

Case C-253/24 [Pelavi]ⁱ**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:**

9 April 2024

Referring court:

Corte di Appello di L'Aquila (Italy)

Date of the decision to refer:

4 April 2024

Defendant and appellant:

Ministero della Giustizia (Italy)

Applicant and respondent:

NZ

Subject matter of the main proceedings

Appeal proceedings following an appeal against the judgment partially accepting the application lodged by the applicant, an honorary judge at the court of first instance, seeking, inter alia, a determination on the status of worker under EU law and the consequent right to financial and legal treatment equivalent to ordinary judges, including holidays, leave, sickness and injury benefit, severance pay, pensions and social security, as well as an order for the Ministero della Giustizia (Ministry of Justice, Italy) to pay compensation for non-fulfilment of the obligations laid down by the relevant EU directives and for misuse of successive fixed-term employment relationships.

Subject matter and legal basis of the request

Interpretation of Articles 31 and 47 of the Charter of Fundamental Rights of the European Union, Article 7 of Directive 2003/88/EC and Clauses 4 and 5(1) of the

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Framework Agreement on Fixed-term Work concluded on 18 March 1999, which is annexed to Directive 1999/70/EC. The referring court has doubts as to the compatibility with those provisions of national legislation which provides, for an honorary judge who may be classified as a ‘worker’ and a ‘fixed-term worker’, (i) for the loss of the right to paid leave previously accrued in the event of confirmation in post until the age of 70, and (ii) as a measure aimed at penalising the misuse of fixed-term employment contracts, for the confirmation in post of the honorary judge until the age of 70 or, in the event of non-confirmation, for financial compensation, with a waiver, in both cases, of any rights previously accrued.

Questions referred for a preliminary ruling

1. Do Articles 31(1) and 47 of the Charter of Fundamental Rights of the European Union, Article 7 of Directive 2003/88/EC and Clause 4 of the Framework Agreement on Fixed-term Work preclude national legislation which provides that an honorary judge, who may be classified as a ‘worker’ and a ‘fixed-term worker’ and who is confirmed in post until the age of 70, forfeits the right to paid leave for the period prior to the confirmation?

2. Does Clause 5(1) of the Framework Agreement on Fixed-term Work preclude national legislation which, as a measure aimed at penalising the misuse of fixed-term contracts, provides for the confirmation in post of the honorary judge until the age of 70, after passing a non-competitive assessment procedure, and – in the event of failing the assessment procedure – provides for an allowance, in both cases requiring a waiver of any rights previously accrued?

Provisions of European Union law relied on

Charter of Fundamental Rights of the European Union, Articles 31 and 47 (‘the Charter’).

Framework Agreement on fixed-term work, concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Clause 2 and, in particular, Clause 4 and Clause 5(1).

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 7 (Working Time Directive).

Judgment of 15 April 2008, *Impact* (C-286/06, EU:C:2008:223) (‘the judgment in *Impact*’).

Judgment of 9 November 2023, *Keolis Agen* (C-271/22 to C-275/22, EU:C:2023:834).

Judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572) ('the judgment in *UX*').

Judgment of 7 April 2022, *Ministero della Giustizia and Others (Status of Italian magistrates)* (C-236/20, EU:C:2022:263) ('the judgment in *PG*').

Judgment of 26 November 2014, *Mascolo and Others* (C-31/13 to C-63/13 and C-418/13, EU:C:2014:2401) ('the judgment in *Mascolo*').

Judgment of 8 May 2019, *Rossato and Conservatorio di Musica F.A. Bonporti* (C-494/17, EU:C:2019:387) ('the judgment in *Rossato*').

Provisions of national law relied on

Article 29(1) to (9) of decreto legislativo del 13 luglio 2017, n. 116 (Legislative Decree No 116 of 13 July 2017; 'Legislative Decree No 116/2017'), as replaced by Article 1(629) et seq. of legge del 30 dicembre 2021, n. 234 (Law No 234 of 30 December 2021):

'1. Honorary judges in service on the date on which this decree enters into force may be confirmed in their posts on request until the age of 70.

2. Honorary judges in service on the date when this decree enters into force who do not qualify for confirmation, either because they do not submit an application or because they do not pass the assessment procedure referred to in paragraph 3, shall be entitled, subject to their right to refuse, to a payment of EUR 2 500 before tax for each year of service during which the judge has been engaged in hearings for at least 80 days, and to a payment of EUR 1 500 before tax for each year of service during which the judge has been engaged in hearings for fewer than 80 days, and in any case up to a total per capita limit of EUR 50 000 before tax. For the purpose of calculating the payment due under the preceding sentence, service for periods exceeding six months shall be deemed equal to one year. Receipt of the payment entails a waiver of all further claims of any nature whatsoever arising from the terminated honorary relationship.

