Opinion of Advocate General Poiares Maduro delivered on 20 September 2005

Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate

Reference for a preliminary ruling: Tribunale di Genova - Italy

Directive 1999/70/EC - Clauses 1(b) and 5 of the framework agreement on fixed-term work - Establishment of employment relationships of indefinite duration resulting from infringement of the rules governing successive fixed-term contracts - Possible derogation in respect of employment contracts in the public sector

Case C-53/04

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1. By two separate orders, the Tribunale (District Court) di Genova (Italy) has made references to the Court of Justice for a preliminary ruling on the interpretation of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work **concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).**

2. Those references were made in connection with disputes between Mr Marrosu, Mr Sardino and Mr Vassallo and their employer, the Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate (Hospital Company, St Martin's Hospital, Genoa, and associated university clinics) ('the defendant establishment'), concerning the application of the Italian legislation on fixed-term work in the case of public authorities.

I – Law and facts

3. The facts are straightforward in both cases. Any difficulty there may be resides in determining the relevant law.

A – The Marrosu and Sardino case

4. Mr Marrosu and Mr Sardino were employed as technical kitchen staff at the defendant establishment from 1999 to 2002 under a series of fixed-term contracts. The last contract of each employee was signed eight days after their preceding contracts had expired. Shortly before the expiry of those last contracts, which were concluded for six months, the general manager of the establishment notified them of a decision whereby the decision on which their new employment was based '[was] to be understood to all intents and purposes as a decision to extend fixed-term contracts so long as they continue[d] to be justified'. It was that decision which the two employees decided to contest before the Tribunale di Genova on the ground that it infringed Legislative Decree No 368 of 6 September 2001 transposing Directive 1999/70 into the Italian legal system (GURI No 235 of 9 October 2001, p. 4, 'Decree No 368').

5. Although under Article 1(1) of that decree 'a limit may be set to the duration of the employment contract on technical grounds or for production, organisation or replacement purposes', Article 5(3) of that decree provides that 'where a worker is re-employed for a fixed term, in accordance with Article 1, within a period of 10 days from the expiry of a contract covering a period of up to six months … the second contract shall be deemed to be a contract of indefinite duration'.

6. On that basis, Mr Marrosu and Mr Sardino claim that the referring court should declare that there was an employment relationship of indefinite duration dating from the commencement of the first employment relationship in existence at the time that decree came into force and, under Law No 300 of 20 May 1970 on the status of workers (GURI No 131 of 27 May 1970), should order the employer to pay the wages owed and damages for the losses suffered.

7. In answer to those claims, the defendant establishment relies on another legislative decree, namely Decree No 165 of 30 March 2001 laying down 'general rules on the organisation of employment with the public authorities' (Ordinary Supplement to GURI No 106 of 9 May 2001) ('Decree No 165'). It relies in particular on Article 36 thereof, which provides:

'1. The public authorities, in accordance with the provisions on the recruitment of staff referred to in the preceding paragraphs, shall use the flexible forms of contract for the recruitment and employment of staff provided in the Civil Code and the laws on employment relationships in undertakings. National collective agreements shall provide for rules on the subject of fixed-term contracts, training and employment contracts, other training relationships and the provision of temporary employment services … .

2. In any case, infringement of binding provisions on the recruitment or employment of workers by the public authorities cannot justify the establishment of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction. The worker concerned is entitled to compensation for damage incurred as a result of working in breach of binding provisions. The authorities must recover any sums paid in that connection from the executives responsible, whether the infringement is intentional or the result of gross negligence.'

8. Thus, the disputes in the main proceedings appear to centre on a conflict concerning the relevant national legislation. According to the referring court, it is also necessary to take into account a conflict of a constitutional nature. On the one hand it finds that, in a ruling of 13 March 2003, the Corte costituzionale (Constitutional Court) (Italy) held that Article 36(2) of Decree No 165 was in compliance with Articles 3 and 97 of the Italian Constitution providing for equality before the law and impartiality of the authorities. On the other hand, however, the referring court notes that that ruling was made without regard to the constitutional provisions guaranteeing compliance, under Italian law, with obligations under Community law. To accept that that decree applies to the facts in the present case in its view raises the question of compliance with Directive 1999/70.

