Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 27 June 2019[1]

**Case C-274/18**

**Minoo Schuch-Ghannadan**
**v**
**Medizinische Universität Wien**

(Request for a preliminary ruling from the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria))

(Reference for a preliminary ruling – Social policy – Equal treatment of men and women in matters of employment and occupation – Restriction of the overall maximum duration of successive fixed-term contracts of employment – Indirect discrimination on grounds of sex – Burden of proof)

1. In the request for a preliminary ruling which forms the subject matter of this Opinion, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) referred three questions to the Court concerning, firstly, the interpretation of clause 4 of the Framework Agreement on part-time work, concluded on 6 June 1997 ('the Framework Agreement on part-time work');[2] secondly, the interpretation of Article 2(1)(b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[3] and, thirdly, the interpretation of Article 19(1) of that same directive.

## I. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

2. The reference for a preliminary ruling of the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria)was made in the context of an action brought by Ms Minoo Schuch-Ghannadan against the Medizinische Universität Wien (Medical University of Vienna, Austria; 'the MUW') concerning the termination of her employment relationship with that institution. In support of her action, Ms Schuch-Ghannadan has claimed, inter alia, that the scheme established pursuant to paragraph 109(2) of the 2002 Universitätsgesetz (2002 Austrian Law on Universities; 'the UG'), which applies to the MUW,[4] and which governed her employment relationship with that university, is incompatible with EU law because it introduces, first, discrimination between part-time workers and full-time workers and, second, for that reason, indirect discrimination against women. Under that provision, employment relationships may be concluded for a fixed term or an indefinite duration, fixed-term employment relationships having to be limited to a maximum of six years, save

1 Original language: French.

2 This agreement is 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).

3 OJ 2006 L 204, p. 23.

4 It is apparent from the order for reference that paragraph 109 of the UG applies to the majority of Austrian universities, including the defendant in the main proceedings.

where the UG provides otherwise. Subparagraph 2 of that paragraph states that 'successive immediately consecutive fixed-term [relationships] shall be permissible only in the case of employees working within the framework of externally funded projects or research projects and staff assigned exclusively to teaching positions as well as substitute staff. The total duration of an employee's consecutive employment relationships may not exceed six years, or eight years in the case of a part-time job. A further one-off extension up to a maximum of ten years, or of twelve years in total in the case of a part-time job, shall be permissible with objective justification, in particular for the continuation or completion of research projects and publications'.

3. It is apparent from the order for reference that Ms Schuch-Ghannadan was employed by the MUW as a scientist [5] for a period from 9 September 2002 to 30 April 2014 (with an interruption from 1 September 2005 to 30 September 2006) under successive fixed-term contracts pursuant to paragraph 109(2) of the UG, partly on a full-time basis and partly on a part-time basis. Before the referring court, Ms Schuch-Ghannadan is seeking a finding that her employment relationship with the MUW should continue, alleging both infringement of paragraph 109(2) of the UG, in so far as that provision does not lay down conditions on the basis of which her contract may be extended beyond the eight-year limit, and, as I have already noted, the incompatibility of that provision with EU law.

4. By a judgment of 2 June 2016, the referring court dismissed Ms Schuch-Ghannadan's application, finding, first, that paragraph 109(2) of the UG had not been infringed and, second, that the incompatibility of that provision with EU law alleged by the applicant in the main proceedings was irrelevant since the wording of that provision left no room for an interpretation consistent with Directive 2006/54. The Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), before which Ms Schuch-Ghannadan had brought the matter, set aside the abovementioned judgment of 2 June 2016 in part on the ground that Ms Schuch-Ghannadan's arguments alleging that paragraph 109(2) of the UG is incompatible with EU law had not been examined, and remitted the case to the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna).

5. Before that court, the MUW argued that the applicant in the main proceedings had merely made the unsubstantiated allegation that there was discrimination between part-time and full-time fixed-term employees, without specifying the nature of that discrimination. It contends that the difference in duration of a fixed-term employment relationship between those two categories of employees does not penalise part-time employees, since they are able to remain employed for a longer period of time, permanent positions at universities being rare. As for the claim of indirect discrimination against women, the MUW states that it was for the applicant in the main proceedings to prove, supported by statistical data, that a greater number of women are affected by the difference in treatment between part-time and full-time fixed-term employees provided for in paragraph 109(2) of the UG. Such discrimination cannot be substantiated on the basis of data relating to fixed-term employees covered by that provision and employed by the MUW.

6. It is in that context that, by decision of 19 April 2018, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) ordered that the proceedings pending before it be stayed and referred the following questions for a preliminary ruling:

'(1) Is the principle of *pro rata temporis* under point 2 of clause 4 of the [Framework Agreement on part-time work], in conjunction with the principle of non-discrimination under point 1 of clause 4, to be applied to legislation under which the total duration of immediately consecutive employment contracts of an employee of an Austrian university working within the framework of externally funded projects or research projects is 6 years for full-time employees, but 8 years for

5 I note that, at the hearing, Ms Schuch-Ghannadan's representative submitted – a submission disputed by the MUW – that, within the framework of the projects to which she was assigned during her employment relationship with the MUW, his client in fact had merely performed the duties of an assistant.

part-time employees, and moreover, if there is objective justification, in particular for the continuation or completion of research projects or publications, a further one-off extension up to a total of 10 years for full-time employees and of 12 years for part-time employees is permissible?

(2) Does legislation such as that described in Question 1 constitute indirect discrimination based on sex within the meaning of Article 2(1)(b) of [Directive 2006/54] in the case where, within the group of workers subject to that legislation, a significantly higher percentage of women is affected as compared with the percentage of men so affected?

(3) Is Article 19(1) of [Directive 2006/54] to be interpreted as meaning that a woman who, in the area of application of legislation such as that set out in Question 1, claims to have suffered indirect discrimination based on sex on the ground that significantly more women than men are employed on a part-time basis, must assert this fact, in particular that women are statistically much more significantly affected, by submitting specific statistics or specific facts and must substantiate this by means of appropriate evidence?'

