# OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 12 May 2011 [1]

1. By this reference for a preliminary ruling, the Court is once more asked to interpret the framework agreement on fixed-term work, concluded on 18 March 1999 between the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations (UNICE) and the European Centre of Enterprises with Public Participation (CEEP) ('the framework agreement'), contained in the Annex to Directive 1999/70 ('the directive'). [2]

2. The particular issue in the present case involves the compatibility with clause 4 of the framework agreement of a provision in rules governing a promotion procedure for civil servants. The provision in question required candidates to have spent a period of time as a career civil servant (that is, an established or permanent civil servant) prior to becoming eligible for promotion under that procedure. Civil servants whose prior experience had been acquired under a fixed-term contract were accordingly ineligible.

1 — Original language: English.

2 — Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43, and corrigendum OJ 1999 L 244, p. 64).

## Legal framework

### A — *European Union legislation*

3. The second recital in the preamble to the framework agreement states:

'The parties to this agreement [ETUC, UNICE and CEEP] recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers.'

4. Clause 1 of the framework agreement provides:

'The purpose of this framework agreement is to:

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

…'

5. Clause 3 of the framework agreement states:

'1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

…'

6. Clause 4 of the framework agreement, entitled 'principle of non-discrimination', provides:

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

…

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

7. Clause 8(5) of the framework agreement states:

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

B — *National law*

8. The order for reference states that, in addition to the directive and the framework agreement, Mr Rosado Santana relies (a) on Article 14 of the Spanish Constitution, which enshrines the principle of equal treatment,

and (b) on Article 1 of Law 70/1978 of 26 December 1978 on the recognition of prior service in the public administration ('Law 70/1978'), which provides:

'1. In the case of career civil servants in the State, local, institutional, justice, employment tribunals and social security administrative authorities, all periods of service, without exception, which they completed in those administrative authorities before the formation of the relevant bodies, grades and posts, or their entry thereto, shall be recognised, in addition to any probationary period of civil servants who passed the entrance tests for the public administration.

2. All periods of service, without exception, in the sectors of the public administration referred to in the previous paragraph, completed either as a temporary civil servant (fixed-term or interim) or under a contract governed by administrative or employment law, irrespective of whether or not such a contract was recorded in writing, shall be regarded as effective periods of service.'

9. The order for reference goes on to note that the applicability of Law 70/1978 is disputed in the main proceedings by the Junta de Andalucía (the Autonomous Government of Andalusia) ('the Junta'), on the basis that national case-law provides that that legislation has no application to merit-based selection procedures for civil servants.

10. In its written observations, the Spanish Government also contends that Law 70/1978 is inapplicable. It refers, for its part, to the 22nd additional provision to Law 30/1984 of 2 August 1984 on the reform of the civil service. That provision lays down certain grounds of eligibility for promotion from group D to group C in the Spanish civil service career structure. These include 10 years' service as a career civil servant in the first-mentioned group. According to the Junta, the provision in question finds its specific expression in the laws of the Autonomous Community of Andalusia in Decree 2/2002 of 9 January 2002, Article 32(2) of which is worded to similar effect.

11. The Spanish Government also refers to Law 7/2007 of 12 April 2007 on the basic regulations relating to public servants. Article 10 of that law applies to temporary civil servants and contains provisions relating to their appointment, the nature of their duties and the termination of their office. [3]

12. The order for reference goes on to address the case-law of the Spanish Constitutional Court. It appears that that court has held that differences in remuneration between temporary civil servants and career civil servants with the same duties may not be

3 — The material provided by the Spanish Government in its observations does not make it possible to establish whether that law also contains provisions governing the effects of a change in status as between temporary and career civil servants.

contrary to the principle of equal treatment, as laid down under Article 14 of the Spanish Constitution. Different legal treatment may thus be constitutional.

13. Lastly, the order for reference notes that a great many (but not all) Spanish courts take the view that, where a public notice of a recruitment process sets out the rules governing, inter alia, eligibility, those rules amount to the 'law' of the process. If a candidate fails to contest those rules within the period laid down, he may not subsequently claim that they are unlawful in order to challenge the outcome in so far as it affects him.

