Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 18 March 2021 [1]

Case C-282/19

YT,
ZU,
AW,
BY,
CX,
DZ,
EA,
FB,
GC,
IE,
JF,
KG,
LH,
MI,
NY,
PL,
HD,
OK
v
Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR,
Ufficio Scolastico Regionale per la Campania,
joined parties:
Federazione GILDA-UNAMS

(Request for a preliminary ruling from the Tribunale di Napoli (District Court, Naples, Italy))

(Request for a preliminary ruling – Fixed-term work – Directive 1999/70/EC – Contracts concluded with public-sector teachers of the Catholic faith – Absence of measures aimed at preventing abusive recourse to fixed-term contracts – Clause 5(1) of the Framework Agreement annexed to Directive 1999/70/EC – Objective reasons justifying renewal of fixed-term contracts – Remedies – Article 17(1) TFEU on the status of religious groups –

[1] Original language: English.

Articles 20, 21 and 47 of the Charter of Fundamental Rights – Constitutional impediments to the application of EU law)

1. This reference for a preliminary ruling from the Tribunale di Napoli (District Court, Naples, Italy, 'the referring court') is another in a series of cases concerning recourse to fixed-term employment contracts in the public sector in Italy, and domestic rules precluding their conversion to contracts of indeterminate duration.[2] It falls within a subset of these orders for reference, namely those concerning employment of teachers in public schools,[3] while also inquiring about the influence on the outcome of the proceedings of Article 17(1) TFEU, pursuant to which the Union respects and does not prejudice the status under national law of churches and religious associations. This arises because the complainants in the main proceedings are teachers of the Catholic faith in Italian public schools.

2. I have reached the conclusion that the facts arising in the main proceedings do not engage the protections afforded to religious organisations with respect to their status under national law, as guaranteed by Article 17(1) TFEU. That being so, the main proceedings are resolvable by reference to the Court's established case-law on Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP[4] ('the Framework Agreement'), as interpreted in the light of the prohibition on discrimination on the basis of religion or belief, protected by Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the right to an effective remedy to enforce it under the first paragraph of Article 47 of the Charter.[5]

3. The referring court has two core concerns. First, whether the circumstances of the main proceedings present 'objective reasons' to justify recourse to fixed-term contracts, as provided for by Clause 5(1)(a) of the Framework Agreement. Second, the referring court queries whether a prohibition under Member State law, and which has been affirmed by the Corte costituzionale (Constitutional Court, Italy),[6] on conversion of fixed-term contracts to contracts of indeterminate duration, is consistent with Clause 5 of the Framework Agreement, or is otherwise incompatible with EU law, including Article 21 of the Charter.

4. I have concluded that no issue arises, on the facts of the main proceedings, affecting the 'status' of the Catholic Church under Article 17(1) TFEU, and that there are no 'objective reasons', pursuant to Clause 5(1)(a) of the Framework Agreement, justifying successive recourse to fixed-term contracts.

2 See, notably, judgments of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517); of 7 September 2006, *Vassallo* (C-180/04, EU:C:2006:518); and of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166). See also Order of 1 October 2010, *Affatato* (C-3/10, not published, EU:C:2010:574), and the rulings referred to in footnote 3. For cases arising in the context of private sector employment, see judgments of 3 July 2014, *Fiamingo and Others* (C-362/13, C-363/13 and C-407/13, EU:C:2014:2044), and of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859). Note that, in paragraph 43 of the latter judgment, the Court held that the public or private nature of the employer 'has no bearing on the protection enjoyed by a worker under Clause 5 of the Framework Agreement'.

3 Judgments of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401), and of 8 May 2019, *Rossato and Conservatorio di Musica F.A. Bonporti* (C-494/17, EU:C:2019:387).

4 OJ 1999 L 175, p. 43.

5 Among numerous judgments on the rule that EU secondary law is to be interpreted in conformity with the Charter, see, for example, judgments of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 78), and of 14 January 2021, *Okrazhna prokuratura - Haskovo and Apelativna prokuratura - Plovdiv* (C-393/19, EU:C:2021:8, paragraph 52).

6 Judgment 248/18 of 23 October 2018.

5. However, given that Clause 5(1) of the Framework Agreement lacks the preconditions for direct effect,[7] and that there appears to be an unequivocal exclusion under Member State law of conversion of the applicants' fixed-term contracts to contracts of indeterminate duration,[8] the obligation imposed by the Court's case-law on Member State courts to interpret pertinent national rules so as to secure the efficacy of Clause 5[9] does not extend to requiring *contra legem* interpretation of Member State law so as to imperil legal certainty or the principle of non-retroactivity.[10]

6. Therefore, the referring court will only be obliged to convert the applicants' fixed-term contracts to contracts of indeterminate duration in the event of violation of their right not to be discriminated against on the basis of religion or belief, as protected by Article 21 of the Charter, and the right to an effective remedy to correct this wrong, under the first paragraph of Article 47 of the Charter, in conformity with the principles set out by the Court in its ruling in *Egenberger*.[11] If this is established, lifting the prohibition on conversion of the fixed-term contracts in issue will be required by EU law, in the absence of one or more legal remedies within the structure of the national legal system concerned,[12] making it possible to ensure, even indirectly, the applicants' rights under Articles 21 and 47 of the Charter.[13]

I. Legal Framework

A. EU Law

7. Article 17(1) TFEU states:

'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'

7 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 119 and the case-law cited). See, similarly, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 79). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 64).

8 See the provisions reproduced in points 12 and 14 below.

9 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraphs 121 to 122, and 124 and the case-law cited). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraphs 65 to 66 and 68).

10 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 123). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 67).

11 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257).

12 Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 104), referring to judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 40). See also judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 70) reproduced below at point 66.

13 This is referred to as a free-standing action which seeks primarily to dispute the compatibility of national provisions with EU law. See, recently, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 96 and the case-law cited).

8. Clause 5 of the Framework Agreement is entitled 'Measures to prevent abuse'. Its first paragraph states:

'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.'

B. Member State law

9. Article 3 of Legge del 18 luglio 2003, n. 186 – Norme sullo stato giuridico degli insegnanti di religione cattolica degli istituti e delle scuole di ogni ordine e grado (Law No 186 of 18 July 2003 laying down provisions governing the legal status of Catholic religious education teachers in establishments and schools of all types and levels) (GURI No 170 of 24 July 2003; 'Law No 186/2003'), states in paragraph 3 that candidates in the open competitions for grant of tenure for Catholic religious education teachers must have a certificate attesting to their aptitude issued by the diocesan ordinary with jurisdiction for the area concerned. Under Article 3(8), successful candidates are to be recruited, under contracts of indeterminate duration, by the regional director in consultation with the territorially competent diocesan ordinary. Under Article 3(9), revocation of the certificate by the competent diocesan ordinary is a ground for termination of the employment relationship.

