

Case C-40/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 January 2020

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

12 December 2019

Appellants:

AQ

BO

CP

Respondants:

Presidenza del Consiglio dei Ministri

Ministero dell’Istruzione, dell’Università e della Ricerca — MIUR

Università degli studi di Perugia

Subject matter of the main proceedings

Appeals before the Consiglio di Stato (Council of State, Italy) against the judgment of the Tribunale Amministrativo Regionale per l’Umbria (‘Regional Administrative Court, Umbria’), with which that court dismissed the actions brought by the appellants against the University of Perugia’s rejection of their requests for selection procedures to be launched with a view to their permanent employment at the university, and against the corresponding Circular No 3/2017 adopted by the Ministro per la semplificazione e la pubblica amministrazione (Italian Minister for Simplification and Public Administration), and also seeking to establish their right to be employed for an indefinite duration as researchers and

to undergo the evaluation procedure referred to in Article 24(5) of legge n. 240 del 2010 (Law No 240/2010) in order to be classified as associate professors.

Subject matter and legal basis of the reference

Compatibility of Article 29(2)(d) and (4) of decreto legislativo del 15 giugno 2015, n. 81 (Legislative Decree No 81 of 15 June 2015), Article 36(2) and (5) of decreto legislativo del 30 marzo 2001, n. 165 (Legislative Decree No 165 of 30 March 2001), Articles 22(9) and 24(1) and (3) of legge del 30 dicembre 2010, n. 240 (Law No 240 of 30 December 2010), and Article 20(1) of decreto legislativo del 25 maggio 2017, n. 75 (Legislative Decree No 75 of 25 May 2017), with clause 5 and clause 4 of the Framework Agreement on fixed-term work annexed to Directive 1999/70/EC, particularly in the light of the principles of equivalence, effectiveness and practical effect.

Questions referred

(1) Does clause 5 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 ('the Directive'), entitled 'Measures to prevent abuse', read in conjunction with recitals 6 and 7 and clause 4 of that agreement ('Principle of non-discrimination'), and in the light of the principles of equivalence, effectiveness and practical effect of [European Union] law, preclude national legislation, specifically Article 24(3)(a) and Article 22(9) of Law No 240/2010, which allows universities to make unlimited use of fixed-term three-year contracts for researchers which may be extended for a further two years, without making the conclusion and extension of such contracts contingent on there being an objective reason connected with the temporary or exceptional requirements of the university offering such contracts, and which only stipulates, as the sole limit on the use of multiple fixed-term contracts with the same person, a maximum duration of 12 years, continuous or otherwise?

(2) Does clause 5 of the Framework Agreement, read in conjunction with recitals 6 and 7 of the Directive and clause 4 of the Framework Agreement, and in the light of the practical effect of [European Union] law, preclude national legislation (specifically Articles 24 and 29(1) of Law No 240/2010), in so far as it allows universities to recruit researchers on a fixed-term basis only — without making the decision to employ such researchers contingent on the existence of temporary or exceptional requirements and without imposing any limit on this practice — through the potentially indefinite succession of fixed-term contracts, to cover the ordinary teaching and research requirements of those universities?

(3) Does clause 4 of that Framework Agreement preclude national legislation, such as Article 20(1) of Legislative Decree No 75/2017 (as interpreted by the above-mentioned Ministerial Circular No 3/2017), which — while recognising that researchers on fixed-term contracts with public research bodies may be made

permanent members of staff, provided that they have been employed for at least three years prior to 31 December 2017 — does not permit this for university researchers on fixed-term contracts solely because Article 22(16) of Legislative Decree No 75/2017 applies the ‘public law regime’ to the employment relationship — even though, as a matter of law, that relationship is based on a contract of employment — and despite the fact that Article 22(9) of Law No 240/2010 imposes the same rule on researchers at research bodies and at universities regarding the maximum duration of fixed-term employment relationships with universities and research bodies, whether in the form of the contracts referred to in Article 24 of that law or the research projects referred to in Article 22?

