Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

7 March 2018*

(Reference for a preliminary ruling — Social policy — Fixed-term work — Contracts concluded with a public sector employer — Measures to penalise the misuse of fixed-term contracts — Principles of equivalence and effectiveness)

In Case C-494/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Trapani (District Court, Trapani, Italy), made by decision of 5 September 2016, received at the Court on 15 September 2016, in the proceedings

Giuseppa Santoro

v

Comune di Valderice,

Presidenza del Consiglio dei Ministri,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2017,

after considering the observations submitted on behalf of:

– Ms Santoro, by S. Galleano, V. De Michele, M. De Luca and E. De Nisco, avvocati,

– the Comune di Valderice, by G. Messina, avvocatessa,

– the Italian Government, by G. Palmieri, acting as Agent, G. De Bellis, vice avvocato generale dello Stato, and C. Colelli and G. D'Avanzo, avvocati dello Stato,

– the European Commission, by G. Gattinara and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2017,

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

2 The request has been made in proceedings between Ms Giuseppa Santoro and the Comune di Valderice (municipality of Valderice, Italy) concerning the conclusions to be drawn from the succession of fixed-term employment contracts between her and that municipality.

Legal context

EU law

3 According to clause 1 of the Framework Agreement, the purpose of that agreement is, first, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and, second, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

4 Clause 5 of the Framework Agreement, entitled 'Measures to prevent abuse', is worded as follows:

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

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

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

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

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

(a) shall be regarded as "successive";

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

Italian law

5 Article 97 of the Constitution requires public authorities to recruit solely by means of selection procedures.

6 As is apparent from the file before the Court, Article 5(2) of decreto legislativo n. 368 — Attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES (Legislative Decree No 368 transposing Directive 1999/70/EC

concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) of 6 September 2001 (GURI No 235 of 9 October 2001), in the version applicable at the material time, provides:

'If the employment relationship continues beyond the 30th day for contracts for a term of less than six months, and beyond the overall period referred to in paragraph 4bis, or beyond the 50th day in other cases, the contract shall be considered to be of indefinite duration once those terms have elapsed.'

7 Article 5(4bis) of that legislative decree provides:

'Without prejudice to the rules on successive contracts set out in the preceding paragraphs, where, as a result of a succession of fixed-term contracts for the performance of equivalent tasks, an employment relationship between the same employer and the same worker continues for an overall period of more than 36 months, including any extensions and renewals, disregarding any breaks between one contract and another, the employment relationship shall be regarded as being a relationship of indefinite duration within the meaning of paragraph 2 …'

8 Article 36 of decreto legislativo n. 165 — Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche (Legislative Decree No 165 laying down general rules concerning the organisation of employment in public authorities) of 30 March 2001 (Ordinary Supplement to GURI No 106 of 9 May 2001, 'Legislative Decree No 165/2001') is worded as follows:

'1. For requirements connected with their everyday needs, public authorities shall recruit exclusively by means of employment contracts of indefinite duration …

2. To meet exclusively temporary and exceptional requirements, public authorities may make use of the flexible forms of contract for the recruitment and employment of staff provided for in the Civil Code and the laws on employment relationships in undertakings, in accordance with existing recruitment procedures …

…

5. In any event, infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction which those authorities may incur. The worker concerned shall be entitled to compensation for damage suffered as a result of working in breach of mandatory provisions. The authorities must recover any sums paid in that connection from the managers responsible if the infringement is intentional or the result of wilful misconduct or gross negligence. Managers who act in breach of provisions of this Article shall also be responsible within the meaning of Article 21 of this Decree. These infringements will be taken into account in the evaluation of the work of the manager pursuant to Article 5 of Legislative Decree No 286 of 30 July 1999.

…

5 quater. Fixed-term employment contracts established in breach of this Article shall be deemed null and void and shall give rise to the responsibility of the authority. Managers who act in breach of the provisions of this Article shall also be responsible within the meaning of Article 21. No performance bonus may be awarded to managers who have made unlawful use of flexible work.'

