

**Italy, Justice of the Peace for Bologna, No. 2508/2020, ordinary instance (honorary judge),
30/09/2020**

Member State

 Italy

Topic

Independence (Recruitment, appointment, salaries and promotion of magistrates)

Impartiality (Individual judges' liability)

Deciding Court Original Language

Giudice di Pace di Bologna

CJEU C-658/18

Deciding Court English translation

Justice of the Peace for Bologna

Registration N

Ruolo Gen. Nr. 54384/2018

Payment order Nr. 2508/2020

Date Decision

30/09/2020

National Follow Up Of (when relevant)

Direct follow up of the CJEU judgment C-658/18

EU legal sources and CJEU jurisprudence

- Article 267 TFEU
- Article 340 TFEU
- Articles 31(2) and 47 CFR

- Articles 1(3) and 7 of Directive 2003/88/EC
- Clauses 2(1), (2) and (4), 4 and 5 of the framework agreement on fixed-term work approved by Directive 1999/70/EC

CJEU judgments:

- Wilson (EU:C:2006:587)
- Associação Sindical dos Juizes Portugueses (EU:C:2018:117)
- LM (EU:C:2018:586)
- Commission v Italy (EU:C:2008:618)
- O' Brien (EU:C:2012:110)
- King (EU:C:2017:914)
- Kobler (EU:C:2003:513)
- Traghetti del Mediterraneo (EU:C:2006:391)
- Commission v Italy (EU:C:2011:775)
- First and Franex (C-275/00, EU:C:2002:711)
- Santoro (EU:C:2018:166)
- Motter (EU:C:2018:758)
- Order in Di Girolamo (EU:C:2018:684)
- Mascolo and Others (EU:C:2014:2401)

Subject Matter

Application before the Giudice di pace di Bologna for an order directing Italian Government to pay damages to the applicant, a giudice di pace, for infringement by Italy of Directives 1999/70/EC and 2003/88/EC and Article 31(2) of the Charter. The breach of EU law is found in the lower economic and social security guarantees enjoyed by honorary judges (giudici di pace) in comparison with ordinary judges.

Legal issue(s)

Independence of the Italian giudice di pace

Because of their job insecurity, honorary judges in Italy do not enjoy working conditions equivalent to those of professional judges, even though they perform the same judicial functions and are included in the national judicial system. According to the national court, not only their job insecurity is in breach of EU law (Directives 1999/70/EC and 2003/88/EC and Article 31(2) of the Charter) but also it is at issue whether honorary judge meet the definition of “independent court” having jurisdiction to make a request for a preliminary ruling pursuant to Article 267 TFEU.

Request for expedited/PPU procedures

The Giudice di Pace requested the case to be decided under the urgent procedure, in accordance with Article 107 of the Court's Rules of Procedure. It argued that the legal framework and the Commission's inaction gave rise to a structural crisis in the judicial system at the national and European level in so far as concerns the measures for the protection of the fundamental rights of honorary judges. However, on 6 November 2018, the Court of Justice decided that it was unnecessary to grant that request.

National Law Sources

- Articles 36, 97, 102, 106, 111, 117 of the Italian Constitution
 - Article 2109 of the Civil Code
 - Articles 8a and 9 of Law no. 97 of 2 April 1979 laying down rules on the legal status of judges and the remuneration of ordinary and administrative judges
 - Articles 1, 3 and 11 of Law no. 374 of 21 November 1991 establishing the office of giudice di pace
 - Legislative Decree no. 81 of 15 June 2015, laying down general rules governing employment contracts: Articles 1 and 25
 - Article 10 of the Legislative Decree no. 66 of 8 April 2003 implementing Directives 93/104/EC and 2000/34/EC
 - Articles 24 and 25 of the Legislative Decree no. 116 of 13 July 2017 amending the rules applicable to honorary judges and laying down other provisions applicable to giudici di pace
 - Article 54a of Legislative Decree no. 50 of 24 April 2017 (converted into Law No 96 of 21 June 2017) on the rules governing occasional work
 - Article 1 of Law No 217 of 18 May 1974 laying down the judicial and remuneration system for honorary vice pretori (deputy Praetors) entrusted with judicial functions
 - Articles 1, 2 and 8 of Law No 117 of 13 April 1988 on the reparation of damage caused in the exercise of judicial functions and the civil liability of judges.
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Facts of the case

