OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 9 January 2008 [1]

I — Introduction

1. Are national courts required to apply directly effective provisions of Community law even if they have not been given express jurisdiction to do so under domestic law? That fundamental question has been referred to the Court of Justice by the Irish Labour Court in Dublin in the light of the Community rules on fixed-term employment contained in the framework agreement on fixed-term work. [2]

2. In addition, the Labour Court asks how it should interpret two main provisions of that framework agreement encompassing, first, the principle of non-discrimination against fixed-term workers and, second, measures to prevent abuse arising from the use of successive fixed-term employment relationships. The Labour Court also seeks guidance on the scope of its obligation to interpret national law in conformity with directives.

3. The present case looks at how fixed-term employment relationships are used by public sector employers, as did the earlier cases of *Adeneler*, *Marrosu and Sardino*, *Vassallo* and *Del Cerro Alonso*. The fact that such employment relationships are also within the scope of the framework agreement on fixed-term work has already been clarified by the Court in the cases just mentioned. [3]

II — Legal framework

A — *Community law*

4. The Community-law framework for this case is established by Council

1 — Original language: German.

2 — OJ 1999 L 175, p. 45.

3 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 54 to 57; Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraphs 39 to 42; Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 32; and Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 25.

Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP ('Directive 1999/70'). [4] This Directive puts into effect the framework agreement on fixed-term work (also: 'the Framework Agreement') which was concluded on 18 March 1999 between three general cross-industry organisations (ETUC, UNICE and CEEP) and is annexed to the Directive.

5. Overall, the framework agreement on fixed-term work aims to set out 'the general principles and minimum requirements for fixed-term employment contracts and employment relationships' and thereby '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'. [5]

6. Underlying the Framework Agreement is the consideration 'that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers'. [6] Yet, at the same time, the Framework Agreement recognises that fixed-term employment contracts 'are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers'. [7] Furthermore, the Framework Agreement presupposes that 'the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse'. [8]

7. Clause 1 of the Framework Agreement defines the purpose of the agreement:

'The purpose of this 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.'

4 — OJ 1999 L 175, p. 43.

5 — Recital (14) in the preamble to Directive 1999/70.

6 — Second paragraph in the preamble to the Framework Agreement; see also paragraph 6 of its General Considerations.

7 — Paragraph 8 of the General Considerations of the Framework Agreement; see also the second paragraph in the preamble to the agreement.

8 — Paragraph 7 of the General Considerations of the Framework Agreement.

8. The principle of non-discrimination is set out as follows in Clause 4 of the Framework Agreement:

'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.'

9. Clause 5 of the Framework Agreement concerns measures to prevent abuse of successive fixed-term employment contracts or relationships:

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

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

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

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

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

(a) shall be regarded as "successive";

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

10. Finally, Clause 8(5) of the Framework Agreement provides:

'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.'

11. Directive 1999/70 allows Member States to define the terms used in the Framework Agreement, but not specifically defined therein, in conformity with national law or practice, provided that the definitions in question respect the content of the Framework Agreement. [9] Such a measure is designed to take account of the situation in each Member State and the circumstances of particular sectors and occupations, including activities of a seasonal nature. [10]

12. Article 3 of Directive 1999/70 provides that the Directive was to enter into force on the day of its publication in the *Official Journal of the European Communities*, that is, on 10 July 1999.

13. Under the first paragraph of Article 2 of Directive 1999/70, the Member States were required to 'bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 July 2001', or to ensure that, by that date at the latest, 'management and labour have introduced the necessary measures by agreement'. According to the second paragraph of Article 2 of the Directive, Member States could have a maximum of one more year for transposition, if necessary, and following consultation with management and labour, to take account of special difficulties or implementation by a collective agreement. Ireland did not, however, avail itself of that option.

9 — Recital (17) in the preamble to Directive 1999/70.

10 — Paragraph 10 of the General Considerations of the framework agreement on fixed-term work; see also the third paragraph in the preamble to the Framework Agreement.

14. In addition to Directive 1999/70 and the Framework Agreement, reference must also be made to the social provisions of the EC Treaty, in particular, to Article 137 EC and Article 139 EC.

15. Article 137 EC is worded, in part, as follows:

'(1) With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:

...

(b) working conditions;

...

(2) To this end, the Council:

...

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

...

(5) The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.'

16. In addition, Article 139 EC provides, inter alia, as follows:

'(1) Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

(2) Agreements concluded at Community level shall be implemented either in

accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

…'

B — *National law*

Protection of Employees (Fixed-Term Work) Act 2003

17. Directive 1999/70 was transposed into Irish law by Act No 29 of 2003, the Protection of Employees (Fixed-Term Work) Act 2003 [11] ('the 2003 Act'). The 2003 Act entered into force on 14 July 2003.

18. The combined effect of section 6(1) and section 2(1) of the 2003 Act is that a fixed-term employee may not be treated in a less favourable manner than a comparable permanent employee in respect of his or her conditions of employment, including pay and pension provision. As regards pensions, however, section 6(5) of the 2003 Act provides that the prohibition of less favourable treatment applies only to fixed-term employees whose normal hours of work constitute not less than 20% of the normal hours of work of a comparable permanent employee.

19. It follows from section 9(1) of the 2003 Act 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 may be renewed on only one occasion and any such renewal is to be for a fixed term of no longer than one year. According to section 9(3) of the 2003 Act, any term of a fixed-term employment contract which purports to contravene subsection (1) is to have no effect, [12] and the contract concerned is to be deemed to be a contract of indefinite duration.

20. An employer may derogate from the requirements of sections 6 and 9 of the 2003 Act if there are objective grounds for doing so. [13] What may be regarded as 'objective grounds' is set out in section 7 of the 2003 Act.

11 — Footnote not relevant to the English translation.

12 — The order for reference states that an agreement as to the expiry of the contract by effluxion of time or the occurrence of an event, and which contravenes section 9(1) of the 2003 Act, is 'void *ab initio*'.

13 — See section 6(2) and section 9(4) of the 2003 Act.

21. Under section 14 of the 2003 Act, a complaint alleging that an employer has contravened any provision of the Act must be referred in the first instance to a 'Rights Commissioner'.[14] The complaint may be referred by an employee or — with the employee's consent — by a trade union of which the employee is a member. The Rights Commissioner's decision on a complaint is taken after hearing the parties and must incorporate one or more of the measures set out in section 14(2) of the 2003 Act. The Rights Commissioner may, inter alia, require the employer to pay appropriate compensation of up to twice the complainant's annual remuneration.

22. Section 15 of the 2003 Act provides that the parties may appeal to the Labour Court against the decision of a Rights Commissioner. An appeal against a judgment of the Labour Court may then be brought — on a point of law only — before the High Court. The determination of the High Court is final and conclusive.

23. According to the referring court, the jurisdiction of the Rights Commissioner and of the Labour Court is limited to that which has been conferred upon them by statute. Neither has express jurisdiction to determine a claim based on a directly effective provision of Community law unless the provision at issue comes within the scope of the legislation that confers jurisdiction upon them.

Special features of Irish civil service law

24. In its order for reference, the referring court refers also to the following special features of Irish civil service law.

25. Civil servants in Ireland are recruited either on an 'established' or an 'unestablished' basis.

26. Recruitment to 'established' posts is by way of public competition, and the appointment to an 'established' post of a person who is employed in a temporary capacity is prohibited. On the other hand, recruitment to 'unestablished' posts is either by way of public competition or local recruitment, and may also be for a fixed term.

27. Under relevant regulations governing pension entitlements in the Irish civil service,

14 — The Rights Commissioners are appointed by the competent Minister. Their function can best be compared to that of a publicly appointed independent arbitrator. They operate under the auspices of the Irish Labour Relations Commission. Their decisions are either binding or simply in the nature of a non-binding recommendation, depending on the relevant legislation. Further information about the role of the Rights Commissioners in employment disputes may be found at http://www.lrc.ie (last viewed on 14 November 2007).

separate schemes exist for established and unestablished civil servants. There are significant differences also in the regulations applicable for the purpose of dismissing established as against unestablished civil servants. The practical consequence of these differences is that the security of tenure of established civil servants is significantly greater than that of unestablished civil servants. By contrast, other disparities which used to exist, for example in relation to sick pay, have since been abolished.

III — Facts and the main proceedings

28. IMPACT is a trade union representing the interests of civil and public servants in Ireland. The main proceedings are between IMPACT, as the representative of 91 of its members, and various Irish government departments ('the respondents') in which the trade union members concerned ('the complainants') are or were all employed as unestablished civil servants on the basis of successive fixed-term employment contracts of varying duration.

29. The complainants' fixed-term employment contracts all commenced before 14 July 2003 and continued beyond that date. Some of the complainants have completed less than three years' continuous service in their respective departments and accordingly are merely claiming the same employment conditions as those of comparable permanent workers. Other complainants have completed more than three years' continuous service and are claiming not only the same employment conditions, but also contracts of indefinite duration.

30. The reason for resorting to fixed-term contracts was either to meet a temporary need or to cover situations where permanent funding for the posts involved could not be guaranteed. The respondents' general practice was to renew fixed-term employment contracts for periods of between 12 and 24 months. However, during the period immediately before the 2003 Act entered into force, the Department of Foreign Affairs renewed the employment contracts of a number of the complainants for a fixed term of up to eight years.

31. In the proceedings before the Rights Commissioner, the complainants, represented by IMPACT, sought redress for alleged contraventions of their rights to equal treatment, particularly in not being afforded the same level of pay and the same pension entitlements as established civil servants who, they claim, are comparable permanent workers. The complainants also alleged that the respondents' repeated renewal of fixed-term contracts constituted abuse.