9. The purpose of that directive, which is based on Article 139(2) EC, 'is to put into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP)'. As 'contracts of an indefinite duration are … the general form of employment relationships', the purpose of that framework agreement is in particular to 'establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'. To that end, it contains a clause 5 concerning 'measures to prevent abuse', which reads as follows:

'1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as "successive"

(b) shall be deemed to be contracts or relationships of indefinite duration.'

10. In those circumstances, the Tribunale di Genova has doubts and refers the following question for a preliminary ruling:

'Are Article 1 of Directive 1999/70/EC and Clauses 1(b) and 5 of the [framework agreement concluded by ETUC, UNICE and CEEP] … to be interpreted as precluding provisions of national law (in force before the directive was implemented) which differentiate between employment contracts signed with the public authorities and contracts with employers in the private sector by excluding the former from the protection afforded by establishing an employment relationship of indefinite duration in the event of an infringement of binding rules on successive fixed-term contracts?'

B – The Vassallo case

11. Mr Vassallo was employed as a cook at the same hospital. That employment relationship was based on two successive fixed-term contracts, the first covering the period from 5 July 2001 to 4 January 2002, the second, concluded with effect from 1 January 2002, extending that period until 11 July 2002. On expiry of that contract, Mr Vassallo brought an action before the Tribunale di Genova challenging the termination of his contract. He claims that he should be considered to have had a contract of unlimited duration at the end of his initial contract. The grounds of that action are in every detail similar to those put forward in the Marrosu and Sardino case.

12. The orders for reference, however, show a difference of opinion between the judges of the Tribunale di Genova on the state of the relevant law. The judge hearing the Marrosu and Sardino case seems to consider that Decree No 368, which transposed Directive 1999/70, should prevail in all circumstances over the earlier provisions of Decree No 165. The judge in the Vassallo case, on the other hand, seems to consider that, given the state of Italian law applying at the time of the dispute in the main proceedings, that directive had not been transposed as regards employment relations with the public service. In support of their respective positions, those judges rely on different authorities: whilst the first judge refers to the principle of the primacy of Community law, which precludes any domestic rule that conflicts with the provisions of Directive 1999/70, the second judge bases his view on the consitutional case-law, which establishes the validity of a special rule derogating from the general rules in the field of fixed-term employment contracts. Conscious, however, that that rule must be justified with regard to Community law, the second judge considers it appropriate to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In view of the principles of non-discrimination and effectiveness, having regard in particular to the measures taken by [the Italian Republic] in relation to employment relationships with non-public-sector employers, must Council Directive 1999/70/EC of 28 June 1999 (Article 1, and Clauses 1(b) and 5 of the ETUC-UNICE-CEEP framework agreement on fixed-term work set out in the directive) be interpreted as meaning that it precludes national provisions such as those in Article 36 of Legislative Decree No 165 of 30 March 2001 which do not determine "under what conditions fixed-term employment contracts or relationships … shall be deemed to be contracts or relationships of indefinite duration", and in fact contain an absolute prohibition from the outset on the establishment of employment relationships of indefinite duration resulting from abuse arising from the use of fixed-term contracts and relationships?

2. If the answer to the first question is in the affirmative, in view of the expiry of the time-limit for its implementation, must Directive 1999/70/EC (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered, also in the light of Legislative Decree No 368/2001 and particularly Article 5 thereof, which provides as a usual consequence of abuse of fixed-term contracts or relationships for conversion to a relationship of indefinite duration, to confer on individuals an actual right, which may be exercised immediately, in accordance with the national law most relevant to the present case (Legislative Decree No 368/2001) to recognition of the existence of an employment relationship of indefinite duration?