14. According to the Spanish Government's written observations, the result of that case-law is that there are two, and only two, possibilities open to a candidate who wishes to challenge selection procedures in the context of civil service recruitment. If the candidate wishes to contest the conditions applying to the selection procedure in question, he must bring a challenge directed at those conditions. If, by contrast, the candidate wishes to contest the manner in which the selection procedure was operated, he must bring a challenge directed at the operation of the selection procedure. What he cannot do is to challenge the conditions applying to the selection procedure indirectly, in the form of a challenge ostensibly directed to the operation of the selection procedure. By virtue of Law 29/1998 of 13 July 1998 on disputes in administrative proceedings, in circumstances such as those arising in the main proceedings a challenge to the conditions applying to the selection procedure had to be brought within two months of the date on which notice of the procedure was published. In the present case, any challenge would thus have had to have been brought no later than 17 March 2008.

## II — Facts, procedure and the questions referred

15. Mr Rosado Santana, the applicant in the main proceedings, first entered into an employment relationship with the Junta on 19 May 1989, when he was engaged on a fixed-term basis. That relationship ended on 27 May 2005. On 28 May 2005, he became a career civil servant under a contract of indefinite duration.

16. The order for reference states that, by order of 17 December 2007 of the Consejería de Justicia y Administración Pública (Ministry of Justice and Public Administration) of the Junta, it was announced that selection tests would be held under the internal promotion system for the advancement of civil servants to the general body of administrative officials in that public authority ('the competition notice'). Rule 2(1)(b) of the competition notice stated that candidates were required 'to hold or to be in a position to obtain the

qualification of bachiller superior [baccalaureate]... or, alternatively, to have 10 years' service as a career civil servant in a group D post, or to have five years' service and have passed the specific course referred to in the Decision of 4 July 2002 of the Instituto Andaluz de la Administración Pública [Andalusian Institute of Public Administration] announcing a selection process consisting of tests for access by internal promotion to a group C post from a group D post of the Administración General de la Junta de Andalucía [General Administration of the Junta] …'

17. In what follows, I shall refer to the eligibility criterion relating to 10 years' service as a career civil servant in a group D post as 'the disputed criterion'.

18. Although the order for reference does not set out the whole of the terms of rule 2(1)(b) of the competition notice, the written observations submitted by the Junta purport to do so. According to those observations, the rule in question went on to state:

'… periods of service … completed as a career civil servant in other areas of the public administration … will be taken into consideration, for the purposes of calculating periods of service … However, no account will be taken of prior periods of service completed as a temporary or interim employee in another area of the public administration or other similar previous periods of service.'

19. The competition notice was published in the *Boletín Oficial* (Official Journal) of the Junta of 16 January 2008.

20. While the order for reference is not entirely clear in this respect, it appears that Mr Rosado Santana would have satisfied the disputed criterion by virtue of his service with the defendant since 19 May 1989, but for the fact that the notice required that service to have been undertaken as a career civil servant. The other eligibility criteria laid down under the recruitment notice are not relevant to his case.

21. Mr Rosado Santana nevertheless applied to sit the selection tests in question; and his application was accepted. He participated in the competition procedure, which was divided into two parts. He was successful and his name was accordingly included in the list of successful candidates published on 12 November 2008.

22. On 2 February 2009, a notice of vacancies was published. Mr Rosado Santana duly applied for a post and submitted the documentation requested. On 25 March 2009, however, the Secretaría General para la Administración Pública (General Secretariat

for the Public Administration) of the Junta adopted a decision annulling his classification as a successful candidate ('the decision at issue'). The reason given for the annulment was that Mr Rosado Santana satisfied none of the eligibility criteria specified in point 16 above. In particular, he did not satisfy the disputed criterion, on the basis that the period during which he had served as a temporary civil servant did not fall to be taken into account in determining whether that criterion had been met.

23. On 8 June 2009, Mr Rosado Santana brought proceedings before the Juzgado de lo Contencioso-Administrativo No 12 de Sevilla (Court for Contentious Administrative Proceedings, No 12, Seville (Spain)), in which he contested the decision at issue. In particular, he challenged the validity of the disputed criterion, since it wrongly required the service in question to have been undertaken as a career civil servant.