10. Article 5(4-bis) of Decreto legislativo del 6 settembre 2001, 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 (Legislative Decree No 368 of 6 September 2001 implementing Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) (GURI No 235 of 9 October 2001; 'Legislative Decree No 368/2001') stated:

'… where, as a result of a series of fixed-term contracts for equivalent tasks, an employment relationship between the same employee 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 one of indeterminate duration…' [14]

[14] Article 19 of Decreto legislativo del 15 giugno 2015, n. 81 – Disciplina organica dei contratti di lavoro … (Legislative Decree No 81 of 15 June 2015 laying down provisions governing employment contracts) (GURI No 144 of 24 June 2015; 'Legislative Decree No 81/2015') repealed and replaced Legislative Decree No 368/2001, and restated in substance Article 5(4-bis) of Legislative Decree No 368/2001.

11. Article 10(4-bis) of Legislative Decree No 368/2001 excluded application of Article 5(4-bis) of Legislative Decree No 368/2001 to fixed-term contracts concluded in order to fill temporary teaching, administrative, technical and auxiliary vacancies to ensure the continuity of provision of teaching and education services. [15]

12. Article 36 of Decreto legislativo del 30 marzo 2001, n. 165 – Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche (Legislative Decree No 165 of 30 March 2001 laying down general rules concerning the organisation of employment in public administrations) (Ordinary Supplement to GURI No 106 of 9 May 2001; 'Legislative Decree No 165/2001'), provides in paragraph 1 that public administrations are, generally, to recruit solely on the basis of contracts of indeterminate duration. However, under Article 36(2), recourse may be made to flexible contractual arrangements provided by law to meet temporary or exceptional requirements. Article 36(5) states that 'in any event, infringement of binding provisions on the recruitment or employment of workers by public administrations cannot lead to the establishment of employment contracts of indeterminate duration with those public administrations, without prejudice to any liability or penalty that those administrations might incur. The worker concerned shall be entitled to compensation for damage suffered as a result of working in breach of binding provisions. …'.

13. Article 309 of Decreto legislativo del 16 aprile 1994, n. 297 – Approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado (Legislative Decree No 297 of 16 April 1994 approving the consolidated text of the applicable legislative provisions on education relating to schools of all types and levels) (GURI No 115 of 19 May 1994; 'Legislative Decree No 297/1994'), on Catholic religious education, provides in paragraph 1 that in public non-university schools of all types and levels, Catholic religious education is governed by the agreement between the Italian Republic and the Holy See, and its additional protocol, ratified by Law No 121 of 25 March 1985, and by the agreements foreseen by that protocol under its point 5(b). Pursuant to Article 309(2), 'for the teaching of the Catholic religion, the head of the educational establishment concerned shall appoint teaching staff on an annual, fixed-term basis in consultation with the diocesan ordinary'. Pursuant to Article 309(3) of Legislative Decree No 297/1994, Catholic religious education teachers form part of the teaching staff of schools and have the same rights and obligations as other teachers. However, they only participate in periodic evaluations and final evaluations for students who have followed a course on Catholic religious education. Under Article 309(4) of Legislative Decree No 297/1994, for the teaching of the Catholic faith in place of giving grades and organising exams, teachers are to prepare and transmit to families a special grade, which is to accompany the bulletin or the school book, concerning student interest in the course and what they have gained from it.

14. Article 1(95) of Legge n. 107 – Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti (Law No 107 on reform of the national training system and the delegation of remaining legislative provisions in force) of 13 July 2015 (GURI No 162 of 15 July 2015; 'Law No 107/2015') provides that, for the 2015/16 school year, the Ministero dell'Istruzione dell'università e della ricerca (Ministry of Education, Universities and Research, Italy) is authorised to put in place an extraordinary plan of recruitment of teachers for an indeterminate duration for public school establishments of all types and all levels.

[15] Article 10(4-bis) of Legislative Decree No 368/2001 was repealed by Legislative Decree No 81/2015 and is restated in substance in Article 29(2) of Legislative Decree No 81/2015.

15. Pursuant to Article 40(5) of the CCNL (Contratto collettivo nazionale di lavoro) Scuola (National Collective Employment Agreement for Schools) of 27 November 2007 ('the CCNL of 27 November 2007'), 'Catholic religious education teachers shall be recruited on the basis of the provisions laid down in Article 309 of [Legislative Decree No 297/1994] by means of annual employment contracts that shall be deemed to be confirmed where the conditions and requirements laid down by the applicable legal provisions continue to be met'.

16. Article 1 of the Agreement of 18 February 1984 between the Italian State and the Holy See ('the Agreement of 18 February 1984') states:

'The Italian Republic and the Holy See reaffirm that the State and the Catholic Church are, each in their order, independent and sovereign, and fully respect these principles in their relations and in reciprocal collaboration for the elevation of man and the good of the country.'

17. Article 9(2) of the Agreement of 18 February 1984 states:

'The Italian Republic, recognising the value of religious culture and taking account of the fact that the principles of Catholicism form part of the historical patrimony of the Italian people, will continue to assure, within the framework of the schools aims, the teaching of the Catholic religion in public schools that are not universities in all categories and in all degrees.

Out of respect for freedom of conscience and educational responsibility of the parents, the right of everyone to choose to follow or not this teaching is guaranteed.

At the moment of enrolment, the students or their parents exercise this right vis-à-vis the school authorities, and this choice cannot give rise to any form of discrimination.'

18. Article 2(5) of Intesa tra Autorità scolastica e la Conferenza Episcopale Italiana per l'insegnamento della religione cattolica nelle scuole pubbliche (Agreement between the Italian Education Authority and the Italian Bishops' Conference on Catholic religious education in State schools) of 16 December 1985 provides that Catholic religious education shall be provided by teachers in possession of unrevoked certificates attesting to their aptitude issued by the diocesan ordinary, and appointed in consultation between the diocesan ordinary and the competent education authorities under national legislation. [16]

19. Under Canon 804(2) of the Code of Canon Law, [17] the diocesan ordinary is to be concerned that those who are designated teachers of religious instruction in schools, even in non-Catholic ones, are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.

II. The facts and the question referred for a preliminary ruling

20. YT and 18 others ('the applicants') are Catholic religious education teachers recruited by the defendant Ministry under fixed-term employment contracts. The employment relationship is based on annual appointments, which are automatically reconfirmed, in accordance with Article 40(5) of the CCNL of 27 November 2007 (point 15 above). All applicants hold certificates attesting to their aptitude issued by the diocesan ordinary.

16 See also point 5 of the additional protocol to the Agreement of 18 February 1984.

17 This is a provision of Catholic ecclesiastical law rather than Member State law.

21. The applicants were appointed by the education authority on the basis of a proposal from the diocesan ordinary. Each of the fixed-term contracts in question has a total duration of more than 36 months (see point 10 above). In some cases, the contracts exceed 20 years. [18]

22. On 31 July 2015, the applicants brought an action before the referring court, claiming (i) that their fixed-term employment contracts should be converted into contracts of indeterminate duration and, in the alternative, (ii) compensation for damage. The Federazione GILDA-UNAMS (GILDA-UNAMS Federation), the trade union that was a signatory to the CCNL of 27 November 2007, also made an appearance in the proceedings.