9 Article 32(5) of legge n. 183 — Deleghe al Governo in materia di lavori usuranti, di riorganizzazione di enti, di congedi, aspettative e permessi, di ammortizzatori sociali, di servizi per l'impiego, di incentivi all'occupazione, di apprendistato, di occupazione femminile, nonché misure contro il lavoro sommerso e disposizioni in tema di lavoro pubblico e di controversie di lavoro (Law No 183 delegating powers to

the Government regarding heavy and arduous work, reorganisation of entities, leave, availability and authorised absences, social protection measures, employment services, measures on employment incentives, training and the employment of women, measures to combat undeclared work and provisions regarding employment in the public sector and labour disputes) of 4 November 2010 (Ordinary Supplement to GURI No 262 of 9 November 2010, 'Law No 183/2010') provides:

'In cases in which a fixed-term contract is converted, the court shall order the employer to pay to the employee overall compensation of between 2.5 and 12 times his last actual overall monthly salary payment, having regard to the criteria laid down in Article 8 of Law No 604 of 15 July 1966.'

10 As set out in Article 8 of legge n. 604 — Norme sui licenziamenti individuali (Law No 604 on individual dismissals) of 15 July 1966 (GURI No 195 of 6 August 1966):

'Where conditions for dismissal with good cause or justified grounds are shown not to exist, the employer must reinstate the employee within three days or, failing that, compensate the loss by paying compensation in an amount between a minimum of 2.5 and a maximum of 6 times his last actual overall monthly salary payment, having regard to the number of employers, the size of the undertaking, the length of service of the employee, the conduct of the parties and the conditions to which they are subject. The upper level of that compensation bracket may be raised to up to 10 months' pay where the employee's length of service exceeds 10 years, and up to 14 months' pay where the length of service exceeds 20 years and the undertaking employs more than 15 employees.'

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

11 From 1996 to 2002, Ms Santoro worked as a provider of socially useful services for the municipality of Valderice. She was then employed by that municipality under a continuous and coordinated contractual relationship until the end of 2010. On 4 October 2010 she entered into a part-time contract of employment with that municipality, which was due to end on 31 December 2012. The contract was extended three times until 31 December 2016, that is, for a total period of four years.

12 Ms Santoro brought an action before the Tribunale di Trapani (District Court, Trapani, Italy), seeking inter alia a declaration that those fixed-term contracts were unlawful, an order that the municipality of Valderice compensate in kind the loss suffered, by ordering the establishment of an employment relationship of indefinite duration, and, in the alternative, an order that the municipality award her financial compensation for that loss by compensating her and by granting her treatment, in legal terms, identical to that of a worker of that municipality employed for an indefinite period and having the same length of service as her.

13 In accordance with Article 36(5) of Legislative Decree No 165/2001, infringement by the public authorities of the prohibition on repeated conclusion of fixed-term employment contracts cannot lead to conversion of those contracts into a contract of indefinite duration. Consequently, workers such as Ms Santoro would be able to seek only compensation for the loss they have suffered, which, under Article 32(5) of Law No 183/2010, would be limited to payment of overall compensation of between 2.5 and 12 times the worker's last actual overall monthly salary payment. According to the findings of the referring court, such compensation would replace only the income that would have been received 'pending' a successful outcome for the worker.

14 The Tribunale di Genova (District Court, Genoa, Italy) had asked the Court of Justice to rule on the question whether the prohibition on converting successive fixed-term contracts concluded with the public authorities into an employment contract of indefinite duration was compatible with EU law. In the judgment of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517, paragraph 57), the Court replied to that question that such a prohibition is not incompatible with the clauses of the

Framework Agreement, as long as the national legal order of the Member State concerned provides for the application of 'another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public sector employer'.

15 Following that judgment, the Tribunale di Genova (District Court, Genoa) granted the workers affected not only compensation representing a minimum of five monthly salary payments but also 'reinstatement compensation' amounting to 15 times the last actual overall monthly salary payment of those workers. That decision was expressly upheld by the Corte d'appello di Genova (Court of Appeal, Genoa, Italy), which found that it constituted a response to the need to strengthen the protection of public sector workers, in accordance with the judgment of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517).