(4) Do the principles of equivalence, effectiveness and practical effect of EU law, with regard to the Framework Agreement, and the principle of non-discrimination enshrined in clause 4 thereof, preclude national legislation (Article 24(3)(a) of Law No 240/2010 and Article 29(2)(d) and (4) of Legislative Decree No 81/2015) which — notwithstanding the existence of rules applicable to all public-sector and private-sector workers recently set out in Legislative Decree No 81 which establish (from 2018) that the maximum duration of a fixed-term relationship is 24 months (including extensions and renewals) and make the use of such relationships by the public authorities contingent on the existence of ‘temporary and exceptional requirements’ — allows universities to hire researchers on a three-year fixed-term contract, which may be extended for two years in the event of a favourable assessment of the research and teaching activities carried out during those three years, without making either the conclusion of the initial contract or its extension conditional on the university having such temporary or exceptional requirements, and even allowing it, at the end of the five-year period, to enter into another fixed-term contract of the same type with the same individuals or with other individuals, in order to cover the same teaching and research requirements as those of the earlier contract?

(5) Does clause 5 of the Framework Agreement, in the light of the principles of effectiveness and equivalence and clause 4 of that agreement, preclude national legislation (Article 29(2)(d) and (4) of Legislative Decree No 81/2015 and Article 36(2) and (5) of Legislative Decree No 165/2001) which prevents university researchers hired on a three-year fixed-term contract, which may be extended for a further two years (pursuant to Article 24(3)(a) of Law No 240/2010), from subsequently establishing a relationship of indefinite duration, there being no other measures within the Italian legal system which can prevent and penalise the misuse of successive fixed-term contracts by universities?

Provisions of EU law cited

Article 155 of the Treaty on the Functioning of the European Union.

Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP ('Directive 1999/70'), and in particular clause 5 and clause 4 of the Framework Agreement annexed thereto, and recitals 6 and 7 thereof.

Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (2005/251/EC)

Provisions of national law cited

Legge del 30 dicembre 2010, n. 240, 'Norme in materia di organizzazione delle università, di personale accademico e reclutamento, nonché delega al Governo per incentivare la qualità e l'efficienza del sistema universitario' (Law No 240 of 30 December 2010 laying down rules on the organisation of universities, academic staff and recruitment and delegating powers to the Government to enhance the quality and efficiency of the university system) ('Law No 240/2010'). In particular, Article 24, headed 'Fixed-term researchers', which provides, in the first two paragraphs, that, for the purposes of carrying out research and teaching activities, universities may conclude fixed-term employment contracts with applicants selected through open selection procedures governed by rules laid down by the universities themselves, which must be published in the Official Journal and on the websites of the university, the Ministry and the European Union, for which a research doctorate or equivalent qualification is one of the eligibility requirements. Selection must also be preceded by a preliminary appraisal of the applicants on the basis of their qualifications, curriculum vitae and academic output. According to paragraph 3 of that article, the contracts in question may take the form of '(a) three-year contracts which may be extended once only for a period of two years, subject to a favourable assessment of the teaching and research activities carried out' (type A researcher contract), or '(b) three-year contracts, reserved for candidates who have been employed under contracts of the type referred to in subparagraph (a)' or for applicants 'who have obtained the national academic qualification for the position of full or associate professor', and for other types of applicants (type B researcher contract). With regard to holders of type B researcher contracts who have obtained the requisite academic qualification, the university is required, in the third year of the contract in question, to assess them with a view to determining whether they may be appointed to the post of associate professor and, if the assessment is favourable, the holders of the contract, upon the expiration thereof, are to be appointed to the post of associate professor.