3. For the purposes of the confirmation referred to in paragraph 1, the Consiglio superiore della magistratura (Supreme Council of the Judiciary) shall pass a resolution to hold three separate assessment procedures each year in the three-year period 2022-2024. These shall cover honorary judges in service who have completed the following as of the date on which this decree enters into force: (a) more than 16 years of service; (b) between 12 and 16 years of service; and (c) fewer than 12 years of service.

4. The assessment procedures referred to in paragraph 3 shall consist of an oral examination, of a maximum duration of 30 minutes, on a practical case involving substantive and procedural civil law or substantive and procedural criminal law in the field in which the candidates have worked, exclusively or at least

predominantly, as an honorary judge. The assessment procedures shall take place on a district basis. The assessment committee shall be composed of the president of the court or a representative thereof, a judge who has passed at least the second professional assessment, appointed by the judicial council, and a lawyer entered in the special register of advocates before the higher courts, appointed by the Bar Council. ...

5. The application to participate in the assessment procedures referred to in paragraph 3 entails the waiver of all further claims of any nature whatsoever arising from the previous honorary relationship, except for the right to the payment referred to in paragraph 2 in the event of non-confirmation.

6. Honorary judges who are confirmed in post, within a period of 30 days from notification of the outcome of the assessment procedure referred to in paragraph 3, may opt to work exclusively as an honorary judge. In that case, honorary judges who are confirmed in post shall receive remuneration based on the salary and payment in respect of the 13th month due on 31 December 2021 to judicial administrative staff ... A judicial allowance shall also be paid of an amount equal to twice the administrative allowance due to the judicial administrative staff referred to in the previous sentence ...

7. Honorary judges who are confirmed in post and who do not exercise the option referred to in paragraph 6 shall receive remuneration based on the salary and payment in respect of the 13th month due on 31 December 2021 to judicial administrative staff ... The provisions of Article 1(3) of this decree shall apply, in so far as they are compatible, solely in relation to the appointment conferred, so as to allow the simultaneous performance of other work or professional activities.

8. Honorary judges shall be entitled to the meal voucher on the same basis as judicial administrative staff, for each hearing that lasts for more than six hours, as evidenced by a specific declaration from the manager of the court.

9. Honorary magistrates in service on the date of entry into force of this decree shall leave the service if they do not submit an application to participate in the assessment procedure referred to in paragraph 3.'

Article 15a(2) and (3) of decreto-legge del 22 giugno 2023, n. 75 (Decree-Law No 75 of 22 June 2023), as converted with amendments by legge del 10 agosto 2023, n. 112 (Law No 112 of 10 August 2023):

'2. The honorary judges of the cohort confirmed in post indefinitely pursuant to Article 29 of Legislative Decree No 116 of 13 July 2017, who have opted for the exclusive regime, shall be enrolled in the compulsory general insurance scheme managed by the Istituto nazionale della previdenza sociale [National Social Security Institute, Italy; 'the INPS'].

3. Without prejudice to the provisions of paragraph 5, the honorary judges of the cohort confirmed in post indefinitely pursuant to Article 29 of Legislative

Decree No 116 of 13 July 2017, who carry out their duties on a non-exclusive basis and are entitled to enrol with the Cassa nazionale di previdenza e assistenza forense [lawyers' pension organisation] shall remain enrolled with that organisation.'

Succinct presentation of the facts and of the essential arguments of the parties in the main proceedings