32. In respect of the period from 10 July 2001 to 14 July 2003 — the period between the deadline for transposing Directive 1999/70 and the date of its actual transposition in Ireland — the complainants' claims were based on Clauses 4 and 5 of the Framework Agreement and they relied on the direct effect of those provisions. In respect of the period after 14 July 2003, the complainants relied on section 6 of the 2003 Act.

33. The respondents challenged the jurisdiction of the Rights Commissioner to entertain the complaints 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 alleging a contravention of the relevant national law. In the alternative, the respondents contended that Clauses 4 and 5 of the Framework Agreement were not unconditional or sufficiently precise and could not therefore be relied upon by individuals before national courts. They also contended that a fixed-term worker was not entitled under Clause 4 of the Framework Agreement to the same pay and pensions as a comparable permanent worker.

34. The Rights Commissioner took the view that she had jurisdiction, including in respect of the period between the deadline for transposing Directive 1999/70 and the date of its actual transposition in Ireland. Furthermore, she proceeded on the assumption that, in relation to employment conditions, the principle of non-discrimination referred to in Clause 4 of the Framework Agreement encompassed pay and pension entitlements. The Rights Commissioner ruled that Clause 4 of the Framework Agreement was directly effective but that Clause 5 was not.

35. Accordingly, the Rights Commissioner found that only the complaints made by the complainants which were not based on Clause 5 of the Framework Agreement were well founded. She held that the respondents had infringed the complainants' rights under both national law and Directive 1999/70 by affording them less favourable conditions of employment than those afforded to comparable permanent workers. The Rights Commissioner regarded established civil servants as comparable permanent workers.

36. The Rights Commissioner awarded the complainants monetary compensation pursuant to section 14(2) of the 2003 Act, ranging from EUR 2 000 to EUR 40 000, depending on the individual case. She also ordered the respondents to apply to the complainants terms and conditions of employment equivalent to those enjoyed by comparable permanent workers. Finally, the Rights Commissioner granted some of the complainants the right to an employment contract of indefinite duration on terms no less favourable than those enjoyed by comparable permanent workers.

37. The respondents appealed against the Rights Commissioner's decision to the Labour Court in Dublin. IMPACT cross-appealed against the Rights Commissioner's decision in so far as it held that Clause 5 of the Framework Agreement was not directly effective.

IV — Reference for a preliminary ruling and the proceedings before the Court of Justice

38. By order of 12 June 2006, received at the Court of Justice on 19 June 2006, the Labour Court in Dublin decided to stay the proceedings before it and to refer the following questions to the Court of Justice 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 principle of equivalence and effectiveness) to apply a directly effective provision of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP 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 on Fixed-Term Work concluded by ETUC, UNICE and CEEP annexed to

Directive 1999/70/EC 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 on Fixed-Term Work concluded by ETUC, UNICE and CEEP annexed to Directive 1999/70/EC 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 on Fixed-Term Work concluded by ETUC, UNICE and CEEP annexed to Directive 1999/70/EC 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 Council

Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP 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 annexed to Directive 1990/70/EC refers include conditions of an employment contract relating to remuneration and pensions?'

39. IMPACT and the respondents in the main proceedings, and also the United Kingdom Government and the Commission of the European Communities, have submitted written and oral observations in the proceedings before the Court of Justice. In addition, the Netherlands Government has submitted written observations.

V — Assessment

A — *Question 1: Obligation to apply directly effective provisions of Community law in the absence of express jurisdiction*

Preliminary remarks

40. By its first question, the Labour Court asks, in essence, whether a national court is required to apply directly effective provisions of Community law if, notwithstanding the fact that it has not been given express jurisdiction to do so under domestic law, it does have jurisdiction to apply the national transposing legislation enacted in relation to those provisions and those provisions could

otherwise be directly relied upon by individuals only before other domestic courts and on less favourable terms.

41. That question may initially appear somewhat unusual. For a better understanding of the question, we need to look at the system of court jurisdiction in Ireland.

42. According to the referring court, the jurisdiction of the Rights Commissioners and of the Labour Court is limited to that which has been conferred upon them by statute. However, neither has express jurisdiction to determine claims based on a directly effective provision of Community law unless that provision comes within the scope of the legislation that confers jurisdiction upon them.

43. On that basis, the government departments concerned have, as respondents in the main proceedings, challenged the jurisdiction of the Rights Commissioner and of the Labour Court to determine the complaint lodged by the complainants in so far as it is based directly on Directive 1999/70.

44. The practical significance of this jurisdictional issue relates to the period before 14 July 2003, when Directive 1999/70 had not yet been transposed into Irish law, since that is precisely the period in respect of which the complainants rely directly on the Directive and on the framework agreement on fixed-term work that is annexed to it.

The procedural autonomy of the Member States and its limits

45. Neither Directive 1999/70 nor the framework agreement on fixed-term work includes rules on jurisdiction to determine disputes relating to claims arising under them. Instead, Clause 8(5) of the Framework Agreement specifically refers in that regard to national law, collective agreements and practice.

46. The starting point for answering the question put to the Court is therefore the principle of the *procedural autonomy* of the Member States.[15] The Court has consistently held that, in the absence of Community rules governing the matter, it is for the

15 — Regarding the term *procedural autonomy*, see the judgments cited in footnote 3: *Adeneler*, paragraph 95; *Marrosu and Sardino*, paragraph 52; and *Vassallo*, paragraph 37; also Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67, and Case C-1/06 *Bonn Fleisch* [2007] ECR I-5609, paragraph 41.

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. [16]

47. In line with that procedural autonomy, it is not, in principle, for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise within a national judicial system. [17]

48. However, it follows from the principle of Community loyalty (Article 10 EC) that the Member States — including the domestic courts — are, in terms of their procedural autonomy, required to ensure judicial protection of an individual's rights under Community law. [18] It is for the Member States to *ensure in each case* that those rights are effectively protected. [19]

49. That reflects the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and forms part of the fundamental principles protected by the Community legal order, [20] which must therefore also be observed by the Member States when applying Community law. [21]

50. However, in order to ensure that individuals' rights under Community law are protected effectively in each case, those individuals must be given appropriate access to the domestic courts. That access is principally governed by the determination of the courts' jurisdiction and by the detailed procedural rules governing the legal remedies available in each case. To that extent, there

16 — Case 13/68 *Salgoil* [1968] ECR 453, at p. 463; Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989, paragraph 5; Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 46; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39; and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

17 — *Bozzetti* (cited in footnote 16), paragraph 17; Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 35; and *Köbler* (cited in footnote 16), paragraph 47.

18 — *Unibet* (cited in footnote 16), paragraph 38 in conjunction with paragraph 39.

19 — *Bozzetti* (cited in footnote 16), paragraph 17; *SEIM* (cited in footnote 17), paragraph 32; *Dorsch Consult* (cited in footnote 17), paragraph 40; *Connect Austria* (cited in footnote 17), paragraph 35; and *Köbler* (cited in footnote 16), paragraph 47.

20 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and *Unibet* (cited in footnote 16), paragraph 37. As to the enshrinement of the right to effective judicial protection as a fundamental right, see Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) and the first paragraph of Article 47 of the Charter of fundamental rights of the European Union (proclaimed in Nice on 7 December 2000) (OJ 2000 C 364, p. 1).

21 — See, to that effect, by way of example, Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 35; similarly, in relation to European Union law, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 45; and Article 51(1) of the Charter of fundamental rights of the European Union.

is no material difference between the rules governing jurisdiction and those governing procedure, as unfavourable procedural arrangements can be as much of an obstacle to an individual's access to the domestic courts as unfavourable jurisdictional rules.

51. Both the rules on jurisdiction and the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must therefore 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*). [22]

52. Those criteria of equivalence and effectiveness must be applied in order to ascertain whether it is compatible with Community law, in a case such as this, for the jurisdiction of the Irish labour courts (consisting of the Rights Commissioners and the Labour Court) to be declined in respect of claims based directly on Directive 1999/70 or the Framework Agreement and covering the period before 14 July 2003, and for the complainants to be directed instead to pursue their claims in proceedings before the ordinary Irish courts.

53. In that context, it is for the referring court — which alone has direct knowledge of the procedural rules governing actions under domestic law — to ascertain whether the principles of equivalence and effectiveness have been complied with in each particular case. With a view to the appraisal to be carried out by the referring court, the Court of Justice can, however, provide the necessary guidance on the requirements of Community law. [23]

The principle of effectiveness

54. With regard to the principle of effectiveness, it is necessary, first, to ascertain whether the exercise of the complainants' rights under Directive 1999/70 or the Framework Agreement would be rendered practically impossible or excessively difficult if — in respect of the period prior to 14 July 2003 — they were denied access to the Irish labour courts and instead directed to seek legal redress in the ordinary Irish courts.

22 — As regards the detailed procedural rules, that is what the Court has consistently held. See, by way of example, *Rewe-Zentralfinanz*, paragraph 5; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Unibet*, paragraph 43; and *Van der Weerd*, paragraph 28 (all cited in footnote 16).

23 — Case C-326/96 *Levez* [1998] ECR I-7835, paragraphs 39 and 40, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraphs 49 and 50.

55. The mere fact that certain claims cannot be brought before just any domestic court in a Member State but are reserved to a particular court does not in itself offend against the principle of effectiveness. A certain degree of specialisation within a judicial system can meet a legitimate need; it facilitates optimal efficiency in the organisation of the administration of justice and occurs in a great many variations in several Member States.

56. In any event, it would appear that the provisions of Directive 1999/70 or of the Framework Agreement could — in principle — certainly be relied upon directly in proceedings before the ordinary Irish courts since, according to the referring court, the complainants could bring proceedings against Ireland (the State) in its capacity as their employer and thus seek redress directly for the alleged infringement of their rights under the Directive. [24] They would not be restricted to seeking redress by claiming compensation against Ireland on account of the failure to transpose Directive 1999/70 on time. [25]

57. The present case is distinguished, however, by the fact that the complainants' claims against their employer are based on Community law in respect of both the period before 14 July 2003 — in other words, before Directive 1999/70 was transposed into Irish law — and the period after that date.

