JUDGMENT OF THE COURT (Grand Chamber)

15 April 2008 (*)

(Directive 1999/70/EC – Clauses 4 and 5 of the framework agreement on fixed-term work – Fixed-term employment in the public sector – Employment conditions – Pay and pensions – Renewal of fixed-term contracts for a period of up to eight years – Procedural autonomy – Direct effect)

In Case C−268/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Labour Court (Ireland), made by decision of 12 June 2006, received at the Court on 19 June 2006, in the proceedings

Impact

v

Minister for Agriculture and Food,

Minister for Arts, Sport and Tourism,

Minister for Communications, Marine and Natural Resources,

Minister for Foreign Affairs,

Minister for Justice, Equality and Law Reform,

Minister for Transport,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Rosas, K. Lenaerts (Rapporteur), G. Arestis, U. Lõhmus and L. Bay Larsen, Presidents of Chambers, P. Kūris, E. Juhász, A. Borg Barthet, J. Klučka and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 5 December 2007,

after considering the observations submitted on behalf of:

– Impact, by B. O'Moore SC, M. Bolger BL, and D. Connolly, Solicitor,

– Ireland, by D. O'Hagan and M. Heneghan, acting as Agents, assisted by A. Collins SC, and by A. Kerr and F. O'Dubhghaill BL,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the United Kingdom Government, by E. O'Neill, K. Smith and I. Rao, acting as Agents, assisted by R. Hill, Barrister,

– the Commission of the European Communities, by M. van Beek and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 January 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Clauses 4 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999 ('the framework agreement'), 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 (OJ 1999 L 175, p. 43), and the scope of the Member States' procedural autonomy and extent of the obligation on the courts of the Member States to interpret national law in conformity with Community law.

2 The reference was made in proceedings brought by the Irish trade union Impact, acting on behalf of Irish civil servants, against the government departments which employ them concerning, first, the pay and pension conditions applied to those civil servants on the basis of their status as fixed-term workers and, second, the conditions for the renewal of certain fixed-term contracts by one of those government departments.

Legal context

Community legislation

3 Directive 1999/70 is founded on Article 139(2) EC and its purpose, as provided in Article 1, is 'to put into effect the framework agreement … concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.

4 According to the first paragraph of Article 2 of the directive:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 July 2001, or shall ensure that, by that date at the latest, management and labour have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.'

5 In accordance with Article 3, the directive entered into force on 10 July 1999, the date of its publication in the *Official Journal of the European Communities*.

6 As provided in Clause 1, the purpose of the framework agreement 'is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

7 Clause 4 of the framework agreement, entitled 'Principle of non-discrimination', provides:

‘1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.

4. Period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of-service qualifications are justified on objective grounds.’

8 Clause 5 of the framework agreement, relating to ‘[m]easures to prevent abuse’, states:

‘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.’

9 The framework agreement also contains a clause relating to ‘[p]rovisions on implementation’, which provides, in Clause 8(5):

‘The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practice.’

National legislation

10 Directive 1999/70 was transposed into Irish law by the Protection of Employees (Fixed-Term Work) Act 2003 (‘the 2003 Act’). The 2003 Act entered into force on 14 July 2003.

11 Section 6 of the 2003 Act transposes Clause 4 of the framework agreement. The combined provisions of sections 2(1) and 6(1) of the 2003 Act secure pay and pension rights for fixed-term employees that are equal to those of comparable permanent employees.

12 Section 9 of the 2003 Act transposes Clause 5 of the framework agreement. Section 9(1) provides that the fixed-term contract of an employee who, on or after the passing of the 2003

Act, has completed his or her third year of continuous employment with his or her employer or associated employer, may be renewed by that employer on only one occasion for a fixed term of no longer than one year. Under section 9(3) of the 2003 Act, any term of a fixed-term employment contract which purports to contravene section 9(1) is to have no effect and the contract in question is to be deemed to be a contract of indefinite duration.

13 An employer may nevertheless derogate from the requirements of sections 6 and 9 of the 2003 Act if there are objective grounds for doing so. The meaning of 'objective grounds' is amplified in section 7 of the 2003 Act.

14 Section 14(1) of the 2003 Act provides that an employee or the trade union of which the employee is a member may present a complaint alleging a breach of the 2003 Act to a Rights Commissioner, who is required to investigate the complaint and give a decision in writing. Where the complaint is upheld, the Rights Commissioner may order redress in the terms provided for by section 14(2) of the 2003 Act, namely, inter alia, compensation of up to two years' remuneration.

15 Section 15 of the 2003 Act provides that the parties may bring an appeal before the Labour Court against the decision of a Rights Commissioner. An appeal against the decision of the Labour Court may be brought before the High Court.

16 The office of Rights Commissioner and the Labour Court were established by the Industrial Relations Act 1969 and the Industrial Relations Act 1946 respectively. Various Irish statutes, including the 2003 Act, confer jurisdiction upon them to hear and determine disputes between employers and employees. However, according to the order for reference, neither the Rights Commissioners nor the Labour Court have express jurisdiction to determine a claim based on a directly effective provision of Community law unless that provision comes within the scope of the legislation conferring jurisdiction upon them.

The facts of the case in the main proceedings and the questions referred for a preliminary ruling

17 In the main proceedings, Impact is acting on behalf of 91 of its members ('the complainants in the main proceedings') employed in various Irish government departments ('the respondents in the main proceedings') on the basis of successive fixed-term employment contracts for periods which commenced before 14 July 2003, the date on which the 2003 Act entered into force, and which continued beyond that date.