The Italian giudici di pace (honorary magistrates) have a compensation scheme different from the one for ordinary judges. They are not entitled to one-month annual leave and their compensation is contingent on their actually working. The applicant, Ms UX, has worked as giudice di pace for several years. She had not received any compensations respect of the month of August 2018 as she had not worked. She sought compensation from the Italian Government in the form of the sum of EUR 4500, corresponding to the monthly remuneration payable to an ordinary judge having the same length of service. In particular, she claimed the infringement of the framework agreement on fixed-term work, read in conjunction with the Working time Directive (2003/88/EC) and Article 31(2) of the Charter.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Giudice di pace considered the applicant's claim as well founded. According to the national court, the breach by Italy of directives 1999/70/CE and 2003/88 emerged per tabulas from the documents appended to the application and the case law of the Court of Justice.

Despite the applicant has not received any compensation for the month of August 2018, she has uninterruptedly performed judicial functions equivalent to those of an ordinary judge having the same length of service. Firstly, the fact that the applicant cannot benefit from economic or social-security protection during the holiday period is proven by both the Italian legislation and the national case-law. Both the Law 374/1991 and the Legislative Decree 116/2017 provide that compensation to honorary judges is to be paid for on the basis of actual service and exclude any form of compensation in respect of periods of voluntary leave. Moreover, neither the Corte di Cassazione nor the Consiglio di Stato consider that honorary judges are engaged in paid and subordinate employment.

Secondly, according to the referring court the infringement of Directives 1999/70/EC and 2003/88/EC is proven by a series of documents presented by the applicant. These includes, inter alia:

- the decision of the European Committee of Social Rights on collective complaint No 102/2013, concerning the social security entitlements of giudici di pace;
- the 2018 resolution of the European Parliament criticizing the failure of some Member States to comply with Directive 1999/70/EC and calling on them to amend their internal legislation;
- the 2017 communication of the European Parliament's Committee on Petitions calling upon the Italian Ministry of Justice to take the necessary steps to eradicate the disparity in treatment between ordinary and honorary judges;
- the report of the expert appointed by the European Parliament's Committee on Petitions on the principle of non-discrimination and the abuse of fixed-term contracts in light of the EU Court of Justice case laws, presented on 22 November 2017;
- circular No 11799 of the Ministry of Justice on 18 January 2018 withdrawing the right of honorary judges to bear arms, while maintaining that right for ordinary judges;
- a number of collective petitions brought before the European Committee of Social Rights concerning the lack of protection for certain categories of worker, including honorary judges.

Most importantly, the referring court made reference to Communication of the European Commission (DGEMPL/B2/DA-MAT/sk (2016)), where the latter gave notice of the imminent initiation of infringement proceedings against Italy insofar as the national legislation applicable to the services provided by honorary judges were incompatible with EU law. However, such proceedings were never initiated.

Lastly, the case-law of the Court of Justice on the interpretation of Directives 1999/70/EC and 2003/88/EC also confirms that the work performed by giudici di pace is in the nature of subordinate paid employment (judgments in O'Brien and King).

Although the Giudice di pace di Bologna considered the applicant's claim as well founded, it was also of the view that, before upholding the claim, there was the need to address some requests for a preliminary ruling to the Court of Justice.