7. In the case forming the subject matter of this Opinion, written observations have been submitted by the parties to the main proceedings, by the Austrian and Portuguese Governments and by the European Commission. At the hearing held before the Court on 7 March 2019, oral argument was presented by Ms Schuch-Ghannadan, the MUW, the Austrian Government and the Commission.

## II. Analysis

### *A. Preliminary remarks*

8. In the grounds of its order for reference, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) also took into account, as a measure of the legality of paragraph 109(2) of the UG, the Framework Agreement on part-time work and Directive 2006/54, the Framework Agreement on fixed-term work, concluded on 18 March 1999 ('the Framework Agreement on fixed-term work') [6] and, in particular, clause 5 of that agreement, which, in point 1 thereof, requires Member States to adopt measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. According to the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna), paragraph 109(2) of the UG constitutes a 'sufficient and permissible' implementation of point 1 of that clause. Accordingly, none of the questions referred for a preliminary ruling by that court concerns the interpretation of that clause.

9. In its written observations, the Commission disagrees with the referring court's assessment and asks the Court, in essence, to answer, first of all, the question whether paragraph 109(2) of the UG constitutes a sufficient transposition of point 1 of clause 5 of the Framework Agreement on fixed-term work. In the Commission's view, an answer in the negative to that question, as it advocates, would render the answers to the questions submitted by the referring court superfluous.

10. Before addressing the substance of the preliminary question raised by the Commission, consideration must be given to whether the approach which that institution suggests taking, entailing, in essence, a further question for a preliminary ruling being raised by the Court of its own motion in addition to those submitted by the referring court, is compatible with the case-law of the Court concerning the interpretation of Article 267 TFEU.

6 This agreement is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

*1. Admissibility of an additional question for a preliminary ruling raised by the Court of its own motion in the circumstances of the present case*

11. According to settled case-law, the right to determine the questions to be put to the Court devolves solely upon the national court[7] before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision.[8] Accordingly, the parties to the main proceedings may not change the tenor of the questions submitted to the Court,[9] or have them declared to be without purpose. Nor can the Court be compelled, at the initiative of a party, to entertain a supplementary question.[10] The Court justifies this case-law in the light, first, of the nature of the reference for a preliminary ruling, which is intended to establish 'direct cooperation between [it] and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure',[11] and, second, of its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind the fact that, under that provision, only the decision of the referring court would be notified to the interested parties.[12] Altering the substance of the questions referred for a preliminary ruling or answering the additional questions mentioned by one of the parties to the main proceedings would be incompatible with such a duty.[13]

12. If, pursuant to the abovementioned case-law, the Court refuses, in principle, to answer additional questions mentioned by the parties to the main proceedings or interested parties, there is, however, a line of case-law which endorses an opposing solution that gives preference, despite the national court's delimitation of the reference for a preliminary ruling, to the requirement to provide an answer which is of use to settle the dispute in the main proceedings.[14] With that in mind, the Court has, on several occasions, been called on to consider rules of EU law to which the national court had not made reference in the formulation of its question,[15] in the light inter alia of the facts and the arguments submitted during the procedure,[16] or to reformulate the questions asked so as to include in the interpretation of EU law one or more provisions cited by one of the parties, or even on its own

7 See, inter alia, judgments of 9 December 1965, *Singer* (44/65, EU:C:1965:122, p. 965); of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 21); and of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863, paragraph 32).

8 See, inter alia, judgment of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863, paragraph 32).

9 See, inter alia, judgments of 9 December 1965, *Singer* (44/65, EU:C:1965:122, p. 965); of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 21); and of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863, paragraph 32).

10 See judgment of 9 December 1965, *Singer* (44/65, EU:C:1965:122, p. 965).

11 Judgment of 9 December 1965, *Singer* (44/65, EU:C:1965:122, p. 965).

12 See judgments of 20 March 1997, *Phytheron International* (C-352/95, EU:C:1997:170, paragraph 14); of 17 September 1998, *Kainuun Liikenne and Pohjolan Liikenne* (C-412/96, EU:C:1998:415, paragraph 24); and of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863, paragraph 33).

13 See, inter alia, judgments of 17 September 1998, *Kainuun Liikenne and Pohjolan Liikenne* (C-412/96, EU:C:1998:415, paragraph 24), and of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863, paragraph 33).

14 For a summary of the decisions forming part of this line of case-law, see the Opinion of Advocate General Mengozzi in *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, point 17). For more recent decisions, see judgments of 28 April 2016, *Oniors Bio* (C-233/15, EU:C:2016:305, paragraph 30), and of 1 February 2017, *Município de Palmela* (C-144/16, EU:C:2017:76, paragraph 20). As Advocate General Mengozzi observed in his Opinion, cited above, there is some tension between that line of case-law and the case-law set out in point 11 of the present Opinion, which make it necessary to identify criteria enabling all the related decisions to be read in a coherent fashion.

15 See, inter alia, judgment of 1 February 2017, *Município de Palmela* (C-144/16, EU:C:2017:76), and order of 14 July 2016, *BASF* (C-456/15, not published, EU:C:2016:567, paragraph 15 and the case-law cited).