3. If the answer to the first question is in the affirmative and the second question in the negative, in view of the expiry of the time-limit for its implementation, must Directive 1999/70/EC (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered to confer on individuals a right to reparation for any loss or damage caused by the failure of the Italian Republic to adopt appropriate measures to prevent abuse relating to the use of fixed-term contracts and/or relationships with employers in the public sector?'

II – The questions referred for a preliminary ruling

13. Although the questions referred in these cases are not couched in identical terms, they concern the same problem of interpretation of Community law. In those circumstances, it is permissible to join the two cases for the purposes of assessment.

A – Admissibility

14. Objections of inadmissibility have been raised in each of these cases.

15. First, the defendant establishment relies in both of the cases at issue on the case-law of the Court which states that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. As that establishment is not subject to the control of the Italian State or of any ministry, it concludes from this that Directive 1999/70 is not applicable to the disputes in the main proceedings.

16. That argument cannot be upheld. It must be borne in mind that a directive does not exhaust all its effects in the production of rights that may be relied on directly by individuals. Even if the cases in question were between individuals, as the defendant establishment contends, it would not follow that the directive concerned was devoid of any effect. Although it has been established that individuals are not justified in relying on the provisions of a directive that meets the condition of having direct effect against other individuals, it has consistently been held in the case-law that in such circumstances the national court is in principle bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by that directive. (2) It follows that, in any case, in circumstances such as those in the present case, a reference for an interpretation concerning provisions of Directive 1999/70 cannot be unfounded.

17. In any event, it is difficult to plead that the claims are inadmissible because the disputes in the main proceedings are between individuals, or that application of the directive concerned should be rejected on the substance because the defendant establishment is a public authority. The case-law of the Court shows both positions, maintained at one and the same time by the defendant establishment, to be manifestly contradictory. A directive may be relied upon not only against the authorities of the State, but also 'against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service'. (3) In the circumstances of the present case, it is agreed that the establishment concerned is a body attached to the public service. There is therefore nothing to prevent Directive 1999/70 being relied upon against it by individuals.

18. Secondly, the Italian Government states, in its written observations submitted in the Vassallo case, that the first question referred by the national court is irrelevant, since it concerns a succession of two contracts, the first of which was signed before the expiry of the time-limit for the transposition of Directive 1999/70. At the hearing, the Italian Government extended that ground of inadmissibility to the reference made by the judge hearing the Marrosu and Sardino case.

19. Suffice it to say in that regard that the interpretation sought concerns the provisions of a directive relating to the renewal of fixed-term employment contracts. (4) The date of renewal in the Vassallo case was 1 January 2002. In the Marrosu and Sardino case, the respective renewal dates of the latest fixed-term contracts with the two persons concerned were 10 and 11 January 2002 respectively. By those dates the time-limit for transposition of Directive 1999/70, 10 July 2001, had expired. It was therefore possible for the directive to have full effect.

20. A final objection was lodged in respect of the Marrosu and Sardino case. In that case, the Italian Government argues that the question referred is devoid of purpose, as it relates only to national law and there is no doubt about which law applies in that regard. It infers therefrom that the reference for a preliminary ruling is purely hypothetical.

21. There is no disputing the fact that in proceedings under Article 234 EC the Court of Justice has no jurisdiction to rule on the interpretation of national law or on the validity of domestic procedures for resolving conflicts between conflicting rules. (5) However, since it is solely for the national court before which the dispute in the main proceedings has been brought to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling and the relevance of the questions which it submits to the Court, (6) it is sufficient for the reference by the national court to concern a question of interpretation of Community law which does not appear to be manifestly without relevance to the situation or to the subject-matter of that case in order for the Court of Justice, in principle, to be bound to give a ruling. (7)

22. It follows from this that, although it is not for the Court of Justice to settle, in the light of Community law, the regulatory conflict between the legislative decrees relied on in the cases in the main proceedings, it is bound none the less to provide the national court with any interpretations of Community law which may be useful to it in order to determine the provision applying to the dispute before it.

23. In the present case, the referring court is dealing with a situation in which the matter in issue is the application of two apparently relevant pieces of legislation, the purpose of one of which is specifically to transpose a Community measure. Clearly, a reference for a preliminary ruling concerning the interpretation of that measure cannot be regarded as hypothetical.