The decision of the Commission not to initiate an infringement procedure left honorary judges without the guarantees of the independence and impartiality of ordinary European courts referred to by the Court of Justice in its judgments in Wilson, Associação Sindical dos Juizes Portugueses and Minister for Justice and Equality. Thus, the Giudice di Pace asked whether honorary judges meet the definition of an ordinary European court having jurisdiction to make a request for a preliminary ruling under Article 267 TFEU, even though they do not enjoy working conditions

equivalent to those of ordinary judges.

The second question sought to ascertain whether giudici di pace are fixed-term workers for the purposes of Directives 2003/88 and 1999/70/EC, read in conjunction with Article 31(2) of the Charter of Fundamental Rights.

By the third request, the referring court asked whether Article 47 of the Charter, read in conjunction with Article 267 TFEU and read in light of the Court of Justice's case-law on liability of the Member States for infringement of EU law, is inconsistent with Article 2(3) and (3a) of Law No 117 of 13 April 1988 on the civil liability of judges for intentional fault or serious misconduct 'in the event of manifest infringement of the law or of European Union law'.

The Court of Justice answered the requests in its judgment of 16 July 2020 (Case C-658/18). For what concerns the first claim, which is the most interesting in this context, the Court of Justice analysed whether the Giudice di Pace meets the criteria to be regarded as a national court or tribunal for the purposes of Article 267 TFEU. In particular, the Court analysed whether the independence of the referring court and the other criteria to be regarded as a court under Article 267 TFEU were satisfied. After having recalled the two dimensions of independence, the external and the internal one, and the relevant case-law, the Court concluded that such a requirement was met in the present case. The Court relied on the fact that the Giudici di Pace are appointed by the President of the Italian Republic but with a choice made by magistrates and that they have a renewable four-year term of office, with the additional guarantee that they remain in office until the expiry of their four-year term, provided that the latter is not renewed. Moreover, their dismissal is regulated by express national provisions and they "perform their duties wholly autonomously, subject to disciplinary rules, and without external pressure capable of influencing their decisions". Finally, as regards the internal independence of the referring Giudice di pace, which was disputed by Italy and the Commission because the status and rights of magistrates were involved in the dispute, the Court observed that in several occasions it had answered requests for preliminary rulings concerning the status of judges, without doubting the impartiality of the referring courts. Having concluded that the Giudice di pace falls within the concept of a court or tribunal of a Member State within the meaning of Article 267 TFEU, the Court answered the second question but not the third one, which was deemed inadmissible. It found that the justices of peace fall in the category of fixed-term workers for the purposes of Directives 2003/88 and 1999/70/EC and that the national legislation precluding them the 30 days paid annual leave provided for ordinary judges. However, the Court left to the referring court the duty to verify whether the difference in treatment is justified by "the differences in the qualifications required and the nature of the duties undertaken" by ordinary and honorary judges.

On 30 September 2020 the Giudice di Pace di Bologna, without finding objective reasons to differentiate working conditions between honorary and ordinary judges, issued an order of payment in favour of the applicant granting her the amount of the salary that would have been due for the vacations of August 2018.

Relation of the case to the EU Charter

Two provisions of the Charter were invoked by the Giudice di pace, both of them directly in the questions referred for a preliminary ruling.

Article 31(2) of the Charter is referred to in conjunction with Directives 2003/88 and 1999/70 in the

first question (on whether the applicant Giudice di pace falls within the definition of “fixed-term worker”).

Article 47 of the Charter is invoked, in conjunction with Article 267 TFEU, in the third question to establish whether those provisions allow a civil liability of judges, such as the one envisaged by Law 177/1988, which provides for judicial liability for intentional fault or serious misconduct for manifest infringement of the law or of EU law.

Despite being directly invoked as legally binding parameters in the questions referred, no relevance of the provisions of the Charter to the case was explained to by the national court in the order for reference. The Giudice di pace did not engage neither in an assessment nor in explaining why the above provisions are relevant but limits himself to invoke them. Indeed, the Court of Justice found the third question irrelevant as “the referring court has not explained in what respect there is a need for an interpretation of Article 47 of the Charter for the purposes of giving a ruling, or the link which it establishes between the EU provisions which it seeks to have interpreted and the national legislation applicable to the proceedings pending before it”.

