



## Reports of Cases

### JUDGMENT OF THE COURT (Third Chamber)

26 February 2015\*

(Failure of a Member State to fulfil obligations — Social policy — Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Occasional workers in the entertainment arts — Successive fixed-term employment contracts — Clause 5(1) — Measures to prevent the abusive use of successive fixed-term contracts — Concept of ‘objective grounds’ justifying such contracts)

In Case C-238/14,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 13 May 2014,

**European Commission**, represented by J. Enegren and D. Martin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Grand Duchy of Luxembourg**, represented by D. Holderer, acting as Agent,

defendant,

THE COURT (Third Chamber),

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

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure,

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

gives the following

\* Language of the case: French.

## Judgment

- 1 By its application, the European Commission claims that the Court should declare that, by maintaining in force, with respect to occasional workers in the entertainment arts, derogations from measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement on fixed-term work of 18 March 1999 ('the Framework Agreement'), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

### Legal context

#### *EU law*

- 2 Article 1 of Directive 1999/70 states that the purpose of that directive is 'to put into effect the framework agreement ... concluded ... between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.
- 3 Paragraphs 6, 7, 8 and 10 of the general considerations prefacing the Framework Agreement state:
- '6. ... employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance;
7. ... the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;
8. ... fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers;
- ...
10. ... this agreement refers back to Member States and social partners for the arrangements for the application of its general principles, minimum requirements and provisions, in order to take account of the situation in each Member State and the circumstances of particular sectors and occupations, including the activities of a seasonal nature;'
- 4 Clause 1 of the Framework Agreement states that one of the purposes of that agreement is to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.
- 5 Under Clause 5 of the Framework Agreement, entitled 'Measures to prevent abuse':
- '1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) the maximum total duration of successive fixed-term employment contracts or relationships;

- (c) the number of renewals of such contracts or relationships.
2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
- (a) shall be regarded as “successive”
  - (b) shall be deemed to be contracts or relationships of indefinite duration.’

*Luxembourg law*

The Labour Code

- 6 In Section 1, entitled ‘General provisions’, of Chapter I of Title II of the Labour Code, Article L. 121-2 provides:

‘Employment contracts shall be concluded for an indefinite period.

However, in the cases and under the conditions referred to in Chapter 3 of the present Title, an employment contract may end on a particular date in accordance with its terms or upon fulfilment of the purpose for which it is concluded.’

- 7 In Section 1, entitled ‘Use of fixed-term contracts’, of Chapter II of Title II of that code, Article L. 122-1 provides:

‘(1) A fixed-term employment contract may be concluded for the performance of a specific and non-permanent task; it cannot be used on a long-term basis to govern an employment post related to the normal and permanent activity of an undertaking.

(2) The following shall be considered to be specific and non-permanent tasks for the purposes of paragraph (1):

- 1. the replacement of an employee who is temporarily absent, or whose employment contract is suspended, for reasons other than a collective labour dispute or where there is insufficient work owing to economic causes or bad weather, and also the replacement of an employee with a permanent contract whose post has become vacant, pending the actual entry into service of the employee hired to replace the employee whose contract has come to an end;
- 2. seasonal employment as defined by Grand Ducal regulation;
- 3. employment posts in respect of which it is normal in some sectors of economic activity not to use permanent contracts owing to the nature of the activity or the temporary nature of those posts, the list of those sectors and those posts being established by Grand Ducal regulation;
- 4. the fulfilment, on a casual-employment basis, of a clearly defined specific task outside the ambit of the undertaking’s normal activities;
- 5. the fulfilment of a specific and non-permanent task where there is a temporary and exceptional increase in the activity of the undertaking or where the undertaking is in course of start-up or expansion;

6. the undertaking of urgent work needed to prevent accidents, to remedy any material shortfall or to organise measures to repair the undertaking's facilities or buildings so as avoid any harm to the undertaking or its staff;
7. the employment of a person who is registered as unemployed with the 'Agence pour le développement de l'emploi' [(Luxembourg National Employment Agency)], as a measure for the insertion or reintegration of that unemployed person in the workforce, or where that person falls within a category of unemployed persons declared eligible to be employed under temporary contract, defined by a Grand Ducal regulation to be adopted following the opinion of the Conseil d'Etat [(Luxembourg Council of State)] and with the approval of the Conference of the Presidents of the [Luxembourg] Chamber of Deputies. The criteria for determining the categories of unemployed person eligible shall primarily reflect the unemployed person's age and education, the length of time for which that person has been registered as unemployed and the social context in which that person has grown up;
8. employment intended to encourage the hiring of certain categories of job seeker;
9. employment in respect of which the employer agrees to provide the employee with additional occupational training;

...

