Case C-132/22

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:

25 February 2022

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

13 December 2021

Applicants:

BM

NP

Defendant:

Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR

Subject matter of the main proceedings

Actions brought before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) seeking the annulment of decreto ministeriale n. 597/2018 (Ministerial Decree No 597/2018). That decree, adopted by the Ministero dell'Istruzione, dell'Università e della Ricerca (Ministry of Education, Universities and Research, Italy), governs the procedure for compiling national lists of candidates for permanent and temporary teaching posts in State higher education institutions for the fine arts, music and dance (alta formazione artistica, musicale e coreutica – AFAM) ('the AFAM institutions'). The decree is contested in so far as – for the purpose of admission to that procedure – it does not allow the possibility that the requisite professional experience of at least three years may also be gained at peer institutions in other Member States. To that end, the disapplication is also requested of legge n. 205/2017 (Law No 205/2017), which is the primary legislation on the basis of which the abovementioned ministerial decree was adopted.

Subject matter and legal basis of the request

Compatibility of Italian legislation on the compilation of national lists for awarding permanent and temporary teaching posts in AFAM institutions with Article 45(1) and (2) TFEU and with Article 3(1)(b) of Regulation (EU) No 492/2011.

Question referred for a preliminary ruling

Must Article 45(1) and (2) TFEU and Article 3(1)(b) of Regulation (EU) No 492/2011 be interpreted as precluding a rule, such as that laid down in Article 1(655) of Law No 205/2017, according to which, in order to take part in the procedure for inclusion on the lists compiled for the award of permanent and temporary teaching contracts in Italian AFAM institutions, professional experience gained by candidates at those national institutions alone is taken into account, and not experience gained at peer institutions in other European countries, given that the procedure in question is specifically intended to counter the phenomenon of precarious employment in Italy? If the Court of Justice does not hold the Italian legislation to be contrary, in abstract terms, to the European regulatory framework, can the measures envisaged by that legislation be regarded as proportionate, in concrete terms, in view of the abovementioned public-interest objective?

Provisions of EU law relied on

Article 45(1), (2) and (4) TFEU.

Article 3(1)(b) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (‘Regulation No 492/2011’).

Provisions of national law relied on

Law No 205 of 27 December 2017 (‘Law No 205/2017’). In particular, Article 1(655) provides that teaching staff who do not already hold permanent contracts in AFAM institutions, who have passed the competition for inclusion on the lists and who have accrued at least three academic years of teaching, even if non-consecutive, in the last eight academic years, up to and including the 2020/2021 academic year, at one of those institutions and on the courses stipulated in the relevant legislation, are to be included on specific national lists for the award of permanent and temporary teaching posts, subject to the current national lists based on qualifications and those referred to in paragraph 653, within the limits of the vacancies available. The inclusion process is defined by decree of the Ministro dell’Istruzione, dell’Università e della Ricerca (Minister for Education, Universities and Research).

Ministerial Decree No 597/2018 ('Decree No 597/2018'). In particular, Article 2(1), in defining the required amount of teaching experience, provides that only candidates who have completed at least three academic years of teaching at AFAM institutions may take part in the procedure for compiling the lists, irrespective of any prior professional experience gained at peer institutions in other Member States.

Succinct presentation of the facts and procedure in the main proceedings

1 The defendant Ministry, on the basis of Article 1(655) of Law No 205/2017, adopted Decree No 597/2018 to lay down the rules for compiling lists for awarding teaching posts in AFAM institutions.

2 The applicants contested Decree No 597/2018 before the referring court, seeking its annulment in so far as, in Article 2(1) – for the purpose of admission to the procedure for the compilation of the lists – it does not recognise prior professional experience gained in foreign institutions, as well as seeking annulment of the national list drawn up pursuant to that decree. The applicants also request the disapplication of Article 1(655) of Law No 205/2017, which constitutes the underlying primary legislation.

3 The defendant Ministry requests that the actions be dismissed as unfounded.

The essential arguments of the parties in the main proceedings

4 The applicants submit that the Italian legislation infringes Article 45 TFEU and Article 3 of Regulation No 492/2011, as well as the principles of impartiality and sound public administration under Articles 3 and 97 of the Italian Constitution.

5 The defendant contends, in particular, that Decree No 597/2018 is not unlawful, since its content complies with the provisions of Law No 205/2017, which is the higher-ranking law and thus constitutes binding primary legislation.