- 1 The respondent (the applicant at first instance) has been an honorary judge serving at a Tribunale (District Court) on a continuous basis since 14 February 2001.
- 2 Since that date, she has held an average of three hearings a week and delivered an average of over 200 judgments a year, mainly in criminal cases. She has not held any hearings during the annual non-working holiday period (fixed by law from 1 to 31 August).
- 3 She was initially appointed for a three-year term, renewed every four years until 13 December 2022, when she was confirmed in post until the age of 70.
- 4 Prior to that confirmation, she was a member of the Bar Association and was able to practise freely as a lawyer in a district other than that of the District Court where she served, paying mandatory contributions to the Cassa Nazionale Forense, an organisation that provides social security and pensions for lawyers on the basis of their income. Given her membership of the Bar Association and her enrolment with the Cassa Nazionale Forense, the allowance she received as an honorary judge was also subject to contributions to that organisation.
- 5 From 14 February 2001 to 13 December 2022, she received an allowance determined on the basis of the number of hearings held of EUR 98 per hearing, plus an additional EUR 98 in the event that she had to work for more than five hours a day. The allowance was not paid during the holiday period.
- 6 On the allowances she received as an honorary judge, until 13 December 2022, the Ministry paid social security contributions to the Cassa Forense at the rate of 4% (by way of a 'supplementary contribution'), while the respondent paid the 'personal contribution', equivalent to 14.5% to 15% of her total net professional income (allowances plus income from her work as a lawyer).
- 7 In the first-instance proceedings, the honorary judge applied for and was granted the status of 'worker' under EU law (rather than an 'employee' under national law). She also asked to be granted the right to receive the same salary as an 'ordinary judge' – that is to say, a professional judge – and for the Ministry of Justice to be ordered to pay compensation for misuse of successive fixed-term employment relationships, quantified by the District Court as nine months' salary, as stated above. However, the District Court has only granted the right to receive payment of previous salaries within the five-year limitation period applicable to employee claims.

- 8 The Ministry of Justice appealed the decision, disputing the comparability of the role of honorary judge with that of a professional judge on various grounds, including the absence of a public entrance competition, the lower quality and quantity of the work carried out by the honorary judge, and the compatibility of the role of honorary judge with other professional activities, unlike the public officer. It further disputed that there was misuse of successive fixed-term contracts, submitting that each appointment of the honorary judge must be considered a new appointment, which the interested party is not automatically entitled to, but for which they may indicate a preference.
- 9 The respondent contested the allegations and brought a cross-appeal, in which she challenged the classification of the claims by the court of first instance as employee claims rather than compensation, with the consequent application of the five-year limitation period instead of the ten-year limitation period.
- 10 During the appeal proceedings, the respondent completed the ‘confirmation procedure’ introduced by Law No 234/2021 (Article 1(629) et seq.), which allowed honorary judges in service on 1 January 2022 the option of being confirmed in post until the age of 70, subject to passing an assessment procedure, without the need for renewal or interim confirmation. Honorary judges thus confirmed in post are entitled to a fixed salary – determined on the basis of the salary of an administrative officer employed by the ministry – a judicial allowance and a meal voucher. The salary is also paid during the non-working holiday period, when they do not work. If honorary judges who are confirmed in post decide to work exclusively in that role, they are removed from the register of lawyers and the Cassa Forense and are eligible for the employee pension scheme by registering with the INPS (Article 15a of Decree-Law No 75/2023, as converted by Law No 112/2023). If they opt to maintain their registration with the Cassa Forense (and thus retain the option of practising as a lawyer), they continue to pay contributions to the Cassa Forense on the income they earn as a lawyer.
- 11 To obtain the confirmation, the respondent had to undergo an oral examination on a practical case in the field in which she previously worked as an honorary judge. The respondent was confirmed in post by decree of the Ministro della Giustizia (Minister for Justice) of 13 December 2022 and opted to work exclusively as an honorary judge. In such a situation, the provisions that exclude (i) the establishment of a public employment relationship, (ii) the maximum commitment of two days a week, and (iii) the temporary nature of the appointment (Article 1(3) of Legislative Decree No 116/2017) do not apply to the honorary judge.
- 12 The law provides that the request to participate in the assessment procedure for confirmation in post, regardless of its outcome, entails the waiver of any other rights previously accrued. It also provides that failure to submit the application terminates the appointment as honorary judge for those who have served in that capacity for more than four years, with the right to an indemnity based on the number of years’ service.