16 See, inter alia, judgments of 12 December 1990, *Hennen Olie* (302/88, EU:C:1990:455, paragraph 20), in which the Court nevertheless took the view, in the light of the facts and the arguments submitted by the parties during the procedure, that it was 'not necessary' to examine the point of principle raised by the Commission, and of 17 October 2013, *Welte* (C-181/12, EU:C:2013:662, paragraphs 16 and 27, in which the Court dealt with the issue of whether the restriction on the free movement of capital within the meaning of Article 56(1) EC at issue in the dispute in the main proceedings could be allowed under Article 57(1) EC). See also judgment of 3 June 2010, *Internetportal und Marketing* (C-569/08, EU:C:2010:311, paragraphs 27 to 30). In paragraph 28 of that judgment, the Court clarified that, 'although the national court has not asked a question on this point, within the context of the procedure laid down by Article 267 TFEU providing for cooperation between national courts and [it], and to the extent to which the argument of the appellant in the main proceedings affects the resolution of the dispute in those proceedings, it is for [it] to provide the national court with an answer which will be of use to it and enable it to determine the case before it'.

initiative.[17] It has, moreover, found that it was for it to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute,[18] even where the answer to the additional question thus raised risked making the questions referred for a preliminary ruling by the national court redundant[19] or where that question has been implicitly or explicitly settled at a stage prior to the dispute between the parties to the main proceedings.[20]

13. It is therefore necessary to establish whether the case forming the subject matter of this Opinion justifies the Court adopting a solution consistent with that same line of case-law.

14. In that regard, I note, first of all, that it is apparent from the request for a preliminary ruling, and was confirmed during the hearing by the representative of the applicant in the main proceedings, that the applicant did not contest, before the referring court, the legality of paragraph 109(2) of the UG from the perspective of its compatibility with clause 5 of the Framework Agreement on fixed-term work. That question has, however, been addressed and decided by the referring court, such that it cannot be ruled out a priori that it forms part of the subject matter of the dispute in the main proceedings.

15. Next, I recall that paragraph 109 of the UG is intended to transpose that clause 5 within the university research and education sector. There is, therefore, a direct functional link between that article and the provision of EU law which the Court would be prompted to interpret of its own motion.

16. Furthermore, it appears to me incontrovertible that an answer to the question whether clause 5 of the Framework Agreement on fixed-term work precludes legislation such as paragraph 109 of the UG would be of use in settling the dispute pending before the referring court. That dispute is concerned with the legality of successive fixed-term employment contracts concluded between the applicant in the main proceedings and the MUW as well as the consequences of any finding of illegality for the continuation of the employment relationship between the parties to the main proceedings.

17. Lastly, I note that the interested parties which had lodged written observations before the Court expressed their views on that matter orally at the hearing. The interested parties which did not participate in the written procedure, for their part, were notified by the Registry (in the language of the case and in French) of the Commission's observations and were thus informed of the extension of the subject matter of the discussion before the Court proposed by the latter. They were therefore allowed to participate in the hearing before the Court so as to set out their observations in this regard.

17 See, for example, judgments of 12 December 1990, *SARPP* (C-241/89, EU:C:1990:459, paragraph 8); of 2 February 1994, *Verband Sozialer Wettbewerb 'Clinique'* (C-315/92, EU:C:1994:34, paragraph 7); of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 16); of 29 April 2004, *Weigel* (C-387/01, EU:C:2004:256, paragraph 44: the question relating to the application of Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (OJ 1983 L 105, p. 64) had been submitted only by the applicants to the main proceedings and the Commission); of 21 February 2006, *Ritter-Coulais* (C-152/03, EU:C:2006:123, paragraph 29: questions referred for a preliminary ruling concerning freedom of establishment and the free movement of capital and the raising by the Court of its own motion, at the behest of the Commission, of a question concerning the free movement of workers); of 25 January 2007, *Dyson* (C-321/03, EU:C:2007:51, paragraphs 24 to 26); of 30 May 2013, *Worten* (C-342/12, EU:C:2013:355, paragraphs 30 and 31); and of 12 December 2013, *Hay* (C-267/12, ECLI:EU:C:2013:823, paragraph 23: the referring court assumes this to be a case of indirect discrimination on the ground of sexual orientation whereas the Court determines whether it is a case of direct discrimination). For a reminder of the case-law, see Opinion of Advocate General Mengozzi in *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, paragraph 17).

18 See judgments of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3, paragraph 32 and the case-law cited), and of 14 October 2010, *Fuß* (C-243/09, EU:C:2010:609, paragraph 40).

19 See judgment of 29 April 2004, *Weigel* (C-387/01, EU:C:2004:256, paragraphs 43 and 44).

20 See judgment of 25 January 2007, *Dyson* (C-321/03, EU:C:2007:51, paragraphs 21 to 26).

18. In those circumstances and in the light of the case-law mentioned in point 12 of this Opinion, I suggest that the Court answer the additional question on the interpretation of clause 5 of the Framework Agreement on fixed-term work raised by the Commission.

*2. Interpretation of clause 5 of the Framework Agreement on fixed-term work*

19. Clause 5 of the Framework Agreement on fixed-term work, entitled 'Measures to prevent abuse', provides, in point 1 thereof, that, '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 measures 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'. [21]

20. The purpose of that clause is to implement one of the objectives of the framework agreement in which it is inserted, namely to place limits on successive recourse to fixed-term employment contracts or relationships, 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. [22]

21. The benefit of stable employment is indeed viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts can respond to the needs of both employers and workers. [23]

22. Accordingly, point 1 of clause 5 of the Framework Agreement on fixed-term work requires, with a view to preventing abuse of successive fixed-term employment contracts or relationships, the effective and binding adoption by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures. The measures listed in (a) to (c) of point 1 of that clause, of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of those successive fixed-term employment contracts or relationships and the number of renewals of such contracts or relationships. [24]

23. The Court has clarified that the Member States enjoy a certain discretion in that regard since they have the choice of relying on one or more of the measures listed in (a) to (c) of point 1 of that same clause, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers. [25]

24. It is necessary in that context to establish whether the provisions of paragraph 109(2) of the UG, which permits the renewal of fixed-term employment relationships in the fields of university research and teaching in Austria, [26] satisfy the criterion required to constitute measures to prevent abuse as laid down in point 1 of clause 5 of the Framework Agreement on fixed-term work.

21 In accordance with point 2 of that clause, it is a matter for the competence of the Member States to determine under what conditions fixed-term employment contracts or relationships are to be regarded as 'successive' and deemed to be 'contracts or relationships of indefinite duration'.

