



[Pagina iniziale](#) > [Formulario di ricerca](#) > [Elenco dei risultati](#) > **Documenti**



Lingua del documento :

JUDGMENT OF THE COURT (Eighth Chamber)  
11 April 2013 (\*)

(Social policy – Directive 1999/70/EC – Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 2 – Scope of application of the Framework Agreement – Temporary employment business – Supply of temporary workers to a user undertaking – Successive fixed-term employment contracts)

In Case C-290/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Napoli (Italy), made by decision of 29 May 2012, received at the Court on 11 June 2012, in the proceedings

**Oreste Della Rocca**

v

**Poste Italiane SpA,**

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas, President of the Chamber, A. Ó Caoimh (Rapporteur) and G.C. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

Poste Italiane SpA, by R. De Luca Tamajo, avvocato,

the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Palatiello, avvocato dello Stato,

the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,

the European Commission, by C. Cattabriga and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### Judgment

This request for a preliminary ruling concerns the interpretation of Clauses 2 and 5 of the Framework Agreement of fixed-term work, concluded on 18 mars 1999 ('the Framework Agreement') set out in the Annex 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).

The request has been made in proceedings between Mr Della Rocca and Poste Italiane SpA ('Poste Italiane') concerning the employment relationship established with the latter.

#### Legal context

##### *European Union law*

##### Directive 1999/70

Recital 14 in the preamble to Directive 1999/70, which is based on Article 139(2) EC, indicates that, in concluding the Framework Agreement, the signatory parties wished to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

Article 1 of Directive 1999/70 states that the purpose of the directive is 'to put into effect the framework agreement on fixed-term contracts concluded ... between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.

The fourth paragraph in the preamble to the Framework Agreement is worded as follows:

'This agreement applies to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise. It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work.'

Clause 2 of the Framework Agreement, entitled 'Scope', is worded as follows:

'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.

Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:

initial vocational training relationships and apprenticeship schemes;

employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.'

Clause 3 of the Framework Agreement, entitled 'Definitions', provides:

'(1) For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker 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.

Clause 5 of the Framework Agreement, entitled 'Measures to prevent abuse', provides:

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:

objective reasons justifying the renewal of such contracts or relationships;  
the maximum total duration of successive fixed-term employment contracts or relationships;  
the number of renewals of such contracts or relationships.

Directive 2008/104

Recitals 5 to 7 in the preamble to Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9), are worded as follows:

In the introduction to the framework agreement on fixed-term work ..., the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work.

On 21 May 2001, the social partners acknowledged that their negotiations on temporary agency work had not produced any agreement.'

*Italian legislation*

Legislative Decree No 368/01

Article 1 of Legislative Decree No 368 of 6 September 2001 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (decreto legislativo n. 368, attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES) of 6 September 2001 (GURI No 235 of 9 October 2001, p. 4) ('Legislative Decree No 368/01'), provides:

- '1. A worker's employment contract may specify an end-date for technical reasons, or for reasons relating to production, organisational or worker replacement requirements.
2. The indication of an end-date of a contract shall be of no effect if it does not result from a written document specifying one of the reasons referred to in paragraph 1.
3. A copy of the written document must be given by the employer to the employee within five working days after that employee begins work.
4. It is not, however, necessary to draw up a written document when purely occasional work does not exceed 12 days in duration.'

Article 4 of Legislative Decree No 368/01 provides as follows with respect to extensions:

- '1. The term of a fixed-term contract may be extended, with the employee's consent, only if the initial duration of the contract is less than three years. In that case, extension shall be permitted once, provided that it is done on objective grounds and relates to the same activity as the one for which the fixed-term contract was concluded. In that case only, the total duration of the fixed-term employment relationship may not exceed three years.
2. The burden of proof of the objective existence of the reasons justifying any extension shall lie with the employer.'

Article 5 of Legislative Decree No 368/2001, entitled 'Expiry of term and penalties. Successive contracts', provides:

- '1. If an employment relationship continues after the expiry of the term initially fixed or subsequently extended as provided for in Article 4, the employer shall be required to pay the worker an increase in pay equal to 20% per day up to the 10th day, and 40% for each additional day.
2. If the employment relationship continues beyond the 20th day for contracts for a term of less than six months, or beyond the 30th day in other cases, the contract shall be considered to be of indefinite duration as from those dates.
3. Where a worker is re-employed for a fixed-term as provided for in Article 1 within a period of 10 days from the expiry of a contract for a term of up to 6 months, or 20 days from the expiry of a contract for a term of more than 6 months, the second contract shall be considered to be of indefinite duration.
4. Where a worker is employed for two successive fixed-terms, which shall be understood to mean employment relationships between which there is no break in continuity, the employment relationship shall be considered to be of indefinite duration as from the date on which the first contract was made.'