24. I therefore consider that the questions referred by the Tribunale di Genova are admissible in both those cases.

B – Merits of the case

1. Preliminary remarks

25. Let me begin by dismissing the argument put forward by the Italian Government in the Vassallo case that Directive 1999/70 applies solely to relationships between workers and private-sector employers. To support this argument, it refers to the origin of that directive, which lies in an agreement between organisations representing private-sector workers.

26. That point is disputed between the parties. There is no point in considering the identity of the organisations which signed that agreement, suffice it to say that the measure to be interpreted has the legal nature of a directive adopted by the Council. (8) The scope of application of that directive is clearly defined by clause 2 of the framework agreement which it implements. Clause 2 provides: 'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'. Such workers are defined in the following clause as any 'person having an employment contract or relationship' [Tr.N.: English text of clause 2 has no equivalent of 'à durée déterminée'] which meets the conditions laid down therein. Under clause 2, the directive concerned provides no possibility for Member States to avoid the provisions of the agreement except in the case of 'vocational training relationships and apprenticeship schemes' and 'employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme'. It does not appear therefore that the directive intended that fixed-term employment contracts or relationships with the public authorities should be excluded from its scope.

2. The first question

27. By the first question, which is essentially common to both cases, the referring courts are asking whether clauses 1 and 5 of the framework agreement, as implemented by Directive 1999/70, preclude domestic legislation which prevents abuse by the public authorities of the use of successive fixed-term employment contracts from giving rise to the establishment of an employment relationship of indefinite duration, where such a measure is provided for in connection with abuse arising from the use of fixed-term employment relationships attributable to private-sector employers.

28. In order to define the purpose and scope of the question referred, it is appropriate to recall the context in which it was raised.

29. Clause 5 of the framework agreement concerns 'measures to prevent abuse' of fixed-term employment contracts. It must be interpreted in the light of the purpose of that agreement, as set out in clause 1, which is 'to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'. That framework comprises two sorts of measure: measures to prevent abuse, provided for in clause 5, paragraph 1, and measures to penalise abuse, which are provided for in particular in paragraph 2(b) of that clause.

30. It is clear from the wording of that provision that those two types of measure are subject to different rules: whilst clause 5, paragraph 1, contains the *obligation* for Member States to introduce one or more of the measures listed in (a) to (c) where no equivalent statutory measures exist already in the Member State concerned, paragraph 2 of that clause gives Member States the *option* to provide that cases of abuse may lead to an employment contract being converted into an employment relationship of indefinite duration. It is only 'where appropriate' that Member States and/or the social partners are to act in accordance with clause 5, paragraph 2(b). It must therefore be recognised that those States and social partners, jointly or severally, enjoy wide discretion in determining, according to the existing social and statutory context, whether it is appropriate to adopt conversion measures.

31. In the present case, it is established that the Italian Republic, by Decree No 368, adopted measures to convert fixed-term contracts that constituted abuse into contracts of an indefinite duration. The only question that arises, therefore, is whether Member States which have adopted such measures are entitled to differentiate between unjustified fixed-term employment relationships so that some of them which relate to the public authorities are excluded from the possibility of being converted into employment relationships of indefinite duration.

a) Is a Member State entitled to prevent some unjustified fixed-term employment relationships from being converted?

32. The following points should be taken into consideration in order to provide an answer to that question.

33. Clause 5, paragraph 2(b), of the framework agreement implemented by Directive 1999/70 provides that Member States 'shall … determine *under what conditions* fixed-term employment contracts shall be deemed to be contracts of indefinite duration'. (9) The wording of that clause shows clearly that those States have wide discretion, not only in deciding whether it is appropriate to adopt conversion measures but also, where such measures have been adopted, in determining the scope and procedure for implementing such conversion.