22 See, inter alia, judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 26 and the case-law cited).

23 As is apparent from points 6 and 8 of the general considerations of the Framework Agreement on fixed-time work.

24 See, inter alia, judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 28 and the case-law cited).

25 See, inter alia, judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 29 and the case-law cited).

26 With regard to the applicability of the Framework Agreement on fixed-term work to the university teaching and research sectors, see judgment of 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146, paragraphs 38 and 39).

25. With regard, in the first place, to whether paragraph 109(2) of the UG can be regarded as a measure within the meaning of clause 5(1)(a) of the Framework Agreement on fixed-term work, I recall that, in accordance with settled case-law, the concept of an 'objective reason' contained in the latter provision must be understood as referring to *precise* and *concrete* circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social policy objective of a Member State.[27] In the Court's view, a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner, without allowing objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a general need, is capable of achieving the objective pursued and is necessary for that purpose, would not accord with those requirements.[28]

26. Paragraph 109(2) of the UG identifies three categories of workers with whom immediately consecutive fixed-term employment relationships are permitted, namely employees working within the framework of 'externally funded projects or research projects', 'staff assigned exclusively to teaching positions' and 'substitute staff'. Since the applicant falls within the first of those categories, I will confine my analysis to that category.

27. In that regard, I note, first of all, that paragraph 109(2) of the UG does not state the *objective reasons* justifying recourse to immediately consecutive fixed-term employment relationships for that category of workers.

28. Admittedly, the view could be taken that, since they are linked to the delivery of 'projects', the jobs in question are *by nature* temporary and that they are intended to meet the temporary needs of the university concerned, which continue only until the completion of the project. Similarly, as the MUW and the Austrian Government argue, the fact that a project is externally funded, such that maintaining jobs is dependent on continued funding, would appear to justify recourse to greater flexibility in the management of workers assigned to such projects.

29. However, firstly, I note that the justification based on the non-permanent nature of the funding of the jobs can be relied on only in respect of employees working within the framework of externally funded projects, whereas, in the light of its wording, paragraph 109(2) of the UG appears to be capable of applying regardless of the source of the funding of the research activity;[29] this is, however, for the referring court to confirm.[30]

30. Secondly, I observe that paragraph 109(2) of the UG does not make recourse to successive fixed-term employment relationships with the same person conditional upon that person's assignment to a particular research project, or to the performance of specific tasks or services connected with such a project; nor does it require that the overall duration of those relationships be aligned with the lifetime of the project to which that person is assigned. That provision therefore leaves universities free, in principle, to employ the same worker consecutively within the framework of several projects

27 See, inter alia, judgments of 26 February 2015, *Commission* v *Luxembourg* (C-238/14, EU:C:2015:128, paragraph 44 and the case-law cited), and of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraph 38).

28 See, inter alia, judgment of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraphs 39 and 40 and the case-law cited).

29 In the text of that provision, reference is made both to 'externally funded projects' ('*Drittmittelprojekten*') and, quite simply, to 'research projects' ('*Forschungsprojekten*'). At the hearing before the Court, the MUW clarified that most research activity conducted by Austrian universities is funded by the universities (approximately 75 % in the case of the MUW).

30 In this regard, I note that, at the hearing before the Court, the MUW's lawyer and the agent of the Austrian Government suggested that paragraph 109(2) of the UG applies only to employees working within the framework of externally funded research projects. As far as the applicant in the main proceedings is concerned, it would appear that she was employed solely within the framework of externally funded projects, which it is likewise for the referring court to establish.

for a period of up to twelve years.[31] In such a scenario, recourse to fixed-term employment contracts is rather aimed at meeting the fixed and permanent needs of universities in one of the key sectors of their activity, namely research,[32] whether externally funded or not.[33] In this regard, I note that, at the hearing before the Court, the MUW's lawyer clarified that paragraph 109(2) of the UG covers around 30 % of its staff.[34] In addition, on several occasions during the proceedings, both the MUW and the Austrian Government have made the point that permanent jobs are rare in universities in the case of scientific staff. Those factors confirm, as the Commission correctly argues, that recourse to fixed-term employment relationships in the research and teaching sector is common practice within the MUW and concerns a significant proportion of its staff.

31. Next, I note that paragraph 109(2) of the UG provides no clarification as to the *conditions* under which recourse to immediately consecutive fixed-term employment relationships is permitted in relation to the category of employees working within the framework of externally funded projects or research projects. That category is conceived in general terms. No specific qualification or experience is required in connection with the research projects on which those employees work, with the result that that category includes, potentially, both scientific staff, researchers and professors, and technical and administrative staff, that is to say, all the staff employed within the research sector. Furthermore, since no condition to that effect is laid down in its wording, paragraph 109(2) of the UG cannot, contrary to claim made by the MUW's lawyer at the hearing before the Court, be regarded as covering only scientific staff undergoing training.[35]

32. Moreover, the last sentence of paragraph 109(2) of the UG provides that, for the three categories of workers covered by that subparagraph, a 'one-off extension' of the employment relationship beyond the six or eight years specified earlier in the same subparagraph and for a further fixed maximum duration of four years 'shall be permissible with objective justification, in particular for the continuation or completion of research projects and publications'.

33. However, I note, first, that, despite such an extension being characterised as a 'one-off', it is clear from the case of the applicant in the main proceedings – with whom the MUW concluded nine consecutive contracts in the period relevant for the purposes of the present case and three consecutive contracts over an earlier period[36] – that paragraph 109(2) of the UG permits, at least according to the MUW's reading of that provision, the conclusion of an indefinite number of consecutive contracts over the period of six to eight years preceding the extension provided for in the last sentence of that same provision. Second, I observe that it follows from a reading *a contrario* of the last sentence of paragraph 109(2) of the UG, according to which only the last extension is subject to the condition that there be an objective justification, that the renewals made during the abovementioned period of six to eight years are not subject to the same condition.