16 However, in its judgment of 15 March 2016 (No 5072/2016), the Corte suprema di cassazione (Court of Cassation, Italy) held that, in cases of use of fixed-term contracts by a public authority, use which is unlawful due to the prohibition referred to in Article 36(1) of Legislative Decree No 165/2001, apart from the application of redress mechanisms against the managers responsible, it is merely envisaged that a worker who has been harmed is entitled, in addition to the lump sum compensation referred to in the previous paragraph, to compensation for 'loss of opportunity'. The loss of opportunity stems from the fact that fixed-term employment may have made 'the worker lose other stable employment opportunities'. That court considered that the measure adopted by the Tribunale di Genova (District Court, Genoa) was inappropriate on the ground that a person who concludes a contract with a public authority is not liable to lose a job which can be obtained only following success in a recruitment competition.

17 According to the referring court, that aspect is not entirely consistent with the requirements arising from the judgment of the Court of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517), bearing in mind, in particular, the difference in treatment between employed persons who conclude a contract with a public authority and those who conclude an employment contract with an entity governed by private law. The referring court therefore wonders whether the former must benefit from a measure no less favourable than that from which the latter benefit, namely, compensation for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration.

18 In those circumstances, the Tribunale di Trapani (District Court, Trapani) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the granting of compensation of between 2.5 and 12 times the last monthly salary payment (Article 32(5) of Law No 183/2010) to a public sector employee who is a victim of the unlawful successive renewal of fixed-term contracts and who may obtain full compensation only by proving the loss of other employment opportunities or by proving that, if he had participated in an open competition, he would have been successful, an equivalent and effective measure for the purpose of the judgments of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517), and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401)?

(2) Must the principle of equivalence referred to by the Court of Justice (inter alia) in the judgments of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517), and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401), be interpreted as meaning that, when the Member State decides not to apply the conversion of the employment relationship (as awarded in the private sector) to the public sector, it must nevertheless provide the worker with the same benefit, if necessary in the form of compensation which must relate to the value of the employment contract of indefinite duration?'

Consideration of the questions referred

Admissibility

19 The Italian Government expresses doubts as to the admissibility of the questions referred. It argues that the decision of the referring court does not clearly set out the facts in the main proceedings, since it fails to specify either the public sector field in which the applicant worked or the duties assigned to her.

20 In that regard, it must be borne in mind that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted concern the interpretation of EU law, the Court is bound, in principle, to give a ruling (judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraph 24 and the case-law cited).

21 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 30).

22 However, that is not the case here. First, the order for reference sets out the factual and legal context in sufficient detail to enable the scope of the questions referred to be determined. The referring court explains, in that regard, that the applicant in the main proceedings worked for the same employer between 4 October 2010 and 31 December 2016 under successive fixed-term contracts, and it states that the claims made before it are based on the misuse of fixed-term contracts. Second, the request for a preliminary ruling clearly reveals and sets out the reasons that led the referring court to be uncertain as to the interpretation of certain provisions of EU law and to consider it necessary to refer questions to the Court of Justice for a preliminary ruling. That court is uncertain whether the compensation provided for in Article 32(5) of Law No 183/2010 constitutes an appropriate measure for compensating for the loss resulting from the misuse of fixed-term contracts and indicates that the answer to that question is necessary for it to rule on the dispute in the main proceedings.

23 It follows that the questions referred are admissible.

Substance

24 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether clause 5 of the Framework Agreement must be interpreted as precluding national legislation which does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him to obtain full compensation for the harm by proving the loss of opportunities to find employment or by proving that, if a recruitment competition had been duly organised, he would have been successful.

25 It should be recalled that the purpose of clause 5(1) of the Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, which are regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (see, inter alia, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 63; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 25; and of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 54).

26 It follows that clause 5(1) of the Framework Agreement requires Member States, in order to prevent the misuse of successive fixed-term employment contracts or relationships, to adopt one or more of the measures listed in that provision, where their domestic law does not include equivalent legal measures. The measures listed in clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 74 and the case-law cited).

27 The Member States enjoy a certain discretion in this regard since they have the choice of relying on one or more of the measures listed in clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 75 and the case-law cited).

28 In that way, clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the Framework Agreement (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 76 and the case-law cited).

29 Furthermore, where, as in the present instance, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 77 and the case-law cited).