18 The complainants in the main proceedings are all unestablished civil servants and, under Irish regulations governing employment in the civil service, are subject to a different scheme to that which is applicable to established civil servants. The order for reference states that the complainants in the main proceedings consider the latter scheme to be more favourable than that which is applicable to them.

19 Some of the complainants in the main proceedings had less than three continuous years' service as fixed-term employees and are claiming employment conditions equal to those of comparable permanent employees; the others had more than three continuous years' service and are claiming, in addition to equality of employment conditions, a contract of indefinite duration.

20 According to the order for reference, the purpose of the fixed-term contracts at issue was to meet the temporary needs of the respondents in the main proceedings and to cover situations in which permanent funding for the posts involved could not be guaranteed. The general practice of the respondents in the main proceedings was to renew those contracts for periods of between one and two years. However, in the period immediately before the 2003 Act entered into force,

one of the respondents in the main proceedings renewed the contracts of a certain number of the complainants in the main proceedings for a fixed term of up to eight years.

21 Taking the view that the respondents in the main proceedings, in their capacity as employers, had contravened the provisions of the 2003 Act and Directive 1999/70 to the detriment of the complainants in the main proceedings, Impact initiated proceedings before a Rights Commissioner on behalf of those complainants. In those proceedings, it alleged, first, infringement of the entitlement of the complainants in the main proceedings to equal treatment in respect of pay and pension rights with established civil servants – the latter being regarded, according to the complainants in the main proceedings, as comparable permanent workers – and, second, that the successive renewals of fixed-term contracts constituted an abuse. The complaints thus presented were based on Clauses 4 and 5 of the framework agreement as regards the period between 10 July 2001, the deadline for transposing Directive 1999/70, and 14 July 2003, the date on which the provisions transposing the directive into Irish law entered into force. As regards the period after 14 July 2003, the complaints were based on section 6 of the 2003 Act.

22 The respondents in the main proceedings challenged the jurisdiction of the Rights Commissioner to entertain the complaints in question in so far as they were based on Directive 1999/70. They contended that the Rights Commissioner's jurisdiction was confined to adjudicating on complaints based on domestic law. They also claimed that Clauses 4 and 5 of the framework agreement – which are neither unconditional nor sufficiently precise – could not be relied upon by individuals before national courts. They contended further that a fixed-term worker was not entitled under the terms of Clause 4 of the framework agreement to the same pay and pension conditions as a comparable permanent worker.

23 The Rights Commissioner took the view that she had jurisdiction to entertain all of the complaints, including those relating to the period between 10 July 2001 and 14 July 2003. She held that the principle of non-discrimination referred to in Clause 4 of the framework agreement encompassed both pay and pension rights and that that clause was directly effective, unlike Clause 5.

24 Taking the view that the complaints, other than those based on Clause 5 of the framework agreement, were well founded, and that the respondents in the main proceedings had infringed the rights of the complainants in the main proceedings under both national law and Directive 1999/70 by affording them less favourable employment conditions than those afforded to comparable permanent workers, the Rights Commissioner awarded the complainants monetary compensation ranging from EUR 2 000 to EUR 40 000, pursuant to section 14(2) of the 2003 Act. In addition she ordered the respondents in the main proceedings to apply to the complainants in the main proceedings terms and conditions of employment equivalent to those applicable to comparable permanent workers. She also ordered them to grant certain complainants in the main proceedings a contract of indefinite duration on terms no less favourable than those enjoyed by comparable permanent workers.

25 The respondents in the main proceedings appealed to the Labour Court against the Rights Commissioner's decision. Impact cross-appealed against the decision in so far as it held Clause 5 of the framework agreement not to be directly effective.

26 In the light of the arguments exchanged, the referring court is faced with a series of questions which are decisive for the resolution of the dispute in the main proceedings and which turn on the interpretation of Community law.

27 First, while the 2003 Act does not expressly confer jurisdiction upon it to adjudicate on a claim which requires the application of directly effective Community law, the Labour Court nevertheless has doubts as to whether, in the light of Article 10 EC, on the one hand, and the

principles of equivalence and effectiveness underpinning the procedural autonomy of the Member States, on the other, it may decline jurisdiction to consider the claims in the main proceedings in so far as they are based on Directive 1999/70 and the framework agreement.

28 Second, on the assumption that it does have jurisdiction to apply Community law, the referring court questions whether Clauses 4 and 5 of the framework agreement – on which the claims in the main proceedings are based so far as concerns the period between 10 July 2001 and 14 July 2003 – are unconditional and sufficiently precise so as to be directly effective. It takes the view that this is the case only in respect of Clause 4.

29 Third, the referring court questions whether Clause 5 of the framework agreement may be relied upon so as to render unlawful the decision taken by one of the respondents in the main proceedings in the period immediately prior to the entry into force of the 2003 Act to retain some of the complainants in the main proceedings on contracts of up to eight years' duration.

30 The referring court takes the view that, notwithstanding the apparent absence of bad faith on the part of the relevant defendant and its explanation concerning temporary needs and the impossibility of guaranteeing permanent funding for the posts concerned, the specific effect of that decision was to deprive the complainants in the main proceedings of the opportunity to obtain a contract of indefinite duration within a reasonable time after the adoption of the 2003 Act. The referring court considers that, by that decision, Ireland gained an advantage at the expense of those complainants from its own illegality in failing to transpose Directive 1999/70 on time.

31 Fourth, on the assumption that it does not have jurisdiction to apply Community law or that Clauses 4 and 5 of the framework agreement are not directly effective, the referring court questions whether its obligation to interpret national law in conformity with Community law means that it must interpret the 2003 Act as having retrospective effect to 10 July 2001.