23. The defendant Ministry objected to the action.

24. The referring court states that Directive 1999/70 was transposed into Italian law by Legislative Decree No 368/2001 (points 10 and 11 above). Article 5(4-bis) of the version in force at the time when the events covered by the main proceedings occurred provided, in particular, for the conversion of a fixed-term employment relationship into one of indeterminate duration where that relationship has exceeded a total period of 36 months as a result of a succession of fixed-term contracts between the same employer and the same worker. [19]

25. However, those provisions, in particular the requirement for conversion of a contract into one of indeterminate duration, are not applicable to public-sector workers. As illustrated above (point 12 above), for those workers, Article 36 of Legislative Decree No 165/2001 states, in particular, that public authorities may recruit staff, using fixed-term contracts, only to meet temporary or exceptional requirements, and that any breach of binding provisions cannot entail the creation of employment relationships of indeterminate duration. Instead, workers are entitled to compensation for damage from the public authorities.

26. However, Legislative Decree No 165/2001 does not apply to fixed-term contracts concluded in the schools sector to fill temporary vacancies for teaching staff and administrative, technical and auxiliary (ATA) staff (point 11 above).

27. Thus, prohibitions and penalties for repeated use of fixed-term contracts laid down by Italian law are inapplicable to the schools sector.

28. The referring court notes that the applicants' employment relationships are totally insecure and unprotected. Indeed, Article 309 of Legislative Decree No 297/1994 stipulates that the heads of educational establishments are to be responsible for appointing staff on an annual basis for Catholic religious education in consultation with the diocesan ordinary in accordance with the provisions laid down in the agreement between the Italian Republic and the Holy See and the agreements between the Italian Education Authority and the Italian Bishops' Conference on Catholic religious education in State schools (point 13 above). The agreements provide that Catholic religious education teachers must hold an unrevoked certificate attesting to their aptitude, issued by the diocesan ordinary, and for their appointment via consultation with the diocesan ordinary, by the competent school authorities (point 18 above).

18 The written observations of the applicants indicate that the lengths of service range from 8 years through to 30 years.

19 As noted above in footnote 14, this provision was substantially reproduced in Article 19 of the subsequent Legislative Decree No 81/2015.

29. Revocation of the certificate by the competent diocesan ordinary for Catholic religious education teachers recruited following the only open competition ever held equally constitutes grounds for termination of the employment relationship, under Article 3(9) of Law No 186/2003 (point 9 above).

30. The referring court also mentions what it terms as a conflict between the case-law resulting from the judgment of the Court in *Sciotto*[20] in relation to the interpretation of Clause 5 of the Framework Agreement and the case-law of the Corte costituzionale (Constitutional Court), which held, in Judgment 248/18,[21] that 'it can only be reiterated that it is impossible, for the entire public sector, for a fixed-term relationship to be converted into one of indeterminate duration – in accordance with established EU and Italian case-law'. It therefore followed that a national court cannot ever impose employment relationships of indeterminate duration in the various sectors of the public administration, even where, in the view of the referring court, there is no measure precluding this for the purpose of Clause 5 of the Framework Agreement.

31. Judgment 248/2018 concerned constitutional review of Article 10(4-bis) of Legislative Decree No 368/2001 (point 11 above) and of Article 36(5), (5-ter) and (5-quarter) of Legislative Decree No 165/2001 (point 12 above) referring to, inter alia, the judgments of 7 March 2018, *Santoro*,[22] and of 7 September 2006, *Marrosu and Sardino*.[23]

32. The referring court questions the compatibility of Italian legislation implementing Directive 1999/70, and particularly Clause 5 of the Framework Agreement, and with Article 21 of the Charter and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[24] with respect to different treatment accorded to Catholic religious education teachers compared to treatment of other teachers.

33. The referring court points out that all teachers other than Catholic religious education teachers have been granted tenure and consequently now have contracts of indeterminate duration, under the special recruitment plan introduced by Law No 107/2015 (point 14 above) and wonders whether it is possible, on the basis of Article 21 of the Charter, Clause 4 of the Framework Agreement and Article 1 of Directive 2000/78, to disapply the national provisions that preclude the automatic conversion of a fixed-term contract into a contract of indeterminate duration if the employment relationship exceeds a certain period of time.

34. For these reasons, the referring court requests answers to the following questions for a preliminary ruling:

'(1) Does the different treatment accorded only to Catholic religious education teachers, such as the applicants, constitute discrimination on grounds of religion, within the meaning of Article 21 of the Charter of Fundamental Rights of the European Union and Directive 2000/78/EC, or does the fact that the certificate attesting to their suitability issued to these workers can be revoked constitute an adequate reason why only Catholic religious education teachers, such as the applicants, are treated differently from other teachers and are not covered by any measure precluding such treatment, as required under Clause 5 of the

20 Judgment of 25 October 2018 (C-331/17, EU:C:2018:859).

21 Footnote 6 above.

22 C-494/16, EU:C:2018:166.

23 C-53/04, EU:C:2006:517.

24 OJ 2000 L 303, p. 16.

Framework Agreement on fixed-term work concluded on 18 March 1999 and annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP?

(2) If direct discrimination is taken to have occurred, within the meaning of Article 2(2)(a) of Directive 2000/78/EC, on grounds of religion (Article 1), and the Charter, the Court is requested to consider what instruments are available to the referring court to eliminate the effects of such discrimination, bearing in mind that all teachers other than Catholic religious education teachers are now covered by the special recruitment plan laid down in Law No 107/2015, being granted tenure and consequently given employment contracts of indeterminate duration. Should this court therefore impose an employment relationship of indeterminate duration with the defendant public authorities?

(3) Must Clause 5 of the Framework Agreement laid down in Directive 1999/70/EC be interpreted as precluding a national legal provision, such as the provision at issue, under which the rules of ordinary law governing employment relationships and intended to penalise the misuse of successive fixed-term employment contracts by the automatic conversion of a fixed-term contract into a contract of indeterminate duration where the employment relationship continues for more than a certain period of time, do not apply to the schools sector – specifically to Catholic religious education teachers – and therefore permit successive fixed-term employment contracts for an indeterminate period of time? In particular, can the requirement to obtain the approval of the diocesan ordinary constitute an objective reason within the meaning of Clause 5(1)(a) of the Framework Agreement, or, instead, should such treatment be regarded as discrimination prohibited under Article 21 of the Charter?

(4) If the answer to question 3 is in the affirmative, do Article 21 of the Charter of Fundamental Rights of the European Union, Clause 4 of the Framework Agreement] laid down in Directive 1999/70/EC and/or Article 1 of Directive 2000/78/EC permit the disapplication of provisions that preclude the automatic conversion of a fixed-term employment contract into an employment contract of indeterminate duration where the employment relationship continues for more than a certain period of time?'

35. Written observations were filed at the Court by the GILDA-UNAMS Federation (joined by all 18 applicants) the Italian Republic, and the European Commission. There was no hearing.

III. Analysis

A. Preliminary remarks

1. The role of Article 17(1) TFEU in the resolution of the dispute

36. Contrary to arguments made in the written observations of the Italian Republic, the circumstances of the main proceedings do not impact on the 'status' under Member State law of a religious organisation prescribed under Article 17(1) TFEU. The Italian Republic's argument with respect to admissibility is therefore to be rejected.

37. First, as pointed out in the written observations of the Commission, delivery of the certificate of aptitude for Catholic religious education teachers is irrelevant to the fixing or not of the contract. This is so because the certificate is required for both Catholic religious education teachers on fixed-term contracts and Catholic religious education teachers on contracts of indeterminate duration (see points 9 and 18 above). Moreover, the consequences of its revocation by the diocesan ordinary are the same for teachers on both types of contract.