24. The national court has referred the following questions to the Court for a preliminary ruling:

'1. Is [the directive] to be interpreted as meaning that, if the Constitutional Court of a Member State has ruled that the establishment of different rights for temporary civil servants and career civil servants of that State might not be contrary to its Constitution, that necessarily means that the directive is excluded from applying in the sphere of that State's civil service?

2. Is [the directive] to be interpreted as meaning that it precludes a national court from interpreting the principles of equal treatment and non-discrimination in a manner which generally excludes from their scope the placing of temporary civil servants and career civil servants on an equal footing?

3. Is clause 4 [of the framework agreement] to be interpreted as meaning that it precludes a refusal to take into account as length of service, in attaining the status of member of the permanent staff, previous periods of service as a temporary employee, specifically for the purposes of remuneration, grading and career advancement in the civil service?

4. Does clause 4 [of the framework agreement] require the national legislation to be interpreted so as not to exclude periods worked under a temporary employment relationship from the calculation of length of service of civil servants?

5. Is clause 4 [of the framework agreement] to be interpreted as meaning that, even though the rules of a public selection process were published and were not contested by the applicant, the national court must examine whether those rules are contrary to [European Union]

legislation and, in that case, must the national court refrain from applying those rules or the national provision on which they are based in so far as they conflict with that clause?'

25. Written observations have been submitted by the Spanish Government, the Junta and the European Commission. No hearing has been requested and none has been held.

## III — Admissibility

26. The Junta has raised two general objections as to admissibility in its written observations.

27. In the first of these, the Junta argues that the order for reference fails to satisfy the requirements of the Court's case-law. In particular, the national court has failed to specify the domestic legal framework which applies to the questions referred and the reasons which led that court to select a particular provision of European Union (EU) law. Nor has it demonstrated the link between that provision and the national rules or factual situation which constitute the context of the dispute. The reference should therefore be declared inadmissible.

28. I do not agree.

29. It is settled case-law that the procedure established in Article 267 TFEU rests on a clear separation of functions between the national courts and the Court of Justice. It is a matter for the referring court alone 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. [4]

30. Perusal of the order for reference shows that the national court sets out the national legislation relied on by Mr Rosado Santana in the proceedings before it. By necessary implication, that court must consider those provisions relevant to the questions referred. It goes on to give details of the national case-law which leads it to have doubts as to the precise application of the directive in its national jurisdiction in the light of that case-law. It is clear on any basis that, in a preliminary ruling procedure, it is a matter for the national court before which the proceedings were brought to determine the provisions of national law that are applicable to the main proceedings. [5]

31. As regards the reasons which led the national court to make reference to the directive and the framework agreement and the link between those provisions and the dispute in

4 — See, among many, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 18, and Case C-356/09 *Kleist* [2010] ECR I-11939, paragraph 44.

5 — See, to that effect, order of 12 June 2008 in Case C-364/07 *Vassilakis and Others*, not published in the ECR, paragraph 77.

the main proceedings, the order for reference makes it clear, beyond any doubt, why the provisions of the directive are relevant to the factual situation described in the order.

32. All of that being so, the first objection must, in my view, be rejected.

33. In the second objection, the Junta argues, as I understand it, that the questions referred are inadmissible on the ground that clause 4 of the framework agreement cannot apply in the circumstances to which those questions relate. The dispute in the main proceedings does not concern an 'employment condition' for the purposes of clause 4 of the framework agreement, but rather a criterion for participation in the competition procedure entered into by Mr Rosado Santana.

34. It is clear from the Court's case-law that where the Court receives a request for interpretation of EU law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request. [6]

35. I shall address the question of what is meant by the term 'employment condition' in point 51 et seq. below. But I consider the Junta's second objection as to admissibility to be manifestly misconceived. It is plain beyond doubt that the applicability of clause 4 of the framework agreement, including the interpretation to be given to the expression 'employment condition', is relevant to the issues arising in the main proceedings.