58. Whilst the complainants' claims in respect of the period before 14 July 2003 stem directly from the Directive or the Framework Agreement, they rely on the 2003 Act enacted to transpose the Directive so far as the period from 14 July 2003 is concerned. However, regardless of those formal distinctions as to the legal basis of their claim, they seek the same protection as fixed-term workers in respect of the period both before and after 14 July 2003, such protection ultimately being derived from Directive 1999/70.

59. If — in respect of the period before Directive 1999/70 was transposed — the Directive could be relied upon by the complainants only in proceedings before the ordinary Irish courts, rather than the Irish labour courts, the complainants would effectively be forced to pursue two parallel sets of proceedings in order to obtain the protection to which they

24 — Paragraph 51 of the order for reference states in that regard: '… [t]he Complainants could proceed against the State as their employer before a Court of competent jurisdiction claiming redress for the alleged infringement of their rights under the Directive. …' See also the second indent of Question 1 referred.

25 — Such compensation claims have been consistently recognised in case-law since the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

are entitled under Community law: the first before the ordinary courts in respect of the period before the — belated — transposition of the Directive into Irish law, and the second before the labour courts in respect of the period afterwards.

60. The respondents raise the objection that the complainants could have avoided such a double burden if, from the outset, they had brought proceedings only before the ordinary Irish courts. They claim that the Irish labour courts do not have compulsory jurisdiction, [26] and that the complainants were not, therefore, obliged to turn to the Rights Commissioner and the Labour Court in respect of the period from 14 July 2003. Instead, they could have brought all their claims before the ordinary Irish courts, irrespective of whether they relate to the period before or after 14 July 2003.

61. Those assertions were emphatically opposed by IMPACT at the hearing. In IMPACT's view, the Irish labour courts have compulsory jurisdiction under the 2003 Act. In any event, proceedings before the ordinary courts regarding fixed-term employment disputes have had no practical significance to date.

62. It is not for the Court of Justice to adopt a particular view on the interpretation of domestic law in this case since, under the division of jurisdiction between the Community courts and the national courts, the Court must take account of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. [27] It appears from the order for reference that Irish labour courts have compulsory jurisdiction under the 2003 Act. [28]

63. Accordingly, it must be assumed that the complainants were in fact compelled to bring two sets of proceedings before different courts in order to enjoy the full protection afforded to them as fixed-term workers under Directive 1999/70 and the Framework Agreement. Such a double burden of two sets of proceedings, each with its own associated special features and risks, would make it excessively difficult for the complainants effectively to obtain the protection afforded to them by Community law in their capacity

26 — According to the respondents, the non-compulsory nature of that jurisdiction stems from section 14 of the 2003 Act, which states that '[a]n employee … *may* present a complaint to a rights commissioner …' (emphasis added).

27 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; Case C-28/04 *Tod's* [2005] ECR I-5781, paragraph 14; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 21.

28 — See, in particular, paragraph 21 of the order for reference, in which it is stated that a complaint made on the basis of the 2003 Act is to be referred initially to a Rights Commissioner ('Section 14 of the Act of 2003 provides that a complaint alleging a contravention of the Act *shall* be referred in the first instance to a Rights Commissioner' — emphasis added). There is no reference anywhere in that order to the non-compulsory jurisdiction which is claimed by the respondents.

as fixed-term workers. That is incompatible with the principle of effectiveness.

64. However, even if the Irish labour courts only had non-compulsory jurisdiction, consideration would in any event have to be given to the fact that these are the *specialised courts* which — on transposing Directive 1999/70 — the Irish legislature specifically entrusted with the determination of employment disputes arising from fixed-term employment. It must be possible for the full protection granted to fixed-term workers by the Directive to be invoked before such a specialised court. In essence, the protection at issue is the same, whether it is afforded directly or only indirectly — through the national transposing legislation — by the Directive. [29]

65. Any separation of jurisdiction as regards the application of the Directive, on the one hand, and of its national transposing legislation, on the other, would make the effective enforcement of the protection provided by Community law considerably more difficult for the workers concerned. In addition, the direct effect of Community law — which, in the absence of action by the national authorities, serves to ensure that rights conferred by Community law are asserted effectively [30] — would thus be weakened.

66. The principle of effectiveness requires that, in proceedings before the court tasked with applying the national legislation transposing a directive, it should be possible to assert also those claims which arise directly from that directive in respect of periods prior to its transposition.

The principle of equivalence

67. The principle of equivalence is an expression of the general principle of equal treatment and non-discrimination, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [31]

29 — The only difference is in so far as the national transposing legislation grants wider protection, extending beyond that granted by the Directive and the Framework Agreement.

30 — As regards, specifically, the direct effect of directives, see Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 21 and 22, and Case 8/81 *Becker* [1982] ECR 53, paragraphs 23 and 24.

31 — As to the principle of equal treatment, see settled case-law, including Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63; also *Cordero Alonso* (cited in footnote 21), paragraph 37; and *Advocaten voor de Wereld* (cited in footnote 21), paragraph 56.

68. The redress which the complainants seek in the Irish labour courts serves, as already explained, to enforce the protection which, as fixed-term workers, they are guaranteed under Community law. [32] As already mentioned, the protection at issue is the same both before and after 14 July 2003 and ultimately derives from Directive 1999/70, irrespective of whether it is afforded directly or only indirectly — through the national transposing legislation — by the Directive.

69. If, therefore, the complainants are to be directed to assert some of their rights — those relating to the period before 14 July 2003 — by bringing claims against their employers before the ordinary courts, then (contrary to the view taken by the respondents) it is precisely those claims which must be examined as to their equivalence with the redress to be sought before the labour courts. Both types of claim are intended, after all, to enforce the same protection for fixed-term workers deriving from the Directive, and the principle of equivalence requires that the conditions for a claim based directly on the Directive should be no less favourable than those for a claim based on the national transposing legislation.

70. In examining those claims, the referring court must consider both the purpose and the essential characteristics of the allegedly similar redress sought under domestic law. It must assess the relevant procedural rules in their overall context. Therefore, it must take into account the role played by the applicable provisions in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts. [33]

71. The principle of equivalence is infringed, for example, if a person relying on a right conferred by Community law is forced to incur additional costs and delay by comparison with those he would incur if he were only to bring an action under domestic law. [34]

72. In the present case there are, according to the order for reference, distinct differences between the redress which fixed-term workers such as the complainants can seek against their employer before a Rights Commissioner or the Labour Court, on the one hand, and that which they can seek before the ordinary Irish courts, on the other.

32 — See point 58 of this Opinion.

33 — See, to that effect, *Levez* (cited in footnote 23), paragraphs 43 and 44, and *Preston* (cited in footnote 23), paragraphs 61 and 62.

34 — Again, see *Levez* (cited in footnote 23), paragraph 51, and *Preston* (cited in footnote 23), paragraph 60.

73. Thus, proceedings before the ordinary Irish courts are described as being considerably more formal, complex, costly and time-consuming. Court fees are payable, an unsuccessful party may be ordered to pay costs, and parties may be represented only by lawyers, not by trade unions or employers' associations. [35] By contrast, complaints before the Rights Commissioner and the Labour Court are subject to a simpler procedure in which the parties may be represented by any person, in particular by a trade union or employers' association, costs are not awarded and no court fees are payable.

74. Admittedly, the respondents have challenged some aspects of that description and assessment of Irish procedural law before the Court of Justice. Suffice it to say in that regard, however, that it is not for the Court to determine, in the context of a reference for a preliminary ruling, whether the referring court's interpretation of provisions of national law is correct. [36] Rather, the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. [37]

75. In the present case, as described by the referring court, the possible redress available from the ordinary Irish courts appears, viewed as a whole, to be less favourable than that which is available from the Rights Commissioner or the Labour Court. In particular, anyone in the complainants' position would be exposed to a greater degree of financial risk and could not be legally represented by a trade union.

76. Thus, those concerned would be in a worse position when asserting claims based directly on Community law in respect of the period prior to the transposition of Directive 1999/70 than when asserting claims based on the Irish transposing legislation in respect of the period after transposition.

77. In so far as the jurisdiction of the Irish labour courts is regarded as compulsory in respect of the period from 14 July 2003, the fact that employees such as the complainants are in a worse position is apparent also from the fact that — as already mentioned

35 — A natural person may, however, appear as a litigant in person, according to the order for reference.

36 — Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24; *Orfanopoulos and Oliveri* (cited in footnote 27), paragraph 42; and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 25.

37 — See, again, the case-law cited in footnote 27.

in another context [38] — they would in practice be forced to pursue two parallel sets of proceedings in order to obtain the protection to which they are entitled under Community law: the first before the ordinary courts in respect of the period prior to the transposition of Directive 1999/70, and the second before the labour courts in respect of the period afterwards. If, on the other hand, their claims were based only on the 2003 Act and not also on Community law, only one set of proceedings would be required, with recourse to the Irish labour courts being available in any event.

78. The fact that the complainants are in a worse position cannot be justified, for example, on the ground that there was no Irish legislation to transpose Directive 1999/70 in place before 14 July 2003 that could have established the jurisdiction of the labour courts, since a Member State cannot rely, as against individuals, on its own failure to transpose a directive. [39]

79. It would, therefore, constitute an infringement of the principle of equivalence for the complainants to be denied access to the Irish labour courts in respect of the period before 14 July 2003 and to be directed instead to seek legal redress in the ordinary Irish courts.