38. Further, two previous rulings interpreting Article 17(1) TFEU featured a clear articulation of the loss of 'status' to follow for the religious organisation under the first paragraph of Article 17(1) TFEU if the relevant EU rules were applied to them,[25] Article 17(1) TFEU providing a 'let-out' from such application. However, this is not the case in the main proceedings. Not only is the authority of the diocesan ordinary to issue the certificate of aptitude not being challenged, that authority will remain in place whether the applicants succeed or not in converting their fixed-term contracts into contracts of indeterminate duration.

39. Generalised concerns about the independence of churches under the Member State constitution (see point 16 above) and the role of a church in approving teachers of the Catholic faith (see points 9, 13 and 18 above), as put forward in the written observations of the Italian Republic, are insufficient to trigger Article 17(1) TFEU.

40. It is further suggested in the pleadings of the Italian Republic that, if 30% of teachers of the Catholic faith are not on temporary contracts, the practical impact of the legislative scheme set out in Part I(B) above, the teaching of this faith in Italian public schools will be imperilled due to the need for flexibility. However, all applicants have been stable employees of the defendant for extended periods of time,[26] with some having been employed for over 20 years. Here, too, it is not self-evident what is at stake in terms of 'status' under Article 17(1) TFEU, given that, in practice, demand has been constant.

41. The application of the Framework Agreement to the circumstances of the main proceedings amounts to no judgment on the optional character of the teaching of the Catholic faith in Italian public schools, as suggested in the written observations of the Italian Republic. It rather concerns employment conditions of those teaching an optional subject.

42. Thus, while the Court has acknowledged that Article 17(1) TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities,[27] it has also held that national provisions which seek to give employees who are members of certain churches an additional public holiday to coincide with important religious festivals for those churches do not seek to organise the

[25] In the judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257), the defendant was seeking to protect the limited judicial review provided under German law of the determination by churches, under Article 4(2) of Directive 2000/78, of whether an employer such as the Evangelisches Werk für Diakonie und Entwicklung eV, or the church on its behalf, may authoritatively determine whether adherence by an applicant for a job to specificied Christian faiths , by reason of the nature of the activities or of the context in which they are carried out, constituted a genuine, legitimate and justified occupational requirement, having regard to the Evangelisches Werk für Diakonie und Entwicklung eV's ethos. See also judgment of 11 September 2018, *IR* (C-68/17, EU:C:2018:696), where the referring court was uncertain as to whether churches or other public or private organisations the ethos of which is based on religion or belief may themselves definitively determine what constitutes acting in good faith and with loyalty 'to the ethos of the organisation' within the meaning of the second subparagraph of Article 4(2) of Directive 2000/78, and whether in that regard they may also – as they were permitted under German constitutional law – independently impose a scale of loyalty requirements for the same managerial positions which took into account only the denominational affiliation of the employee.

[26] See footnote 18 above.

[27] Judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 33), referring to judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 58), and of 11 September 2018, *IR* (C-68/17, EU:C:2018:696, paragraph 48).

relations between a Member State and those churches.[28] Equally, national rules which allow a Member State to place 30% of the teachers of a given faith on successive fixed-term contracts, and preclude the conversion of such contracts to contracts of indeterminate duration even in the event of abuse pursuant to Clause 5 of the Framework Agreement, do not seek to organise relations between that Member State and the Catholic Church.

2. Article 351 TFEU does not render the order for reference inadmissible

43. Contrary to arguments made in the written observations of the Italian Republic, the admissibility of the order for reference cannot be called into question by Article 351(1) TFEU. Pursuant to this provision, the rights and duties under public international law agreements entered into by a Member State prior to accession to the EU with a non-Member State are not affected by EU law. However, agreements with the Holy See or linked to it remain unaffected by the dispute in the main proceedings, given that they concern the powers of the diocesan ordinaries to issue and revoke aptitude certificates (see points 9 and 18 above) – a power which remains unaffected by Clause 5 of the Framework Agreement. Article 351 TFEU affords Member States the option of continuing to adhere to obligations under public international law incurred before their accession to the EU.[29] However, Article 351 TFEU is pertinent only to international agreements which impact on the application of EU law.[30] That is not the case in the main proceedings.

3. Directive 2000/78 is a subsidiary norm to the resolution of the main proceedings

44. The Framework Agreement is the dominant measure of EU law, rather than Directive 2000/78, governing the main proceedings. In the circumstances of the main proceedings, both the alleged discrimination and remedial issues arising fall for resolution by reference to primary EU law, namely Articles 21 and 47 of the Charter, respectively.

45. Clause 5 of the Framework Agreement is the source of the case-law pertinent to the resolution of the main proceedings. Moreover, the referring court asks, in effect, whether the prohibition on discrimination on the basis of religion in Article 21 of the Charter, a provision with which Clause 5 of the Framework Agreement is bound to comply, requires the referring court to remove a legislative block under Italian law against conversion of the applicants fixed term contracts into contracts of indeterminate duration. Further, given that Clause 5 of the Framework Agreement lacks the pre-conditions for direct effect,[31] the main proceedings warrant analysis by reference to the ruling of the Court in *Egenberger*.[32] Direct effect was equally precluded in that case, given that

28 Ibid.

29 See Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:135, point 97), referring to judgments of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84, paragraph 27); of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 56); and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 61).

30 See Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:135, point 96). See further, Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraphs 253 to 256).

31 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraphs 118 and 119 and the case-law cited). See, similarly, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 80). See most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 64).

32 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257).

it was a horizontal dispute between two private parties, so that the parties relied on Article 21 of the Charter, and indeed Article 47 of the Charter, in seeking to remove a legislative barrier to a remedy. [33]

46. The case-file indicates that the difference of treatment complained of lies in the fact that 30% of teachers of the Catholic religion work on fixed-term contracts that cannot, under Member State law, be converted to contracts of indeterminate duration, thereby causing discriminatory access to remedies when such teachers are compared with other public-sector teachers. There is also disagreement on an objective reason justifying successive recourse to fixed-term contracts pursuant to Clause 5(1)(a) of the Framework Agreement.

47. However, under the case-law of the Court, these matters are governed by Clause 5 of the Framework Agreement (see further points 59 to 62 below). Given that the core of the dispute lies in whether Member State legislation precluding conversion of the applicants contracts to contracts of indeterminate duration must, as a matter of EU law be set aside, and the role of Clause 5 of the Framework Agreement in deciding this, the applicant's arguments on religious discrimination fall to be considered by reference to primary EU law, namely Article 21 [34] of the Charter, and the principle of equal treatment as protected by Article 20 [35] of the Charter. Questions 1 and 2 posed by the referring court on Directive 2000/78 are confined to remedies in the context of direct discrimination. [36] The protection provided by primary EU law, and more specifically Articles 20 and 21 of the Charter encapsulate, in any event, indirect discrimination (see points 71 to 75 below). It is has long since been established in the Court's case-law that all EU legislation is to be interpreted in conformity with the principle of equal treatment, now reflected in Article 20 of the Charter, [37] as are Member State laws implementing EU measures. [38]

48. The approach advocated here is supported in the established practice of the Court when it is alleged that breach of Articles 20 and 21 of the Charter has occurred, in contexts going beyond Directive 2000/78. In the judgment in *Léger*, [39] in considering whether the applicant had been discriminated against on the basis of his sexual orientation by Member State implementation of point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, [40] the Court relied on Articles 20 and 21 of the Charter.