(3) By way of derogation from paragraphs (1) and (2), the following may be fixed-term employment contracts:

...

2. employment contracts entered into by occasional workers in the entertainment arts — as defined in Article 3 of the [Law of 30 July 1999 concerning (a) the employment status of independent professional artists and occasional workers in the entertainment arts and (b) the promotion of artistic creation, as amended by the Law of 26 May 2004 ('the amended Law of 30 July 1999')] — either with an entertainment company or in connection with a cinematographic, audio-visual, theatrical or musical production.

...'

- 8 In Section 3, entitled 'Duration of the fixed-term contract', of Chapter II of Title II of that code, Article L. 122-3 provides:

'(1) Fixed-term contracts must, at the time when they are entered into, specify a precise term of duration.

No such precise duration need be specified, however, if the contract is concluded in any of the following cases:

1. to replace an employee who is absent, or whose employment contract is suspended, for a reason other than a collective labour dispute, or to replace an employee whose post has become vacant before the entry into service of his successor;
2. for seasonal employment posts;
3. for employment posts in respect of which it is normal not to use permanent contracts owing to the nature of the activity or the temporary nature of that post.

If, in those cases, no precise duration is specified, the contract must be concluded for a minimal period and shall come to an end when the absent employee is able to resume his duties or the purpose for which it is concluded has been achieved.

...'

- 9 In Section 3 of Chapter II of Title II of the Labour Code, Article L. 122-4 is worded as follows:

'(1) With the exception of seasonal employment contracts, the duration of the contract concluded for a fixed term on the basis of Article L. 122-1 may not, in respect of the same employee, exceed twenty-four months inclusive of renewals.

...'

- 10 In Section 4, entitled 'Renewal of the contract concluded for a fixed term', of Chapter II of Title II of the Labour Code, Article L. 122-5 provides:

'(1) A contract concluded for a fixed term may be renewed twice for a fixed term.

The principle underlying renewal and/or the conditions for renewal must form the subject-matter of a clause in the initial employment contract or of a subsequent amendment to that contract.

Failing written disposition to such effect, in conformity with the present provision, the renewed employment contract shall be deemed to have been concluded for an indefinite period, and evidence to the contrary shall not be permissible.

...

(3) By way of derogation from the provisions of the present Article, fixed-term employment contracts may be renewed more than twice, even for a total period exceeding twenty-four months, without being deemed to be permanent contracts of employment, where those contracts are concluded:

...

2. by occasional workers in the entertainment arts, as defined in Article 4 of [the amended Law of 30 July 1999];

...'

- 11 In Section 5, entitled 'Successive contracts', of Chapter II of Title II of the Labour Code, Article L. 122-6 provides:

'If the employment relationship continues after the expiry of the fixed-term contract, that contract shall become a permanent contract.'

The amended Law of 30 July 1999

- 12 Article 3 of the amended Law of 30 July 1999, entitled 'Recognition of the status of independent professional artist', provides:

'Recognition of the status of independent professional artist may be obtained upon written application to the [m]inister in charge of cultural affairs ('the Minister'). That application shall be accompanied by a file the content of which is to be determined by Grand Ducal regulation.

After hearing the opinion of the Advisory Committee established by the present Law, the Minister shall confer that status on a person who has met the criteria set by this Law for at least the three years immediately preceding his application.

The minimum period of three years immediately preceding the application shall be reduced to twelve months for persons with the right to use an official title as a result of specialised studies in one of the disciplines covered by the present Law.

This recognition shall remain valid for [twenty-four] months. After each such period, it may be renewed upon written application to the Minister. After hearing the opinion of the Advisory Committee, the Minister shall renew the recognition granted to persons who have met the criteria laid down in the present Law since their recognition as independent professional artists, respectively since the renewal of that recognition. Before taking that decision, the Minister may, after hearing the opinion of the Advisory Committee, decide that the applicant must submit a wholly or partly new file, as defined in the first paragraph of the present Article.