Legal consequences

80. In accordance with the preceding remarks, therefore, both the principle of effectiveness and the principle of equivalence would be infringed if fixed-term workers such as the complainants were directed to seek legal redress in the ordinary Irish courts in respect of the period prior to 14 July 2003 and were denied access to the Irish labour courts.

81. It follows from the principle of Community loyalty (Article 10 EC) that the referring court must interpret the provisions relating to its own jurisdiction and the procedural rules governing actions brought before it in such a way as to ensure, wherever possible, the effective judicial protection of an individual's rights under Directive 1999/70 and the Framework Agreement. [40]

38 — See, in that regard, the remarks on the principle of effectiveness in points 54 to 66 of this Opinion.

39 — See, by way of example, *Ratti* (cited in footnote 30), paragraph 22, and *Becker* (cited in footnote 30), paragraphs 24, 33 and 34.

40 — See, to that effect, *Unibet* (cited in footnote 16), paragraph 44.

82. As the order for reference shows, the Labour Court sees some scope in the present case for its jurisdiction to be interpreted in conformity with Community law in such a way as to enable it to declare that it has jurisdiction in respect of the period not only from, but also before, 14 July 2003, and thus to apply the directly effective provisions of Directive 1999/70 or of the Framework Agreement.

83. In those circumstances, the referring court is required, in accordance with the principles of equivalence and effectiveness, to apply the directly effective provisions of Directive 1999/70 or of the framework agreement on fixed-term work in the main proceedings in order to ensure, in each case, the effective judicial protection of the rights of individuals conferred by that legislation. [41]

Interim conclusion

84. The following interim conclusion can therefore be drawn:

In accordance with the principles of equivalence and effectiveness, a national court is required to apply directly effective provisions of Community law where, although it has not been given express jurisdiction to do so under domestic law, it does have jurisdiction to apply national transposing legislation enacted subsequently in respect of those provisions, and, in respect of the period before that legislation was enacted, individuals would otherwise be able to rely directly on those provisions only before other domestic courts and only on less favourable terms.

B — *Question 2: Examination of the direct effect of Clauses 4 and 5 of the Framework Agreement*

85. The second question is referred only in the event that Question 1 is, as I suggest, to be answered in the affirmative. [42] By the second question, the referring court asks whether Clauses 4(1) and 5(1) of the framework agreement on fixed-term work are directly applicable, so as to be capable of being relied upon by individuals before the courts.

86. It is settled case-law that the provisions of directives may have direct

41 — See point 48 and footnote 19 of this Opinion.

42 — Points 45 to 84 of this Opinion.

effect. [43] Wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State. [44] Directly effective provisions of directives may also be relied upon as against the State in its capacity as employer. [45]

87. That case-law can readily be applied to framework agreements since, while their content may have been agreed between management and labour at Community level (Article 139(1) EC), they are nevertheless an integral component of the directives adopted by the Council for the purposes of their implementation (Article 139(2) EC in conjunction with Article 137 EC) and have the same legal status.

88. While the Court has already had occasion to interpret the provisions of the framework agreement on fixed-term work at issue here, [46] it has not yet commented on their direct applicability. [47]

First part of Question 2: Clause 4 of the Framework Agreement

89. The first part of Question 2 (Question 2(a)) concerns the direct effect of Clause 4(1) of the framework agreement on fixed-term work, which sets out the principle of non-discrimination against fixed-term workers.

90. The prohibition of discrimination is one of the classic examples of the application of the direct effect of Community law. That applies not only in respect of the prohibitions of discrimination contained in primary legislation — particularly in the fundamental freedoms and in provisions such as Article 141 EC [48] — but also the prohibi-

43 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 12; *Ratti* (cited in footnote 30), paragraphs 19 to 23; and *Becker* (cited in footnote 30), paragraphs 17 to 25; see also *Dorsch Consult* (cited in footnote 17), paragraph 44.

44 — Case C-363/05 *JP Morgan Fleming Claverhouse* [2007] ECR I-5517, paragraph 58; see also *Becker* (cited in footnote 30), paragraph 25; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 7; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29; and Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 37.

45 — See, by way of example, Case 152/84 *Marshall* [1986] ECR 723 ('*Marshall I*'), paragraph 49, and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraphs 31 and 71.

46 — See, in that regard, *Adeneler*, *MarrosuandSardino*, *Vassallo* and *Del Cerro Alonso* (all cited in footnote 3).

47 — In *Adeneler* (cited in footnote 3), paragraphs 28 and 107, the Court merely restates the position taken by the referring court in relation to the (lack of) direct applicability of the Framework Agreement, without however setting out its own view on that issue.

48 — See, for example, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 24 to 32, and Case 43/75 *Defrenne* [1976] ECR 455 ('*Defrenne II*'), paragraphs 38 and 39.

tions of discrimination which the Community legislature has laid down in secondary legislation, particularly in a number of employment- and social-law directives. [49]

91. Nevertheless, in the present case, the respondents contest the direct effect of the prohibition of discrimination against fixed-term employees. First, they take the view that that prohibition of discrimination is too vague in substance, as evidenced, for example, by the use of undefined legal terms and the reference to the principle of *pro rata temporis* in Clause 4(2) of the Framework Agreement. Second, they contend, by reference to Clause 4(3), that the prohibition of discrimination is not unconditional, as the arrangements for its application still need to be defined by the Member States.

92. I am not persuaded by those arguments.

93. As regards, first, Clause 4(3) of the Framework Agreement, the 'arrangements' to be defined by the Member States are certainly not a *condition* to which the application of the principle of non-discrimination is subject. I agree with the referring court that the arrangements are merely to *make easier* the enforcement of the prohibition of discrimination and its observance in everyday work. [50]

94. Such arrangements may be procedural in nature but may equally include substantive provisions or guidelines drawing out the practical consequences of the prohibition of discrimination or demonstrating its effects, perhaps by describing standard cases. In that way, account can be taken of the situation in each Member State and the special circumstances of particular sectors and occupations, [51] whether in national legislation or in collective agreements.

95. It cannot be inferred from the mere fact that such arrangements have yet to be defined that the prohibition of discrimina-

49 — See, for example, *Marshall I* (cited in footnote 45), paragraph 52, and Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, paragraph 19, on the prohibition in secondary legislation of discrimination on the ground of sex.

50 — See, in that regard, *Becker* (cited in footnote 30), paragraphs 32 and 33, in relation to the 'conditions' to be established by the Member States in connection with the implementation of the Sixth VAT Directive. Similarly, *Reyners* (cited in footnote 48), paragraphs 26 and 31, in relation to a fundamental freedom.

51 — See paragraph 10 of the General Considerations of the Framework Agreement and the third paragraph in the preamble to the Agreement.

tion is conditional and that individuals are precluded from relying on the prohibition in the absence of such arrangements. [52] Instead, where no arrangements for application are defined, the minimum protection required for fixed-term employees follows from the Framework Agreement itself.

96. It is generally the case that a provision of a directive is not precluded from having direct effect merely because the directive allows the Member States a certain discretion as to its implementation. [53] Instead, such discretion is integral to a directive, which, according to the third paragraph of Article 249 EC, is binding only as to the result to be achieved and leaves the choice of form and methods to the national authorities. What determines whether the provision at issue in any given case is directly applicable must therefore be the question as to whether its content is determined with sufficient precision [54] and whether it is capable of being applied by any court. [55]

97. Such is the case here. The prohibition of discrimination under Clause 4(1) of the Framework Agreement expresses the general principle of equal treatment and non-discrimination and is intended to protect employees from being treated less favourably — with regard to their employment conditions — on the grounds of their status as fixed-term workers by comparison with comparable permanent workers. Applying such guidance to individual cases is one of the classic examples of the work of courts within the scope of Community law.

98. The mere fact that a Community-law provision such as the prohibition of discrimination at issue here is described as a 'principle', and incorporates undefined legal terms such as 'working conditions' or 'conditions of employment', does not mean that that provision lacks precision as to its substance and therefore is not directly effective. [56] Instead, any doubts as to the interpretation of such terms can be resolved by means of a reference for a preliminary ruling. [57]

52 — Similarly, see *Reyners* (cited in footnote 48), paragraphs 25, 26 and 29; and Case C-413/99 *BaumbastandR* [2002] ECR I-7091, paragraphs 84 to 86, in relation to fundamental freedoms; also *Becker* (cited in footnote 30), paragraphs 33 and 34, in relation to a directive.

53 — See in that regard, for example, *Becker* (cited in footnote 30), paragraph 30; Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraph 15; *Francovich* (cited in footnote 25), paragraph 17; Case C-271/91 *Marshall* [1993] ECR I-4367 (*'Marshall II'*), paragraph 37; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 105.

54 — Similarly, see *Pfeiffer* (cited in footnote 53), paragraph 105.

55 — Case 131/79 *Santillo* [1980] ECR 1585, paragraph 13; similarly, *Marshall I* (cited in footnote 45), paragraph 55; *Marshall II* (cited in footnote 53), paragraph 37; and the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks* [1994] ECR I-1209, point 27.

56 — See, for example, the settled case-law on the 'principle of equal pay for male and female workers' (Article 141 EC) since *Defrenne II* (cited in footnote 48), paragraph 28, and the equally settled case-law on the 'principle of equal treatment for men and women', not least in relation to 'working conditions', for example, *Marshall I* (cited in footnote 45) and *Johnston* (cited in footnote 20).

57 — See, to that effect, *Van Duyn* (cited in footnote 43), paragraph 14.

99. Nor does the reference in the present case to 'objective grounds', on which different treatment of fixed-term workers and comparable permanent workers may be justified (see Clause 4(1) the Framework Agreement), preclude the direct effect of the prohibition of discrimination. On the contrary, it is settled case-law that the mere fact that it is possible in exceptional cases to derogate from the provisions of directives does not deprive those provisions of direct effect. [58]

100. The possibility of differentiation on objective grounds is recognised within the framework of all of the prohibitions of discrimination contained in Community law. [59] The fact that it is expressly referred to in the wording of the Framework Agreement is no more than a declaratory adjunct, which states what is self-evident and which in no way detracts from the clarity of the substance of the prohibition of discrimination.