33 The situation arising in the main proceedings is therefore different from rulings in which the Court has considered, in tandem, the Framework Agreement and Directive 2000/78, and in which no question of primary EU law, such as a provision of the Charter, arose for consideration, nor a request for disapplication of a Member State provision which was *contra legem* a Directive. See, for example, judgments of 8 October 2020, *Universitatea „Lucian Blaga" Sibiu and Others* (C-644/19, EU:C:2020:810), and of 28 February 2018, *John* (C-46/17, EU:C:2018:131).

34 Judgments of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872), and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031).

35 See, for example, judgments of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031); of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872); and of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89).

36 On direct discrimination under Directive 2000/78 see judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43).

37 See classically judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100).

38 See recently, for example, judgment of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 95). On religious discrimination specifically see judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraphs 34 and 35).

39 Judgment of 29 April 2015 (C-528/13, EU:C:2015:288).

40 OJ 2004 L 91, p. 25.

49. Similarly, in the ruling of the Court in *Glatzel*,[41] allegations of breach of Articles 20, 21 and 26 of the Charter, with respect to discrimination on the basis of disability, featured discussion of Directive 2000/78 only to the extent necessary to determine the meaning of 'disability'.[42] This was so because the alleged unequal treatment occurred in the context of Member State implementation of point 6.4 of Annex III to Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences,[43] (provisions alleged to be invalid) so that discrimination was assessed by reference to Articles 20 and 21 of the Charter.

50. It is to be underscored, therefore, that Directive 2000/78 is not the only norm of EU law that protects against unlawful discrimination, whether that be on the basis of religion, sexual orientation, or any other ground mentioned in Article 21 of the Charter. The consequence for the main proceedings of the *Léger* ruling, and others, is that all provisions of the Framework Agreement, including Clause 5 and the remedial norms running with it (see further points 63 to 77 below), are to be interpreted in conformity with the principle of equal treatment under Article 20 of the Charter, and the prohibitions mentioned in Article 21(1) of the Charter, including discrimination on the basis of religion or belief, given that it is protected in the primary provision of EU law that is Article 21 of the Charter.[44] The same applies with respect to Article 47 of the Charter, given the pertinence to the resolution of the dispute of established case-law on the remedial rules linked to Clause 5 of the Framework Agreement, and which fall within Article 47.[45]

51. Further, Member States are bound, pursuant to Article 51 of the Charter, to comply with the Charter, including Articles 20, 21 and 47, when they are 'implementing' Clause 5 of the Framework Agreement[46] – an obligation that extends to the designation of remedies.[47] The Italian Republic is therefore bound, when furnishing remedies to protect against abusive recourse to fixed-term contracts, to do so in a manner that respects the applicants' right not to be discriminated against on the basis of their religion or belief, as guaranteed by Article 21 of the Charter, and to ensure that the remedies available are effective, as required by the first paragraph of Article 47 of the Charter.

52. The role of Articles 21 and 47 of the Charter in resolving these proceedings will be further elaborated below (points 63 to 77).

41 Judgment of 22 May 2014 (C-356/12, EU:C:2014:350).

42 Ibid., paragraph 45.

43 OJ 2006 L 403, p. 18. See also judgment of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513), concerning challenge to the validity of point FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2011 L 311, p. 1). The basis of the challenge was violation of the prohibition on discrimination on the basis of age as protected by Article 21 of the Charter. In paragraph 42, the Court made reference to Article 2(5) and Article 4(1) of Directive 2000/78, but only to recall that it had held that the objective of guaranteeing air-traffic safety constitutes a legitimate objective within the meaning of those provisions. The Court referred to the judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 58 and 69).

44 Under the established case-law of the Court, EU secondary legislation is to be interpreted in conformity with the Charter. See, for example, judgments of 14 January 2021, *Okrazhna prokuratura - Haskovo and Apelativna prokuratura - Plovdiv* (C-393/19, EU:C:2021:8, paragraph 52), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 78).

45 See, for example, Opinion of Advocate General Szpunar in *Santoro* (C-494/16, EU:C:2017:822, point 53), which refers to three cases in which the right to effective judicial protection was relevant in the context of Clause 5 of the Framework Agreement. They are judgment of 23 April 2009, *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 176); and orders of 12 June 2008, *Vassilakis and Others* (C-364/07, not published, EU:C:2008:346, paragraph 149); and of 24 April 2009, *Koukou* (C-519/08, not published, EU:C:2009:269, paragraph 101).

46 Judgment of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288, paragraph 40). See also cases referred to at foonote 38 above. On the concept of implementing EU law, see, for example, recently, judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraphs 45 to 46).

47 Judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811). See, more recently, for example, Opinion of Advocate General Pikamäe in Joined Cases *R.N.N.S. and K.A.* (C-225/19 and C-226/19, EU:C:2020:679, point 119 and the case-law cited).

53. Therefore, only questions 3 and 4 will be answered.

4. Approach to answering questions 3 and 4

54. Question 3 asks whether any objective reason exists to justify successive recourse to fixed-term contracts.[48] Then, what consequences follow, in remedial terms, in the event of a finding of no objective reason? Question 4 asks what is to be done with Member State laws obstructing the remedy required by EU law, including norms of a constitutional value. Questions 3 and 4 will therefore be answered together.

55. As pointed out by the referring court, the primary complaint of the applicants is that they have been discriminated against vis-à-vis teachers who benefitted from the reform introduced by Law No 107/2015 (point 14 above) and in which the fixed-term contracts of teachers were converted into contracts of indeterminate duration.

56. I note, however, that the Court has held, in the specific context of Law No 107/2015 (point 14 above) that 'the different treatment of two categories of fixed-term workers resulting from a reform of the legislation applicable is not covered by the principle of non-discrimination established in Clause 4 of the Framework Agreement'.[49] That being so, Clause 4 is irrelevant to the main proceedings and Clause 4 will not feature in the reply to question 4.

57. Yet, the Court's finding in this respect in no way attenuates the broader obligation of the referring court to uphold the applicants' right not to be discriminated against on the basis of their religion, as protected under Articles 20 and 21 of the Charter, the former being an expression of the general principle of equal treatment under EU law (see further below points 63 to 77).

B. Answer to questions referred

58. Questions 3 and 4 should be answered to the effect that the requirement for Catholic religious education teachers to obtain the approval of the diocesan ordinary as a prerequisite to teaching in public schools does not constitute an objective reason within the meaning of Clause 5(1)(a) of the Framework Agreement, justifying renewal of fixed-term contracts. In the circumstances of the main proceedings, and because Clause 5 of the Framework Agreement lacks the preconditions of direct effect, the referring court is required to disapply an absolute legislative prohibition under national law which precludes conversion of fixed-term contracts to contracts of indeterminate duration, only if non-conversion results in discrimination on the basis of religion or belief inconsistently with Article 21 of the Charter, and the unavailability of an effective remedy to correct this wrong, inconsistently with the first paragraph of Article 47 of the Charter, which is for the referring court to determine. In this event, all rules of Member State law that cannot be interpreted in conformity with the prohibition on discrimination on the basis of religion or belief protected by Article 21 of the Charter, and the remedy for its breach guaranteed by the first paragraph of Article 47 of the Charter, are to be disapplied, including rules of a constitutional nature.