32 The referring court notes that, while Irish law generally precludes the retrospective application of legislation, there is nothing in section 6 of the 2003 Act to prevent it from being applied retrospectively. The referring court goes on to state that, while the interpretative obligation is indeed limited by the principles of legal certainty and non-retroactivity and cannot, of itself and irrespective of national legislation implementing Directive 1999/70, determine or aggravate the liability in criminal law resulting from an infringement of Community law, the question nevertheless arises in the present case as to whether that obligation means that domestic law can be applied retrospectively so as to impose civil liability on a Member State, in its capacity as an employer, for acts or omissions contrary to the provisions of a directive which occurred at a time when that directive ought to have been transposed by the Member State in question.

33 Fifth, the referring court questions whether employment conditions within the meaning of Clause 4 of the framework agreement encompass conditions relating to pay and pension rights.

34 It refers to the broad meaning of 'pay' in the context of Article 141 EC in relation to the principle of gender equality, and considers that if the clause in question were to be construed as being inapplicable to pay it would deprive fixed-term workers of protection against discrimination with regard to a number of essential matters covered by pay, which would be contrary to the objective of the framework agreement.

35 Furthermore it takes the view that, having regard to Article 136 EC and the Community Charter of the Fundamental Social Rights of Workers adopted at the European Council's meeting in Strasbourg on 9 December 1989 (in particular Article 7 of the Charter) – in conjunction with which Article 137 EC must be read –, Article 137(5) EC, which excludes pay from the scope of Article 137 EC, must be interpreted as being intended solely to preclude the European Community from having legislative competence to fix a Community minimum wage and that it

does not therefore prevent the term 'working conditions' within the meaning of Article 137(1) EC from encompassing pay and pension matters.

36 In the light of these various unresolved issues, the Labour Court decided to stay the proceedings and to put the following questions to the Court for a preliminary ruling:

'(1) In deciding a case at first instance under a provision of domestic law or in determining an appeal against such a decision, are the Rights Commissioners and the Labour Court required by any principle of Community law (in particular the principles of equivalence and effectiveness) to apply a directly effective provision of … Directive 1999/70 … in circumstances where:

– the Rights Commissioner and the Labour Court have not been given express jurisdiction to do so under the domestic law of the Member State including the provisions of domestic law transposing the Directive,

– Individuals can pursue alternative claims arising out of a failure by their employer to apply the Directive to their individual circumstances before the High Court and

– Individuals can pursue alternative claims before an ordinary court of competent jurisdiction against the Member State seeking damages for loss suffered by them arising from the Member State's failure to transpose the Directive on time?

(2) If the answer to Question 1 is in the affirmative:

(a) Is Clause 4(1) of the framework agreement … unconditional and sufficiently precise in its terms as to be capable of being relied upon by individuals before their national courts?

(b) Is Clause 5(1) of the framework agreement … unconditional and sufficiently precise in its terms as to be capable of being relied upon by individuals before their national courts?

(3) Having regard to the Court's answers to Question 1 and Question 2(b), does Clause 5(1) of the framework agreement … preclude a Member State, acting in its capacity as an employer, from renewing a fixed-term contract of employment for up to eight years in the period after the said Directive should have been transposed and before the transposing legislation was enacted in domestic law where:

– on all previous occasions the contract had been renewed for shorter periods, and the employer requires the services of the employee for the extended period,

– the renewal for the extended period has the effect of circumventing the application to an individual of the full benefit of Clause 5 of the framework agreement when transposed into domestic law, and

– there are no objective reasons unrelated to the employee's status as a fixed-term worker for such a renewal?

(4) If the answer to Question 1 or Question 2 is in the negative, are the Rights Commissioner and the Labour Court required by any provision of Community law (and in particular the obligation to interpret domestic law in light of the wording and purpose of a Directive so as to produce the result pursued by the Directive) to interpret provisions of domestic law enacted for the purpose of transposing Directive 1999/70 … as having retrospective effect to the date on which the said Directive should have been transposed where:

– the wording of the provision of domestic law does not expressly preclude such an interpretation, but,

– a rule of domestic law governing the construction of statutes precludes such retrospective application unless there is a clear and unambiguous indication to the contrary?

(5) If the answer to Question 1 or Question 4 is in the affirmative, do the "employment conditions" to which Clause 4 of the framework agreement … refers include conditions of an employment contract relating to remuneration and pensions?'

The questions referred for a preliminary ruling

Question 1

37 By its first question, the referring court seeks, in essence, to establish whether, notwithstanding the absence of any express provision to that effect in the relevant national law, a national court or tribunal, such as the Labour Court or a Rights Commissioner, which is called upon to decide a case concerning an infringement of the legislation transposing Directive 1999/70 is required by Community law to hold that it also has jurisdiction to hear and determine claims based directly on that directive itself, where such claims relate to a period after the deadline for transposing the directive concerned, but before the date of entry into force of the transposing legislation giving it jurisdiction to hear and determine claims based on that legislation.

38 The referring court explains in that regard that the parties can bring the Member State concerned before the ordinary courts, either in its capacity as an employer or in order to obtain damages for loss arising from a failure to transpose Directive 1999/70 within the prescribed period.

39 As a preliminary point, it should be noted, as it was by Ireland at the hearing, that neither Directive 1999/70 nor the framework agreement designates the national courts having jurisdiction to ensure that they are applied, nor do they define the detailed procedural rules governing judicial actions for safeguarding their application. On the contrary, Clause 8(5) of the framework agreement refers to national law, collective agreements and practice as regards the prevention and settlement of disputes and grievances arising from the application of that agreement.

40 It must also be observed that the freedom to choose the ways and means of ensuring that a directive is implemented does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it pursues (see Case 14/83 *von Colsonand Kamann* [1984] ECR 1891, paragraph 15).