Legislative Decree No 276/03

It is apparent from the order for reference that Legislative Decree No 276 of 10 September 2003 implementing the delegations concerning employment and the labour market, referred to in Law No 30 of

14 February 2003 (decreto legislativo n. 276, attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30) (Ordinary Supplement to GURI No 235 of 9 October 2003) ('Legislative Decree No 276/03') derogates from Legislative Decree No 368/01 as regards the fixed-term employment contracts concluded with a temporary employment agency in providing that those employment contracts may have a fixed term and may be extended without justification being given, under a system which is only indirectly part of the ordinary law.

Legislative Decree No 276/03 defines the contract for the supply of staff (*somministrazione di lavoro*) as a contract the object of which is the professional supply of staff, for an indefinite or fixed term, under which workers perform their duties for the benefit of and under the management and supervision of the user. It is a contract between two parties: the agency (*somministratore*) and the user (*somministrato*), by which the former provides the latter with staff hired by the former, in exchange for payment. The contract for the supply of staff is accompanied by an employment contract concluded by the agency and the worker.

Article 20(4) of Legislative Decree No 276/03 provides that the supply of fixed-term staff is permitted for technical, production or organisational reasons, or for replacement purposes, even if those reasons relate to the ordinary business activity of the user. National collective employment agreements may provide that quantitative limits on the use of fixed-term staff be defined, even in a non-uniform manner.

Under Article 21 of Legislative Decree No 276/03, a contract for the supply of staff must be in writing and contain, inter alia, the technical, production or organisational circumstances or reasons or replacement purposes provided for in Article 20(3) and (4). That information is to be provided in writing by the agency to the worker at the time of conclusion of the employment contract or at the time of placement of the worker with the user.

Article 22(2) of Legislative Decree No 276/03 provides that, where fixed-term staff is supplied, the employment relationship between the agency and the worker is governed by the provisions of Legislative Decree No 368/01, in so far as they are compatible, in any event apart from Article 5(3) et seq. thereof. The initial term of the employment contract may in any event be extended, with the written consent of the worker, in the circumstances and for the duration provided for in the collective agreement by which the agency is bound.

Article 27 of Legislative Decree No 276/03 provides that, if the supply of staff does not remain within the limits and conditions laid down in Articles 20 and 21 thereof, the worker may, by means of an action which may be brought only against the user, request that an employment relationship be declared to exist between himself and the user, with effect from the beginning of the supply.

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

Mr Della Rocca concluded with Obiettivo Lavoro SpA ('Obiettivo Lavoro'), a temporary employment business, three successive fixed-term employment contracts under which he was placed with Poste Italiane as a postman. Those contracts covered the periods from 2 November 2005 to 31 January 2006, 2 February to 30 September 2006, and 2 October 2006 to 31 January 2007 respectively. The employment contracts were concluded on the basis of a contract for the supply of fixed-term staff concluded by Obiettivo Lavoro and Poste Italiane for the supply of replacement staff in the postal distribution service in the Campania region. It is common ground that only contracts for the supply of staff and not fixed-term employment contracts incorporate objective reasons justifying their conclusion and renewal.

Taking the view that the reasons for using a supply of fixed-term staff were 'vague and inconsistent' and that no proper reasons were given for extending the use of such staff, Mr Della Rocca brought an action before the Tribunale di Napoli (Naples District Court), asking that court to find that that supply of staff is contrary to Articles 20, 21 and 27 of Legislative Decree No 276/03 and that he is in a permanent employment relationship with Poste Italiane.

In Poste Italiane's submission, the grounds justifying the use of contracts for the supply of staff were sufficiently stated and genuine. Moreover, the renewal of the employment contracts concluded between Obiettivo Lavoro and Mr Della Rocca were not subject to any statutory limitations, since Article 22 of Legislative Decree No 276/03 rules out the application of Article 5(3) and (4) of Legislative Decree No 368/01 to that type of contract.

In the order for reference, the Tribunale di Napoli states that under Article 22, by way of derogation from the ordinary legal rules governing fixed-term employment contracts, the national legislation does not place any restrictions on the renewal of fixed-term employment contracts by temporary employment businesses. Whilst Legislative Decree No 368/01 provides that the justification for the contract and any extensions thereof depend on the employer's requirements, Legislative Decree No 276/03 allows for fixed-term employment contracts to be concluded where a contract for the supply of staff has also been concluded for a fixed term. Under Articles 20(4) and 27(1) of Legislative Decree No 276/03, only the latter type of contract may be justified for technical, production or organisational reasons.