An action for annulment may be brought against a decision of the Minister.’

- 13 Article 4 of the amended Law of 30 July 1999, entitled ‘Definition of occasional worker in the entertainment arts’, is worded as follows:

“Occasional worker in the entertainment arts” means the artist, or set or studio technician, who pursues his occupation primarily on behalf of an entertainment company, or in connection with a cinematographic, audio-visual, theatrical or musical production, in particular, and who offers his services in exchange for wages, fees or a stamp on the basis of a fixed-term contract or a works contract.’

### **The pre-litigation procedure**

- 14 On 12 March 2009, the Commission sent a letter to the Grand Duchy of Luxembourg asking that Member State, in respect of the Labour Code, to provide clarification, in the light of the Framework Agreement, of certain points of Luxembourg law concerning: (i) the lack of any definition of ‘comparable permanent worker’; (ii) the existence of derogations from measures designed to prevent the abusive use of successive fixed-term contracts; and (iii) the absence of an obligation for employers to provide fixed-term workers with information about employment opportunities.
- 15 Since that letter remained unanswered, the Commission sent the Grand Duchy of Luxembourg a letter of formal notice on 1 October 2010. By letter of 20 December 2010, that Member State replied to the letter of formal notice.
- 16 Being only partially satisfied with the response of the Grand Duchy of Luxembourg, the Commission sent that Member State an additional formal letter dated 1 October 2012, stating its view that the first complaint had to be abandoned. As regards the second complaint, however, the Commission stated that the response of the Luxembourg authorities did not explain how, in order to prevent the abusive use of successive fixed-term contracts, limitations had been placed on the renewal of employment contracts for two categories of worker, namely, teacher-researchers at the University of Luxembourg and occasional workers in the entertainment arts. The Commission also restated the third complaint, relating to the absence of any obligation for employers to provide fixed-term workers with information about employment opportunities.
- 17 As that additional letter of formal notice remained unanswered, the Commission sent the Grand Duchy of Luxembourg a reasoned opinion on 26 April 2013, in which it maintained its second and third complaints. The Grand Duchy of Luxembourg replied to that reasoned opinion on 10 July 2013.

18 Not being satisfied with that reply, the Commission decided to bring the present action.

## **The action**

### *Arguments of the parties*

- 19 As a first point, the Commission draws the Court's attention to the limitation of the scope of its action with respect to the content of the reasoned opinion. The Commission has abandoned its complaints concerning the teacher-researchers at the University of Luxembourg and the absence of an obligation for employers to provide fixed-term workers with information about employment opportunities in their undertakings, since the Luxembourg authorities have demonstrated that those teacher-researchers are protected against the abusive use of successive fixed-term contracts and have notified to the Commission the legislative provisions putting an end to the infringement in respect of the obligation to provide information.
- 20 The present action therefore relates exclusively to the failure of the Grand Duchy of Luxembourg to fulfil its obligations under Clause 5 of the Framework Agreement to the extent that, with respect to occasional workers in the entertainment arts, it maintains derogations from measures designed to prevent the abusive use of successive fixed-term contracts.
- 21 The Commission submits that Clause 5 of the Framework Agreement, which requires Member States to adopt measures to prevent the abusive use of successive fixed-term contracts, was transposed into Luxembourg law by Article L. 122-4 of the Labour Code, paragraph (1) of which provides that '[w]ith the exception of seasonal employment contracts, the duration of the contract concluded for a fixed term on the basis of Article L. 122-1 may not, in respect of the same employee, exceed twenty-four months inclusive of renewals'. Paragraph (3) of Article L. 122-5 of the Labour Code provides, however, that '[b]y way of derogation from the provisions of the present Article, fixed-term employment contracts may be renewed more than twice, even for a total period exceeding twenty-four months, without being deemed to be permanent contracts of employment, where those contracts are concluded: ... 2. by occasional workers in the entertainment arts, as defined in Article 4 of [the amended Law of 30 July 1999]'.
- 22 According to the Commission, it is therefore apparent that, in the case of occasional workers in the entertainment arts, Luxembourg law does not require any objective reason, enabling the abusive use of successive fixed-term contracts to be prevented. In its reply to the letter of formal notice, the Grand Duchy of Luxembourg confined itself to arguing that contracts concluded with occasional workers in the entertainment arts pursuant to Article L. 122-5 of the Labour Code 'are in all cases subject to the limits imposed by paragraphs (1) and (2) of Article L. 122-1'. The Commission argues, however, that, on the contrary, those provisions exclude occasional workers in the entertainment arts from all protection: in accordance with the actual terms of those provisions, contracts involving those workers are not subject to the requirement that there be an objective reason justifying renewal of the fixed-period employment contract, or to a limitation of the number of times that such contracts may be renewed, or to any limit regarding the total duration of a series of such contracts.
- 23 In response to the reasoned opinion, the Grand Duchy of Luxembourg also adjusted its line of argument, claiming that 'as regards occasional workers in the entertainment arts, it is clear that their area of activity is a sector in which it is normal not to use permanent contracts, owing to the nature of the activity or the temporary nature of those posts.' The Commission disputes that analysis, given the actual terms of the Luxembourg legislation.