41 The Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (*von Colson and Kamann*, paragraph 26).

42 It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective (Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 111).

43 In that regard, it is important to note that the principle of effective judicial protection is a general principle of Community law (see, to that effect, Case C−432/05 *Unibet* [2007] ECR I−2271, paragraph 37 and the case-law cited).

44 The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, in particular, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C−312/93 *Peterbroeck* [1995] ECR I−4599, paragraph 12; *Unibet*, paragraph 39; and Joined Cases C−222/05 to C−225/05 *van der Weerd and Others* [2007] ECR I−4233, paragraph 28).

45 The Member States, however, are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17; Case C−446/93 *SEIM* [1996] ECR I−73, paragraph 32; and Case C−54/96 *Dorsch Consult* [1997] ECR I−4961, paragraph 40).

46 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, *Rewe-Zentralfinanz and Rewe-Zentral*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Unibet*, paragraph 43; and *van der Weerd and Others*, paragraph 28).

47 Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.

48 A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection.

49 It is in the light of those considerations that the referring court's first question must be answered.

50 It must be observed that, since the 2003 Act constitutes the legislation by which Ireland discharged its obligations under Directive 1999/70, a claim based on an infringement of that legislation and a claim based directly on that directive must, as the referring court itself pointed out, be regarded as being covered by the same form of action (see, to that effect, Case C−326/96 *Levez* [1998] ECR I−7835, paragraphs 46 and 47, and Case C−78/98 *Preston and Others* [2000] ECR I−3201, paragraph 51). Notwithstanding formal distinctions as to their legal basis, both claims, as the Advocate General noted at point 58 of her Opinion, seek the protection of the same rights deriving from Community law, namely Directive 1999/70 and the framework agreement.

51 In those circumstances, where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70, the obligation which would be placed on individuals in the situation of the complainants – who sought to bring a claim based on an infringement of that legislation before such a specialised court – to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period

between the deadline for transposing it and the date on which the transposing legislation entered into force, would be contrary to the principle of effectiveness if – which is for the referring court to ascertain – it would result in procedural disadvantages for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive.

52 At the hearing, Ireland claimed that the jurisdiction given to the Rights Commissioners and the Labour Court by the 2003 Act is optional and therefore does not prevent individuals from bringing a single action, based partly on national law and partly on Community law, before an ordinary court.

53 Even if that is so, the fact remains that where individuals intended – as the complainants did in the main proceedings – to rely on the, albeit optional, jurisdiction which the national legislature, when transposing Directive 1999/70, conferred on those specialised courts to hear and determine disputes arising from the 2003 Act, the principle of effectiveness requires that those individuals should also be able to seek before the same courts the protection of the rights which they can derive directly from the directive itself, if it should emerge from the checks undertaken by the referring court that the obligation to divide their action into two separate claims and to bring the claim based directly on the directive before an ordinary court leads to procedural complications liable to render excessively difficult the exercise of those rights conferred on the parties by Community law.

54 If the referring court were to find such an infringement of the principle of effectiveness, it would be for that court to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see, to that effect, *Unibet*, paragraph 44).

55 Having regard to the foregoing considerations, the answer to the first question must be that Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard.

Question 2

56 In the event that, having regard to the answer given to its first question, the referring court must declare that it has jurisdiction to hear and determine the claims of the complainants in the main proceedings based directly on Directive 1999/70, it is necessary to answer the second question, by which the referring court asks, in essence, whether Clauses 4(1) and 5(1) of the framework agreement are capable of being relied upon by individuals before their national courts.

57 The Court has consistently held in that regard that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by individuals as against the State, particularly in its capacity as an employer (see, in particular, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraphs 46 and 49, and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraphs 69 and 71).

58 As the Advocate General noted at point 87 of her Opinion, that case-law can be applied to

agreements which, like the framework agreement, are the product of a dialogue, based on Article 139(1) EC, between management and labour at Community level and which have been implemented in accordance with Article 139(2) EC by a directive of the Council of the European Union, of which they are thus an integral component.

Clause 4(1) of the framework agreement

59 Clause 4(1) of the framework agreement prohibits, in respect of employment conditions, the treatment of fixed-term workers in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

60 That provision prohibits, in a general manner and in unequivocal terms, any difference in treatment of fixed-term workers in respect of employment conditions which is not objectively justified. As Impact maintained, its subject-matter appears therefore to be sufficiently precise to be relied upon by an individual and to be applied by the national court (see, by analogy, *Marshall*, paragraph 52).

61 Contrary to Ireland's submission, the fact that there is no definition of 'employment conditions' in Clause 4(1) does not render that provision incapable of being applied by a national court to the facts of a dispute which it is to hear and determine and, consequently, is unlikely to render the subject-matter of that provision insufficiently precise. Thus, the provisions of a directive have already been deemed to be sufficiently precise notwithstanding the absence of a Community definition of the social-law terms included in those provisions (see, in that respect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 13 and 14).

62 Furthermore, the precise prohibition laid down by Clause 4(1) of the framework agreement does not require the adoption of any further measure of the Community institutions (see, by analogy, Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 6). Besides, the provision under consideration does not in any way confer on Member States the right, when transposing it into domestic law, to limit the scope of the prohibition laid down in respect of employment conditions (see, by analogy, *Marshall*, paragraph 55).

63 Admittedly, as Ireland submitted, that provision includes, in relation to the principle of non-discrimination there laid down, a qualification concerning justification on objective grounds.