34. That interpretation is corroborated by the context in which that clause is to be found. Among its general provisions, the framework agreement provides that the national procedures for applying the clauses of that agreement may take account of '*the situation in each Member State and the circumstances of particular sectors and occupations*'. The preamble to the agreement states, to the same effect, that the agreement '*sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situation*'. Moreover, that agreement is expressly based on the Agreement on Social Policy annexed to the Protocol on Social Policy, annexed to the Treaty establishing the European Community, which provides that '*the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations*'.

(10) The same consideration appears at the very essence of the clause to be interpreted. Clause 5, paragraph 1, concedes that Member States and/or the social partners may introduce measures to prevent abuse '*in a manner which takes account of the needs of specific sectors and/or categories of worker*'. This must be the case all the more in the context of clause 5, paragraph 2, which grants those States wide discretion in adopting the measures concerned.

35. In such a context, it seems clear to me that a Member State is entitled to take into account the specific features of certain sectors in order to lay down conditions which lead to precluding the possibility of bringing about the conversion of fixed-term employment contracts into contracts of indefinite duration. It is sufficient for the sectors in question to be governed, as regards employment relationships, by their own particular needs or by specific rules. It is not disputed that that was the case as regards the public authorities in Italy.

36. The fact remains, however, that the freedom thus afforded to Member States cannot be regarded as absolute. It must be exercised within the limits imposed on them under Community law when they apply the provisions of a directive. In the present case, those limits are of two kinds. First, the Member State concerned is under an obligation to comply with the general principles of Community law. Second, it is required to implement the provisions of that directive without compromising its integrity.

b) Compliance with the general principles of Community law

37. The Court of Justice has consistently held that the requirements stemming from the general principles of Community law are binding on the Member States when they implement Community rules. (11) Such a requirement stems in particular from compliance with the fundamental principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. (12) The Member State in question in such cases is therefore required, as far as possible, to apply the directive concerned under conditions which do not infringe that principle.

38. The fact remains that at first sight workers bound to a public authority by a fixed-term contract are in the same situation, as regards the objective of Directive 1999/70, as workers bound under the same conditions to an employer in the private sector. The criterion determining whether that directive applies is not the nature of the employer but the nature of the employment relationship binding the worker to his or her employer. Since under clauses 2 and 3 of the framework agreement that relationship is based on an employment contract or relationship 'where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event', the protection conferred by the national legislation adopted under that directive should, in principle, apply. A difference in treatment based on the nature of the employer alone cannot therefore be allowed without further justification. That is why it is necessary to find out whether in the present case the difference established is based on an objective justification.

39. The Italian Government and the court making the reference in the Vassallo case justify that difference in treatment by the need to comply with constitutional requirements, namely the conditions ensuring the impartiality and efficiency of the authorities. They rely upon a ruling of the Corte Costituzionale of 27 March 2003 to that effect.

40. What is the value of that justification? Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect. (13) The fact remains, however, that it is the duty of the Court of Justice to ensure that that assessment is made in accordance with the fundamental rights and objectives with which it must ensure compliance within the Community context.

41. By Judgment No 89 of 27 March 2003, the Corte Costituzionale had occasion to decide whether the second paragraph of Article 36 of Decree No 165 was in accordance with the Italian Constitution, in particular Articles 3 and 97 thereof. (14) That judgment was delivered in a dispute similar to the disputes forming the subject of the two cases in the main proceedings. (15) On that occasion, the constitutional court noted that 'the fundamental principle with regard to introduction of an employment relationship in service with the public authorities is that of access through competition, as laid down in the third paragraph of Article 97 of the Constitution, which is totally alien to the system of employment in the private sector'. The Italian Constitution states that competition is 'the means of selecting staff which is most suitable in principle for ensuring the impartiality and efficiency of the public service'. Therefore, 'the existence of that principle, which is intended to protect the requirements of impartiality and efficiency of the public service, as referred to in the first paragraph of Article 97 of the Constitution, makes it clear that the situations [of employees of public authorities and of private-sector employees] are not the same in that respect, and justifies the decision by the legislature to lay down in respect of infringement of mandatory rules governing the recruitment and employment of workers by the public authorities penalties of a purely compensatory nature instead of conversion to an employment relationship of an indefinite duration.'