- 24 First, the Commission submits that, according to the wording of Chapter II of Title II of the Labour Code, relating to fixed-term employment contracts, the work of occasional workers in the entertainment arts is recognised as not necessarily entailing the performance of specific and non-permanent tasks. Paragraph (1) of Article L. 122-1 of that code establishes a rule that fixed-term contracts may, exceptionally, be concluded for the performance of specific and non-permanent tasks, while paragraph (2) of that article lists several examples of the application of that rule. Paragraph (3) of that article provides, on the other hand, that fixed-term contracts may be concluded with occasional workers in the entertainment arts ‘by way of derogation from paragraphs (1) and (2) above.’ According to the Commission, the logical inference is that paragraph (3) of Article L. 122-1 of the Labour Code permits fixed-term contracts to be concluded with occasional workers in the entertainment arts for the performance of more general and/or permanent tasks.
- 25 Second, the Commission submits that, as the sole criterion identifying the ‘occasional worker in the entertainment arts’, Article 4 of the amended Law of 30 July 1999 refers to the type of contractual relationship, with no mention of the actual nature of the activities in which such a worker engages. That definition accordingly permits occasional workers in the entertainment arts to be hired in situations which are not temporary in nature.
- 26 In that regard, the Commission argues that although, in the case of a large number of occasional workers in the entertainment arts, there may be objective reasons for hiring them under successive fixed-term contracts — such as the fact that those contracts are linked to a specific project — many workers in the entertainment sector, such as the permanent members of an orchestra or core crew members of a theatre troupe or a television station, are hired on a stable basis by the employer. Such workers are also deemed to be ‘occasional workers in the entertainment arts’, as defined by Luxembourg law, in so far as their contractual relationship with their employer meets the criteria laid down in the amended Law of 30 July 1999.
- 27 The Commission therefore considers that the definition of ‘occasional workers in the entertainment arts’ under Luxembourg law does not entail any requirement for there to be objective reasons justifying the renewal of fixed-term contracts for the purposes of Clause 5(1)(a) of the Framework Agreement and that, moreover, there is nothing to distinguish occasional workers in the entertainment arts who are hired on a stable basis from workers employed in other sectors of the economy in which there is also a large fluctuation of the workload.
- 28 The Grand Duchy of Luxembourg contests the allegation that it has failed to fulfil its obligations.
- 29 First, as regards the scope of paragraph (3) of Article L. 122-5 of the Labour Code, that Member State disputes the Commission’s argument that workers hired on a stable basis in the entertainment sector have the status of ‘occasional worker in the entertainment arts’ under Luxembourg law in so far they meet the criteria laid down by the amended law of 30 July 1999. The Grand Duchy of Luxembourg argues that, for a worker to have that status, his work in the entertainment sector must be intermittent. The very term ‘occasional worker in the entertainment arts’ implies that periods of work are interspersed with periods of inactivity. The Grand Duchy of Luxembourg accordingly contends that, in practice, occasional workers in the entertainment arts participate in individual projects which are limited in time, such as the creation of a cinematographic work or the performance of a play.
- 30 That assessment is borne out, according to the Grand Duchy of Luxembourg, by the fact that the assistance granted to that category of worker, on the basis of Article 7 of the amended Law of 30 July 1999, in the event of involuntary inactivity is calculated on a daily basis, according to the number of days of inactivity between two projects, and by the fact that the purpose of the activity book provided for under Article 8 of that law is to record the activities of an occasional worker in the entertainment arts on a daily basis. That being so, to construe Article 4 of the amended Law of 30 July 1999 as meaning that a permanent worker in the entertainment sector also has the status of ‘occasional worker in the entertainment arts’ would not make sense.