- 13 After the respondent had been confirmed in post, the Ministry requested that the subject matter of the dispute be declared terminated. The respondent objected, asking the referring court to raise the question of constitutional legitimacy regarding the abovementioned waiver *ex lege* of the rights previously accrued, on the ground that it infringed various provisions of the Italian Constitution in relation to Clause 5(1) of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999 and annexed to Council Directive 1999/70/EC of 28 March 1999.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 The referring court considers it appropriate to refer the first question to the Court of Justice, having regard to the direct effect of Article 31(2) of the Charter and Article 7 of Directive 2003/88 (see judgment of 9 November 2023, *Keolis Agen*, C-271/22 to C-275/22, EU:C:2023:834), Article 47(1) of the Charter and Clause 4 of the Framework Agreement on Fixed-term Work (see judgment of 15 April 2008, *Impact*, C-286/06, EU:C:2008:223; ‘the judgment in *Impact*’), from which the national judicial authority derives the power/duty to disapply the conflicting domestic legislation. For the second question, however, to ensure the reasonable duration of the proceedings, the referring court considers the reference for a preliminary ruling appropriate in relation to Clause 5(1) of the Framework Agreement on Fixed-term Work – even though it does not have direct effect (see judgment in *Impact*) – since the answer to that question would facilitate the assessment of the need to inquire of the Corte costituzionale (Constitutional Court, Italy) as to the constitutionality of the domestic rule which is unable to be disapplied.
- 15 The referring court is aware that infringement proceedings are currently pending in the matter of the Italian legislation applicable to honorary judges, initiated by the Commission’s letter of formal notice sent to Italy on 15 July 2021, followed by another letter of formal notice on 15 July 2022 (after the entry into force of the rules at issue in the present case), with a reasoned opinion issued on 14 July 2023.
- 16 The referring court takes the view that the subject matter of the present proceedings is somewhat different to that of Case C-548/22, currently pending before the Court of Justice. It thus considers it appropriate to provide the Court of Justice with more factual and legal information on the legal status of honorary judges in Italy.

The respondent’s classification as a ‘worker’ under EU law

- 17 In view of the principles outlined by the Court of Justice, particularly in the judgments in *UX* and *PG*, the referring court considers that the respondent, in working as an honorary judge at the District Court, has performed real and genuine services which are not purely marginal, taking into account the productivity demonstrated in terms of judgments and the number of hearings, and

the nature and structure of the allowances provided for honorary judges, which can in no way be regarded as the simple reimbursement of expenses, but is closely connected to the nature and volume of the services rendered.

- 18 The relationship that existed between the respondent and the Ministry of Justice until 13 December 2022 was also fixed term: the initial appointment was for three years, and then continued to be renewed at four-yearly intervals, until the outcome of the confirmation procedure provided for by Article 29 of Legislative Decree No 116/2017. Even in the present case, therefore, the end of the relationship was ‘determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event’ (judgment in *UX*, paragraph 131).
- 19 On the basis of the evidence highlighted, the referring court considers the classification of the respondent as a ‘worker’ for the purposes of the application of Article 7 of the Working Time Directive, and as a ‘fixed-term worker’ for the purposes of the application of the framework agreement, to be correct.
- 20 The right to paid leave – at least for the minimum period of four weeks a year – which the respondent may rely on directly, derives from Article 7 of the Working Time Directive, which gives concrete expression to the right enshrined in Article 31(2) of the Charter (see judgment of 9 November 2023, *Keolis Agen*, C-271/22 to C-275/22, paragraph 28).
- 21 As regards employment conditions, Clause 4(1) of the framework agreement prohibits differences in treatment of the respondent from permanent workers in a comparable situation, unless they are justified by objective reasons.
- 22 However, the referring court, like the court of first instance, rules out the existence of ‘subordination’ under domestic law, which gives access to a wider and more generalised range of protections than those recognised by EU law (for example, in relation to the termination of the relationship), which remains subject to national rules.

Remuneration

- 23 On the basis of several aspects examined by the Court of Justice in the judgment in *PG* (paragraphs 42 and 53) regarding the comparability of magistrates with ordinary judges and the existence of objective grounds for differentiation, mainly due to differences in qualifications and duties and the conditions of admission to judicial office, the referring court finds that the respondent is not comparable to an ordinary judge for remuneration purposes.

Leave

- 24 The referring court observes that it is common ground between the parties that the respondent did not hold any hearings during the annual non-working holiday

period (from 1 to 31 August), nor could she have done, since by law, the normal activity of the District Court was suspended during that period. It is also common ground that, until her confirmation in post on 13 December 2022, the respondent had not been paid during that period. That circumstance alone is incompatible with the right to leave granted to the respondent as a ‘worker’.