36. The Junta's objections as to admissibility should accordingly be rejected.

## IV — Substance

37. The national court puts forward five questions in its order for reference. Question 1 relates to the interaction of national and EU law. Questions 2, 3 and 4 each concern the applicability and interpretation of the directive, and, in particular, clause 4 of the framework agreement. Question 5 raises issues relating to the availability of remedies under national law where EU law is infringed.

38. Since whether Questions 1 and 5 are relevant depends on the answers the Court gives in relation to the applicability and interpretation of the directive, I shall address Questions 2, 3 and 4 first. I shall then consider Question 1, before turning to Question 5.

6 — Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 12.

A — *Questions 2, 3 and 4*

39. By these questions, which are best dealt with together, the national court is essentially asking the Court to give a ruling on the applicability and interpretation of the directive, and, in particular, clause 4 of the framework agreement, to the circumstances arising in the main proceedings.

40. In particular, the national court wishes to know whether a competition notice, such as the notice in the main proceedings, which makes eligibility for promotion within the civil service dependent on a period of service as a career civil servant and expressly excludes periods of time spent as a temporary civil servant, infringes clause 4 of the framework agreement.

The applicability of the directive to the case in the main proceedings

(a) Public servants

41. It is clear from the Court's case-law that the fact that Mr Rosado Santana's employment relationship was entered into with a public-sector body has no bearing on the application of the directive and the framework agreement in this case. It is apparent from both the wording of, and the background to, those measures that the provisions they contain can apply to fixed-term employment contracts and relationships concluded with the public authorities and public sector bodies. [7] Equally, the fact that a post may be classified as 'regulated' under national law is irrelevant as regards the application of those measures. [8]

42. Contrary to the argument put forward by the Junta in relation to Question 2, it follows that temporary and career civil servants must be regarded as 'comparable' for the purposes of clause 4 of the framework agreement.

(b) Applicability of the directive and the framework agreement to a person who has ceased to be a fixed-term worker

43. The Spanish Government argues in its written observations that the directive and

7 — See, inter alia, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 54 to 57; Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 25; and Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECR I-14031, paragraph 38.

8 — See, to that effect, *Del Cerro Alonso*, cited in footnote 7 above, paragraph 29.

the framework agreement cannot apply to a person, such as Mr Rosado Santana, who brings his claim as a career civil servant, that is to say, as a member of the permanent workforce. In support of that line of argument, it cites paragraphs 28 and 30 of the judgment in *Del Cerro Alonso*, [9] where the Court held that the directive and the framework agreement apply 'to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer', going on to observe that, since 'the dispute in the main proceedings concern[ed] the comparison between a member of the temporary regulated staff and a member of the permanent regulated staff', the applicant in the main proceedings '[came] within the scope of [the directive] and of the framework agreement'. Since the comparison which Mr Rosado Santana seeks to establish in this case is between himself, as a career civil servant, and other career civil servants, there can be no question of the directive and the framework agreement applying to him.

44. The Commission adopts a similar approach.

45. Such a line of reasoning seems to me to misconstrue the case-law and to adopt an approach to the interpretation of the directive and the framework agreement which bears no relation to their objective.

46. In order to give the directive and the framework agreement their proper construction, it is necessary to have regard to the context in which they were enacted. Thus, the Court held in *Impact* [10] that 'the framework agreement, in particular clause 4, ... follows an aim which is akin to the fundamental objectives enshrined in the first paragraph of [Article 151 TFEU]... and Article 7 and the first paragraph of Article 10 of the Community Charter of the Fundamental Social Rights of Workers to which [Article 151 TFEU] refers, and which are associated with the improvement of living and working conditions and the existence of proper social protection for workers, in the present case for fixed-term workers.... In the light of those objectives, clause 4 of the framework agreement must be interpreted as articulating a principle of [EU] social law, which cannot be interpreted restrictively.' [11]

47. What is being claimed in the main proceedings is the right to have periods of time spent as a fixed-term worker taken into account in calculating eligibility for promotion in the same way as a comparable permanent worker in an employment relationship with the same employer.

48. Can such a broad interpretation of clause 4 be justified?

9 — Cited in footnote 7 above.