31 In note that, in the course of the hearing before the Court, the representative of the applicant in the main proceedings put forward a similar argument, stating that the applicant in the main proceedings was a laboratory assistant and that, as part of her activities, she assisted several PhD students, each of whom had their own projects. Furthermore, as early as the start of the proceedings before the Austrian courts, the applicant in the main proceedings claimed that the recourse to fixed-term contracts was not justified in her case because she was not carrying out work within the framework of projects as such.

32 I would observe, however, that this does not appear to be the case as far as the applicant in the main proceedings is concerned, who, according to the order for reference, was employed throughout the period at issue within the framework of the same project.

33 See, inter alia, judgments of 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146, paragraph 55), and of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679, paragraphs 49 to 51).

34 The MUW's lawyer refers only to fixed-term employees working within the framework of externally funded projects.

35 The fact, assuming it were established, that, as a matter of Austrian universities' general practice, or the MUW's general practice, paragraph 109(2) of the UG is applied solely in respect of young researchers who are required to acquire experience in order to be able to progress in their university career does not call into question the finding that, as it is worded, that provision potentially has a much broader scope.

36 There was a period of around one year between the first and the second series of contracts which, it appears, prevents the applicant's employment relationship with the MUW as a whole being regarded as successive immediately consecutive fixed-term contracts. However, it is for the referring court to rule on this point.

34. On the basis of the foregoing considerations, I am of the view that paragraph 109(2) of the UG does not satisfy the conditions required by the case-law mentioned in point 25 of this Opinion to constitute a measure within the meaning of clause 5(1)(a) of the Framework Agreement on fixed-term work, since that provision does not lay down the precise and concrete circumstances in which fixed-term employment contracts may be concluded and renewed with employees working in the university research sector. [37]

35. It is appropriate, in the second place, to establish whether paragraph 109(2) of the UG satisfies the conditions to constitute a measure within the meaning of clause 5(1)(b) of the Framework Agreement, in that it sets the maximum total duration of the fixed-term employment relationships at issue at ten years for full-time workers and at twelve years for part-time workers.

36. There can be no doubt that those periods of time are, in absolute terms, very long. As the Commission has pointed out in its written observations, the Court has found significantly shorter maximum durations to be excessive. [38] However, I am of the view that it is not (or, at least, not only) the length of the total duration envisaged as such that matters in assessing whether a national provision satisfies the objective pursued by a measure within the meaning of clause 5(1)(b) of the Framework Agreement on fixed-term work. That duration must be assessed taking into account the nature of the jobs in question, as well as the entirety of the circumstances characterising the employment relationships at issue. With regard to the maximum durations provided for in paragraph 109(2) of the UG, those cannot, in my view, be regarded as enabling, on their own, abuse of fixed-term relationships in the sector at issue to be avoided.

37. First, I note that such periods of time may account for up to a third of the career of a person employed within a university's scientific staff. [39] Periods of such length, in absolute and relative terms, suggest that the work required of the employees concerned does not constitute a mere temporary need but is intended, on the contrary, to cover a fixed and permanent need of the employer. [40] Second, I would point out that the length of the durations in question, coupled with the absence of limits on the number of consecutive renewals allowed for the first six to eight years of the employment relationship, amplifies the precarious position of those employees. Similarly, the lack of any requirement of objective justification for those successive renewals makes such lengthy durations even less suited to forming, on their own, a safeguard against abuse.

38. It is therefore my view that paragraph 109(2) of the UG does not satisfy the requirements of clause 5(1)(b) of the Framework Agreement on fixed-term work.

39. Lastly, it is apparent from the wording of paragraph 109(2) of the UG that, with the exception of the final four-year period, no restriction on the number of renewals allowed has been established. That provision is therefore not intended to transpose point 1(c) of the abovementioned clause.

40. On the basis of all the foregoing considerations, it must in my view be concluded that the provisions of paragraph 109(2) of the UG do not satisfy the criterion required to constitute measures as set out in clause 5(1)(a) to (c) of the Framework Agreement on fixed-term work. Furthermore, the referring court has not identified equivalent legal measures within the meaning of that clause which

37 The Court came to the opposite conclusion in the judgment of 13 March 2014, *Márquez Samohano* (C-190/13, EU:C:2014:146), concerning the recruitment of associate professors by Spanish universities, in a context in which the relevant provisions of national law were, compared to the present case, far more precise and detailed, and the consequences of their application on the instability of the employment relationship of the persons concerned less serious. In that judgment, the Court found that the recourse to successive employment contracts was justified by the need to entrust 'specialists with recognised competence' who exercise a professional activity otherwise than in a university with the performance, on a part-time basis, of specific teaching tasks (paragraph 48). It also pointed out that the conditions to which such recourse was subject did not expose the lecturers concerned to an insecure situation (paragraph 52).

38 See, inter alia, order of 21 September 2016, *Popescu* (C-614/15, EU:C:2016:726, paragraph 61).

39 Assuming a career beginning at the age of 25 and ending at the age of 65.

40 See, inter alia, judgment of 26 January 2012, *Kücük* (C-586/10, EU:C:2012:39, paragraph 39 and the case-law cited), and order of 21 September 2016, *Popescu* (C-614/15, EU:C:2016:726, paragraph 65 and the case-law cited).

would apply to the situation of the applicant in the main proceedings. It must therefore be concluded that the recourse to successive fixed-term employment relationships in the university research sector, which is permitted under Austrian law by paragraph 109(2) of the UG, is not accompanied by measures to prevent the abuse of such recourse.

### *B. The first question referred for a preliminary ruling*

41. By its first question, the referring court asks the Court, in essence, first, whether point 1 of clause 4 of the Framework Agreement on part-time work precludes legislation such as that at issue in the main proceedings and, second, whether the principle of *pro rata temporis* under point 2 of the same clause applies in a situation such as that of the applicant in the main proceedings.