Decreto legislativo del 25 maggio 2017, n. 75, 'Modifiche e integrazioni al decreto legislativo 30 marzo 2001, n. 165 ...' (Legislative Decree No 75 of 25 May 2017, 'Amending and supplementing Legislative Decree No 165 of 30 March 2001 ...') ('Legislative Decree No 75/2017'). In particular, Article 20, entitled 'Overcoming job insecurity in employment with public authorities',

provides, in paragraph 1, that the authorities may, to overcome job insecurity and reduce the use of fixed-term contracts, in the three-year period 2018-2020, hire for an indefinite period staff who ‘(a) are in post after the date of entry into force of Law No 124/2015 on fixed-term contracts with the authority employing them ...; (b) have been hired on a fixed-term basis, in relation to the same activities carried out, by means of selection procedures ...; (c) have accrued, as of 31 December 2017, at least three years’ employment with the hiring authority ..., continuous or otherwise, during the previous eight years.’ Under paragraph 8 of the article in question, the authorities may extend flexible employment relationships with those participating in the procedures outlined in paragraphs 1 and 2 described above until the conclusion thereof. Finally, paragraph 9 of Article 20 provides that the latter ‘shall not apply to the recruitment of academic, teaching, administrative, technical and auxiliary staff in State schools and educational establishments’ and that the fellows of public research bodies fall, on the other hand, within the scope of paragraph 2 of the article in question.

Decreto legislativo del 30 marzo 2001, n. 165 (‘Legislative Decree No 165/2001 of 30 March 2001’), which constitutes the basic consolidated law on employment by public authorities. In particular, Article 3, headed ‘Staff governed by public law’, provides, in paragraph 2, that ‘The employment relationship of fixed-term or permanent university professors and researchers shall continue to be governed by the relevant provisions in force pending specific rules which will govern it in a systematic manner ...’ Article 36 of that Legislative Decree, in the wording in force since 22 June 2017, provides, in the first two paragraphs, that the public authorities are, as a rule, to recruit staff solely on employment contracts of indefinite duration but may resort to flexible forms of contractual employment of staff provided for in law to meet exclusively temporary or exceptional requirements. Under paragraph 5 of the same article ‘In any event, infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment relationships 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 ...’ The following paragraph 5-quater provides that employment contracts concluded in violation of Article 36 are to be null and void. Finally, subsequent paragraph 5-quinquies provides that the article in question ‘shall, without prejudice to paragraph 5, not apply to the recruitment of fixed-term academic, teaching, administrative, technical and auxiliary staff in State schools and educational establishments ...’

Decreto legislativo del 15 giugno 2015, n. 81, ‘Disciplina organica dei contratti di lavoro e la revisione della normativa in tema di mansioni ...’ (Legislative Decree No 81 of 15 June 2015, on the systematic regulation of employment contracts and amendment of the legislation on employment-related duties ...) (‘Legislative Decree No 81/2015’), which transposes Directive 1999/70/EC into Italian law. In particular, Article 19 (‘The use of fixed-terms and maximum duration’), in the version applicable to the present case and prior to the amendment made by decreto

legge n. 87/2018 (Decree-Law No 87/2018), provided that the maximum duration of fixed-term employment relationships between the same employer and the same worker, by operation of successive contracts, was to be 36 months. Article 29(2)(d) of the Legislative Decree in question, in force since 12 August 2018, provides that ‘The following shall also be excluded from the scope of this Chapter: ... (d) fixed-term contracts within the meaning of Law No 240 of 30 December 2010.’ Finally, under paragraph 4 of that article, this is to be ‘without prejudice to the provisions of Article 36 of Legislative Decree No 165 of 2001.’

Outline of the facts and the main proceedings

- 1 The applicants, AQ, BO and CP, have been employed as researchers on fixed-term contracts by the University of Perugia for a number of years.
- 2 They asked the university to commence selection procedures with a view to their permanent employment, in accordance with Article 20(1) of Legislative Decree No 75/2017.
- 3 The University of Perugia, by memoranda dated 11 and 19 April 2018, rejected the appellants’ requests, arguing that, under Ministerial Circular No 3/2017, the procedure referred to in Article 20 had not altered the existing legislation on the employment relationship of university researchers and professors.
- 4 The applicants challenged those memoranda and that circular before the Regional Administrative Court, Umbria.
- 5 By judgment of 20 March 2019, that court dismissed the actions. Specifically, it found that the procedure referred to in Article 20(1) of Legislative Decree No 75/2017 was an exception to the principle of access through open competition, which is the general principle applicable in public-sector employment, and that, even though it did not expressly exclude the category of fixed-term university researchers, Article 20 did not apply to them.
- 6 The applicants then lodged an appeal with the referring court.
- 7 The Presidenza del Consiglio dei ministri (Presidency of the Council of Ministers), the Ministero dell’Istruzione, dell’Università e della Ricerca (Ministry of Education, Universities and Research) and the Università di Perugia (University of Perugia) contend that the appeal should be dismissed.