64 However, as the referring court itself pointed out, the application of that qualification is subject to judicial control (for an example of such control in relation to the concept of objective reasons in the context of Clause 5(1) of the framework agreement, see Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 58 to 75), although the possibility of relying on it does not preclude the view that the provision at issue confers on individuals rights which they may enforce in the national courts and which the latter must protect (see, by analogy, *van Duyn*, paragraph 7; Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, paragraph 15; Case C-374/97 *Feyrer* [1999] ECR I-5153, paragraph 24; and also Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraphs 85 and 86).

65 The precision and unconditionality of Clause 4(1) of the framework agreement are not affected by Clause 4(2) either. As the Advocate General noted at point 101 of her Opinion, Clause 4(2) simply articulates one of the consequences which may be associated, where appropriate, subject to judicial control, with the application of the principle of non-discrimination in favour of fixed-term workers, without in any way undermining the substance of that principle.

66 As regards Clause 4(3) of the framework agreement, upon which Ireland also relied in order to deny Clause 4(1) direct effect, it must be observed that Clause 4(3) entrusts the Member States

and/or the social partners with the definition of the arrangements for facilitating the 'application' of the principle of non-discrimination laid down by that clause.

67 Such arrangements cannot therefore in any way relate to the actual substance of that principle (see, by analogy, Case 8/81 *Becker* [1982] ECR 53, paragraphs 32 and 33). As the referring court itself suggested, and as Impact submitted, they cannot therefore limit the existence or restrict the scope of that principle (see, by analogy, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 21 and 26, and *Becker*, paragraph 39).

68 It follows that Clause 4(1) of the framework agreement appears, so far as its subject-matter is concerned, to be unconditional and sufficiently precise for individuals to be able to rely upon it before a national court.

Clause 5(1) of the framework agreement

69 Clause 5(1) of the framework agreement requires Member States to adopt one or more of the measures listed where domestic law does not include equivalent legal measures, in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The measures listed, of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships.

70 In prescribing the effective and binding adoption of at least one of the measures listed in Clause 5(1) of the framework agreement intended to prevent the abusive use of successive fixed-term employment contracts or relationships, where domestic law does not already include equivalent measures (see *Adenelerand Others*, paragraphs 65 and 101; Case C−53/04 *Marrosu and Sardino* [2006] ECR I−7213, paragraph 44; and also Case C−180/04 *Vassallo* [2006] ECR I−7251, paragraph 35), Clause 5(1) assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve it.

71 Under Clause 5(1), it is effectively left to the discretion of the Member States to rely to that end on one or more of the measures listed in that clause, or even on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers.

72 Admittedly, as the Commission contended when referring to the judgment in *Francovich and Others* (paragraph 17), the right of the Member States to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights the content of which can be determined sufficiently precisely on the basis of the provisions of that directive alone (see also, to that effect, Case C−271/91 *Marshall* [1993] ECR I−4367, paragraph 37, and *Pfeiffer and Others*, paragraph 105).

73 However, it must be held that, unlike the provisions at issue in the case giving rise to the judgment in *Francovich and Others*, Clause 5(1) of the framework agreement does not contain any unconditional and sufficiently precise obligation capable of being relied upon, in the absence of transposing measures taken within the requisite period, by an individual before a national court.

74 In *Francovich and Others*, notwithstanding the freedom of choice given to the Member States by the directive in question to achieve the result required by that directive, the Court of Justice was able to identify in the directive provisions defining, unconditionally and sufficiently precisely, content comprising minimum protection in favour of individuals: in that case, a minimum guarantee for the payment of wage claims in the event of the employer's insolvency (for other cases of identification of minimum protection, see also Case C−303/98 *Simap* [2000]

ECR I-7963, paragraphs 68 and 69, and *Pfeiffer and Others*, paragraph 105).

75 In the present case, however, the Court cannot accept the Commission's suggestion that Clause 5(1) of the framework agreement also establishes such minimum material protection in that, in the absence of any other measure intended to combat abuse or at least of any sufficiently effective, objective and transparent measure to that end, it requires objective reasons to justify the renewal of successive fixed-term employment contracts or relationships.

76 First, while it is true, as the Court stated in paragraph 67 of the judgment in *Adeneler and Others*, that, according to paragraph 7 of the general considerations in the framework agreement, the signatory parties to that agreement took the view that 'the use of fixed-term employment contracts founded on objective reasons is a way to prevent abuse', the fact remains that the construction advocated by the Commission effectively introduces a hierarchy between the various measures referred to in Clause 5(1) of the framework agreement, whereas the terms of that provision themselves unequivocally show that the various measures envisaged are intended to be 'equivalent'.

77 Second, as the Advocate General also noted at point 116 of her Opinion, the interpretation proposed by the Commission would have the effect of rendering meaningless the choice of means allowed by Clause 5(1) of the framework agreement, since it would permit an individual to plead the absence of objective reasons in order to challenge the renewal of his fixed-term contract, even where that renewal did not infringe the rules relating to maximum total duration or number of renewals adopted by the Member State concerned in accordance with the options available under Clause 5(1)(b) and (c).

78 Contrary to what was accepted in the cases giving rise to the judgments cited in paragraph 72 of the present judgment, it is therefore not possible, in the present case, to determine sufficiently the minimum protection which should, on any view, be implemented pursuant to Clause 5(1) of the framework agreement.

79 It follows that that provision does not appear, so far as its subject-matter is concerned, to be unconditional and sufficiently precise for individuals to be able to rely upon it before a national court.

80 In the light of the foregoing, the answer to the second question must be that 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; that is not the case, however, as regards Clause 5(1) of the framework agreement.

Question 3

81 By its third question the referring court asks, in essence, having regard to the answers to the first question and to the second question in so far as it relates to Clause 5(1) of the framework agreement, whether Clause 5(1) of the framework agreement precludes a Member State, acting in its capacity as an employer, from renewing a fixed-term employment contract for up to eight years in the period between the deadline for transposing Directive 1999/70 and the date on which the legislation transposing that directive enters into force.