The Tribunale di Napoli, however, expresses doubts as to the compatibility of that legislation with Clause 5 of the Framework Agreement.

It takes the view that it must first be determined whether the employment relationship between the temporary employment business and the temporary worker or the one established between the temporary worker and the user undertaking come within the scope of the Framework Agreement. Although the preamble thereto suggests that the Framework Agreement does not apply, paragraph 36 of the order in Case C-386/09 *Briot* [2010] ECR I-8471 appears to indicate that the employment relationship between the

temporary employment business and the temporary worker remains subject to the Framework Agreement, since Directive 2008/104 governs only the employment relationship established between the temporary worker and the user undertaking.

Next, if the Framework Agreement is applicable, the national court asks whether, in the absence of other preventive measures, Clause 5(1)(a) of the Framework Agreement allows the technical, production or organisational reasons which justified the conclusion of a contract for the supply of fixed-term staff – which are features not of the temporary employment business but of the user undertaking and are unrelated to the specific employment relationship – to be sufficient grounds to justify the conclusion and extension of a fixed-term employment contract between the temporary worker and the temporary employment business.

Lastly, the national court wonders whether that clause permits the consequences of abuse of fixed-term employment contracts to be made to be borne by a third party, in this case the user undertaking. Since temporary employment businesses merely act as intermediaries and may not take any business risks on their own, workers systematically base their actions on Article 27(1) of Legislative Decree No 276/03, with the result that the employer is not vulnerable to any sanctions.

In those circumstances, the Tribunale di Napoli decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Taking into account the remark interpolated in paragraph 36 of the Order ... in [*Briot*], does Directive [1999/70] – and, in particular, Clause 2 [of the Framework Agreement] – also refer to the fixed-term employment relationship between worker and temporary employment agency or between worker and user, and does Directive [1999/70] accordingly regulate those relationships?

In the absence of other prohibitive measures, does a provision which permits the specification, in the employment contract with a temporary employment agency, of a date on which that contract is to end, as well as its successive renewal, not on the basis of technical, organisational or production requirements of the agency in connection with the specific temporary employment relationship, but on the basis of general reasons relating to the worker, unconnected with the specific employment relationship, meet the requirements under Clause 5(1)(c) [of the Framework Agreement set out in the Annex to] Directive [1999/70], or can it constitute a circumvention of that directive, and must the objective reasons referred to in Clause 5(1)(a) of [the above Framework Agreement] be set down in a document and must they relate to the specific temporary employment relationship and its successive renewal, rendering the reference to general objective requirements which served as justification for that *somministrazione* contract being drawn up incapable of meeting the condition set out in Clause 5(1)(a), or unsuitable for those purposes?

Does Clause 5 of [the framework agreement set out in the Annex to] Directive [1999/70] preclude the consequences of abuse from being made the responsibility of a third party, in this case, the user?'

### **The questions referred for a preliminary ruling**

#### *Admissibility*

Poste Italiane submits that the questions referred are not relevant as they concern the application of the Framework Agreement to the employment relationship between the temporary worker and the temporary employment business, whereas in the dispute in the main proceedings Mr Della Rocca relies solely on the unlawfulness of the contract for the supply of staff concluded between the temporary employment business and the user undertaking.

It should be borne in mind that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

The questions referred by the national court concern the interpretation of the Framework Agreement in a real dispute, in which, as evidenced by paragraphs 20 and 21 of this judgment, Mr Della Rocca challenges not only the supply of staff but also the renewal of his employment contracts with the temporary employment business, whilst Poste Italiane argues that those renewals comply with the requirements laid down in the national legislation, which has led the national court to consider whether that legislation complies with the Framework Agreement.

Therefore, the present request for a preliminary ruling must be regarded as admissible.

#### *The first question*

By this question, the national court asks, in essence, whether Directive 1999/70 and the Framework Agreement must be interpreted as applying to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the fixed-term employment relationship between such a worker and a user undertaking.

It should be noted, as a preliminary point, that a temporary worker such as Mr Della Rocca comes within the scope *ratione materiae* of Directive 2008/104. However, it is common ground that that directive, which was supposed to have been transposed into national law by 5 December 2011, is not applicable *ratione temporis* to the main proceedings, since the periods of temporary work at issue in those proceedings concern the period between 2 November 2005 and 31 January 2007. In those circumstances, the national

court is correct in asking only about the applicability of the Framework Agreement to such a worker.