101. The reference to the principle of *pro rata temporis* has a similar clarifying function, albeit with the qualification, '[w]here appropriate', in Clause 4(2) of the Framework Agreement. It too, ultimately, simply articulates the general consequence of the principle of non-discrimination: the employment conditions of fixed-term workers may not be less favourable than those of comparable permanent workers except on objective grounds. The limited period of service of fixed-term workers may, however, constitute just such an objective reason for granting them certain benefits only partly (*pro rata temporis*), not fully. [60] Whether that is the case and in what circumstances is a matter of assessment of the particular facts of each case. The clarity of the substance of the prohibition of discrimination is, in any event, equally unaffected by the reference to the principle of *pro rata temporis*.

102. The principle of non-discrimination set out in Clause 4(1) of the Framework Agreement does, as a whole, therefore, satisfy all the requirements for its direct application.

103. In applying the principle of non-discrimination, the referring court will, however, need to satisfy itself that the established civil servants employed in Ireland's civil service can indeed be regarded as *comparable permanent workers* in relation

58 — 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 *Pfeiffer* (cited in footnote 53), paragraph 105; similarly *Marshall I* (cited in footnote 45), paragraphs 53 to 55. The same applies, incidentally, to the fundamental freedoms under the EC Treaty, which are also directly applicable notwithstanding the exceptions for which they provide; see, by way of example, *Van Duyn* (cited in footnote 43), paragraph 7, and *Baumbast and R* (cited in footnote 52), paragraphs 85 and 86.

59 — See, by way of example, *Advocaten voor de Wereld* (cited in footnote 21), paragraph 56.

60 — In that regard, see also Clause 4(4) of the Framework Agreement.

to fixed-term unestablished workers such as the complainants. That depends on an overall assessment of all the circumstances of each case. I should point out merely in passing that, in relation to the European Civil Service, for example, the Community courts have rejected any comparability between officials and other servants of the European Communities. [61]

104. In addition, reference must be made also to the legal consequences of any infringement of the principle of non-discrimination. According to settled case-law, the same advantages must be granted to persons within the disadvantaged category as those enjoyed by persons within the favoured category, as long as measures reinstating equal treatment have not been adopted. A national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by persons within the other category. [62]

61 — Joined Cases 118/82 to 123/82 *Celant* v *Commission* [1983] ECR 2995, paragraph 22; and Case 37/87 *Sperber* v *Court of Justice* [1988] ECR 1943, paragraphs 8 and 9; also the judgment of the European Union Civil Service Tribunal of 19 October 2006 in Case F-59/05 *De Smedt* v *Commission* [2006] ECR-SC I-A-1-109 and II-1-409, paragraphs 70 to 76, the latter confirmed by order of the Court of First Instance in Case T-415/06 P *De Smedt* v *Commission*, not yet published in the ECR-SC, paragraphs 54 and 55.

62 — See, by way of example, *Cordero Alonso* (cited in footnote 21), paragraphs 45 and 46, and *Jonkman* (cited in footnote 49), paragraph 39.

Second part of Question 2: Clause 5 of the Framework Agreement

105. By the second part of Question 2 (Question 2(b)), the Labour Court asks whether Clause 5(1) of the framework agreement on fixed-term work is directly effective. That provision requires Member States to introduce one or more of the measures listed in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

106. Both IMPACT and the Commission take the view that Clause 5(1) of the Framework Agreement can be directly applied. However, while IMPACT assumes unconditionally that that provision has direct effect, the Commission takes a more cautious view: it submits that the provision has direct effect only in so far as an objective reason is required for the renewal of fixed-term contracts or relationships, which is certainly the case where the Member State concerned has not introduced any other measures pursuant to Clause 5(1) within the period prescribed for transposing the directive.

107. By contrast, both the respondents and the referring court reject altogether the notion of any direct effect. They refer to the

broad discretion given to Member States by that provision.

108. I should make it clear from the outset that I prefer the latter view.

109. Certainly the Framework Agreement proceeds on the premiss that the benefit of stable employment is viewed as a major element in the protection of workers, whereas successive recourse to fixed-term employment contracts is regarded as a potential source of abuse to the disadvantage of workers and contributes to greater insecurity in the status of employees. [63] That is why the social partners sought to 'establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'. [64]

110. To that end, however, the Member States are merely required to comply with the very general obligation under Clause 5(1) of the Framework Agreement to introduce into their national law one or more of the following measures, in so far as their national law does not yet include equivalent legal measures:

— objective reasons justifying the renewal of fixed-term employment contracts or relationships (Clause 5(1)(a));

— definition of the maximum total duration of successive fixed-term employment contracts or relationships (Clause 5(1)(b));

— definition of the number of renewals of fixed-term employment contracts or relationships (Clause 5(1)(c)).

111. While the Member States are thus required to make *effective and binding* provision in their domestic law for at least one of the measures to prevent abuse referred to in Clause 5(1)(a) to (c), [65] the Framework Agreement does not prescribe precisely which one(s). Instead it leaves it to the Member States to choose between the three types of measure, all of which are ranked equally and one or more of which the Member States must — at their total discretion — implement

63 — *Adeneler* (cited in footnote 3), paragraphs 62 and 63.

64 — Clause 1(b) of the Framework Agreement. See also *Adeneler* (cited in footnote 3), paragraphs 63 and 79.

65 — *Adeneler*, paragraphs 65, 80, 92 and 101; *Marrosu and Sardino*, paragraphs 44 and 50; and *Vassallo*, paragraph 35 (all cited in footnote 3).

in a manner that is effective and consistent with the purpose of the Directive. [66] In that way, account is taken of the situation in each Member State and the circumstances of particular sectors and occupations. [67]

112. A Member State is therefore not necessarily required to introduce the first of the three possible measures. There is nothing to prevent it from simply defining the maximum total duration of successive employment relationships or the maximum number of renewals of fixed-term employment relationships in order to prevent abuse, instead of defining objective reasons.

113. Nor does a failure to introduce the other two possible measures necessarily imply that the options available to the Member State concerned are limited to the first measure once the deadline for transposing Directive 1999/70 has passed. Once that deadline has passed, all that has been established is that the Member State concerned has failed to fulfil its obligations to transpose the directive. However, as the three measures laid down under Clause 5(1)(a) to (c) of the Framework Agreement are not ranked *inter se*, it cannot be inferred merely from the Member State's failure to transpose the Directive that Clause 5(1) or individual components of it are directly applicable.

114. Nor, contrary to the Commission's view, does the requirement of an objective reason for the renewal of fixed-term employment relationships represent a sort of lowest common denominator which, if the Directive is not properly transposed, could be distilled from Clause 5(1) of the Framework Agreement as constituting the *minimum content* of that provision.

115. This is because only the first of the three possible measures would, on being incorporated into national law, result in any requirement that the renewal of fixed-term employment contracts or relationships be based on objective reasons. By contrast, the other two measures do not necessarily entail the need for such justification since, provided that the maximum total duration or maximum number of renewals fixed in accordance with the Directive, is not exceeded, a fixed-term employment relationship may be renewed even if there is no objective reason for doing so, without that renewal being contrary to the Framework Agreement.

66 — As to the obligation in respect of the purpose and the practical effectiveness of the Directive or of the Framework Agreement, see *Adeneler* (cited in footnote 3), paragraphs 68, 82 and 101.

67 — See paragraph 10 of the General Considerations of the Framework Agreement and the third paragraph in the preamble to the Agreement; also *Adeneler* (cited in footnote 3), paragraph 68.

116. Although it is made particularly clear in paragraph 7 of the General Considerations of the Framework Agreement that the use of fixed-term employment contracts founded on objective reasons [68] is a way to prevent abuse, that does not mean, however, that fixed-term employment contracts are permissible only if there are objective reasons for fixing the term, or that, in the absence of objective reasons, such contracts should automatically be regarded as an abuse. If that were the case, the measures provided for in Clause 5(1)(b) and (c) of the Framework Agreement would be superfluous.

117. I should add that no other conclusion can be drawn from the *exceptional nature* of fixed-term employment relationships [69] either. The Framework Agreement is undoubtedly based on the premiss that contracts of indefinite duration are the general form of employment relationship [70] and that, as the Court emphasises, it is 'only in certain circumstances' that fixed-term employment contracts are liable to respond to the needs of both employers and workers. [71] That does not mean, however, that there must always be an objective reason for concluding or renewing fixed-term employment relationships. Member States may reflect the exceptional nature of fixed-term employment relationships in their national law in other ways too, for example by defining a maximum total duration (Clause 5(1)(b)) or a maximum number of renewals (Clause 5(1)(c)).

118. In general terms, therefore, the present case is not so much on a par with *Francovich* (cited by the Commission) — the minimum scope of protection could at least be established from the directive at issue in that case [72] — as it is with *Von Colson and Kamann* (referred to by the Labour Court), in which no particular measure was prescribed and in which, moreover, the Member States were given a wide discretion as to the nature of the measures to be adopted. [73]

119. Overall, therefore, Clause 5(1) of the Framework Agreement does not fulfil the requirements for direct applicability.

68 — The terminology varies in the German text of the Framework Agreement. Thus, in paragraph 7 of the General Considerations, the reference is to 'objektive Gründe' and in Clause 5(1)(a) to 'sachliche Gründe'. It is clear from the other language versions, however, that the problem is confined specifically to the German version and that there is no material distinction.

69 — See to that effect *Adeneler* (cited in footnote 3), paragraph 62.