[48] The written observation of the Italian Republic contain suggestions to the effect that successive recourse to fixed term contracts in the main proceedings is not abusive. Given that no question has been referred on this question, my proposal is to leave any residual doubt on this question to the referring court, which has the benefit of knowledge of all pertinent factual circumstances.

[49] Judgment of 8 May 2019, *Rossato and Conservatorio di Musica F.A. Bonporti* (C-494/17, EU:C:2019:387, paragraph 44), referring to the judgment of 21 November 2018, *Viejobueno Ibáñez and de la Vara González* (C-245/17, EU:C:2018:934, paragraphs 50 and 51). C.f. judgment of 8 October 2020, *Universitatea "Lucian Blaga" Sibiu and Others* (C-644/19, EU:C:2020:810).

1. Introduction

59. The Framework Agreement applies to staff recruited in the education sector.[50] The Italian Republic has not introduced measures limiting the maximum total duration of contracts, or the number of renewals, within the meaning of Clause 5(1)(b) and (c) of the Framework Agreement. Nor does Italian legislation appear to contain measures equivalent to those set out in Clause 5(1) of the Framework Agreement.[51] Yet, Clause 5(1) of the Framework Agreement requires, with a view to preventing abuse of successive fixed-term employment contracts or relationships, the effective and binding adoption by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures.[52] Thus 'objective reasons justifying the renewal of such contracts or relationships' under Clause 5(1)(a) fall to be considered as a way of preventing abuse.[53]

2. No objective reason for renewal

60. Under the established case-law of the Court, 'the concept of "objective reasons" must be understood as referring 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. Those 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'.[54]

61. It is necessary to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose.[55] However, criteria cannot be 'objective' when they bear no material difference to criteria applicable to employees on contracts of indeterminate duration and who perform the same task as employees on fixed-term contracts. Here, I am referring to the requirement for teachers of the Catholic faith to have a current certificate of aptitude from the diocesan ordinary, which is common to teachers of the Catholic faith on fixed-term contracts and contracts of an indeterminate duration (see points 9 and 18 above). Factors such as special rules for the grading of students of the Catholic faith (see point 13 above), and the fact it is an optional subject (see point 17 above), are insufficient to differentiate teachers of those subjects from other teachers with respect to core tasks (point 13 above).

50 Judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 69 and the case-law cited).

51 Ibid., paragraphs 84 and 85.

52 Judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 28 and the case-law cited). See further, for example, judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 55). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 54).

53 Judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 86), referring to judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 67), and of 3 July 2014, *Fiamingo and Others* (C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 58). See also, for example, judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 38).

54 Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 39 and the case-law cited).

55 See, for example, judgments of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 40 and the case-law cited). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 28).

62. Although not mentioned in question 3, the arguments of the Italian Republic refer to the need for flexibility [56] in the teaching of an optional subject. However, the need for flexibility, in practical terms, [57] is difficult to accept as 'genuine' given that many of the applicants have been employed on fixed-term contracts for over 20 years. No need of a temporary nature is being met, [58] as evidenced by 'the number of successive contracts concluded with the same person or for the purposes of performing the same work'. [59] The Court has held that fixed-term contracts may not be renewed with respect to tasks which normally come under the activity of the sector concerned in a fixed and permanent manner. [60] In the main proceedings, the duration of the employment relationships demonstrate that successive use of fixed-term contracts is meeting the defendant employer's 'fixed and permanent staffing needs' notwithstanding the optional nature of Catholic religious education as a subject. [61] Finally, the legislation in issue does not provide any condition for the specific verification that renewal of successive fixed-term employment contracts is intended to cover temporary needs, [62] nor does it pursue a social-policy objective. [63]

3. Remedial consequences

63. The main proceedings feature the following three complexities. First, the order for reference implies that the applicants have no remedies at all under Member State law to enforce their rights under Clause 5(1) of the Framework Agreement, given that it suggests that they are entitled to neither conversion of their contracts to contracts of indeterminate duration nor compensation (point 27 above). [64] In consequence, and second, this engages the first paragraph of Article 47 of the Charter. Third, the prohibition on discrimination on the basis of religion, as protected by Article 21(1) of the Charter, is in play, as is the guarantee on equal treatment in Article 20 of the Charter, because Clause 5 of the Framework Agreement is to be interpreted in conformity with Charter provisions, [65] and Member States are bound to respect Articles 20 and 21(1) in the context of any Member State measures implementing Clause 5, [66] including remedial measures. [67] Measures 'adopted by the national legislature in order to penalise the misuse of [fixed-term] contracts by private sector employers implement EU law'. [68] The applicants complain of the

56 This has recognised by the Court as being legitimate in the context of the education sector. Judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 95).

57 Ibid., paragraphs 97, 99, 104 and 108; judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 57).

58 Judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraphs 91 and 100).

59 Ibid., paragraph 102. See also judgment of 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39, paragraph 40).

60 Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 49).

61 See Opinion of Advocate General Kokott in Joined Cases *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2019:874, point 50), referring to judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 49).

62 Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraphs 50 and 51).

63 In the established case-law, these include protection for pregnancy and maternity and to enable men and women to reconcile their professional and family obligations. For example, judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 93).

64 Compare, for example, the situation addressed by the Court in the judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 63), in which the Italian Republic suggests that engagement of the liability of the directors might be an effective remedy.

65 See, for example, judgments of 14 January 2021, *Okrazhna prokuratura - Haskovo and Apelativna prokuratura - Plovdiv* (C-393/19, EU:C:2021:8, paragraphs 52), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 78).

66 Judgments of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288, paragraph 40); of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraphs 34 and 35); and of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89). On the concept of implementing EU law, see, for example, recently, judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraphs 45 to 46).

67 Judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811). See, more recently, for example, Opinion of Advocate General Pikamäe in Joined Cases *R.N.N.S. and K.A.* (C-225/19 and C-226/19, EU:C:2020:679, point 119 and the case-law cited).

68 Judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166, paragraph 40).

unfavourable remedial regime at their disposal under Member State law when compared with those available to other public-sector teachers who have worked on fixed-term contracts for more than 36 months. The applicants say this difference of treatment is linked to their religion.

64. Absent these three factors, the Framework Agreement would in no way oblige the referring court to lift an unequivocal statutory block on conversion of the applicants' fixed-term contracts to contracts of indeterminate duration. It is to be recalled that Article 36(5) of Legislative Decree No 165/2001 states that 'infringement of binding provisions on the recruitment or employment of workers by public administrations *cannot* lead to the establishment of employment contracts of indeterminate duration with those public administrations, without prejudice to any liability or penalty that those administrations might occur' (point 12 above, my emphasis). Nor do the reforms specifically designated for the 2015 to 2016 school year (point 14 above) seem to be amenable to interpretation which would include the applicants.