42. As is apparent from its preamble, and from recital 11 of Directive 97/81, the Framework Agreement on part-time work seeks to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike. Clause 4 of that agreement, which is entitled 'Principle of non-discrimination, provides, in point 1 thereof, that, 'in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds'. Point 2 of that clause states that, 'where appropriate, the principle of *pro rata temporis* shall apply'.

43. It is appropriate, in the first place, to determine whether the provisions governing the duration of employment contracts concluded within the framework of paragraph 109(2) of the UG constitute 'employment conditions' within the meaning of the abovementioned clause 4.

44. There is no doubt, in my view, that this is the case. In the light of the objectives it pursues, clause 4 of the Framework Agreement on part-time work must be interpreted as articulating a principle of European Union social law which cannot be interpreted restrictively.[41] To interpret that clause as excluding from the term 'employment conditions' conditions in which fixed-term contracts may be concluded and renewed would effectively reduce – contrary to the objective attributed to that clause – the scope of the protection against discrimination for the workers concerned by introducing a distinction based on the nature of their employment relationships, which is not in any way implicit in the wording of that clause.[42]

45. In the second place, it is necessary to establish whether paragraph 109(2) of the UG affords less favourable treatment to part-time workers as compared with comparable full-time workers. The applicant in the main proceedings and the Commission consider that to be the case, whereas the MUW and the Austrian Government take the opposing view.

46. In this regard, I would point out, first of all, that the group of comparable full-time workers, in comparison with whom the assessment of whether paragraph 109(2) of the UG gives rise to discrimination against part-time workers should be made, consists of full-time workers hired by the MUW on a fixed-term basis within the framework of externally funded projects or research projects.[43]

41 See judgment of 10 June 2010, *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329, paragraph 32).

42 See, by analogy, judgment of 10 June 2010, *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329, paragraph 33). See, also, by analogy, in relation to clause 4 of the Framework Agreement on fixed-term work, judgment of 12 December 2013, *Carratù* (C-361/12, EU:C:2013:830, paragraphs 33 to 35).

43 I refer in this regard to the concept of a 'comparable full-time worker' contained in the first paragraph of point 2 of clause 3 of the Framework Agreement on part-time work.

47. Next, I observe that both the MUW and the Austrian Government argue that the ability of part-time workers to work longer than their full-time colleagues, even if under a fixed-term employment relationship, cannot be regarded as a disadvantage but rather as an advantage (or as compensation for a disadvantage), given that, after that employment relationship has ended, there is no guarantee of being able to find a permanent job, in view inter alia of the shortage of such jobs at universities.

48. I confess that I find that argument unconvincing. It is true that it cannot be ruled out that, where, by their very nature, particular work, a particular service or a particular task can give rise only to a fixed-term employment relationship, taking into account – by setting the maximum duration of that relationship – the fact that a part-time worker has, for the performance of such work, such a service or such a task, fewer working hours as compared with a full-time worker does meet the need to ensure that those two categories of workers are treated equally.

49. However, first, I note that the duties in question in the dispute in the main proceedings can be performed just as well under a fixed-term employment relationship as under an employment relationship of indefinite duration. Second, it is apparent from the considerations set out inter alia in point 30 of this Opinion that recourse to paragraph 109(2) of the UG allows universities to cover staffing needs which are in reality fixed and permanent by using fixed-term employment relationships. In such circumstances, however, the fact that a part-time worker can extend her fixed-term employment relationship with the university for a longer period of time than her full-time colleagues cannot be regarded as an advantage. To subscribe to such an argument would be tantamount to regarding as being given preferential treatment a category of workers who, in reality, are more likely to be affected by an abuse of fixed-term employment relationships and, ultimately, to justifying such abuse by relying on the rarity of comparable permanent jobs, a rarity which, in turn, also depends on the universities' employment policy, tending to make intensive use of the possibilities afforded by paragraph 109(2) of the UG. I moreover note that, while it is true that once the maximum durations set by that provision have expired the employment relationship with the university is interrupted, the fact remains that, if the university has an interest in continuing that relationship, it will be required to do so under a permanent employment contract.[44] Finally, the Austrian Government's argument that paragraph 109(2) of the UG offers the parties to the employment relationship only one opportunity, which they are not obliged to use, cannot be accepted, either, given the imbalance which inevitably exists between the parties, especially in a situation in which the opportunities available to a worker of continuing her employment relationship with the employer university other than by means of a fixed-term contract are only very limited.

50. In any event, even if the view were to be taken – a view to which I do not subscribe – that the possibility for part-time workers to extend their employment relationship with the university for a longer period of time than their full-time colleagues constitutes an advantage, I note, as the Commission does in its written observations, that the last sentence of paragraph 109(2) provides for an extension for full-time workers corresponding to approximately 66% of the maximum duration of six years provided for in that same subparagraph, whereas for part-time workers that percentage is only 50%. In relative terms, such an 'advantage' is therefore greater for the first category of workers than for the second, involving differential treatment to the detriment of the latter.

51. In the third place, it is necessary to verify whether the difference in treatment between part-time and full-time workers provided for in paragraph 109(2) of the UG is justified on objective grounds. The Austrian Government and the MUW claim that the different maximum durations of fixed-term employment contracts permitted for full-time jobs and part-time jobs reflect the actual differences between such jobs in the field of university research. According to those interested parties, services and qualifications in that field are evaluated primarily on the basis the publication of research results.

44 Potentially within the framework of projects funded by the university if – as the MUW's lawyer stated at the hearing in response to a question put by the Court – permanent positions are not available in the case of externally funded projects.

If the same maximum durations were applied, part-time workers would have fewer opportunities to establish themselves in the highly competitive field of university research compared to their full-time colleagues. It is therefore with a view to ensuring that part-time workers are not disadvantaged in competition within the university sector as compared with full-time staff that those workers should be able to be entitled to a longer contract.