70 — See paragraph 6 of the General Considerations and the second paragraph of the preamble to the Framework Agreement.

71 — *Adeneler* (cited in footnote 3), paragraph 62. See also paragraph 8 of the General Considerations and the second paragraph of the preamble to the Framework Agreement.

72 — *Francovich* (cited in footnote 25), paragraphs 17 to 20, on the 'content of the guarantee'). The direct effect of the directive at issue in that case was rejected on other grounds (*Francovich*, paragraphs 23 to 26).

73 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, in particular, paragraphs 18 and 27.

120. If, on the other hand, Clause 5(1) of the Framework Agreement were confirmed to be directly applicable in the terms suggested by the Commission, the protection of the workers concerned would need to be appropriately safeguarded. While the Framework Agreement does not place the Member States under any general obligation to convert fixed-term employment relationships to employment relationships of indefinite duration, [74] it would be contrary to the protective purpose of the Framework Agreement if the workers concerned were to lose their jobs immediately solely on the basis of an unlawful time-limit on their employment contracts.

121. Irrespective of whether individuals can rely directly on Clause 5(1) of the Framework Agreement, the defaulting Member State may however be required (in accordance with *Francovich* and subject to the conditions laid down in that case) to compensate citizens in respect of any loss or damage caused by the failure properly to transpose Directive 1999/70. [75]

74 — See *Adeneler*, paragraphs 91 and 101, and *Marrosu and Sardino*, paragraph 47 (both cited in footnote 3).

75 — *Francovich* (cited in footnote 25), paragraphs 30 to 46, and settled case-law since, most recently *Farrell* (cited in footnote 44), paragraph 43.

C — *Question 3: Community-law requirements for the renewal of fixed-term employment relationships after the deadline for transposing Directive 1999/70 but before the entry into force of the national transposing legislation*

122. By its third question, the referring court seeks to obtain a ruling on whether Clause 5(1) of the Framework Agreement permits a Member State, acting in its capacity as an employer, to renew existing fixed-term employment contracts for relatively extended fixed terms — up to eight years in the present case — in the period between the deadline for transposing Directive 1999/70 and the entry into force of the national transposing legislation.

123. Underlying this question is the concern that the employees affected may have lost the protection of the 2003 Act and of the Framework Agreement because their employment contracts were renewed for such extended terms shortly before the Irish transposing legislation entered into force.

124. The referring court asks the Court of Justice to consider this question 'having regard' to the Court's answers to Questions 1 and 2(b). The following remarks are therefore

based on the premiss that Clause 5(1) of the Framework Agreement is *not* directly applicable, as explained above. [76]

125. If the direct application of that provision is ruled out, Clause 5(1) of the Framework Agreement in itself cannot preclude the renewal for up to eight years of the employment relationships concerned.

126. No other conclusion can be drawn if the *prohibition on frustrating the objective of a directive*, referred to both by the referring court and by IMPACT, is taken into account.

127. Admittedly, all national authorities are obliged to help to achieve the result prescribed by a directive. That obligation stems from Article 10 EC and the third paragraph of Article 249 EC in conjunction with the directive itself. [77] Even during the period prescribed for transposing a directive, the Member States are therefore obliged to refrain from anything that could be liable seriously to compromise the attainment of the result prescribed by it, [78] and all the more so once the period prescribed for transposition has expired, at which point all public authorities are subject to a positive obligation — beyond a mere prohibition on frustrating the objective of a directive — actively to promote the attainment of that objective.

128. However, the framework agreement on fixed-term work is intended merely to establish a *framework* to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (see Clause 1(b) and Clause 5(1) of the Framework Agreement).

129. The Irish Department of Foreign Affairs, in its capacity as a public employer, cannot have infringed that objective of establishing appropriate *general requirements* simply by renewing *individual* fixed-term employment relationships — for another, albeit relatively extended, fixed term — shortly before the national transposing legislation entered into force.

130. The measures to be introduced by the Member States pursuant to Clause 5(1) of the Framework Agreement are undoubtedly intended *to result in* the effective prevention

76 — Points 105 to 119 of this Opinion.

77 — See *Adeneler* (cited in footnote 3), paragraph 117.

78 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and *Adeneler* (cited in footnote 3), paragraph 121.

of abuse in individual cases also.[79] However, Clause 5(1) of the Framework Agreement is not aimed at establishing an *individual prohibition of abuse, independently* of the measures envisaged in Clause 5(1)(a) to (c). Accordingly, such a prohibition of abuse in individual cases cannot be inferred from the Framework Agreement by reference to the prohibition on frustrating the objective of a directive or the domestic authorities' obligation to cooperate (Article 10 EC in conjunction with the third paragraph of Article 249 EC) either.

131. If, in the period before Directive 1999/70 was properly transposed into national law, each individual renewal of an existing fixed-term employment relationship in the public sector had to be examined as to whether it amounted to abuse, that would effectively result in the direct application of Clause 5(1) of the Framework Agreement, the requirements for which — as shown above[80] — have not, however, been fulfilled.

132. To summarise, therefore:

Article 10 EC and the third paragraph of Article 249 EC, in conjunction with Clause 5(1) of the framework agreement on fixed-term work, do not preclude a Member State, in its capacity as employer, from renewing individual fixed-term employment contracts for relatively extended fixed terms in the period between the deadline for transposing Directive 1999/70 and the date of its actual transposition into domestic law.

D — *Question 4: Interpretation of national legislation in conformity with directives*

133. By its fourth question, the referring court asks, in essence, whether a national court is required, on the basis of its obligation to interpret domestic law in conformity with directives, to interpret national legislation transposing a directive (where such legislation has been brought into force out of time) as having retroactive effect to the date by which that directive should have been transposed.

134. That question is referred only in the event that Questions 1 or 2 are to be answered in the negative. Further, it is apparent from the reasoning in the order for reference that the referring court is concerned solely with any retroactive effect of section 6 of the 2003 Act, which transposes the principle of non-discrimination against fixed-term workers into Irish law.

79 — In *Adeneler* (cited in footnote 3), paragraphs 65, 68, 82, 92 and 101, the Court emphasises that the Member States are required to guarantee the result imposed by Community law and to prevent in an effective manner the misuse of successive fixed-term employment relationships.

80 — See points 105 to 119 of this Opinion.

135. As I am proposing that not only Question 1 but also Question 2 should be answered in the affirmative, at least in so far as they concern the principle of non-discrimination (Question 2(a)),[81] Question 4 does not have to be considered. Accordingly, the following remarks are made merely for the sake of completeness.

136. According to settled case-law, national courts are obliged, when applying domestic law, to interpret it, so far as possible, in the light of the wording and the purpose of a directive in order to achieve the result sought by that directive and thus to satisfy the third paragraph of Article 249 EC.[82]

137. The principle that national law must be interpreted in conformity with directives 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 relevant directive is fully effective and achieving an outcome consistent with the objective pursued by it.[83] To do so they must use in full the discretion that is given to them under national law.[84]

138. However, the obligation to interpret national law in conformity with a directive is limited by general principles of law — particularly those of legal certainty and non-retroactivity — and cannot serve as the basis for an interpretation of national law *contra legem*.[85]

139. The *general principles of* Community law do not, in a case such as this, appear to me necessarily to preclude section 6 of the 2003 Act from being interpreted in such a way as to have retroactive effect, at least not in a vertical legal relationship in which the principle of non-discrimination is relied upon by an employee as against a public-sector employer.

81 — See above: points 45 to 84 and points 89 to 102 of this Opinion.

82 — See, by way of example, *Von Colson and Kamann* (cited in footnote 73), paragraph 26; *Pfeiffer* (cited in footnote 53), paragraph 113; and *Adeneler* (cited in footnote 3), paragraph 108.

83 — *Pfeiffer* (cited in footnote 53), paragraphs 115, 116, 118 and 119, and *Adeneler* (cited in footnote 3), paragraph 111. Similarly, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, in which the Court emphasises that the national court 'is required to [interpret the directive], as far as possible, in the light of the wording and the purpose of the directive'.

84 — *Von Colson and Kamann* (cited in footnote 73), paragraph 28; see also Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 68.

85 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47, and *Adeneler* (cited in footnote 3), paragraph 110.

140. Although, in terms of Community law, the principle of legal certainty generally precludes a measure from taking effect from a point in time before its publication, it may exceptionally be otherwise when a purpose that is in the public interest so demands and when the legitimate expectations of the persons concerned are duly respected. [86] A case such as the present could be regarded as such an exception.

141. First, the transposition of a directive into domestic law within the period prescribed undoubtedly constitutes a purpose that is in the public interest. Second, public authorities could hardly invoke the principle of protection of legitimate expectations in a case such as this. Any expectation on their part that the earlier domestic law would be maintained cannot qualify for protection, given that the Member State concerned was under an obligation to ensure that its domestic law conformed to Community law at the latest by the deadline for transposing Directive 1999/70.

142. As it was thus foreseeable by public employers that the law would be amended — in this case, by the introduction of the principle of non-discrimination as required under Community law — they cannot invoke the benefit of the principle of the protection of legitimate expectations. [87] That approach is appropriate also because if it were recognised that public employers' legitimate expectations were to be protected, that would ultimately produce the absurd result that the defaulting Member State could rely, as against individuals, on its own conduct, conduct which infringes Community law. [88]

143. Nevertheless, there is no need in the present case to reach any conclusion as to whether the retroactive application of national transposing legislation may in some circumstances be appropriate under Community law, or whether general principles of law preclude it, since, in any event, a national court cannot be compelled by the principle of interpretation in conformity with directives to apply its domestic law retroactively *contra legem*.