- 31 Furthermore, Article 2 of the Grand Ducal Regulation of 11 July 1989 on the application of Articles L. 122-1, L. 122-4, L. 121-5 and L. 125-8 of the Labour Code explicitly lists the sectors of activity, including that of performing artists, in which fixed-term employment contracts may be concluded for employment posts in respect of which it is normal not to use permanent contracts owing to the nature of the activity and the temporary nature of those posts.
- 32 Second, the Grand Duchy of Luxembourg states that paragraph (3) of Article L. 122-5 of the Labour Code is inspired by social considerations. It is evident from the *travaux préparatoires* for the Law of 26 May 2004 amending the Law of 30 July 1999 concerning (a) the employment status of independent professional artists and occasional workers in the entertainment arts and (b) the promotion of artistic creation that, in drawing up paragraph (3) of Article L. 122-5 of the Labour Code, account was taken of the fact that it is difficult for occasional workers in the entertainment arts to be offered permanent employment contracts, as well as the fact that the status of self-employed freelance worker — to which a large number of artists and technicians had recourse — often gives rise to precarious and legally unclear situations, and that provision was intended to give that specific sector the possibility of concluding, on a recurrent basis, fixed-term employment contracts, under which the employee has guarantees and benefits, especially as regards social security, which are unavailable to the self-employed freelance worker.
- 33 Lastly, the Grand Duchy of Luxembourg acknowledges that, under Luxembourg law, there is no maximum duration, for the purposes of Clause 5(1)(b) of the Framework Agreement, in respect of successive fixed-term employment contracts concluded with ‘occasional workers in the entertainment arts’ within the meaning of Article 4 of the amended Law of 30 July 1999. Nor is there any limit to the number of times such contracts may be renewed, for the purposes of Clause 5(1)(c) of the Framework Agreement. On the other hand, according to the Grand Duchy of Luxembourg, which refers to the judgment in *Márquez Samohano* (C-190/13, EU:C:2014:146, paragraph 45), the situation of those workers is characterised by the existence of ‘objective reasons’ within the meaning of Clause 5(1)(a) of the Framework Agreement and the case-law of the Court. In particular, those workers participate in individual projects which are limited in time, and enjoy a measure of flexibility and social benefits owing to the fact that it is possible for an employer to renew fixed-term contracts with the same workers. According to the Grand Duchy of Luxembourg, the Commission acknowledges, moreover, that working on the basis of individual projects is an objective reason capable of justifying the use of successive fixed-term contracts. In that regard, the Grand Duchy of Luxembourg recalls that, in its judgment in *Kücük* (C-586/10, EU:C:2012:39, paragraph 56), the Court held that, where an objective reason is to be found in the specific nature of the tasks to be carried out, the mere fact that an employer may have to hire workers under recurring fixed-term contracts does not mean that there is no objective reason under Clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause.

#### *Findings of the Court*

- 34 The Commission submits that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement, since there are no measures under Luxembourg law to prevent the abusive use of successive fixed-term employment contracts in the case of occasional workers in the entertainment arts.
- 35 It should be borne in mind that the purpose of Clause 5(1) of the Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (see judgment in *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 72 and the case-law cited).