30 While, in the absence of relevant EU rules, the detailed rules for implementing such provisions are a matter for the domestic legal order of the Member States, under the principle of their procedural autonomy, they must not, however, be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 78 and the case-law cited).

31 Therefore, where abuse of successive fixed-term employment contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of EU law (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 79 and the case-law cited).

32 The Court has held that, since clause 5(2) of the Framework Agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used, it gives Member States a margin of discretion in the matter (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 47).

33 It follows that clause 5 of the Framework Agreement does not preclude, as such, a Member State from treating abuse of successive fixed-term employment contracts or relationships differently according to whether those contracts or relationships were entered into with a private sector or public sector employer (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 48).

34 However, in order for national legislation such as that at issue in the main proceedings — which, in the public sector only, prohibits a succession of fixed-term contracts from being converted into an employment contract of indefinite duration — to be regarded as compatible with the Framework Agreement, the domestic law of the Member State concerned must include, in that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 49).

35 According to the order for reference, Article 36(5) of Legislative Decree No 165/2001 provides that the infringement by public authorities of the provisions on the recruitment or employment of workers cannot lead to the creation of an employment relationship of indefinite duration between those authorities and the workers concerned, but that the latter are entitled to compensation for harm suffered. In that regard, Article 32(5) of Law No 183/2010 provides that, in the event of misuse of fixed-term employment contracts, the court is to order the employer to pay the worker concerned overall compensation of between 2.5 and 12 times his last actual overall monthly salary.

36 It is also apparent from the order for reference that, according to the case-law of the Corte suprema di cassazione (Court of Cassation), the worker may also seek compensation for the harm resulting from the loss of employment opportunities.

37 The referring court considers, however, that the compensation provided for in Article 32(5) of Law No 183/2010 does not constitute an adequate measure for compensating for the harm resulting from the misuse of fixed-term contracts and that the required proof of the loss of employment opportunities may be very difficult, if not impossible, to adduce. It is impossible, in its view, to prove the loss of the opportunity to pass an administrative competition. Accordingly, the possibility for the worker concerned to demonstrate the existence of harm resulting from such a loss of opportunity is purely theoretical. Thus, it cannot, according to the referring court, be precluded that the provisions of national law governing the assessment of harm may render it practically impossible or excessively difficult for that worker to exercise the rights conferred on him by EU law, and in particular his right to compensation for the harm that he has suffered as a result of the misuse by his former public employer of successive fixed-term employment contracts.

38 Nevertheless, in accordance with the considerations referred to in paragraph 30 of the present judgment, it must be verified whether the national provisions at issue in the main proceedings comply with the principles of equivalence and effectiveness.

39 As regards, first, the principle of equivalence, it should be recalled that it follows from this principle that persons asserting rights conferred by EU law must not be treated less favourably than those asserting rights of a purely domestic nature.

40 As observed by the Advocate General in points 32 and 33 of his Opinion, like the measures adopted by the national legislature in the context of Directive 1999/70 in order to penalise the misuse of fixed-term contracts by public sector employers, those adopted by the national legislature in order to

penalise the misuse of such contracts by private sector employers implement EU law. It follows that the rules governing the two types of measures cannot be compared in the light of the principle of equivalence, since those measures relate to the exercise of rights conferred by EU law.

41 Consequently, the Court does not have any material which casts doubt on the compatibility of the provisions at issue in the main proceedings with the principle of equivalence.

42 Moreover, as already recalled in paragraph 33 of the present judgment, clause 5 of the Framework Agreement does not, as such, preclude a Member State from treating misuse of successive fixed-term employment contracts or relationships differently according to whether those contracts or relationships were entered into with a private sector or public sector employer.

43 Second, as regards the principle of effectiveness, it is clear from the case-law of the Court that the question as to whether a national procedural provision makes the exercise of rights conferred on individuals by EU law practically impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, viewed as a whole, and to the conduct and special features of that procedure before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgments of 21 February 2008, *Tele2 Telecommunication*, C-426/05, EU:C:2008:103, paragraph 55 and the case-law cited, and of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraph 47).