144. In the present case, the Labour Court refers to a 'strong presumption' in Irish law against legislation having retroactive effect. That presumption can, it says, be rebutted

86 — C-376/02 '*Goed Wonen*' [2005] ECR I-3445, paragraph 33; similarly, in relation to substantive rules, Joined Cases 212/80 to 217/80 *Amministrazione delle finanze dello Stato* v *Salumi* [1981] ECR 2735, paragraphs 9 and 10 and settled case-law. In Case 80/87 *Dik* [1988] ECR 1601, paragraph 15, the Court expressly confirms that the national legislature may transpose a directive with retroactive effect.

87 — See, to that effect (in relation to traders), Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 48.

88 — The principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 41).

only by clear and unequivocal language in the provision itself or by clear and necessary implication from other provisions of the statute in question. Although the wording of section 6 of the 2003 Act does not contain any express provision to preclude a retroactive construction, there is no unequivocal basis for inferring it either. Therefore, under the rules of construction established in Irish law, section 6 cannot be regarded as having retroactive effect.

145. That suggests that the Labour Court regards it as *contra legem* to apply domestic law retroactively in the present case. [89] If that is so, the Labour Court cannot be required by Community law to establish the retroactivity of the 2003 Act by way of interpretation in conformity with directives.

146. In addition, however, it should be borne in mind that the obligation resting on national courts to interpret legislation in conformity with directives is not confined to the legislation transposing the particular directive in question but encompasses all domestic law, including, therefore, domestic law already in force. [90]

147. Thus, if Irish law before 14 July 2003 contained a legal provision or even a general legal principle which, for example, prohibited conduct by an employer towards his employees that is discriminatory, abusive or in breach of public policy, the referring court would be obliged to interpret and apply that legal provision or principle in conformity with Directive 1999/70, having regard to the wording and purpose of that directive, [91] and, in doing so, to give due consideration in particular to the principle of non-discrimination against fixed-term employees that is at issue in this case (Clause 4(1) of the framework agreement on fixed-term work).

148. If, on the other hand, the result prescribed by Directive 1999/70 cannot be achieved by way of interpretation, Community law requires the Member States to make good any damage that may have been caused to individuals through failure to transpose that directive, in accordance with *Francovich* and subject to the conditions laid down in that case. [92]

89 — According to additional information given by the respondents at the hearing before the Court of Justice, the retroactive application of the 2003 Act was the subject of debate in the Irish Parliament and was consciously rejected by the legislature.

90 — *Marleasing* (cited in footnote 83), paragraph 8; *Pfeiffer* (cited in footnote 53), paragraphs 115, 118 and 119; and *Adeneler* (cited in footnote 3), paragraphs 108 and 111.

91 — Similarly, see my Opinion of 18 May 2004 in Case C-313/02 *Wippel* [2004] ECR I-9483, point 63, on the interpretation in conformity with directives of the concept of breach of public policy, and equally — albeit in another context — the judgment of 5 July 2007 in Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 46, on the prohibition of conduct constituting an abuse.

92 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 27, and *Adeneler* (cited in footnote 3), paragraph 112. See also point 121 of this Opinion together with the case-law cited in footnote 75.

149. To summarise, therefore:

Community law does not give rise to any obligation on a national court to interpret national legislation transposing a directive (where such legislation has been brought into force out of time) as having retroactive effect to the date by which that directive should have been transposed, if such an interpretation would be *contra legem* under the provisions of national law.

The obligation of the national court to interpret in conformity with directives other domestic legislation in force on the date on which the relevant directive should have been transposed is unaffected, as is the obligation of the Member State concerned to make good any damage that may have been caused to individuals through failure to transpose that directive.

E — *Question 5: Applicability of Clause 4 of the Framework Agreement to matters of remuneration and pensions*

150. By its fifth question, the referring court asks, in essence, whether the 'employment conditions' referred to in Clause 4 of the Framework Agreement include conditions of an employment contract that relate to remuneration and pensions.

151. This highly contentious question is referred only in the event that Question 1 or Question 4 is to be answered in the affirmative. In view of my proposed answer to Question 1,[93] Question 5 does require further consideration.

152. Not only IMPACT and the Commission, but also the referring court take the view that the employment conditions referred to in the Framework Agreement also cover pay and pensions. By contrast, the respondents and, in particular, the United Kingdom Government emphatically take the diametrically opposed view, as, incidentally, Advocate General Poiares Maduro did also in his Opinion in *Del Cerro Alonso* a year ago.[94]

153. Essentially, there are two matters in dispute. First, there is no agreement as to how the term 'employment conditions' should be interpreted, including by comparison with other employment and social Community directives. Second, there is a difference of opinion as to the scope of the legal basis of Directive 1999/70 in view of the fact that

93 — See points 45 to 84 of this Opinion.

94 — Opinion of Advocate General Poiares Maduro of 10 January 2007 in *Del Cerro Alonso* (cited in footnote 3), points 16 to 25.

Article 139(2) EC permits Council decisions on the implementation of framework agreements only in relation to the matters covered by Article 137 EC, which, however, expressly exclude pay (see Article 137(5) EC). I shall deal with both aspects in detail below.

The term 'employment conditions'

154. The term 'employment conditions', as it is used in connection with the principle of non-discrimination in Clause 4 of the framework agreement on fixed-term work, neither expressly includes nor excludes payments such as the remuneration and pensions at issue in this case.

155. In a number of measures of recent employment and social legislation, the Community legislature explicitly stated that the term 'employment conditions' used in those measures *includes* pay. [95] However, the fact that there is no such express provision in the present case does not necessarily mean that pay is completely excluded from the scope of Clause 4 of the Framework Agreement.

156. The earlier case-law relating to equal treatment of men and women, according to which the term 'working conditions' in Directive 76/207 — prior to its amendment by Directive 2002/73 — did *not* extend to pay, [96] cannot simply be applied to the present case either, since it is explained primarily by the existence of Directive 75/117/EEC, [97] which contained special provisions for the equal treatment of men and women as regards pay, [98] and the scope of which was distinct from that of Directive 76/207. By contrast, there is no difficulty in the present case of demarcating the scope of application of one legal measure from that of another existing in parallel.

95 — See 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), 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), and 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 (OJ 2002 L 269, p. 15).

96 — Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 24, and Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 30.

97 — 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).

98 — See also the second recital in the preamble to Directive 76/207, to which express reference is made in the judgments cited in footnote 96. Since the amendment of Directive 76/207 by Directive 2002/73, Directive 75/117 is not so much a special provision as a provision to which Article 3(1)(c) of Directive 76/207 refers in order to define the meaning of pay further.

157. The term 'employment conditions' within the meaning of Clause 4 of the framework agreement on fixed-term work requires interpretation. According to settled case-law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objects of the rules of which it is part. [99]

158. According to Clause 1(a) of the Framework Agreement, the purpose of that Agreement is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. [100] Fundamental social policy objectives of the Community are thereby expressed, such as are laid down in particular in the first paragraph of Article 136 EC, especially the improvement of living and working conditions and ensuring proper social protection. The same objectives are alluded to also in the preambles to the EU Treaty [101] and to the EC Treaty, [102] and in the Community Charter of Fundamental Social Rights for Workers [103] and the European Social Charter. [104]

159. In light of the setting of those socio-political objectives, the prohibition of discrimination against fixed-term workers is among the principles of Community social law which may not be narrowly interpreted. [105] That in itself would suggest that financial matters such as pay and pensions cannot be categorically excluded from the scope of the prohibition of discrimination.

160. The practical value of the prohibition of discrimination in working life would be considerably reduced also, if the prohibition applied only to employment conditions that are unrelated to pay. Thus, although it may

99 — Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 21.

100 — See also recital (14) in the preamble to Directive 1999/70 and the third paragraph in the preamble to the Framework Agreement.

101 — In the preamble to the EU Treaty, the importance of fundamental social rights is confirmed (fourth recital) and the objective of economic and social progress emphasised (eighth recital).

102 — In the preamble to the EC Treaty, the importance of economic and social progress is highlighted (second recital) and the constant improvements of the living and working conditions of the peoples of Europe defined as an essential objective (third recital). See in that regard also *Defrenne II* (cited in footnote 48), paragraphs 10 and 11.

103 — The Community Charter of Fundamental Social Rights for Workers was adopted at the European Council meeting held on 9 December 1989 in Strasbourg and is set out in Commission Document COM (89) 471 of 2 October 1989. Article 7 of the Charter is worded as follows: 'The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.' The first paragraph of Article 10 of the Charter adds: 'According to the arrangements applying in each country … [e]very worker of the European Community shall have a right to adequate social protection …'

104 — The European Social Charter was signed by Member States of the Council of Europe on 18 October 1961 in Turin. Paragraphs (2) and (4) of Part I of the Charter emphasise the right of all workers to just conditions of work and to a fair remuneration, albeit that that right is to be considered as a declared aim (see Part III, Article 20(1)(a) of the Charter).

105 — *Del Cerro Alonso* (cited in footnote 3), paragraph 38.

not be entirely unimportant to the fixed-term workers concerned to be treated equally with comparable permanent workers in relation to work clothes and tools, for example, it is by far more important in terms of the living and working conditions of those workers that they should not be in a worse *financial* position than their colleagues with contracts of indefinite duration. That need for protection suggests that the scope of the prohibition of discrimination cannot be limited only to employment conditions that are entirely unrelated to pay.

161. Further, the reference to the principle of *pro rata temporis* in Clause 4(2) of the Framework Agreement shows that the scope of the prohibition of discrimination may also extend to payments. In fact, that principle can only be applied to divisible performance, including, in particular, payments such as salaries, wage supplements and certain premiums.

162. Accordingly, both the meaning and purpose of Clause 4 of the Framework Agreement and also the legal context of that provision would suggest that the term 'employment conditions' covers remuneration and pensions.