52. In this regard, I recall that, in the judgment of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50, paragraph 14), in relation to discrimination on grounds of sex, the Court found that it is impossible to identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to her, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.[45]

53. It is for the national court, which alone has jurisdiction to assess the facts and to interpret national legislation, to determine, in the light of all the relevant factors, whether, by differentiating between the maximum durations allowed for fixed-term relationships with full-time workers and with part-time workers, paragraph 109(2) of the UG intended to take account of the considerations mentioned by the MUW and by the Austrian Government, and whether, in the research sector, particularly the scientific research sector, there is a particular link in Austria between the number of working hours and the acquisition of a qualification, experience or credentials liable to grant access to selections with a view to securing an advancement in an academic career or a permanent position[46] or improve chances of success in such selections. For my part, I would simply note that neither the conversion formula used for workers employed partly on a full-time basis and partly on a part-time basis,[47] which is not based on actual working hours, nor the possibility of extending the fixed-term employment relationship for longer, in relative terms, in the case of full-time workers than in the case of part-time workers appear consistent with the pursuit of the objectives referred to by the Austrian Government and by the MUW.

54. In the fourth and final place, it is appropriate to rule out the applicability, in circumstances such as those of the main proceedings, of the principle of *pro rata temporis* mentioned in point 2 of clause 4 of the Framework Agreement on part-time work. Without it being necessary to consider the question whether, as the Austrian Government claims, that principle applies only to remunerated services, I observe that recourse to the principle is provided for in that clause only where it is 'appropriate'. As that same Government rightly states, a strict application of that principle, involving determining the maximum duration of fixed-term employment relationships applicable in the case of part-time workers, would lead to setting extremely lengthy durations for those workers who work the fewest hours per week, which would be unacceptable in the light of the restrictions imposed by clause 5 of the Framework Agreement on fixed-term work.

45 See, also, judgment of 2 October 1997, *Kording* (C-100/95, EU:C:1997:453, paragraph 23).

46 This could, for example, be the case if, in order to be eligible for a competition or for the purposes of assessing candidates' credentials, account were taken of the hours worked within the framework of research projects led by universities.

47 The maximum duration specified for part-time work applies to such workers and a fixed conversion formula is used to determine 'the part-time equivalent' for periods of full-time work: twelve months' full time corresponds to sixteen months' part time, with a ratio of 4 to 3, and, conversely, twelve months' part time corresponds to nine months' full time.

### *C. The second question referred for a preliminary ruling*

55. By its second question, the referring court asks the Court, in essence, whether a national provision such as paragraph 109(2) of the UG constitutes indirect discrimination on grounds of sex within the meaning of Article 2(1)(b) of Directive 2006/54. According to that provision, 'indirect discrimination' exists 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.

56. As the Court found in the judgment of 2 October 1997, *Kording* (C-100/95, EU:C:1997:453, paragraph 25), a legislative provision which provides for less favourable treatment for part-time employees than for full-time employees gives rise to indirect discrimination against women employees if in fact substantially fewer men than women work part time. However, such inequality of treatment would be compatible with Directive 2006/54 if it were justified by objective factors unrelated to any discrimination on grounds of sex.

57. Two conditions must therefore be met in order to conclude, in the circumstances of the case in the main proceedings, that there is indirect discrimination on grounds of sex. First, paragraph 109(2) of the UG must, without objective reason, afford part-time workers less favourable treatment than full-time workers. Second, it must be shown that a significantly higher percentage of women than men work part time.

58. With regard to the first condition, I refer to points 47 to 50 of this Opinion in which I have answered in the affirmative the question whether paragraph 109(2) of the UG places part-time workers at a disadvantage compared to full-time workers. As for the existence of objective grounds capable of justifying the less favourable treatment which that provision affords part-time workers, I refer to points 51 to 53 of this Opinion in which the assessment of the relevance and objectivity of the criteria forming the basis of the reasons relied on by the MUW and by the Austrian Government is left to the referring court.

59. With regard to the second condition mentioned in point 57 of this Opinion, it follows from the case-law that, in order to ascertain whether a difference in treatment found between full-time workers and part-time workers affects a considerably higher number of women than men, the national court must take into account all those workers subject to the national legislation in which the difference in treatment has its origin. It is therefore the scope of the legislation at issue which determines the category of persons who may be included in the comparison.[48] However, I note that the only statistics provided in the request for a preliminary ruling relate exclusively to those workers employed on the basis of paragraph 109(2) of the UG by the MUW.[49] The Court therefore does not have meaningful data at its disposal to enable it to assess whether, in the category of fixed-term workers employed on a part-time basis – such as the applicant in the main proceedings – within the framework of externally funded projects or research projects, the percentage of women is considerably higher than the percentage of men.

48 See judgments of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18, paragraph 73), and of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraph 40).

49 It is apparent from those statistics that 79 % of the women and 75 % of the men employed under a contract concluded on the basis of paragraph 109(2) of the UG work part time.

### *D. The third question referred for a preliminary ruling*

60. By its third question, the referring court asks about the burden of proof placed, pursuant to Article 19(1) of Directive 2006/54,[50] on persons who consider themselves wronged by indirect discrimination on grounds of sex. Under that provision, it is for the person who considers herself wronged because the principle of equal treatment has not been applied to her to establish, before a court or any other competent authority, facts or evidence from which it may be *presumed* that there has been direct or indirect discrimination.[51] The burden of proof shifts to the respondent when there is a 'prima facie case of discrimination'.[52]

61. Both the MUW and the Austrian Government consider that the applicant in the main proceedings has failed to discharge the burden of proof on her within the meaning of Article 19(1) of Directive 2006/54, since, in support of her claim of discrimination based on sex, she has merely referred to statistics concerning the labour market in Austria, from which it is apparent that a considerably higher number of women than men are employed on a part-time basis. Those interested parties note that, according to the case-law of the Court, in order to ascertain whether an apparently neutral national measure has a more unfavourable impact on women workers than on men workers, it is the scope of the measure at issue which determines the category of persons who may be included in the comparison.[53] The applicant in the main proceedings should therefore have based her application on data relating only to workers covered by paragraph 109(2) of the UG.