42. It is clear that that judgment is intended to protect the procedure for access to employment used by the Italian public authorities. There is reason to fear that the systematic conversion of some fixed-term contracts concluded with the public authorities into contracts of indefinite duration would have the effect of reducing the scope of the constitutional rule that access to public posts is, in principle, through competition.

43. It appears to me that Community law does not preclude such a procedure being taken into account. On the one hand, it seems to me that it has no authority to intervene in the choice, by Member States, of selection and recruitment procedures for posts in the public service. (16) On the other hand, it cannot be ruled out that widespread use of the procedure of conversion would undermine the principle that permanent posts in the public service must be occupied by officials recruited on the basis of a competition. In those circumstances, the need to retain access by competition as the special means of access to employment by the public authorities may be held to be a legitimate objective which justifies exclusion of conversion of fixed-term contracts into contracts of an indefinite duration in that sector.

44. However, it is not enough to accept that differentiation between the employment procedures exists for a legitimate purpose. It must also be ascertained whether the procedure applying in respect of the public authorities is being implemented in accordance with the principle of proportionality. A measure establishing a justified distinction does not comply with the Community principle of equal treatment unless the means it employs are necessary and appropriate in order to achieve the legitimate aim in view. (17)

45. In principle, it is for courts making a reference to ascertain that this is so in the cases before them. However, when a question is referred to it for a preliminary ruling, the Court of Justice must provide the full interpretation required in order for the national court to assess whether the national legislation complies with Community law. Analysis of the details of these cases, as contained in the orders for reference, calls for the following clarification. The differentiation found can be accepted only within the limits of the justification put forward, that is to say, in cases where the principle of competition exists. Since the law, under the third paragraph of Article 97 of the Italian Constitution, permits exceptions to that principle, it is clear that, in the context of those exceptions, there is no logical basis for differentiating between procedures.

c) Compliance with Directive 1999/70

46. This having been established, it is also important to ensure that when the provision concerning the possibility of providing for conversion of fixed-term contacts that are considered to be unjustified is implemented, the Member State concerned does not undermine the framework and objective imposed by Directive 1999/70. Clause 5, paragraph 2(b), of the framework agreement is designed to be a non-mandatory clause which may be used to supplement the framework of measures intended to prevent the unjustified use of successive fixed-term contracts or relationships. It cannot therefore be accepted that adoption of measures taken under such a provision should have the effect of undermining the framework laid down by that agreement.

47. The result is that although exclusion of the conversion of such contracts may be justified in the public service sector, it is necessary at least to ensure that preventive measures such as those provided for in clauses 1 and 5 of that agreement are expressly provided for and can actually be approved. To deprive workers employed by the public authorities of any protection against abuse arising from the use of fixed-term employment contracts would clearly go further than what is allowed by the wording of clause 5, paragraph 2, of the framework agreement and would be contrary to the framework laid down by those rules.

48. The recognition of requirements specific to the national framework does not preclude the minimum constraints under the Community framework from being complied with. This, in my opinion, is the meaning which should be given to the reference made in Directive 1999/70 to the realities of specific national and sectoral situations.

49. In that regard, the referring court mentions national regulations which provide that the public authorities must assume liability and incur penalties in the case of infringement of binding provisions concerning recruitment or employment. It must also ensure that those rules do in fact cover abuse arising from the use of fixed-term contracts and that the penalties incurred are effective.

50. It is clear from the above assessment that Directive 1999/70 does not preclude rules which prevent abuse arising from the use by public authorities of successive fixed-term employment contracts from giving rise to the establishment of an employment relationship of indefinite duration if such a measure is provided for in the case of contracts entered into with private employers, where such exclusion is justified by the existence of a requirement specific to that sector, such as the need to safeguard the constitutional principle of access to employment in the public service through competition, and provided provision is made in that sector for effective measures to prevent and penalise abuse arising from the use of fixed-term employment contracts in that sector.