The essential arguments of the parties to the main proceedings

- 8 The applicants consider that Article 20(9) and (10) of Legislative Decree No 75/2017 does not exclude fixed-term university researchers from the procedure for improving job security which that article introduces. They argue that this is

demonstrated by Article 29(2)(d) of Legislative Decree No 81/2015, which lays down general rules on fixed-term employment relationships, and does not expressly exclude university researchers. This is not at odds with Article 3 of Legislative Decree No 165/2001, as amended by Article 22(16) of Legislative Decree No 75/2017 — which simply maintains all the applicable provisions on the employment relationship of university researchers and professors and provides that they are not covered by the ‘contract’ public-sector employment system — or with the wording of the above-mentioned Article 20, which, referring to the possibility of public authorities hiring temporary workers ‘indefinitely’ and not just ‘on contracts of an indefinite duration’, concerns all temporary workers, including ‘non-contract’ public-sector employees, and therefore university researchers on fixed-term contracts.

- 9 In the appellants’ opinion, if Article 20(1) of Legislative Decree No 75/2017 were deemed not to apply to researchers on fixed-term contracts, this would be contrary to the Italian Constitution, as well as to the Framework Agreement annexed to Directive 1999/70/EC. This is because temporary researchers working for research bodies — which are subject to the above-mentioned rules on job security — would receive more favourable treatment than university researchers, despite the fact that there are no real differences between the activities carried out by the two categories of researchers in question. Moreover, university researchers would not be able to exercise their freedom to conduct research to the full, owing to the precariousness of their employment relationship.

Succinct presentation of the reasons for the request for a preliminary ruling

- 10 The referring court is aware that, under EU legislation on the stability of employment relationships, the contract of indefinite duration represents the ideal, ordinary and prevalent type of contract, whereas the fixed-term contract remains the exception. In that respect, the referring court cites the judgment of the Court of Justice in Case C-331/17, in which that court found that Italian legislation on fixed-term work (in that case, with opera companies) was unlawful because it was contrary to EU law, pointing out that clause 5 of the Framework Agreement annexed to Directive 1999/70, requires, in order to prevent the misuse of fixed-term work, one of the three protective measures provided for therein to be adopted (statement of the reasons for the use of fixed-term employment relationships; maximum non-renewable duration of the employment relationship; limit on the number of renewals). A national provision that authorises recourse to successive fixed-term employment contracts indefinitely cannot therefore be accepted.
- 11 According to the Court’s case-law, moreover, the concept of ‘objective reasons’ referred to in clause 5(1)(a) of the Framework Agreement concerns precise and concrete circumstances characterising a given activity, which are therefore capable of justifying in themselves 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 employment 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. The failure to demonstrate objective reasons justifying the repeated use of fixed-term employment relationships is indicative of misuse in the recourse to such forms of temporary work.