10 — Case C-268/06 [2008] ECR I-2483.

11 — Paragraphs 112 and 114. See also *Del Cerro Alonso*, cited in footnote 7 above, paragraph 38.

49. In my view, such an interpretation is not merely a permissible interpretation. It is the only interpretation which satisfies the requirement that that provision be interpreted in a manner which is not restrictive. The fact that Mr Rosado Santana is now in a permanent employment relationship with the Junta has no bearing whatsoever on the argument being put forward on his behalf. What is of crucial relevance, by contrast, is whether a failure to take into account the periods spent as a fixed-term worker in assessing his eligibility for promotion *purely because of the fixed-term nature of his employment relationship* would amount to discrimination for the purposes of clause 4.

50. A more restrictive approach would defeat the whole purpose of clause 4 of the framework agreement. It would render permissible one of the forms of discrimination the directive and the framework agreement were enacted precisely with a view to avoiding.

(c) 'Employment condition'

51. In order for clause 4 of the framework agreement to apply, the condition at issue must be an 'employment condition'.

52. The Court's case-law makes it plain that that expression also requires to be given a broad interpretation. [12]

53. In the present case, it is an incident of Mr Rosado Santana's employment relationship as a career civil servant that he is eligible for promotion. In other words, provided he satisfies the (valid) requirements imposed by the Junta, as his employing authority, in that regard, he is entitled to be considered for advancement, with all the benefits which that implies, along with his colleagues and other candidates in a similar position.

54. Can such a right be termed an employment condition for the purposes of clause 4 of the framework agreement?

55. In my view, the answer is clearly 'yes'. The employment relationship is characterised by an entitlement, on the one part, and a corresponding obligation, on the other. There is, in that regard, no difference from the terms governing the payment of remuneration in respect of services performed. [13]

12 — See, to that effect, *Del Cerro Alonso*, cited in footnote 7 above, paragraph 31 et seq., and *Impact*, cited in footnote 10 above, paragraph 115.

13 — It is clear that conditions as to 'pay', in the sense of remuneration paid for services performed, fall within the definition of 'employment condition' under clause 4 of the framework agreement (see *Del Cerro Alonso*, cited in footnote 7 above, paragraph 41, and *Impact*, cited in footnote 10 above, paragraph 126).

2. 'Objective grounds'

56. Clause 4 of the framework agreement expressly permits different treatment of fixed-term workers and comparable permanent workers where such different treatment is justified on objective grounds.

57. The expression 'objective grounds' is not defined in the directive or the framework agreement. It has, however, been interpreted in the Court's case-law.

58. In *Del Cerro Alonso*, [14] the Court held that the expression required to be interpreted in a similar manner to the term 'objective reasons' in clause 5 of the framework agreement, which had already been addressed in the case-law. [15] By the clause 5 case-law, the Court held that the 'concept of "objective reasons" 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 pursuit of a legitimate social-policy objective of a Member State.' [16] It went on to add that 'recourse to fixed-term employment contracts solely on the basis of a general provision, unlinked to what the activity in question specifically comprises, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.' [17]

59. Applying that reasoning to clause 4 of the framework agreement, the Court held in *Del Cerro Alonso* that '[the concept of objective grounds] must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement. On the contrary, that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for

14 — Cited in footnote 7 above.

15 — Paragraph 56.

16 — See *Del Cerro Alonso*, cited in footnote 7 above, paragraph 53, and *Adeneler and Others*, cited in footnote 7 above, paragraphs 69 and 70.