It should be borne in mind that, as the Court has held previously, it is apparent from the very wording of Clause 2(1) of the Framework Agreement that the scope of the Framework Agreement is conceived in broad terms, covering generally 'fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'. Moreover, the definition of 'fixed-term workers' for the purposes of the Framework Agreement, set out in clause 3(1), encompasses all workers without drawing a distinction according to whether their employer is in the public or private sector (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 56).

The scope of the Framework Agreement is not unlimited, however. It is apparent from the very wording of Clause 2(1) of the Framework Agreement that the definition of the contracts and employment relationships to which that framework agreement applies do not come within the scope of that agreement or EU law, but rather under national legislation and/or practices. Moreover, Clause 2(2) of the Framework Agreement confers a margin of discretion on Member States as to the application of the Framework Agreement to certain categories of contracts or employment relationships. Clause 2(2) of the Framework Agreement allows Member States and/or management and labour (the social partners) to exclude from the scope of that framework agreement 'initial 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' (see Case C-157/11 *Sibillio* [2012] ECR, paragraphs 42, 52 and 53).

Similarly, it is explicitly stated in the fourth paragraph of the preamble to the Framework Agreement that it does not apply to fixed-term workers placed by a temporary work agency at the disposition of a user enterprise, it being the intention of the parties to conclude a similar agreement relating to temporary agency work. Regulation of temporary agency work is precisely the purpose behind Directive 2008/104 which, as evidenced by recitals 5 and 7 in the preamble thereto, was adopted by the EU legislature following the failure of negotiations by the social partners to conclude such an agreement.

It should be noted in that regard that the exclusion provided for in that preamble to the Framework Agreement concerns the temporary worker as such and not any of his employment relationships, with the result that both his employment relationships with the temporary employment business and the one established with the user undertaking fall outside the scope of that framework agreement.

It is true that, according to the Court's case-law, the preamble to a European Union act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting them in a manner clearly contrary to their wording (Case C-308/97 *Manfredi* [1998] ECR I-7685, paragraph 30; Case C-136/04 *Deutsche Milch-Kontor* [2005] ECR I-10095, paragraph 32; Case C-134/08 *Tyson Parketthandel* [2009] ECR I-2875, paragraph 16; and Case C-7/11 *Caronna* [2012] ECR, paragraph 40).

In the present case, however, it is clear that the exclusion in the preamble is expressly laid down in Clause 3(1) of the Framework Agreement, under which only the employment relationship concluded 'directly' with the employer comes within the scope of that framework agreement.

Furthermore, the supply of temporary workers is a complex situation which is specific to labour law, involving, as evidenced by paragraphs 32 and 37 of this judgment, a two-fold employment relationship between, on the one hand, the temporary employment business and the temporary worker and, on the other, the temporary worker and the user undertaking, as well as a relationship of supply between the temporary employment business and the user undertaking. Yet the Framework Agreement contains no provisions dealing with these specific aspects.

By contrast, Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) provides explicitly that that directive is to apply where a temporary employment business places a worker with a user undertaking, provided there is an employment relationship between the temporary employment business and the temporary worker during the period of posting. Similarly, Article 1(2) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19) states specifically that that directive is to apply to temporary employment relationships between a temporary employment business and the temporary worker.

It follows that the fixed-term employment relationships of a temporary worker made available to a user undertaking by a temporary employment business do not come within the scope of the Framework Agreement nor, therefore, of Directive 1999/70.

This conclusion is in no way contrary to what the Court held in the order in *Briot*. In that case, after having found that the non-renewal of a fixed-term employment contract that had ended, due to expiry of its term, on a date prior to the transfer of the activity to which the temporary worker was assigned, did not disregard Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16), the Court merely stated, in paragraph 36 of that order, that that solution did not prejudice the protection that a temporary worker could, if necessary, receive against the misuse of successive fixed-term employment contracts under other provisions of

European Union law, in particular Directive 1999/70, nor the interpretation thereof by the Court.

It is, moreover, apparent precisely from the interpretation of Directive 1999/70 and the Framework Agreement, in the light of paragraphs 34 to 42 of this judgment, that the fixed-term employment relationships of a temporary worker made available to a user undertaking by a temporary employment business do not come within the scope of that directive or the Framework Agreement.

Accordingly, the answer to the first question is that Directive 1999/70 and the Framework Agreement must be interpreted as not applying either to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.

*The second and third questions*

In the light of the answer to the first question, there is no need to answer the second and third questions.

**Costs**

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 (Eighth Chamber) hereby rules:

**Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, and the Framework Agreement on fixed-term work, concluded on 18 March 1999, set out in the Annex to that directive, must be interpreted as not applying either to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.**

[Signatures]

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\* Language of the case: Italian.