6 The defendant further emphasises that the purpose of the rules laid down by Law No 205/2017 is to overcome the precarious situation in which many teachers in AFAM institutions find themselves – as is also evident from Article 1(653) of the Law, to which Article 1(655) refers – which thus justifies the requirement for experience to be gained specifically at those institutions in order to remedy this situation.

7 The defendant also refutes the infringement of the abovementioned provisions of EU law inasmuch as, in the present case, there is no difference of treatment based on the candidates' nationality, since the requirement for admission to the procedure applies without distinction to both Italian and foreign nationals.

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

8 With regard to Decree No 597/2018, the referring court notes that it allows the possibility of considering periods of service abroad in peer institutions of national AFAM institutions solely for the purpose of assessing candidates' qualifications, but not for the computation of the three years' teaching experience, which is the requirement for taking part in the procedure laid down by the national legislation at issue.

9 As to the interpretation of Article 45 TFEU, the referring court does not consider the judgment of the Court of Justice of 23 [February] 1994, *Scholz* (C-419/92), cited by the applicants, to be relevant in the present case, since that case concerned an open competition and the failure to award – for the purpose of assessing qualifications for the compilation of the list – points for prior periods of public service in another Member State. By contrast, the present case concerns a procedure reserved for teachers with previous work experience in the specific sector of AFAM State institutions, and not an open competition. Moreover, in the case cited, the period of service was not taken into account for the purpose of assessing candidates' qualifications, whereas, in the present case, that period is deemed valid for that purpose, but not for the purpose of satisfying the requirement relating to three years' service.

10 The judgment of the Court of Justice of 12 May 2005, [*Commission* v *Italy*] (C-278/03) is also irrelevant, since that case concerned discrimination against European citizens in accessing public-sector employment in Italy, whereas, in the present case, the applicants are Italian citizens who have worked in other Member States.

11 By contrast, as regards the interpretation of Article 3 of Regulation No 492/2011, the referring court cites the judgments of the Court of Justice of 23 April 2020, *WN* v *Land Niedersachsen* (C-710/18, paragraph 33), of 30 September 2003, *Köbler* (C-224/01), and of 10 October 2019, *Krah* (C-703/17). The referring court observes that it is clear from that case-law that the possibility of excluding prior periods of service completed in another Member State cannot be entirely ruled out, since a restriction on the principle of the free movement of workers may be permissible if it pursues one of the objectives enshrined in the FEU Treaty, or if it is justified by overriding reasons in the public interest, provided that there is compliance with the principle of proportionality.

12 It is precisely in the light of the foregoing that the referring court seeks to ascertain whether the objective of overcoming precarious employment in Italy in the AFAM sector, pursued by the Italian legislation here at issue, can justify the restrictions imposed on taking part in the procedure for compiling the lists in question, and whether it is proportionate.

13 In that regard, the referring court, recalling the judgment of 26 November 2014, *Mascolo and Others* v *MIUR* (C-22/13, C-61/13 to C-63/13, and C-418/13), states

that the adoption by Member States of measures to combat the phenomenon of precarious employment in the public sector, resulting from a succession of temporary contracts, is intended to satisfy not only national but also [EU] interests, as is apparent from Directive 1999/70/EC.

14 With regard to the proportionality of the measures, the referring court notes that, as provided for by decreto del presidente della Repubblica n. 143/2019 (Presidential Decree No 143/2019), currently 50% of permanent staff for AFAM institutions are recruited on the basis that they have moved up the national lists, while the remaining places are awarded to candidates who have been successful in open competitions based on tests and qualifications. For temporary contracts, however, it is provided that the teachers included on those national lists will be given priority, and that individual institutions may issue calls for the compilation of lists on an ancillary basis, if not all vacancies can be filled. Therefore, inclusion on the lists in question is not the only option for obtaining a permanent teaching post in AFAM State institutions, since at least 50% of the available places are still reserved for candidates who are successful in open competitions based on tests and qualifications, to which the restrictions imposed by Law No 205/2017 do not apply.

15 The Corte costituzionale (Italian Constitutional Court), in its judgment No 106 of 2 May 2019, has also affirmed – albeit with reference to different legislation relating to extraordinary competitions – that such rules are in principle compatible with the Italian Constitution, since, by giving certainty to legal relations and seeking to overcome precarious employment, they are intended to ensure sound administration. Consequently, those rules do not impinge unreasonably on the right of access to public service and on the principle of open competition.

16 In the light of the foregoing, the referring court has decided to refer the matter to the Court of Justice for a preliminary ruling.