65. The principles relevant to punishment of abusive recourse to fixed-term contracts are well established in the case-law. National authorities must adopt penalties that are proportionate, sufficiently effective and a sufficient deterrent against breach,[69] so as to nullify the consequences of the breach of EU law.[70] The Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. The domestic law of the Member State concerned must nonetheless contain another measure that is effective to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts.[71] This is a matter of national procedural autonomy, subject to the principles of equivalence[72] and effectiveness.[73] Interpretation of Member State law in this regard is purely for the referring court, which must determine whether Member State law adequately prevents and penalises abusive recourse to fixed term contracts as precluded by Clause 5 of the Framework Agreement.[74] The Court can however provide guidance.[75]

66. Absent any dimension concerning rights arising from the Charter, the case-law places limits on the interpretative obligations of the referring court; they are sourced in the fact that Clause 5 lacks the preconditions for direct effect.[76] The referring court is bound to 'do whatever lies' within its jurisdiction, 'taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that' the

69 Judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 57 and the case-law cited).

70 For example, judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 88 and the case-law cited).

71 Judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 58 and the case-law cited).

72 The principle of equivalence does not dictate the conclusion that the applicant's position is 'analogous' to those of teachers in the public sector whose fixed-term contracts have already been converted to contracts of indeterminate duration. This is so because the principle of equivalence refers to national claims *of a purely domestic nature* and not measures taken by a Member State to enforce rights sourced in EU law. See judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166, paragraph 40 and the case-law cited).

73 Ibid., paragraph 30 and the case-law cited. See also, for example, judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 32 and the case-law cited).

74 Judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraphs 34 and 35 and the case-law cited). See also, for example, judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraphs 89 and 90 and the case-law cited).

75 Judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 36). See also, for example, judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 91 and the case-law cited).

76 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 119 and the case-law cited). See, similarly, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 79). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 64).

Framework Agreement is fully effective.[77] The referring court is not, however, bound to disapply *contra legem* provisions of Member State law, such as the provision mentioned in point 64 above expressly excluding the applicants from an entitlement to conversion of their contracts to contracts of indeterminate duration, because such an obligation would be inconsistent with legal certainty and the non-retroactivity of EU law.[78] The word '*cannot*' (see point 64 above) would seem to be impossible to interpret in conformity with the remedial consequences accompanying failure to meet the obligations inherent in Clause 5 of the Framework Agreement. The Court asserted recently that in 'the event that the national court were to arrive at the conclusion that the conversion of fixed-term employment contracts into contracts of indefinite duration … was not possible, since that would amount to an interpretation *contra legem* of Article 103(7) and (8) of the Greek Constitution, that court should ascertain whether there are other effective measures for that purpose under Greek law'.[79] Nontheless, if this were the full picture, I would agree with the assertion of the Corte costituzionale (Constitutional Court) to the effect that 'it can only be reiterated that it is impossible, for the entire public sector, for a fixed-term relationship to be converted into one of indeterminate duration – in accordance with established EU and Italian case-law'.[80]

67. However, once Articles 21 and 47 of the Charter come into play, Member State courts are required to do more. It was established in the Court's ruling in *Egenberger*[81] that both Articles 21 and 47 of the Charter were sufficient in and of themselves to confer on individuals a right on which they may rely as such, without there being any need for more specific by provisions of EU or national law.[82] In consequence, it was held in *Egenberger* that the referring court was bound to disapply provisions of national law if that was necessary to secure the effectiveness of the rights protected by Articles 21 and 47 of the Charter.[83] These principles apply to the main proceedings irrespective of the fact that Clause 5 of the Framework Agreement lacks direct effect,[84] given that *Egenberger* was a horizontal dispute between two private parties, in which direct effect was equally immaterial.[85]

68. Therefore, if, after the referring court complies with the obligation to 'do whatever lies' within its jurisdiction, 'taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that' the Framework

77 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 101 and the case-law cited). See also, for example, judgment of 10 March 2011, *Deutsche Lufthansa* (C-109/09, EU:C:2011:129, paragraph 56); of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 69 and the case-law cited); of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraphs 121 to 124 and the case-law cited); see, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraphs 65 and 66).

78 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 123 and the case-law cited). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 67).

79 Judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector*) (C-760/18, EU:C:2021:113, paragraph 70).

80 Point 30 above.

81 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257).

82 Ibid., paragraph 78. See also, with respect to the prohibition on discrimination on the basis of religion or belief protected by Article 21(1) of the Charter, judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 36 and the case-law cited).

83 Ibid., paragraph 79.

84 Judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 119 and the case-law cited). See, similarly, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 79). See, most recently, judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 64).

85 On the continued prohibition on horizontal direct effect of directives, see, notably, judgments of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745), and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631).

Agreement is fully effective,[86] and still finds itself precluded by Member State law from enforcing rights of the applicant arising from Article 21 or the remedy following from it under Article 47 of the Charter, then the relevant provisions of Member State law would have to be disapplied. If the only remedy under Member State law which can enforce the prohibition on discrimination on the basis of religion as protected under Article 21(1) of the Charter, and the accompanying right to an effective remedy under the first paragraph of Article 47 of the Charter, is conversion of fixed-term contracts to contracts of indeterminate duration, then that remedy is to be available.

69. To reiterate, the case-law to date on the remedial consequences of abusive recourse to fixed-term contracts in breach of Clause 5 of the Framework Agreement, absent any issue with respect to the enforcement of rights contained in the Charter, remains clear. It does not include an entitlement to conversion of fixed-term contracts to contracts of indeterminate duration.[87] As Advocate General Kokott has recently observed, if national courts were permitted, in order to penalise abuse, to recognise the permanent employment of a fixed-term employee in each specific case, this would have serious consequences for access to the public service as a whole and call into question the function of public-service selection processes.[88] The domestic law of the Member State concerned must, however, contain another measure that is effective to prevent and, where relevant, penalise the abuse of successive fixed term employment contracts.[89]

70. What is proposed here, therefore, with respect to conversion of fixed-term contracts to contracts of indeterminate duration, in the event of abusive recourse to fixed-term contracts inconsistently with Clause 5 of the Framework Agreement, is confined to the unusual circumstance in which non-conversion may result in breach of Article 21(1) and the resulting requirement of an effective remedy under the first paragraph of Article 47 of the Charter.

71. With regard to Article 21(1) of the Charter, it is for the referring court to decide if, under the factual circumstances of the main proceedings, and unusually, the applicants' right not to be discriminated against on the basis of their religious beliefs is imperilled by the remedial regime in place in Italy which is under review here. The prohibition on religious discrimination is a mandatory general principle of EU law[90] with which Member States must comply when they implement EU law under Article 51(1) of the Charter.[91]

72. As the Court recently reiterated with respect to Article 21 of the Charter, 'the prohibition on discrimination is merely a specific expression of the general principle of equality which is one of the fundamental principles of EU law, and that that principle requires that comparable situations

86 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 101 and the case-law cited). See also, for example, judgment of 10 March 2011, *Deutsche Lufthansa* (C-109/09, EU:C:2011:129, paragraph 56); of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 69); and of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraphs 121 to 124).

87 Judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 58 and the case-law cited).

88 See Opinion of Advocate General Kokott in Joined Cases *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2019:874, point 84).