- 36 As can be seen from the second paragraph of the preamble to the Framework Agreement and from paragraphs 6 and 8 of its general considerations, the benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers (judgment in *Mascolo and Others*, paragraph 73 and the case-law cited).
- 37 Accordingly, Clause 5(1) of the Framework Agreement requires Member States, in order to prevent the misuse of successive fixed-term employment contracts or relationships, to adopt one or more of the measures listed in a manner that is effective and binding, where domestic law does not include equivalent legal measures. The measures thus listed in Clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (judgment in *Mascolo and Others*, paragraph 74 and the case-law cited).
- 38 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 Clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers (judgment in *Mascolo and Others*, paragraph 75 and the case-law cited).
- 39 In that way, Clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve this, provided that they do not compromise the objective or the practical effect of the Framework Agreement (judgment in *Mascolo and Others*, paragraph 76 and the case-law cited).
- 40 Moreover, Clause 5(1) of the Framework Agreement, the third paragraph of its preamble and paragraphs 8 and 10 of its general considerations give Member States the discretion, when implementing the agreement, to take account of the particular needs of the specific sectors and/or categories of workers involved, provided that that is justified on objective grounds (see, to that effect, judgment in *Mascolo and Others*, paragraph 70 and the case-law cited).
- 41 In the present case, it is undisputed that the national legislation at issue permits the recruitment of occasional workers in the entertainment arts on the basis of successive fixed-term employment contracts, without providing for any measure limiting the maximum duration of those contracts, or the number of times that they may be renewed, in accordance with Clause 5(1)(b) and (c) of the Framework Agreement. In particular, as is apparent from the very wording of paragraph (3) of Article L. 122-5 of the Labour Code, fixed-term employment contracts concluded with occasional workers in the entertainment arts, as defined in Article 4 of the amended Law of 30 July 1999, may be renewed more than twice, even for a total period exceeding twenty-four months, without being deemed to be permanent employment contracts. It is also common ground that, in respect of occasional workers in the entertainment arts, that legislation does not lay down legal measures equivalent to those described in Clause 5(1) of the Framework Agreement.
- 42 In those circumstances, it is important that the renewal of successive fixed-term employment contracts concluded with workers in that category be justified by an ‘objective reason’ for the purposes of Clause 5(1)(a) of the Framework Agreement.
- 43 As is stated in paragraph 7 of the general considerations prefacing the Framework Agreement and as is clear from paragraph 37 above, the signatory parties to the Framework Agreement considered that the use of fixed-term employment contracts founded on objective reasons is a way to prevent abuse (judgment in *Mascolo and Others*, paragraph 86 and the case-law cited).

- 44 The concept of ‘objective reasons’ must, as the Court has already held, 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 (judgment in *Mascolo and Others*, paragraph 87 and the case-law cited).
- 45 On the other hand, a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation does not accord with the requirements stated in the previous paragraph. Such a provision, which is of a purely formal nature, 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 capable of achieving the objective pursued and is necessary for that purpose. Such a provision therefore carries a real risk that it will result in misuse of that type of contract and, accordingly, is not compatible with the objective of the Framework Agreement and the requirement that it have practical effect (judgment in *Mascolo and Others*, paragraph 88 and the case-law cited).
- 46 In the present case, as regards the argument of the Grand Duchy of Luxembourg that occasional workers in the entertainment arts, within the meaning of Luxembourg law, in fact participate in individual projects which are limited in time, it should be noted that, even assuming that such projects did entail, for the employer, temporary recruitment needs and that those needs could be construed as ‘objective reasons’ justifying the renewal of fixed-term employment contracts within the meaning of Clause 5(1)(a) of the Framework Agreement, that Member State does not explain how the national legislation requires occasional workers in the entertainment arts, within the meaning of Luxembourg law, to engage in their professional activities within the framework of such projects. On the contrary, as the Commission points out, it is clear from the wording of the definition of ‘occasional worker in the entertainment arts’, set out in Article 4 of the amended Law of 30 July 1999, that that definition is neutral as regards whether or not the worker’s activity is temporary.
- 47 Moreover, as the Commission argues, the assertion that every occasional worker in the entertainment arts, within the meaning of Luxembourg law, is hired for projects of a temporary nature is contradicted by the very terms of Article L. 122-1 of the Labour Code. As is clear from paragraphs 7 and 24 above, paragraph (1) of that article establishes a rule that fixed-term contracts may, exceptionally, be concluded for the performance of specific and non-permanent tasks. Paragraph (2) of Article L. 122-1 of the Labour Code lists several examples of the application of that rule, which include ‘employment posts in respect of which it is normal in some sectors of economic activity not to have recourse to permanent contracts owing to the nature of the activity or the temporary nature of those posts, the list of those sectors and those posts being established by Grand Ducal regulation’. Under paragraph (3) of that article, however, fixed-term contracts may be concluded in the case of occasional workers in the entertainment arts ‘by way of derogation from paragraphs (1) and (2)’.
- 48 It follows that the tasks assigned to occasional workers in the entertainment arts need not be specific and non-permanent as required under Article L. 122-1 of the Labour Code and, consequently, the nature of the activity engaged in by such workers is not necessarily temporary. Accordingly, it is clear that the Luxembourg legislation at issue does not prevent employers from entering into successive fixed-term employment contracts with occasional workers in the entertainment arts in order to meet lasting and permanent staffing needs.
- 49 That conclusion cannot be called into question by the argument, set out in paragraph 31 above, relating to the provisions of the Grand Ducal Regulation of 11 July 1989. By that argument, the Grand Duchy of Luxembourg simply contends that that regulation allows fixed-term employment contracts to be concluded in the performing arts sector in order to fill posts in respect of which it is normal not to have recourse to permanent contracts owing to the temporary nature of those posts. That Member