17 — See *Del Cerro Alonso*, cited in footnote 7 above, paragraph 55, and *Adeneler and Others*, cited in footnote 7 above, paragraph 74.

achieving the objective pursued and is necessary for that purpose'.[18]

60. Subsequently, in *Gavieiro Gavieiro and Iglesias Torres*,[19] the Court, again construing clause 4 of the framework agreement, held that '[the precise and concrete factors in question] may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State. … By contrast, reliance on the mere fact of the temporary nature of the employment of staff of the public authorities does not meet those requirements and is therefore not capable of constituting an "objective ground" within the meaning of clause 4(1) of the framework agreement. A difference in treatment with regard to employment conditions as between fixed-term workers and permanent workers cannot be justified on the basis of a criterion which, in a general and abstract manner, refers precisely to the term of the employment. If the mere temporary nature of an employment relationship were held to be sufficient to justify such a difference, the objectives of [the directive] and the framework agreement... would be negated. Instead of improving the quality of fixed-term work and promoting the equal treatment to which both [the directive] and the framework agreement aspire, reliance on such a criterion would amount to perpetuating a situation that is disadvantageous to fixed-term workers'.[20]

61. Contrary to what the Spanish Government argues in its written observations, it follows that the fact that the employment relationship under a fixed-term contract is, by definition, a temporary one cannot constitute an 'objective ground' for the purposes of clause 4(1) of the framework agreement, justifying a difference in treatment. It further follows that, by excluding periods of service completed as a fixed-term worker, as the selection notice did in Mr Rosado Santana's case, that notice did not satisfy the requirements of clause 4(1) as regards the notion of 'objective grounds'.

62. That does not mean that there may never be circumstances in which the concept of an 'objective ground' can apply to a difference in treatment between temporary civil servants and career civil servants. The Spanish Government devotes a relatively large part of its written observations to describing the underlying differences which it sees as being inherent as between temporary civil servants and career civil servants. These include, according to the Spanish Government, differences relating to the manner in which the different

18 — Paragraphs 57 and 58.

19 — Cited in footnote 7 above.

20 — Paragraphs 55 to 57.

categories of civil servant are engaged, the qualifications required and the nature of the duties undertaken.

63. To the extent that those differences do no more than reflect the temporary nature of the employment relationship under which a temporary civil servant is engaged, those arguments cannot succeed in justifying a difference in treatment for the purposes of clause 4(1) of the framework agreement. To the extent, however, that such differences may reflect objective requirements relating to the promotion procedure *in specific instances*, those differences may be capable of being justified.

64. To put that point in concrete terms, it is quite possible to conceive of circumstances where the post to be filled requires particular experience that only a career civil servant could have obtained. This could, for example, stem from the fact that such prior experience is available only in posts to which career civil servants are appointed. Although the second recital in the preamble to the framework agreement records that contracts of an indefinite duration are the general form of employment relationship between employers and workers, neither the directive nor the framework agreement lay down a general obligation that fixed-term employment relationships should, where possible, be converted into permanent relationships. [21]

65. Whether objective grounds for the purposes of clause 4(1) exist in a particular instance is a question of fact which will depend on the particular circumstances of the promotion procedure in question. The matter must be approached on a case-by-case basis, having regard to all factors which may be relevant, including, in particular, the nature of the experience necessary in the post to be filled.

66. In the case in the main proceedings, however, it is clear that, by providing simply that periods of service as a temporary civil servant were not to be taken into account, the selection procedure could never have benefited from the exemption in question. Such grounds may, of course, have existed. But, even if they did, they were not expressed with the transparency that is essential if the exemption is to be founded upon.

67. It follows from all of the above that I am of the view that the competition notice contravened clause 4 of the framework agreement.

21 — See, to that effect, *Adeneler and Others*, cited in footnote 7 above, paragraph 91, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 183.

68. I therefore consider that the answer to Questions 2, 3 and 4 should be that clause 4 of the framework agreement is infringed where a competition notice, such as the notice in the main proceedings, makes eligibility for promotion within the civil service dependent on a period of service as a career civil servant and expressly excludes periods of time spent as a temporary civil servant, without laying down any objective ground as the basis for such an exclusion.

B — *Question 1*

69. In the order for reference, the national court indicates that the Spanish Constitutional Court has ruled that it may not be contrary to the provisions on equal treatment laid down under Article 14 of the national Constitution for temporary civil servants and career civil servants to be treated differently even though they may perform the same duties.

70. As I understand the question put by the national court, it is essentially asking whether the adoption by one of the supreme courts of that Member State of a definition of equal treatment must override a different definition of the same concept under EU law, in a field where the national court is bound to apply EU law. Were the national court to be obliged to adopt the definition of the Constitutional Court, the outcome would (or might) be that the directive and the framework agreement would not be treated as applying to the civil service of that Member State.