89 Judgment of 11 February 2021, *M.V. and Others (Successive fixed-term contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 58 and the case-law cited).

90 Judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 36).

91 Ibid., paragraph 34.

must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'. [92] The general prohibition on discrimination is laid down in Article 21(1) of the Charter. [93]Directive 2000/78 is simply *a* expression of it. [94]

73. This analysis is to be left to the referring court, which has the benefit of all pertinent factual circumstances of all 18 applicants, and which is able to assess the practical impact of the remedial regime in issue on the treatment of the applicants with respect to their religious beliefs. However, the following is offered by way of guidance.

74. The referring court is to decide if Member State restrictions on the remedies available to the applicants with respect to abusive recourse to fixed-term contracts results in them being treated differently in fact or in law on the basis of their religion, from a comparable group, in the absence of objective justification. [95] The referring court is to consider whether a difference in treatment directly or indirectly based on religion has arisen. [96] A difference in treatment is justified 'if it is based on an objective and reasonable criterion, that is, whether the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.' [97] However, as noted above, I have already excluded the release by the diocesan ordinaries of certificates of aptitude (point 61 above), the optional nature of Catholic religious education as a subject offered (point 61 above), and a purported need for flexibility so that 30% of teachers of the Catholic religion, including the applicants, need to be on fixed-term contracts (point 62 above) from being 'objective reasons' under Clause 5(1)(a) of the Framework Agreement. The same would seem to apply with respect to objective justification, although this is a matter for verification by the referring court.

75. While the peculiar features of the role of teaching the Catholic faith are to be acknowledged, such as the fact that it is an optional subject (point 17 above), that it has its own separate and distinct grading scheme (point 13 above), and that appointments are made in collaboration with the authorities of the Catholic Church (points 9, 18 and 19 above), what is decisive is that teachers of the Catholic religion form part of the teaching staff of schools and have the same rights and obligations as other teachers (point 13 above). The group comparable to the applicants would therefore seem to be public-school teachers who have worked on fixed-term contracts for more than 36 months.

92 See judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 85), referring to judgments of 19 October 1977, *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 7), and of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23). See also Opinion of Advocate General Poiares Maduro in *Marrosu and Sardino* (C-53/04, EU:C:2005:569, point 37). The Advocate General referred to judgments of 13 July 1989, *Wachauf* (5/88, EU:C:1989:321, paragraph 19), and of 14 December 2004, *Arnold André* (C-434/02, EU:C:2004:800, paragraph 68). See, further, judgment of 21 November 2018, *Diego Porras* (C-619/17, EU:C:2018:936, paragraph 60).

93 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 47).

94 Ibid. My emphasis.

95 See, for example, the approach of the Court to the discrimination issues in, e.g. the judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350); of 5 July 2014, *Fries* (C-190/16, EU:C:2017:513); and of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288).

96 Judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 40). See also the Opinion of Advocate General Hogan (EU:C:2020:325, point 75). Although the order for reference mentions only direct discrimination on the basis of religion or belief under Directive 2000/78, assessed most recently by the Court in its ruling in judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43), case-law on indirect discrimination on the basis of religion under Directive 2004/78 remains pertinent, given that it is equally protected against under Article 21 of the Charter. See, for example, judgment of 14 March 2017, *Bougnaoui and ADDH* (C-188/15, EU:C:2017:204, paragraph 32), where the Court held it was for the referring court to ascertain if 'Ms Bougnaoui's dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if it were to transpire that that apparently neutral rule resulted, in fact, in persons adhering to a particular religion or belief, such as Ms Bougnaoui, being put at a particular disadvantage, it would have to be concluded that there was a difference of treatment indirectly based on religion or belief, as referred to in Article 2(2)(b) of Directive 2000/78 (see, to that effect, judgment of today's date, *G4S Secure Solutions* C-157/15, paragraphs 30 and 34).'

97 Judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872,, paragraph 37 and the case-law cited).

76. Finally, it would seem that the main proceedings are unusual in that a Charter right, namely the prohibition on discrimination on the basis of religion or belief protected by Article 21(1) of the Charter, is being employed as a yardstick against which to assess the compatibility with EU law of the remedies available at Member State level to enforce a substantive provision of EU law, that is, Clause 5(1) of the Framework Agreement. Normally, assessment of remedies for compliance with the Charter occurs in the context of Article 47. For the sake of completeness, I observe that binding Member States to comply with the prohibitions set out in Article 21 of the Charter when providing remedies to enforce EU rights does not amount to expansion of EU competence by reference to the Charter, contrary to Article 6 TEU and Article 51(2) of the Charter. [98] This is so because EU law extended to setting parameters on Member State discretion with respect to procedural rules and remedies in the enforcement of EU law well before the Charter attained the force of law in 2009, and as far back as 1976. [99] The suggestion proposed here does not, therefore, seem to expand EU competence inconsistently with Article 51(2) of the Charter. [100]

77. With regard to the right to an effective remedy under Article 47, the Court held, in effect, in *Sciotto* that if employees who are victims of abusive recourse of successive fixed-term contracts can obtain, under national law, neither conversion of their contract to one of indeterminate duration, or compensation, it is for the referring court to identify, within the limits of its powers, some other remedy that is sufficiently effective and dissuasive to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective. [101] No remedy at all under Member State law would be likely to undermine the purpose and practical effect of Clause 5 of the Framework Agreement. [102] In such circumstances, under the principles elaborated in *Egenberger*, [103] any rules of Member State law obstructing conversion of fixed-term contracts to contracts of indeterminate duration would have to be disapplied.

IV. Conclusion

78. I therefore conclude that the third and fourth questions referred by the Tribunale di Napoli (District Court, Naples, Italy) should be answered as follows:

The requirement for teachers of the Catholic faith to obtain the approval of a diocesan ordinary as a prerequisite to teaching in public schools does not constitute an objective reason within the meaning of Clause 5(1)(a) of the Framework Agreement annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, justifying renewal of fixed-term contracts. In the circumstances of the main proceedings, and because Clause 5 of the Framework Agreement lacks the preconditions of direct effect, the referring court is required to disapply an absolute legislative prohibition under Member State law which precludes conversion of fixed-term contracts to contracts of indeterminate duration, only if non-conversion results in discrimination on the basis of religion or belief inconsistently with Article 21 of the Charter of Fundamental Rights of the European Union, and the unavailability of an effective remedy to correct this wrong, inconsistently with the first paragraph of Article 47 of the Charter, which is for the referring

98 On this question, see the comprehensive analysis of Advocate General Saugmandsgaard Øe *in Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, points 64 to 112).

99 Judgment of 16 December 1976, *Comet* (45/76, EU:C:1976:191).

100 What is decisive is whether Charter issues arise in the context of implementation of EU law. See, for example, judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraphs 38 and 39).

101 Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraphs 63 to 70).

102 Judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859, paragraph 66).

103 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257).

court to determine. In this event, all rules of Member State law that cannot be interpreted in conformity with the prohibition on discrimination on the basis of religion or belief protected by Article 21 of the Charter, and the remedy for its breach guaranteed by the first paragraph of Article 47 of the Charter, are to be disapplied, including rules of a constitutional nature.