62. In this regard, I observe that it is indeed apparent from the case-law referred to by the MUW and the Austrian Government that only meaningful statistics which focus on the workers concerned by the national measure at issue enable the applicant to establish a 'prima facie case of discrimination' and, therefore, shift the burden of proof to the respondent. However, that case-law does not address the question – which arises, however, in the present case – of the nature of the facts and evidence on the basis of which a person who considers herself wronged by indirect discrimination on grounds of sex can establish a prima facie case of discrimination where such statistics are not available to that person or are difficult for her to access.

63. In the light of the purpose of Article 19(1) of Directive 2006/54, which is to lighten the burden of proof on the applicant in proceedings relating to the infringement of the principle of equal treatment in matters of employment and occupation,[54] and since it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs,[55] it is my view that a prima facie case of discrimination on grounds of sex cannot be regarded as unsubstantiated solely because the applicant, due to a lack of more specific accessible data, has relied

50 Article 19(1) of Directive 2006/54 provides that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

51 See judgment of 19 October 2017, *Otero Ramos* (C-531/15, EU:C:2017:789, paragraph 68), and, to that effect, judgment of 21 July 2011, *Kelly* (C-104/10, EU:C:2011:506, paragraph 29).

52 See recital 30 of Directive 2006/54.

53 See, inter alia, judgments of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 59); of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18, paragraph 73); and of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraph 40).

54 The significance of the role played by the adoption of rules on the burden of proof in the effective enforcement of the principle of equal treatment is, moreover, made clear in recital 30 of Directive 2006/54.

55 See recital 30 of Directive 2006/54.

on general statistics concerning the job market in the Member State concerned. In such a situation, it will fall to the respondent to produce statistical data concerning all the workers concerned by the national measure at issue,[56] or, depending on the applicable rules of national law, to the court or competent national authority to acquire them of its own motion.[57]

### *E. The application for a limitation of the temporal effects of the Court's judgment*

64. In its written observations, the MUW, supported by the Austrian Government, requests the Court, should it answer the questions referred for a preliminary ruling by the referring court in a manner favourable to the argument put forward by the applicant in the main proceedings, to limit the temporal effects of the judgment to be delivered. The Commission asks the Court to reject that request.

65. According to the settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must or ought to have been understood and applied from the date of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts, even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied.[58] It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties.[59] The Court limits the temporal scope of its judgments delivered by way of preliminary ruling only in very specific circumstances, inter alia when there is a risk of serious financial repercussions due, in particular, to the high number of legal relationships established in good faith on the basis that the rules deemed to be validly in force and it appears that individuals and the national authorities were encouraged to adopt conduct that did not comply with EU law due to considerable objective uncertainty as to the scope of EU law provisions, which uncertainty was reinforced by the very conduct adopted by other Member States or by the Commission.[60]

66. In my view, however, such circumstances do not arise in the present case, and therefore the criterion relating to the good faith of those concerned is not met. The analysis conducted in this Opinion is simply the result of the application to the circumstances of the dispute in the main proceedings of settled case-law of the Court, which has, for a long time, specified the criteria in the light of which the compatibility of a national rule with clause 5 of the Framework Agreement on fixed-term work and clause 4 of the Framework Agreement on part-time work must be assessed, with the result that, if the Court were to agree with that analysis, it could not be submitted that considerable objective uncertainty existed as to the scope of those provisions of EU law.

56 I note that, during the main proceedings, the MUW produced before the referring court statistics relating to its employees only, stating that those statistics were the only data available, and that it was only at the hearing that the MUW's lawyer asserted that statistics relating to other universities were published and were therefore easily accessible to all.

57 See recital 30 of Directive 2006/54.

58 See, inter alia, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 58); of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 41); and of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 49).

59 See judgment of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 50 and the case-law cited).

60 See, to that effect, judgment of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 51 and the case-law cited), and Opinion of Advocate General Mengozzi in *Paper Consult* (C-101/16, EU:C:2017:413, point 81).

## III. Conclusion

67. On the basis of all the foregoing considerations, I suggest that the Court answer the questions submitted by the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) and the supplementary question which I propose that it raise of its own motion as follows:

(1) Point 1 of clause 5 of the Framework Agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding a national legislative provision, such as that at issue in the main proceedings, which does not provide for adequate measures, within the meaning of that clause, to prevent the abuse of successive fixed-term employment relationships for workers employed by universities within the framework of externally funded projects or research projects.

(2) National legislation such as that at issue in the main proceedings, which sets at six years the maximum duration of successive fixed-term employment relationships for full-time workers employed by universities within the framework of externally funded projects or research projects, when that maximum duration is eight years for part-time workers, and which permits a one-off extension of such durations of up to, respectively, ten years and twelve years, may give rise to indirect discrimination prohibited by point 1 of clause 4 of the Framework Agreement on part-time work, concluded on 6 June 1997, 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, if such a difference in treatment is not justified on objective grounds, which is a matter for the national court to verify. The principle of *pro rata temporis* provided for in point 2 of clause 4 of that framework agreement does not apply in the circumstances of the dispute in the main proceedings.

(3) Such legislation may also give rise to indirect discrimination on grounds of sex within the meaning of Article 2(1)(b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation if the percentage of women within the group of part-time workers concerned by that legislation is found to be considerably higher than the percentage of men.

(4) Article 19(1) of Directive 2006/54 must be interpreted as meaning that it is possible for a person who considers herself wronged by discrimination on grounds of sex to rely on general statistics concerning the job market in the Member State concerned, with a view to substantiating facts from which such discrimination may be presumed, where more specific statistical data relating to the workers concerned by the national measure challenged are not available or are difficult to access.