Use of Judicial Interaction technique(s)

Preliminary reference; direct reference to the case law of CJEU and disapplication of national law in favour of EU law:

- the Giudice di pace sent three questions for a preliminary ruling to the CJEU
 - the Giudice di pace directly referred to the case law of CJEU (inter alia, Wilson, Associação Sindical dos Juizes Portugueses, Minister for Justice and Equality, O’ Brien, King, Kobler, Traghetti del Mediterraneo, Commission v Italy)
 - the Giudice di pace, given the suspected incompatibility of the national law with Directives on 2003/88 and 1999/70 and Article 31(2) of the Charter, was empowered to disapply it and instead apply EU law. However, the Italian law on the civil liability of judges, which equated the infringement of national law with the infringement of EU law, presented the national court with the choice of either infringing national legislation, by disapplying it and applying EU law, or of infringing EU law and applying national legislation. Therefore, the Giudice di pace decided to send a third question for a preliminary ruling.
 - The Giudice di pace applied the judgment of the Court of Justice and, in light of it, it disapplied the national law in contrast with Directive 1999/70 in order to grant the applicant the sum she claimed.
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Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The national court engaged with an assessment of other national judgments, in particular those of the Corte di Cassazione (Court of Cassation) and the Consiglio di Stato (Council of State). According to the referring court, in several occasions the two high national courts, ignoring the O’Brien judgment of the Court of Justice and the decision of the European Committee of Social Rights on collective complaint 102/2013, denied any economic, substantive and social-security protection (Judgment 13721/2017 of the Corte di cassazione, Sezioni Unite, Judgment No 99/2018 of the Corte di cassazione, Sezione Lavoro and Judgment No 3556/2017 of the Consiglio di

Stato). This is due to the fact that, in the view of the high courts, honorary judges are regarded as volunteers rather than employees. Therefore, the referring court highlights that this case-law proves the fact that the applicant cannot benefit from any economic or social-security protection during the holiday period.

The referring court emphasises that these judgments are also due to the fact that the Commission and the Italian Government misled the Corte di cassazione and the Consiglio di Stato insofar as they failed to inform the courts of the important fact that, in its Communication DG EMPL/B2/DAMAT/sk, the Commission had found that honorary judges were employees whose working condition were comparable to those of ordinary judges, and had announced that the launch of infringement proceedings against Italy.

However, by contrast, the national court highlights that in its Order 28937/2017 and Judgment 22845/2016, the Corte di cassazione recognised that honorary judges perform the same duties as ordinary judges.

The national court cites in several occasions the case-law of the Court of Justice to support its reasoning. In particular, it refers to the guarantees of the independence and impartiality of European courts referred to by the Court of Justice in its judgments *Wilson*, *Associação Sindical dos Juizes Portugueses* and *Minister for Justice and Equality*. According to the referring court, the Commission, by not initiating the infringement proceedings it mentioned, left honorary judges without the above guarantees.

Moreover, the *Giudice di pace* refers to the case-law of the Court of Justice in *O'Brien and King* where the Court interpreted Directives 1999/70/EC and 2003/88/EC to stress fact that the work performed by the *giudici di pace* is in the nature of employment.

Finally, the referring court quotes the case-law of the Court of Justice in *Köbler*, *Traghetti del Mediterraneo* and *Commission v Italy* to stress the duty of national courts to disapply national legislation incompatible with EU law having direct effect or, where possible, to interpret the former in accordance with the latter, in order to prevent the liability of the State.

The judicial dialogue between the two courts reaches its peak in the decision of the *Giudice di pace* to make a reference for a preliminary ruling to the Luxembourg court.