71. In so far as the question asks whether the directive and the framework agreement apply to public servants, I have already addressed that issue in point 41 seq. above.

72. To the extent that the question asks whether the national court may be obliged to apply a definition of equal treatment which differs from, and grants lesser rights than, the definition laid down under EU law, the answer must clearly be 'no'.

73. This is plain from the well-established case-law of the Court.

74. When applying domestic law in the context of a European Union directive, national courts are required to interpret that law, so far as possible, in the light of the wording and purpose of the directive in question and – since the framework agreement forms an integral component of the directive [22] – of the

22 — See, to that effect, the Opinion of Advocate General Kokott in *Impact*, cited in footnote 10 above, point 87.

framework agreement. The requirement that national law be interpreted in accordance with EU law is inherent in the system of the TFEU, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them. [23] The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration, with a view to ensuring that the directive and the framework agreement are fully effective and achieving an outcome consistent with the objective pursued. [24]

75. It follows that the national court is bound to apply the interpretation of the directive and the framework agreement provided by this Court, even where the Constitutional Court of the Member State in question has ruled that differences in treatment between temporary civil servants and career civil servants are not (or may not be) contrary to the Constitution of that Member State.

76. In the light of the above, I consider that the answer to Question 1 should be that the national court is bound to apply the interpretation of the directive and the framework agreement provided by this Court, even where the Spanish Constitutional Court has ruled that differences in treatment between temporary civil servants and career civil servants are not (or may not be) contrary to the Constitution of that Member State.

*C — Question 5*

77. By this question, the national court asks, essentially, whether EU law, and, in particular, clause 4 of the framework agreement, requires it to examine the substantive rules of the competition procedure regardless of a procedural bar, such as a failure to bring a challenge in good time.

78. Mr Rosado Santana's claim in the main proceedings is founded on the argument that, since the disputed criterion required 10 years' experience as a career civil servant, the competition notice contravened EU law. His rights were thus infringed. I have already indicated that I agree. However, it is clear from the order for reference that, when Mr Rosado Santana brought his challenge, the two-month period laid down in the competition notice had already expired.

79. Can a limitation period of that kind be relied on where the basis of the challenge is that rights under EU law have been contravened?

23 — See, inter alia, *Impact*, cited in footnote 10 above, paragraphs 98 and 99 and the case-law cited.

24 — See, to that effect, *Impact*, cited in footnote 10 above, paragraph 101 and the case-law cited.

80. It is the Court's settled case-law that, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. [25]

81. The Member States, however, are responsible for ensuring that those rights are effectively protected in each case. [26] The detailed procedural rules governing those actions must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). [27]

82. The principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of European law or national law, where the purpose and cause of action are similar. [28] While there is nothing in the order for reference to suggest that that principle has been infringed in the case in the main proceedings, it is for the national court to verify the position. [29]

83. As regards the principle of effectiveness, it is settled case-law that the laying down of reasonable limitation periods satisfies, in principle, the requirement for effectiveness, inasmuch as it constitutes an application of the fundamental principle of legal certainty. The Court has also held that it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration. [30]

84. Does the two-month period laid down by the domestic legislation render the exercise of rights conferred by EU law excessively difficult?

85. It is plain that the period in question is short.

86. Having regard, however, to the interests to be taken into consideration in a selection procedure of the kind at issue in the main proceedings, I do not consider it to be so short, of itself, as to infringe the principles outlined above. As the Spanish Government

25 — See, inter alia, *Impact*, cited in footnote 10 above, paragraph 44 and the case-law cited, and *Angelidaki and Others*, cited in footnote 21 above, paragraph 173.

26 — See, inter alia, *Impact*, cited in footnote 10 above, paragraph 45 and the case-law cited.

27 — See, inter alia, *Impact*, cited in footnote 10 above, paragraph 46 and the case-law cited.

28 — See Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 26 and the case-law cited.