82 In relation to that third question the referring court explains that, on previous occasions, the contract in question had always been renewed for shorter periods; that the employer requires the services of the employee for a period exceeding the usual term on renewal; that the renewal for an extended period has the effect of circumventing the application to an employee of Clause 5 of the framework agreement when transposed into domestic law; and that there are no objective reasons unrelated to the employee's status as a fixed-term worker for such a renewal.

83 In the event that, having regard to the answer given to its first question, the referring court must declare that it has jurisdiction to hear and determine the claims of the complainants in the main proceedings based directly on Directive 1999/70, it must be stated that while, in accordance with the answer to the second question, the subject-matter of Clause 5(1) of the framework agreement is not unconditional and sufficiently precise for individuals to be able to rely upon it before a national court, the fact none the less remains that, under the third paragraph of Article 249 EC, the directive leaves to the national authorities the choice of form and methods but is binding, as to the result to be achieved, upon each Member State to which it is addressed (see *von Colson and Kamann*, paragraph 15).

84 The first paragraph of Article 2 of Directive 1999/70 thus provides that the Member States are required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by the directive.

85 As has already been observed in paragraph 41 of this judgment, the Member States' obligation to achieve the result envisaged by a directive and, under Article 10 EC, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of the Member States (see *von Colson and Kamann*, paragraph 26). Such obligations devolve on those authorities, including, where appropriate, in their capacity as a public employer.

86 As regards the objective laid down by Directive 1999/70 and the framework agreement, the latter proceeds – as is apparent from paragraphs 6 and 8 of the general considerations in the framework agreement – on the premiss that employment contracts of indefinite duration are the general form of employment relationship, while recognising that fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (see *Adeneler and Others*, paragraph 61).

87 Consequently, the benefit of stable employment is viewed as a major element in the protection of workers (see Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 64), whereas – as is apparent from the second paragraph of the preamble to the framework agreement and paragraph 8 of the general considerations – it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers (see *Adeneler and Others*, paragraph 62).

88 From this angle, the framework agreement seeks to place limits on successive recourse to the latter category of employment relationship, a category regarded as a potential source of abuse to the disadvantage of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (see *Adeneler and Others*, paragraph 63).

89 As is apparent from Clause 1(b) of the framework agreement, its purpose is to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. According to its own terms, Clause 5(1) of the framework agreement specifically pursues that objective of prevention.

90 It follows that the Member States are required under Article 10 EC and the third paragraph of Article 249 EC, as well as under Directive 1999/70 itself, to take any appropriate measure, whether general or particular, to achieve the objective of that directive and of the framework agreement of preventing the abusive use of fixed-term contracts.

91 However, that obligation would be rendered ineffective if an authority of a Member State, acting in its capacity as a public employer, were authorised to renew contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70 and the date on which the transposing legislation entered into force, thereby depriving the persons concerned for

an unreasonable period of time of the benefit of the measures adopted by the national legislature for the purpose of transposing Clause 5 of the framework agreement.

92 In the light of the foregoing, the answer to the third question must be that Article 10 EC, the third paragraph of Article 249 EC, and Directive 1999/70 must be interpreted as meaning that an authority of a Member State acting in its capacity as a public employer may not adopt measures contrary to the objective pursued by that directive and the framework agreement as regards prevention of the abusive use of fixed-term contracts, which consist in the renewal of such contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70 and the date on which the transposing legislation entered into force.

Question 4

93 In the event that, having regard to the answer given to its first question, the referring court is not required to declare that it has jurisdiction to hear and determine the claims of the complainants in the main proceedings based directly on Directive 1999/70, it is necessary to answer the fourth question, by which the referring court queries, in essence, whether it is under an obligation, by virtue of its obligation to interpret domestic law in conformity with Community law, to give the 2003 Act retrospective effect to the date by which that directive should have been transposed.

94 As a preliminary point, it must be noted that the fourth question relates only to section 6 of the 2003 Act, which is the measure that transposes Clause 4 of the framework agreement.

95 It is indicated in the order for reference that the complainants in the main proceedings have, on the other hand, conceded that the wording used in section 9 of the 2003 Act makes it impossible for retrospective effect to be given to that section (which effectively transposes Clause 5 of the framework agreement), and to interpret it in that way would be *contra legem*.

96 It is thus necessary to consider whether, in the situation referred to in paragraph 93 of this judgment where it would have jurisdiction only to rule on the complaints in the main proceedings in so far as they are based on an infringement of the 2003 Act, the referring court is required – in accordance with the obligation to interpret national law in conformity with Community law – to give section 6 of the 2003 Act retrospective effect to the date by which Directive 1999/70 should have been transposed.

97 The referring court states in that regard that, while it is true that the wording of section 6 of the 2003 Act does not expressly preclude a retrospective construction, a domestic rule of construction does preclude the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary.

98 In that regard, when applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by it and thus to comply with the third paragraph of Article 249 EC (see, in particular, *Pfeiffer and Others*, paragraph 113 and the case-law cited).

99 The requirement that national law be interpreted in conformity with Community law is inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them (see, inter alia, *Pfeiffer and Others*, paragraph 114, and *Adeneler and Others*, paragraph 109).

100 However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of

law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and *Adeneler and Others*, paragraph 110; see also, by analogy, Case C−105/03 *Pupino* [2005] ECR I−5285, paragraphs 44 and 47).

101 The principle that national law must be interpreted in conformity with Community law none the less requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see *Pfeiffer and Others*, paragraphs 115, 116, 118 and 119, and *Adeneler andOthers*, paragraph 111).