The national court affirms, after having received the answer of the Court of Justice, it reserved the right to send the case back to the Italian Constitutional Court for a constitutionality review.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The use of judicial interaction techniques is strategic in the sense that the *Giudice di pace di Bologna* envisages a conflict of norms between the Italian legislation and EU law as regards the working conditions of honorary judges. In particular, the purpose aimed by the national court in sending a reference to the CJEU was to have an interpretation of EU law which is incompatible with the Italian laws on the governing the work of *Giudice di pace*. It appears from the arguments of the national court, that the latter finds the launch of an infringement procedure against Italy as necessary. Thus, the aim pursued was a direct finding of the incompatibility by Italy of Directives

1999/70/EC and 2003/88/EC and Article 31(2) of the Charter in order to disapply it and rule in favor of the applicant. However, the ultimate scope is pushing the Italian legislator to change the national legislation on the status of honorary judges (see also the pending case C-834/19, which addressed the compatibility of the Italian legislation on the status of the honorary judiciary with Directives 1997/81/EC and 1999/70/EC).

Impact on Legislation / Policy

The interactions between courts has not triggered changes to the legislative framework so far. However, it is likely that at some point the Italian legislator will act to change the national provisions governing the working conditions of honorary judges.

Notes on the national implementation of the preliminary ruling by the referring court

- Is the outcome achieved by the national judge consistent with the decision of the CJEU?

Yes, it is. The Giudice di pace disappplied the national law and applied EU law in light of the judgment of the Court of Justice.

- Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

Yes, in particular the judgements in Wilson, Associação Sindical dos Juizes Portugueses and Minister for Justice and Equality-

- Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No

- Did the national court take into account national case law on fundamental rights?

Yes, see the part on Vertical Judicial Interaction.

- If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

Not applicable

- Please indicate if there was consensus among national courts on how to implement the CJEU preliminary ruling; and if there were divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling; if yes, what was the

consequences for judges following the CJEU preliminary ruling, and if these consequences influenced judges in their decision-making.

Impact on national case law from the same Member State or other Member States

The order for reference and the judgment of the Court of Justice had a wide appeal with the honorary judges in Italy as it was read as a new beginning for the status of the Justice of the Peace and the whole honorary judiciary sector.

Other decisions that refer to this decision or to the CJEU's judgment which it implemented:

- Judgment of the Tribunale Amministrativo Regionale per la Emilia Romagna (Italy) n. 644 of 20 October 2020 (connected to the request for a preliminary ruling from lodged by the same court on 4 June 2020, Case C-236/20, PG, pending)
 - Request for a preliminary ruling from the Ufficio del Giudice di Pace di Lanciano (Italy) lodged on 28 May 2020, Case C-220/20, XX v OO, pending.
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Connected national caselaw / templates

Templates:

- Tribunale Amministrativo Regionale per la Emilia Romagna (Italy) n. 644 of 20 October 2020, pending case (connected to the pending request for a preliminary ruling from lodged by the same court on 4 June 2020, Case C-236/20, PG)
 - Justice of the Peace for Lanciano (Italy), no. 803/2019, pending case (connected with CJEU Judgment in Case C-220/20, XX v OO)
 - Case-law:
 - The Tribunal of Vicenza (Italy) sent a similar request for a preliminary ruling (Case C-834/19) but subsequently withdrew it after the CJEU issued the judgment in UX. The template of that case is not provided as it only concerns Directives 1997/81/EC and 1999/70/EC and not the sources relevant for the TRIAL project.
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(Link to) full text

Request for a preliminary ruling:

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=220251&pageIndex=0&doclang=IT&mode=req&dir=8>

CJEU judgment:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=7AA334BC6F7476A8C28A3023BC4FE02A>

Payment Order: not available.

History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Application to the Giudice di pace di Bologna: 8 October 2018
 2. Decision to refer to the CJEU: 16 October 2018
 3. Opinion of Advocate General Kokott: 23 January 2020
 4. Judgment of the Court of Justice: 16 July 2020
 5. Payment Order: 30 September 2020
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