29 — See, to that effect, *Bulicke*, cited in footnote 28 above, paragraph 28 and the case-law cited.

30 — See, to that effect, *Bulicke*, cited in footnote 28 above, paragraph 36.

points out in its written observations, the interests of the other candidates in the competition procedure and of the Junta itself, as the body responsible for the sound administration of the procedure, are relevant. Any challenge to the selection procedure is likely to be disruptive and may cause prejudice. It should be noted that, in *Bulicke*,[31] the Court expressly approved a similar limitation period in relation to the bringing of claims for discrimination in an employment relationship.

87. Can it be said that the time at which the two-month period started to run (that is to say, from the date of publication of the competition notice in the Official Journal of Andalusia) contravenes the principle of effectiveness? Does that principle require that the period should have commenced at a later time, for example, on the date on which Mr Rosado Santana was informed of his ineligibility for promotion?

88. I do not think so.

89. It seems to me that the interests of the parties as a whole can best be served by a requirement that challenges be brought promptly and, in any event, before the competition procedure starts to run its course. By imposing such a rule, those responsible for the organisation of the competition will be in a position to consider any challenges and (if appropriate) to defer the start of the rest of the procedure and take whatever other steps may be necessary in order to address the challenge. Those participating in the procedure will do so in the knowledge that, once underway, it will not be prolonged or invalidated by the need to address subsequent challenges to its lawfulness.

90. I therefore consider that the test of effectiveness has been satisfied in the case in the main proceedings.

91. In reaching that conclusion, I am conscious that it leaves unaddressed the possibility of Mr Rosado Santana having been badly, and possibly wrongly, treated as a result of the sequence of events following his participation in the competition procedure. To notify him that he was successful in that procedure and subsequently to inform him that he was ineligible to apply for a post is, to put it at its kindest, unfortunate.

92. The sequence of events is not entirely clear from the order for reference. Were Mr Rosado Santana to have been given an indication by the Junta, either expressly or by implication, that his candidature satisfied the requirements of the competition notice, any subsequent indication that this was not the case would, on the face of it, represent an

31 — Cited in footnote 28 above.

administrative oversight on the Junta's part and/or a change of position from that initially adopted. It may be that there are principles of Spanish administrative law that can be prayed in aid in such circumstances that preclude an administration from going back on its initial indication (on which Mr Rosado Santana clearly placed reliance by presenting himself for, and going through, the selection process). That is, however, a matter for the national court.

93. It follows that, in my view, such an oversight would not represent either a breach of the principle of effectiveness or an infringement of rights arising under EU law. Its impact would, accordingly, fall to be assessed by the national court under the relevant domestic provisions, which are a matter for the national court alone.

94. I therefore consider that the answer to Question 5 should be that the national court is not bound to examine the substantive rules of the competition procedure in the event of there being a valid procedural bar. In order to satisfy the requirements of EU law, such a bar must comply with the principles of equivalence and effectiveness. A time bar of two months running from the date of publication of the competition notice, of the kind at issue in the main proceedings, will not contravene the principle of effectiveness.

## Conclusion

95. In the light of all of the above, I consider that the Court should answer the questions referred by the Juzgado de lo Contencioso-Administrativo No 12 de Sevilla as follows:

(1) Clause 4 of the framework agreement on fixed-term work, concluded on 18 March 1999, contained 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 is infringed where a competition notice, such as the notice in the main proceedings, makes eligibility for promotion within the civil service dependent on a period of service as a career civil servant and expressly excludes periods of time spent as a temporary civil servant, without laying down any objective ground as the basis for such an exclusion.

(2) The national court is bound to apply the interpretation of the directive and the framework agreement provided by this Court, even where the Spanish Constitutional Court has ruled that differences in treatment between temporary civil servants and career civil servants are not (or may not be) contrary to the Constitution of that Member State.

(3) The national court is not bound to examine the substantive rules of the competition procedure in the event of there being a valid procedural bar. In order to satisfy the requirements of EU law, such a bar must comply with the principles of equivalence and effectiveness. A time bar of two months running from the date of publication of the competition notice, of the kind at issue in the main proceedings, will not contravene the principle of effectiveness.