163. As far as *pensions*, specifically, are concerned, however, one further qualification is required: such financial terms of an employment contract may be regarded as *employment conditions* within the meaning of Clause 4 of the Framework Agreement only if they relate to benefits in the nature of a retirement or occupational pension awarded by the employer, not, however, to benefits under general statutory social security schemes.

164. It is clear from the case-law relating to equal treatment of men and women that only retirement or occupational pensions are covered by the employment relationship and are awarded on the basis of that relationship. [106] That case-law can be applied to the framework agreement on fixed-term work, as the social partners did not intend the Framework Agreement to cover issues relating to statutory social security arrangements. Instead, they recognised that such issues are left to the discretion of the Member States. [107]

106 — Case 80/70 *Defrenne* [1971] ECR 445 ('*Defrenne I*'), paragraphs 7 and 8; Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 22 and 28; *Jonkman* (cited in footnote 49), paragraph 17; and, specifically in relation to civil servants' retirement pensions, Joined Cases C-4/02 and C-5/02 *Schönheit andBecker* [2003] ECR I-12575, paragraphs 56 to 59.

107 — Fifth paragraph in the preamble to the Framework Agreement. The fact that the Framework Agreement makes a distinction between statutory and occupational social security systems is apparent in the fifth and sixth paragraphs of the preamble to the Agreement.

Interpretation in conformity with primary law in the light of Article 137(5) EC

165. It remains to be considered whether higher-ranking law precludes the term 'employment conditions' in Clause 4 of the framework agreement on fixed-term work from covering pay and pensions.

166. The scope of provisions of secondary legislation cannot validly exceed that of their legal basis. [108] To ensure that that is so, secondary law must be interpreted and applied so as to render it consistent with primary law since, on that point, the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty. [109]

167. Accordingly, Clause 4 of the framework agreement on fixed-term work, which uses the undefined term 'employment conditions', should be interpreted having regard to any limitations that may arise as a result of the legal basis of Directive 1999/70.

168. Directive 1999/70 was adopted on the legal basis of Article 139(2) EC, which gives the Council power to implement agreements concluded between management and labour at Community level in the areas covered by Article 137 EC. According to Article 137(1)(b) EC, those include *working conditions*, although Article 137(5) EC goes on to exclude *pay* from the scope of that provision.

169. The meaning of pay as such may, as can be seen from Article 141(2) EC, conceivably be given a broad interpretation and cover, in addition to the ordinary basic or minimum wage or salary, also any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

170. Interpreting that term alone, however, does not provide any insight into what is meant by the fact that, according to Article 137(5) EC, that article 'shall not apply'

108 — Case C-65/04 *Commission* v *United Kingdom* [2006] ECR I-2239, paragraph 27.

109 — Case 218/82 *Commission* v *Council* [1983] ECR 4063, paragraph 15; Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraph 37; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28.

to pay. Therefore, account must be taken also of the positioning of Article 137(5) EC, in addition to the meaning and purpose of that provision.

171. As a derogation, Article 137(5) EC is to be interpreted strictly, as the Court recently held in *Del Cerro Alonso*.[110] The provision cannot, therefore, be interpreted as excluding from the scope of Article 137 EC anything that has any sort of link with pay, as otherwise many of the fields listed in Article 137(1) EC would — in practical terms — be meaningless.[111]

172. Instead, the meaning and purpose of Article 137(5) EC is primarily to protect the social partners' *autonomy in collective bargaining* from being restricted, as evidenced not least by the close association between pay and the other matters excluded from the Community's powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to 'in the same breath' as pay in Article 137(5) EC.

173. In addition, Article 137(5) EC aims to prevent Community-wide standardisation by the Community legislature of the *wage levels* applicable in each of the Member States, since such a levelling out — albeit possibly only partial — of national, regional and occupational differences in wage levels by the Community legislature would represent significant interference in competition between undertakings operating in the internal market. It would also go well beyond the measures intended under Article 137(1) EC to enable the Community to support and complement the activities of the Member States in the field of social policy.

174. Against that background, Article 137(5) EC prevents the Community legislature, for example, from exerting any influence on wage levels in the Member States by fixing a minimum wage. Nor can the Community legislature provide, for example, for annual inflationary compensation, introduce an upper limit for annual pay increases or regulate the amount of pay for overtime or for shiftwork, public holiday overtime or night work.

175. By contrast, Article 137(5) EC does not prevent the Community legislature from adopting *legislation with financial consequences*, such as in relation to working conditions (Article 137(1)(b) EC) or the improvement of the working environment

110 — *Del Cerro Alonso* (cited in footnote 3), paragraph 39; see also, in relation to a restrictive interpretation of derogating provisions in primary law, Case C-349/03 *Commission* v *United Kingdom* [2005] ECR I-7321, paragraph 43.

111 — *Del Cerro Alonso* (cited in footnote 3), paragraph 41.

to protect workers' health and safety (Article 137(1)(a) EC). Thus, the Community may, for example, lay down requirements for national employment law, resulting in a worker's right to be paid for his annual leave. [112]

176. In the same vein, the Court recently also clarified in *Del Cerro Alonso* that it is only the *level of pay* that is removed from the Community legislature's competence by Article 137(5) EC. [113] The Court added that fixing the level of the various constituent parts of a worker's pay continues to be a matter that is entirely for the competent bodies in the Member States concerned. [114]

177. Whether, by contrast, particular workers or groups of workers are entitled to the pay or individual constituent parts of pay fixed within a Member State in the context of the conditions of their employment, is an issue that falls within the scope of Article 137(1)(b) EC and of directives adopted on the basis of that provision. [115]

178. Introducing prohibitions on discrimination, as in Clause 4 of the framework agreement on fixed-term work, [116] does not amount to interference in the fixing of wage levels, nationally or regionally or even within an undertaking. It simply ensures that particular groups of workers are protected from disadvantage with regard to their conditions of work or employment, including financial disadvantage. Such prohibitions of discrimination are an essential component of the measures by which the Community supports and complements the Member States' social policy, which even Article 137(5) EC does not seek to prohibit.

179. At the hearing, the United Kingdom Government contended that fixed-term workers should merely be granted the same remuneration components as comparable

112 — This was the case in Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). That directive laid down a new version of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), the latter having applied until then and already containing an identically worded provision. The fact that Article 118a of the EC Treaty, a precursor to Article 137(1)(a) EC, constituted the appropriate legal basis for Directive 93/104 was confirmed by the Court in Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, in particular paragraphs 45 and 49.

113 — *Del Cerro Alonso* (cited in footnote 3), paragraphs 43 and 44, clarifying the interpretation of the judgment in Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraphs 37 to 39, and of the order in Case C-437/05 *Vorel* [2007] ECR I-331, paragraphs 32, 35 and 36.

114 — *Del Cerro Alonso* (cited in footnote 3), paragraphs 45 and 46.

115 — *Del Cerro Alonso* (cited in footnote 3), paragraph 47.

116 — A further such prohibition of discrimination is to be found, for example, in Clause 4 of the framework agreement on part-time work annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

permanent workers, but not necessarily in the same amount. According to the judgment in *Del Cerro Alonso*, Article 137(5) EC gives the competent national authorities and unions and management the freedom to set each remuneration component at a different level for fixed-term workers and for comparable permanent employees.

180. I do not share that view. While Article 137(5) EC leaves it to the competent national authorities and to unions and management to set the level of individual remuneration components, it cannot serve as a pretext for discriminating between particular groups of workers. Rather, the competent national authorities and unions and management must comply with Community law when exercising the competence reserved to them by Article 137(5) EC, [117] not least with the general legal principles such as the principle of equal treatment and non-discrimination. Consequently, different treatment of fixed-term and of permanent workers so far as concerns the level of the relevant remuneration components can be considered only where it is objectively justified. Clause 4(1) of the Framework Agreement does not, incidentally, provide otherwise, neither does the reference to the *pro rata temporis* principle in Clause 4(2).

181. All in all, Article 137(5) EC does not preclude the term 'employment conditions' in Clause 4 of the framework agreement on fixed-term work from covering remuneration and pensions.

182. To summarise, therefore:

'Employment conditions' within the meaning of Clause 4 of the framework agreement on fixed-term work include conditions of an employment contract that relate to remuneration. The same applies to conditions of an employment contract concerning pensions, provided that the latter are in the nature of a retirement or occupational pension awarded by the employer.

117 — See, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraphs 39 and 40, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 86 and 87, and the case-law cited. Similarly, see Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 63, and Case C-92/02 *Kristiansen* [2003] ECR I-14597, paragraph 31.

VI — Conclusion

183. On the basis of the foregoing considerations I would suggest to the Court that it answer the questions posed by the Labour Court in Dublin as follows:

(1) In accordance with the principles of equivalence and effectiveness, a national court is required to apply directly effective provisions of Community law where, although it has not been given express jurisdiction to do so under domestic law, it does have jurisdiction to apply national transposing legislation enacted subsequently in respect of those provisions, and, in respect of the period before that legislation was enacted, individuals would otherwise be able to rely directly on those provisions only before other domestic courts and only on less favourable terms.

(2) Unlike Clause 5(1) of the framework agreement on fixed-term work annexed to Directive 1999/70/EC, Clause 4(1) of the Framework Agreement does satisfy all the requirements for its direct application.

(3) Article 10 EC and the third paragraph of Article 249 EC, in conjunction with Clause 5(1) of the framework agreement on fixed-term work, do not preclude a Member State, in its capacity as employer, from renewing individual fixed-term employment contracts for relatively extended fixed terms in the period between the deadline for transposing Directive 1999/70 and the date of its actual transposition into domestic law.

(4) 'Employment conditions' within the meaning of Clause 4 of the framework agreement on fixed-term work include conditions of an employment contract that relate to remuneration. The same applies to conditions of an employment contract concerning pensions, provided that the latter are in the nature of a retirement or occupational pension awarded by the employer.