



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 March 2020*

(References for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework Agreement, concluded by ETUC, UNICE and CEEP regarding fixed-term work – Clause 5 – Concept of ‘successive fixed-term employment contracts or relationships’ – Failure by the employer to respect the relevant legal deadline for definitively filling posts temporarily occupied by fixed-term workers – Implicit extension of the employment relationship from year to year – Occupation by a fixed-term worker of the same post in the context of two consecutive appointments – Concept of ‘objective reasons’ justifying the renewal of successive fixed-term employment contracts or relationships – Respect for the reasons for recruitment provided for by the national legislation – Concrete examination finding that the successive renewal of fixed-term employment relationships seeks to cover the employer’s permanent and regular staffing needs – Measures seeking to prevent and, where appropriate, to punish abuses resulting from the use of successive fixed-term employment contracts or relationships – Selection procedures seeking to definitively fill posts occupied temporarily by fixed-term workers – Conversion of the situation of fixed-term workers into ‘non-permanent workers of indefinite duration’ – Grant to the worker of compensation equal to that paid in the event of unfair dismissal – Applicability of the Framework Agreement despite the fact that the worker consented to successive renewals of fixed-term contracts – Clause 5(1) – Absence of obligation for national courts to disapply inconsistent national legislation)

In Joined Cases C-103/18 and C-429/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado Contencioso-Administrativo No 8 de Madrid (Administrative Court No 8, Madrid, Spain) and the Juzgado Contencioso-Administrativo No 14 de Madrid (Administrative Court No 14, Madrid, Spain), by decisions of 30 January and 8 June 2018, received at the Court, respectively, on 13 February and 28 June 2018, in the proceedings

Domingo Sánchez Ruiz (C-103/18),

Berta Fernández Álvarez and Others (C-429/18)

v

Comunidad de Madrid (Servicio Madrileño de Salud)

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, P.G. Xuereb, T. von Danwitz, N. Piçarra and A. Kumin, Judges,

Advocate General : J. Kokott,

* Language of the case: Spanish.

Registrar: L. Carrasco Marco, administratrice,

having regard to the written procedure and further to the hearing on 15 May 2019,

after considering the observations submitted on behalf of:

- Sánchez Ruiz, by J.M. Ruiz de la Cuesta Vacas, procurador de los Tribunales, and F.J. Araúz de Robles Dávila, abogado,
- Fernández Álvarez and Others, by F.J. Araúz de Robles Dávila, abogado,
- the Comunidad de Madrid (Servicio Madrileño de Salud), by L.J. García Redondo and A. Serrano Patiño, letrados,
- the Spanish Government, initially by S. Jiménez García and A. Gavela Llopis, and subsequently by S. Jiménez García, acting as Agents,
- the European Commission, by N. Ruiz García, M. van Beek and J. Rius, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 October 2019,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of the first paragraph of Article 2 of 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 of Clause 5 of the Framework Agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), which is annexed to that directive.
- 2 The requests have been made in two sets of proceedings between workers employed by the Comunidad de Madrid (Servicio Madrileño de Salud) (Community of Madrid (Madrid Health Service), Spain) ('the Community of Madrid'), namely, in Case C-103/18, Mr Domingo Sánchez Ruiz and, in Case C-429/18, Mrs Berta Fernández Álvarez and four other workers ('Mrs Fernández Álvarez and Others'), on the one hand, and the Community of Madrid, on the other hand, concerning the recognition of those persons as members of the permanent regulated staff or, in the alternative, as public employees with a status similar to that staff, who are covered by the principles of permanence and security of employment.

Legal context

European Union law

- 3 It follows from recital 17 of Directive 1999/70 that, 'as regards terms used in the framework agreement but not specifically defined therein, this Directive allows Member States to define such terms in conformity with national law or practice as is the case for other Directives on social matters using similar terms, provided that the definitions in question respect the content of the framework agreement'.