- 25 Since those two rights (the right to take leave and the right to payment of leave) must be considered intrinsically linked, the right to payment of remuneration during the holiday period may not be derogated when transposing EU law into national law. No derogation is allowed with regard to Article 7 of the Working Time Directive. The right to payment of remuneration during the holiday period, provided for by EU law, is therefore binding. As a principle of EU social law, it is of particular importance and cannot be interpreted restrictively (see, for example, judgments of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215 and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576).
- 26 The referring court refers to the case-law of the Court of Justice, in particular the judgment in *PG* (paragraphs 53 and 54), in which the Court of Justice examined the right to leave of magistrates, including in the context of ‘working conditions’, regarding the difference in treatment compared with ordinary judges, holding in essence that the different methods of recruitment, qualifications required and duties are not elements upon which it is possible to base a difference in treatment as regards paid leave.
- 27 The referring court finds that there is no real need for a different quantification of leave for ordinary judges and honorary judges, it being reasonable in both cases that such a quantification coincides with the number of days on which normal court activity is suspended. The referring court also notes that, under Legislative Decree No 116/2017, honorary judges do not work during the holiday period unless there are specific official requirements (Article 24), while receiving, from the time of ‘perpetuation’ (Article 29), the remuneration provided for during that period.
- 28 The referring court further observes that, before the entry into force of Article 29 of Legislative Decree No 116/2017 and the submission of the application for confirmation in post until the age of 70, which entails the waiver of any previous rights, the respondent, as a ‘worker’ and a ‘fixed-term worker’, would have been entitled to have part of her claim granted – namely, the part relating to payment of remuneration during the annual holiday period from 1 to 31 August of each year, which she benefited from. The referring court points out, for the purposes of the Court’s assessment, that the claim liable to be granted does not concern ‘the allowance for leave not taken’, which cannot be monetised until the end of the relationship, but the remuneration of leave taken during the non-working holiday period (subject to the limitation period).

Pension and social security protection

- 29 The judgment under appeal rejected the respondent's application to be granted the right to a pension and for the Ministry to be ordered to pay social security and insurance contributions to the relevant organisations, in addition to compensation for the non-payment of contributions, because such a right would presuppose the recognition of a public employment relationship with the Ministry, which was not sought in the present case.
- 30 By reference to the judgment in *PG*, the referring court recalls that Clause 4 of the framework agreement (i) makes inadmissible the 'exclusion of magistrates ... from all forms of pension and social security protection' (paragraph 53), and (ii) precludes national legislation which does not provide an entitlement for the magistrate, who may be classified as a fixed-term worker, to a social security and pension scheme deriving from the employment relationship, such as that provided for ordinary judges, if in a comparable situation to them (paragraph 54).
- 31 Since, therefore, Clause 4(1) of the framework agreement is unconditional and sufficiently precise for individuals to be able to rely upon it before a national court (judgment in *Impact*, paragraph 2 of the operative part), the national court is obliged to cease the discriminatory treatment, if necessary after disapplying the domestic rules.
- 32 Nevertheless, the referring court notes that the respondent has also received pension and social security protection from the Cassa Forense in relation to her work as an honorary judge: this form of pension protection is compulsory on account of the respondent being entered in the register of lawyers.
- 33 The entry in the register of lawyers, and thus the entitlement to a pension from the Cassa Forense, stem from the respondent's decision to continue practising as a lawyer in parallel with her work as an honorary judge. Ordinary judges are denied this option.
- 34 Therefore, since the respondent has received and will receive a form of pension protection for her role as an honorary judge, the referring court holds that the difference between the conditions of that protection and the protection provided for ordinary judges must be considered justified in view of the fact that honorary judges who choose to remain in the register of lawyers, and thus in the Cassa Forense, may continue to practise law, unlike ordinary judges.

The first question: doubts as to the compatibility with EU law, and in particular Clause 4 of the Framework Agreement on Fixed-term Work, of the deprivation of holiday pay for the period prior to confirmation in post

- 35 According to the referring court, Article 29(5) of Legislative Decree No 116/2017 has essentially led to the deprivation *ex lege* of the respondent's rights following her application to continue working as an honorary judge, as she has done since 2001. Had the respondent not applied for confirmation in post, her fixed-term contract would not have been extended further, and she would not have benefited

from the protections afforded to a permanent worker, even for the short fixed-term period remaining. To be eligible for future protections, the respondent thus had to waive those previously granted to her. The Court of Justice is therefore asked to rule on the compatibility of the deprivation of those indefeasible rights with the recognition of those rights for the future period.