102 In the present case, since, according to the information given in the order for reference, domestic law appears to include a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, it is for the referring court to ascertain whether there is a provision in that legislation, in particular in the 2003 Act, which contains such an indication capable of giving retrospective effect to section 6 of the 2003 Act.

103 In the absence of such a provision, Community law – in particular the requirement for national law to be interpreted in conformity with Community law – cannot be interpreted as requiring the referring court to give section 6 of the 2003 Act retrospective effect to the date by which Directive 1999/70 should have been transposed, as the referring court would otherwise be constrained to interpret national law *contra legem*.

104 In the light of the foregoing, the answer to the fourth question must be that, in so far as the applicable national law contains a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70 is required, under Community law, to give that provision retrospective effect to the date by which that directive should have been transposed only if that national legislation includes an indication of that nature capable of giving that provision retrospective effect.

Question 5

105 In the event that, having regard to the answer given to its first question, the referring court must declare that it has jurisdiction to hear and determine a claim based directly on Directive 1999/70, it is necessary to answer the fifth question, by which the referring court asks whether 'employment conditions' within the meaning of Clause 4 of the framework agreement include conditions of an employment contract relating to remuneration and pensions.

106 In that regard, as the Court has already held, the Council, in adopting Directive 1999/70, in order to implement the framework agreement, relied on Article 139(2) EC, which provides that agreements concluded at a Community level are to be implemented for matters covered by Article 137 EC (Case C−307/05 *Del Cerro Alonso* [2007] ECR I−0000, paragraph 33).

107 Those matters include, in Article 137(1)(b) EC, 'working conditions'.

108 It cannot be determined from the wording of Article 137(1)(b) EC alone, any more than from that of Clause 4 of the framework agreement, whether or not the working conditions or employment conditions respectively referred to in those two provisions include conditions relating to matters such as the remuneration and pensions at issue in the main proceedings.

109 In that regard, the fact, noted by the United Kingdom Government, that a number of Community-law provisions – such as Article 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as

regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15), Article 3(1)(c) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), or even Article 3(1)(c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) –expressly state that the term 'employment and working conditions' (to which those provisions refer) includes remuneration does not permit the conclusion to be drawn from the absence of a statement to that effect in Clause 4 of the framework agreement that, for the purposes of applying that clause, the term 'employment conditions' does not cover financial aspects such as those at issue in the main proceedings.

110 Since the question of interpretation raised cannot be resolved by the wording of Clause 4 of the framework agreement, it is necessary, in accordance with settled case-law, to take into consideration the context and the objectives pursued by the rules of which that clause is part (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St. Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 21).

111 In that regard, as the Court has already noted (*Del Cerro Alonso*, paragraph 36), it is apparent from the wording of Clause 1(a) of the framework agreement that one of its objectives is to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination'. Similarly, the third paragraph of the preamble to the framework agreement states that this framework agreement 'illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination'. Recital (14) in the preamble to Directive 1999/70 states that the aim of the framework agreement is, in particular, to improve the quality of fixed-term work by setting out the minimum requirements in order to ensure the application of the principle of non-discrimination.

112 The framework agreement, in particular Clause 4, thus follows an aim which is akin to the fundamental objectives enshrined in the first paragraph of Article 136 EC as well as in the third paragraph of the preamble to the EC Treaty and Article 7 and the first paragraph of Article 10 of the Community Charter of the Fundamental Social Rights of Workers to which Article 136 EC refers, and which are associated with the improvement of living and working conditions and the existence of proper social protection for workers, in the present case, for fixed-term workers.

113 Moreover, the first paragraph of Article 136 EC, which defines the objectives with a view to which the Council may, in respect of the matters covered by Article 137 EC, implement in accordance with Article 139(2) EC agreements concluded between social partners at Community level, refers to the European Social Charter signed at Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter.

114 In the light of those objectives, Clause 4 of the framework agreement must be interpreted as articulating a principle of Community social law which cannot be interpreted restrictively (see *Del Cerro Alonso*, paragraph 38).

115 As submitted by both Impact and the Commission, to interpret Clause 4 of the framework agreement as categorically excluding from the term 'employment conditions' for the purposes

of that clause financial conditions such as those relating to remuneration and pensions, effectively reduces – contrary to the objective attributed to that clause – the scope of the protection against discrimination for the workers concerned by introducing a distinction based on the nature of the employment conditions, which the wording of that clause does not in any way suggest.

116 Moreover, as the Advocate General noted at point 161 of her Opinion, such an interpretation would render the reference in Clause 4(2) of the framework agreement to the principle of *pro rata temporis* meaningless, that principle being intended by definition only to apply to divisible performance, such as that deriving from financial employment conditions linked, for example, to remuneration and pensions.

117 Contrary to the submissions of Ireland and the United Kingdom Government, the foregoing analysis is not called into question by the case-law which the Court has developed in relation to equal treatment for men and women, according to which working conditions for the purposes of Directive 76/207, prior to its amendment by Directive 2002/73, do not encompass pay (see, in particular, Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 24; Case C-313/02 *Wippel* [2004] ECR I-9483, paragraphs 29 to 33; and Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 30).

118 That case-law is accounted for by the existence also of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC) and of a directive dedicated to the equal treatment of men and women in relation to pay, namely Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

119 Since there is no such duality of legislation in respect of the principle of non-discrimination of fixed-term workers, it is not possible to draw any lessons from that case-law as regards the interpretation of 'employment conditions' within the meaning of Clause 4 of the framework agreement.