44 It must therefore be examined whether, in accordance with the judgments of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517), and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401), national law provides for another effective measure to prevent the misuse of successive fixed-term contracts and also duly to punish that misuse and nullify the consequences of the breach of EU law. In that context, it is necessary to take account of all the provisions laid down by the national legislature, including, in accordance with the case-law cited in paragraph 34 of this judgment, penalty mechanisms.

45 It is not for the Court to rule on the interpretation of national law, that being a matter exclusively for the referring court, which must, in the present case, determine whether the requirements set out in the preceding three paragraphs are met by the provisions of the relevant national legislation. However, when giving a preliminary ruling, the Court may, where appropriate, offer clarification intended to provide the national court with guidance in its assessment.

46 Thus, the national court asks whether public sector workers must benefit, in addition to the lump sum compensation provided for in Article 32(5) of Law No 183/2010, from a measure no less favourable than that from which private sector workers benefit, consisting of compensation for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration.

47 However, as has been recalled in paragraph 32 of the present judgment, in a case such as that at issue in the main proceedings, the Member States are not under an obligation, in the light of clause 5 of the Framework Agreement, to provide for the conversion of fixed-term employment contracts into employment contracts of indefinite duration. Nor, therefore, can they be required to grant, failing that, compensation for the lack of such conversion of a contract.

48 The referring court states, furthermore, that compensation for that harm would be purely theoretical, since it would not be possible to determine how the worker concerned may assert a right to compensation for the harm suffered if, inter alia, a recruitment competition had been organised by the authority or if he had received offers of employment of indefinite duration.

49 The Italian Government maintains in that regard that national courts apply particularly favourable criteria, as regards both the establishment and the assessment of the harm resulting from the loss of employment opportunities, by requiring as the only proof, by way of presumption, that of the loss not of an advantage, but of the mere possibility of obtaining the advantage, and by proceeding to assess the harm suffered, even in the absence of specific evidence adduced by the worker concerned.

50 Given the difficulties inherent in demonstrating the existence of a loss of opportunity, it should be noted that a mechanism of presumption designed to guarantee a worker who has suffered a loss of employment opportunities, due to the misuse of successive fixed-term contracts, the possibility of nullifying the consequences of such a breach of EU law is such as to satisfy the requirement of effectiveness.

51 In any event, the fact that the measure adopted by the national legislature in order to penalise the misuse of fixed-term contracts by private sector employers constitutes the most extensive protection that may be granted to a worker cannot, in itself, result in a reduction of the effectiveness of the national measures applicable to workers in the public sector.

52 In that regard, it is apparent from the documents before the Court that the national legislation contains other measures to prevent and penalise the misuse of fixed-term contracts. Thus, Article 36(5) of Legislative Decree No 165/2001 provides that the authorities are required to recover from the managers responsible the sums paid to workers as compensation for the harm suffered as a result of the infringement of the provisions concerning recruitment or employment, where that infringement is intentional or the result of gross negligence. Such an infringement would also be taken into account for the purpose of assessing the work of those managers, who could, due to that breach, not be awarded a performance bonus. In addition, Article 36(6) of that legislative decree provides that public authorities which have acted in breach of the provisions concerning recruitment or employment cannot proceed with recruitments, for any reason whatsoever, during the three years following that breach.

53 It is for the referring court to verify whether those aspects, concerning the penalties that may be imposed on public authorities and their managers in the event of misuse of fixed-term contracts, are effective and dissuasive so as to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.

54 In the light of all the foregoing considerations, the answer to the questions referred is that clause 5 of the Framework Agreement must be interpreted as not precluding national legislation which, on the one hand, does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but, on the other hand, provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him to obtain full compensation for the harm by demonstrating, by way of presumption, the loss of opportunities to find employment or that, if a recruitment competition had been duly organised, he would have been successful, provided that such legislation is accompanied by an effective and dissuasive penalty mechanism, a matter which is for the referring court to verify.

Costs

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

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

Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation which, on the one hand, does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but, on the other hand, provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him to obtain full compensation for the harm by demonstrating, by way of presumption, the loss of opportunities to find employment or that, if a recruitment competition had been duly organised, he would have been successful, provided that such legislation is accompanied by an effective and dissuasive penalty mechanism, a matter which is for the referring court to verify.

[Signatures]