3. Second and third questions in the Vassallo case

51. As the second and third questions referred in the Vassallo case are submitted for consideration by the Court if an affirmative answer is given to the first question, I do not think there is any need to answer them.

III – Conclusion

52. In the light of the above considerations, I propose that the Court should give the same answer to the questions referred by the Tribunale di Genova in both cases:

'Council Directive 1999/70/EC of 28 June 1999 **concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP** does not preclude national rules which prevent abuse arising from the use by public authorities of successive fixed-term employment contracts from giving rise to the establishment of an employment relationship of indefinite duration if such a measure is provided for in the case of contracts entered into with private employers, where such exclusion is justified by the existence of a requirement specific to that sector, such as the need to safeguard the constitutional principle of access to employment in the public service through competition, and provided provision is made in that sector for effective measures to prevent and penalise abuse arising from the use of fixed-term employment contracts **in that sector.'**

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1 – Original language: Portuguese.

2 – See, most recently, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113.

3 – See, in particular, Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 46.

4 – See to that effect, points 38 to 40 of the Opinion of Advocate General Tizzano in Case C-144/04 *Mangold* [2005] ECR I-9981.

5 – With regard to the Court of Justice having no jurisdiction to give a preliminary ruling on the interpretation of rules of domestic law, see Case 75/63 *Unger* [1964] ECR 177. However, the Court is fully entitled to remind national courts of their obligation to use interpretative methods recognised by national law which enable the result pursued by Directive 1999/70 to be achieved most effectively (see, to that effect, *Pfeiffer and Others*, cited above, paragraph 116).

6 – See, most recently, Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33.

7 – See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

8 – See, by analogy, Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335, paragraphs 66 and 67.

9 – Emphasis added.

10 – As the first recital in the preamble to Directive 1999/70 states, the Agreement on Social Policy was incorporated into Articles 136 EC to 139 EC, as amended by the Treaty of Amsterdam. The provision cited is also contained expressly in the second paragraph of Article 136 EC.

11 – Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

12 – See, most recently, Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 68.

13 – According to Article 6(3) EU: 'The Union shall respect the national identities of its Member States'.

14 – Article 13:

'All citizens shall have the same social worth and shall be equal before the law, without distinction in respect of sex, race, language, religion, political opinion, or personal or social circumstances. It shall be the duty of the Republic to remove economic and social obstacles which, by de facto restrictions on the freedom and equality of citizens, prevent human beings from achieving full development and workers from participating effectively in the political, economic and social organisation of the country.'

Article 97:

'Public offices shall be organised in accordance with provisions of law so as to ensure the good conduct and impartiality of the administrative authorities. The organisation of the offices shall determine the powers, functions and responsibilities of officials. Access to posts in the public authorities shall be by competition, save as otherwise provided by law.'

15 – That was a dispute between the public authorities and employees who were applying for their employment relationship to be treated as being the same as that of employees in the private sector and seeking, under Law No 230 of 18 April 1962 on fixed-term employment contracts, the conversion of their contracts into contracts of indefinite duration. Although that judgment was delivered under a law that was repealed by Decree No 368, it may still be regarded as a reference point that is still valid. So far as the point we are considering is concerned, the repealed law did not differ from that decree, which is currently in force. It stated, in terms that are in essence identical to the decree, the principle of an employment contract of indefinite duration and made provision for the conversion of fixed-term employment contracts that have been unjustifiably extended. Moreover, the Corte costituzionale held that the provisions of that law were compatible with obligations under Directive 1999/70 in its Judgment No 40 of 7 February 2000, in which it dismissed as inadmissible, on that ground, a popular referendum proposing the repeal of that law.

16 – In my opinion, such a reservation is contained implicitly, but none the less clearly, in the judgment in Case C-285/01 *Burbaud* [2003] ECR I-8219, in which the Court points out that under Community law it has no jurisdiction to review the choice and nature of recruitment procedures but only to ascertain that the rules for implementing them do not infringe the fundamental freedoms guaranteed by the EC Treaty (paragraphs 91 to 101).

17 – See to that effect, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39.