- 36 Admittedly, as a result of the legislative intervention, the worker has been granted the ‘perpetuation’ of her employment relationship, in addition to protections for the future period. However, and unlike the cases examined in the judgments in *Mascolo* and *Rossato*, the rules at issue here exclude the rights accrued under each fixed-term contract, in particular the right to remuneration for leave taken by a fixed-term worker, upon their recruitment on a permanent basis.
- 37 Lastly, the deprivation *ex lege* of the right to take action to obtain the protections guaranteed by Clause 4 of the framework agreement and by Article 7 of the Working Time Directive, upon recruitment on a permanent basis, also raises doubts as to the right to an effective remedy for the protection of the rights guaranteed by EU law, as provided for by Article 47 of the Charter. The referring court further observes that Article 29 of Legislative Decree No 116/2017 entered into force in the course of the proceedings, after the Court of Justice delivered the judgment in *PG*, in the light of which the respondent would have had a genuine chance of her claim partially succeeding on appeal.
- 38 The legislative intervention in question could be understood as a legislative amendment with retroactive effect, capable of influencing the outcome of proceedings to which the State was a party (through the Ministry of Justice) in the State’s favour (since the respondent’s claim for the period prior to perpetuation would no longer be viable). In such a case, doubts would arise as to the compatibility of that measure (that is to say, the deprivation of previous rights), which appears to have no purpose other than to limit public spending, with the principles of due process. That argument is supported by the case-law of the European Court of Human Rights in relation to Article 6 ECHR and the incompatibility with that article of retroactive legislation that influences the outcome of litigation to which the State was a party, in the absence of compelling public interest reasons other than the needs of the public finances (see ECtHR, *Azienda Agricola Silverfunghi S.a.s. and Others v. Italy*, applications nos. 48357/07 and others, judgment of 24 June 2014). Article 47 of the Charter, like Article 6 ECHR, protects the right to due process and equality of arms, and can also be read in the light of the latter, considering that under Article 52 of the Charter, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are (at least) the same as those laid down by the said Convention.

The second question: on the perpetuation procedure as a measure aimed at penalising the misuse of successive fixed-term employment relationships

- 39 The referring court also has doubts as to the ability of the perpetuation procedure to fulfil the Member State's obligations under Clause 5 of the framework agreement. It notes that the respondent has served for more than 21 years under successive fixed-term appointments. The judgment in *PG* (in which the confirmation procedure provided for in Article 29 of Legislative Decree No 116/2017 was not examined) stated that 'Clause 5(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Directive 1999/70, must be interpreted as precluding national legislation pursuant to which a fixed-term employment relationship can be renewed a maximum of three times successively, each renewal being for a duration of 4 years, for a total duration that does not exceed 16 years, and which does not provide for the possibility of penalising in an effective and dissuasive way the abusive continuance of the employment relationship'.
- 40 The perpetuation procedure under discussion is proposed as a remedial measure in response to requests from the European Commission, particularly following the judgment in *UX*. If it meets the criteria laid down by the Court of Justice for compliance with the framework agreement, the procedure would thus represent an 'effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts' (judgment of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, cited in *PG*).
- 41 In the event of non-confirmation, provision is made for payment of an allowance (of EUR 2 500 before tax or EUR 1 500, as the case may be, for each year of service rendered). It could thus be considered that the misuse of successive fixed-term relationships is penalised either by confirmation in post until the age of 70, or by payment of the allowance.
- 42 However, each of these scenarios – failing the assessment procedure and receiving the allowance, or passing the assessment procedure and being confirmed in post – entails the waiver of any rights accrued under the previous honorary relationship, including the right to paid leave, as discussed in the first question.
- 43 Two doubts therefore arise as regards the assessment procedure provided for in Article 29(4) of Legislative Decree No 116/2017:
1. Whether the assessment procedure, which leads to either confirmation or non-confirmation in post, is sufficiently certain, non-fortuitous or unpredictable for the purposes of the transformation of the relationship, so as to be an effective penalty for the misuse of successive fixed-term relationships;
 2. In the event that the assessment procedure is considered sufficiently certain because, in the event of non-confirmation, the payment of an allowance is envisaged, whether the overall measure can be considered a penalty that is

sufficiently effective and a sufficient deterrent for the abuse of fixed-term relationships, given that it entails the waiver of any previous rights.

- 44 The referring court is aware that its task is to determine whether the abovementioned provisions of national law are an appropriate measure for preventing and, where necessary, penalising the misuse of successive fixed-term employment contracts or relationships. It notes, however, that the Court of Justice, when giving a preliminary ruling, may provide clarification designed to give the national court guidance in its assessment (*Mascolo*, paragraphs 82 and 83).

WORKING DOCUMENT