- 12 Nevertheless, the referring court notes that, in the case of academic research at universities, the time limits on employment relationships are consistent with the type of services provided in connection with university research. Indeed, it entails specific lines of research being completed within a particular time frame, alongside teaching duties commensurate with the duration and organisation of degree courses. The unpredictable content and duration of university research is claimed to be the objective reason justifying the temporary nature of the employment relationships of university researchers.
- 13 The referring court also points out that the Corte costituzionale (Constitutional Court, Italy) found that the provisions of Legislative Decree No 368/2001, implementing Directive 1999/70/EC, were compatible with public-sector employment law, provided that the contract was not converted into a relationship of indefinite duration and that there was only the right to pecuniary compensation commensurate with the loss suffered (Constitutional Court, Judgment No 207 of 2013). The referring court further notes that, even following the repeal of the above-mentioned Legislative Decree, by Article 21 of Legislative Decree No 81/2015 — which reduced the maximum duration of the fixed-term contract to 24 months — the system of guarantees for public-sector employment remained in place, underpinned by the principle of recruitment by way of open competition, which may be derogated from only if there are one-off, exceptional reasons relating to the public interest.
- 14 According to the referring court, given the particular nature of the relationship between universities and researchers on fixed-term contracts, the direct and automatic application of the Framework Agreement, simply because fixed-term relationships are renewed or the maximum total duration is reached, is inconceivable, since such an outcome would undermine the independence of universities. In that regard, the referring court evokes the principle affirmed by the Court of Justice in its order in Case C-3/10 (paragraph 51) specifically concerning the limits for converting the relationship into one of indefinite duration laid down in Article 36 of Legislative Decree No 165/2001, which it did not consider contrary to clause 5 of the Framework Agreement, provided that that provision were made ‘... in the sector under consideration, for other effective measures to avoid and, as necessary, penalise the abusive use of successive fixed-term contracts ...’
- 15 The referring court is aware that a national provision that merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner does not meet the objective requirements to justify such contracts and would be highly discriminatory (see judgment of the Court of Justice of

26 January 2012, *Küçük*, C-586/10, paragraphs 27, 28 and 29 and the case-law cited), and wholly incompatible with the objective of the Framework Agreement and the requirement that it have practical effect (see also judgments of the Court of Justice of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, and of 25 October 2018, *Sciotto v Fondazione Teatro dell'Opera di Roma*, C-331/17).

- 16 The referring court is uncertain, however, whether the university system, in order to protect freedom of scientific research and its functional autonomy, already inherently contains the objective reasons justifying the renewal of the researchers' contracts in view of the particular nature of university recruitment and research.
- 17 Regarding the questions referred for a preliminary ruling, the referring court clarifies the following aspects.
- 18 First, the fact that university researchers on fixed-term contracts are not mentioned in Article 20 of Legislative Decree No 75/2017 is due to the content of Article 22(16), which amends Article 3(2) of Legislative Decree No 165/2001 in that respect, by including the employment relationships of researchers in non-contract public-sector employment. It would be unnecessary therefore to exclude those researchers expressly from the addressees of the above-mentioned Article 20, which essentially applies only to 'contract' public-sector employment.
- 19 Furthermore, the fact that university researchers are excluded from the procedures referred to in Article 20 of Legislative Decree No 75/2017 is not discriminatory vis-à-vis the admission to those procedures of researchers employed by research bodies, since they represent two separate categories, given the different tasks they perform (unlike researchers employed by research bodies, university researchers also have teaching duties) and the legal regime applicable (university researchers are considered contractual public-sector employees).
- 20 The referring court notes that Article 24(1) of Law No 240/2010 does not appear to contain the necessary 'objective and transparent' criteria, merely requiring the fixed-term contract to be compatible with the available programming resources.
- 21 Logically, however, *first* it should be established that the university has an objective requirement to conclude a fixed-term contract for research purposes, and *then* the necessary financial resources should be found. On this point, the Court of Justice has found that budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the measures which it wishes to adopt, provided they do not in themselves constitute an aim pursued by that policy and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts as referred to in clause 5(1) of the Framework Agreement (see, in addition to the above-mentioned Case C-22/13, order of 21 September 2016, *Popescu*, C-614/15, paragraph 63).
- 22 Similarly, making the possibility of a two-year renewal contingent on a 'positive assessment of the teaching and research activities carried out' does not satisfy the

need for the university to establish and apply ‘objective and transparent criteria in order 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’. Therefore, Article 24(3) of Law No 240/2010 also carries a real risk that it will result in misuse of fixed-term contracts, and therefore seems incompatible with the objective of the Framework Agreement and the requirement that it have practical effect.

WORKING DOCUMENT