State does not explain, however, how that regulation affects the scope, or the interpretation to be given to, the derogation allowed under paragraph (3) of Article L. 122-1 of the Labour Code, under which, as was stated in paragraphs 7, 47 and 48 above, employers are permitted to hire occasional workers in the entertainment arts on the basis of fixed-term employment contracts for tasks which are not temporary in nature. The legal situation of occasional workers in the entertainment arts which results from the national law in question, as described to the Court, does not satisfy the demands of clarity and precision required in respect of national implementing measures (see, to that effect, judgment in *Commission v Spain*, C-151/12, EU:C:2013:690, paragraph 33, and the case-law cited).

- 50 In those circumstances, even supposing that the national legislation at issue pursues the objective invoked by the Grand Duchy of Luxembourg, namely, to provide occasional workers in the entertainment arts with a measure of flexibility, as well as social benefits, by making it possible for employers of that category of worker to recruit on the basis of recurring fixed-term employment contracts, such an objective cannot bring that legislation into conformity with Clause 5(1)(a) of the Framework Agreement, since it does not prove the existence of specific and concrete circumstances characterising the activity in question and therefore justifying, in that particular context, the use of successive fixed-term employment contracts, in accordance with the case-law cited in paragraph 44 above.
- 51 While it is true that, as has already been pointed out in paragraph 40 above, a Member State is entitled, when implementing Clause 5(1) of the Framework Agreement, to take account of the particular needs of a specific sector, that right cannot be understood as allowing that Member State to consider itself, in respect of that sector, relieved of the obligation to provide an adequate measure to prevent and, if necessary, to penalise the abusive use of successive fixed-term contracts. To permit a Member State to rely on an objective such as the flexibility deriving from the use of fixed-term employment contracts in order to regard itself as relieved of that obligation would be in contradiction with one of the objectives pursued by the Framework Agreement and referred to in paragraphs 35 and 36 above, that is to say, stability of employment, considered to be a major element in the protection of workers, and would also be likely to reduce significantly the categories of person able to enjoy the benefit of the protective measures provided for in Clause 5 of the Framework Agreement.
- 52 It must therefore be held that the evidence submitted to the Court in the present case shows that, contrary to the case-law referred to in paragraph 37 above, the Luxembourg legislation at issue makes no provision for measures to prevent the abusive use of successive fixed-term employment contracts, for the purposes of Clause 5(1) of the Framework Agreement, in respect of occasional workers in the entertainment arts. The action brought by the Commission must therefore be held to be well founded.
- 53 In the light of the foregoing considerations, it must be held that, by maintaining in force, with respect to occasional workers in the entertainment arts, derogations from the measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement.

### **Costs**

- 54 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission applied for costs and the Grand Duchy of Luxembourg's failure to fulfil its obligations has been established, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by maintaining in force, with respect to occasional workers in the entertainment arts, derogations from the measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement on fixed-term work of 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP;**
2. **Orders the Grand Duchy of Luxembourg to pay the costs.**

[Signatures]