120 As regards the objection by Ireland and the United Kingdom Government based on Article 137(5) EC, as interpreted by the judgment in Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraphs 38 and 39, it must be borne in mind that Directive 1999/70 was adopted on the basis of Article 139(2) EC, which refers to Article 137 EC for the list of matters within the competence of the Council for the purposes, inter alia, of implementing agreements concluded between social partners at Community level.

121 According to Article 137(5) EC, the provisions of Article 137 EC 'shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

122 As the Court has already held, as Article 137(5) EC derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC (*Del Cerro Alonso*, paragraph 39).

123 More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq. (*Del Cerro Alonso*, paragraphs 40 and 46).

124 As the Commission contended, that exception must therefore be interpreted as covering

measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by Community law in the determination of pay within the Community.

125 It cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance (see, to that effect, *Del Cerro Alonso*, paragraph 41; see also, to the same effect, Case C−84/94 *United Kingdom* v *Council* [1996] ECR I−5755, concerning the Council's competence to adopt, on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC), Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), in particular Article 7 of that directive, relating to the grant of four weeks' paid annual leave).

126 It follows that the derogation in Article 137(5) EC does not preclude the interpretation of Clause 4 of the framework agreement as imposing on the Member States the obligation to ensure that fixed-term workers are also guaranteed the application of the principle of non-discrimination in relation to pay. That derogation cannot therefore prevent workers such as the complainants in the main proceedings from pleading the direct effect of Clause 4(1) in contesting the application, in relation to pay, of less favourable treatment than that which is given to comparable permanent workers and for which there is no objective justification (see, to that effect, *Del Cerro Alonso*, paragraphs 42 and 47).

127 For the reasons set out in paragraphs 43 to 45 of the judgment in *Del CerroAlonso*, the foregoing interpretation is in no way incompatible with the arguments in paragraphs 38 and 39 of the judgment in *Dellas and Others*.

128 At the hearing, the United Kingdom Government submitted that it may be inferred from the judgment in *Del Cerro Alonso* that the principle of non-discrimination laid down by the framework agreement concerns only the constituent parts of pay, excluding the level of pay, which the national competent authorities remain free to set differently for permanent and for fixed-term workers.

129 However, while it is true – as paragraphs 40 and 46 of the judgment in *Del Cerro Alonso* show and as has been noted in paragraphs 123 and 124 of the present judgment – that the establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the Community legislature and is unquestionably still a matter for the competent bodies in the various Member States, those bodies must nevertheless exercise their competence consistently with Community law – particularly Clause 4 of the framework agreement – in the areas in which the Community does not have competence (see, to that effect, Case C−438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I−0000, paragraph 40, and Case C−341/05 *Laval un Partneri* [2007] ECR I−0000, paragraph 87).

130 It follows that, in establishing both the constituent parts of pay and the level of those constituent parts, the national competent bodies must apply to fixed-term workers the principle of non-discrimination as laid down in Clause 4 of the framework agreement.

131 With regard to pensions, it must be noted that, according to the settled case-law of the Court in relation to Article 119 of the Treaty, or, with effect from 1 May 1999, in relation to Article 141 EC, which concern the principle of equal treatment of men and women in relation to pay, the term 'pay' within the meaning of the second subparagraph of Article 141(2) EC covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment

relationship than by considerations of social policy (see, in particular, Case 80/70 *Defrenne* [1971] ECR 445, paragraphs 7 and 8; Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, paragraphs 16 to 22; Case C−262/88 *Barber* [1990] ECR I−1889, paragraphs 22 to 28; and Joined Cases C−4/02 and C−5/02 *Schönheit and Becker* [2003] ECR I−12575, paragraphs 56 to 64).

132 Taking that case-law into account, it must be held that the term 'employment conditions' within the meaning of Clause 4(1) of the framework agreement covers pensions which depend on an employment relationship between worker and employer, excluding statutory social-security pensions, which are determined less by that relationship than by considerations of social policy.

133 That interpretation is supported by the information in the fifth paragraph of the preamble to the framework agreement, according to which the parties to the agreement 'recognis[e] that matters relating to statutory social security are for decision by the Member States' and call on the Member States to give effect to the Employment Declaration of the Dublin European Council in 1996 which emphasised, inter alia, the need to adapt social-security systems to new patterns of work in order to provide appropriate social protection to those engaged in such work.

134 In the light of the foregoing, the answer to the fifth question must be that Clause 4 of the framework agreement must be interpreted as meaning that employment conditions within the meaning of that clause encompass conditions relating to pay and to pensions which depend on the employment relationship, to the exclusion of conditions relating to pensions arising under a statutory social-security scheme.

Costs

135 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard.**

2. **Clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Directive 1999/70, is unconditional and sufficiently precise for individuals to be able to rely upon it before a national court; that is not the case, however, as regards Clause 5(1) of the framework agreement.**

3. **Article 10 EC, the third paragraph of Article 249 EC, and Directive 1999/70 must be interpreted as meaning that an authority of a Member State acting in its capacity as**

a public employer may not adopt measures contrary to the objective pursued by that directive and the framework agreement on fixed-term work as regards prevention of the abusive use of fixed-term contracts, which consist in the renewal of such contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70 and the date on which the transposing legislation entered into force.

4. **In so far as the applicable national law contains a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70 is required, under Community law, to give that provision retrospective effect to the date by which that directive should have been transposed only if that national legislation includes an indication of that nature capable of giving that provision retrospective effect.**

5. **Clause 4 of the framework agreement on fixed-term work must be interpreted as meaning that employment conditions within the meaning of that clause encompass conditions relating to pay and to pensions which depend on the employment relationship, to the exclusion of conditions relating to pensions arising under a statutory social-security scheme.**

[Signatures]

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* Language of the case: English.