- 4 According to Article 1 of Directive 1999/70, the latter seeks ‘to put into effect the framework agreement ... concluded ... between the general cross-industry organisations [the European Trades Union Confederation (ETUC), the Union of Industrial and Employers’ Confederations (UNICE) and the European Centre of Enterprises with Public Participation (CEEP)] ...’.
- 5 The first paragraph of Article 2 of that directive provides:
- ‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive [and shall] take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. ...’
- 6 According to Clause 1 of the Framework Agreement, the purpose thereof is, firstly, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and, secondly, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.
- 7 Clause 5 of the Framework Agreement, entitled ‘Measures to prevent abuse’, states:
- ‘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.’

Spanish law

- 8 Article 8 of the Ley estatal 55/2003 del Estatuto Marco del personal estatutario de los servicios de salud (Law 55/2003 relating to the framework regulations for regulated staff of the health service) of 16 December 2003 (BOE No 301, of 17 December 2003, p. 44742), in the version applicable on the date of the facts in the main proceedings (‘the framework regulations’), defines ‘permanent regulated staff’ as ‘staff who, after having successfully completed the corresponding selection procedure, are appointed to carry out on a permanent basis the functions associated with that appointment’.
- 9 Article 9 of the framework regulation provides:
- ‘1. On grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, the health services may appoint temporary regulated staff.
- Temporary regulated staff may be appointed on an interim, occasional or replacement basis.
2. Appointment on an interim basis shall be made to cover a vacant post in the health-care institutions or services where it is necessary to ensure performance of the duties pertaining to that post.

The interim regulated staff member's service shall be terminated if a permanent regulated staff member is appointed, through the procedure laid down in law or regulation, to the post occupied by that interim regulated staff member, or if that post is abolished.

3. Appointment on an occasional basis shall be made in the following situations:

- (a) when it concerns the provision of certain services of a temporary, auxiliary or extraordinary nature;
- (b) when it is necessary in order to ensure the permanent and continuous operation of the health-care institutions;
- (c) for the provision of additional services in order to compensate for a reduction of normal working hours.

The occasional regulated staff member's service shall be terminated when the purpose of the appointment has been accomplished, when the period expressly set out in his notice of appointment has expired, or when the duties for which the appointment was made are abolished.

If more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, the reasons for this shall be examined in order to assess, if necessary, whether it is appropriate to create a permanent post in the healthcare institution concerned.

4. Appointment on an interim basis may be used where it is necessary in order to ensure performance of the duties of a permanent or temporary member of staff during holidays, leave periods and other absences of a temporary nature which involve the retention of the post.

The appointment of the interim regulated staff member shall terminate when the person being replaced returns to work, or when that person loses his right to return to the same post or function.'

- 10 Article 10 of the Real Decreto Legislativo 5/2015 por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público (Royal Legislative Decree 5/2015 approving the consolidated text of the Law on the basic regulations relating to public employees), of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103105 ('the basic regulations relating to public employees') provides:

'1. Interim civil servants are persons who, for expressly justified reasons of necessity and urgency, are appointed to that status to perform the duties of established civil servants in one of the following cases:

- (a) the existence of vacant posts which cannot be occupied by established civil servants;

...

4. In the circumstances referred to in paragraph 1(a) of this article, vacant posts filled by interim civil servants shall be included on the list of vacancies for the year in which the appointments are made or, if that is not possible, for the following year, unless there is a decision to abolish the post.

...'

- 11 Article 70(1) of the basic regulations relating to public employees provides:

‘Human resource needs which receive a budget allocation and are to be met by appointing new members of staff shall be included on a list of public sector vacancies or filled by means of another similar instrument for managing the fulfilment of staffing needs, which involves organising the relevant selection procedures for the posts to be filled (up to 10% additional posts) and setting the maximum period for the publication of notices. In any event, the implementation of the list of public sector vacancies or similar instrument must take place within a non-renewable period of three years.’

- 12 According to the Fourth Transitional Provision for the Public Employees’ Basis Status:

‘1. The public administration may publish notices of competition with a view to consolidating employment in permanent posts within its various bodies or categories which have budgetary resources and were filled by interim civil servants or temporary staff before 1 January 2005.

...

3. The content of the tests is related to the procedures, tasks and usual functions of the posts subject to each notice of competition. At the competition stage, amongst the merits to be taken into consideration are the length of service within the public administration and experience in the posts subject to the notice of competition.

...’

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

Case C-103/18

- 13 On 2 November 1999, the Community of Madrid appointed Mr Sánchez Ruiz as an interim regulated staff member in a post within the ‘Technical Administrative Staff’ category, to carry out an IT function within that community’s health service.
- 14 Since that staff category was abolished as a result of a legal reform, his appointment was terminated on 28 December 2011. On that same date, Mr Sánchez Ruiz was appointed as a member of the interim regulated staff in a post within a new category, ‘regulated information and communications technology staff’, but still with a view to carrying out IT functions within the same service. The interested party has never contested the termination of his first appointment or his second appointment.
- 15 The notice of appointment of 2 November 1999 and that of 28 December 2011 stated that Mr Sánchez Ruiz was employed as an interim regulated staff member so as to fill a vacant post, that the post would be filled until it is terminated or until he is reinstated as a permanent regulated staff member and that those appointments did not grant the interested person the right to tenured status in that post, regardless of the duration of that situation.
- 16 Throughout the entire duration of his employment by the Community of Madrid, Mr Sánchez Ruiz occupied the same post and consistently and continuously performed the same duties. He did not participate in the sole competition organised in his field between 1999 and 2015 with a view to obtaining the status of permanent regulated staff.
- 17 On 21 December 2016, Mr Sánchez Ruiz requested the Community of Madrid to recognise his status as permanent regulated staff member or, in the alternative, as a public employee with a similar status, to which the principles of permanence and security of employment apply, on the ground that he was a

victim of abusive behaviour on the part of his employer, as a result of the latter's use of successive fixed-term employment relationships, within the meaning of Clause 5(1) of the Framework Agreement.

- 18 The Community of Madrid rejected his request, concluding that such abuse presupposes the existence of successive fixed-term employment relationships and that, in Mr Sánchez Ruiz's case, there was a fixed-term employment relationship, since his second appointment took place as a result of a legal reform of staff categories. The Community of Madrid considered, moreover, that access to the status of permanent regulated staff member is in principle reserved to persons who have passed a selection procedure. It is therefore not possible under Spanish law that, outside of such a procedure, a temporary regulated staff member be appointed as a permanent regulated staff member. At the most, a temporary regulated staff member could be appointed as a 'non-permanent worker of indefinite duration' in a post until it is either terminated or attributed to a permanent regulated staff member. In addition, the Community of Madrid contended that Mr Sánchez Ruiz could not validly allege abusive conduct on the part of his employer, since he has not contested the termination of his post, his appointment in a new post or the publication of the notice of competition.
- 19 Mr Sánchez Ruiz brought an action before the referring court, the Juzgado Contencioso-Administrativo No 8 de Madrid (Administrative Court No 8, Madrid, Spain), contesting the decision to reject his request.
- 20 Since that court considers that Clause 5(1) of the Framework Agreement refers solely to the use of 'successive' fixed-term employment contracts or relationships, it questions, firstly, whether Mr Sánchez Ruiz's situation is characterised by the existence of a single fixed-term employment relationship or, as is claimed by the interested party before it, of two employment relationships of that type.
- 21 In that regard, the referring court states that the interested party was recruited for the reasons set out in Article 9(1) of the framework regulations, that his employer failed to comply with its obligations, resulting from Articles 10 and 70 of the basic regulations relating to public employees, to include the post occupied temporarily by Mr Sánchez Ruiz in the list of vacancies for the year in which his appointment is made or for the following year or, in any event, at the latest in the following three years, which has the consequence that he has occupied that post temporarily for 17 years. It follows therefrom that Mr Sánchez Ruiz's employment relationship could be considered to have been implicitly extended from year to year, even if it had the appearance of a single employment relationship.
- 22 The referring court questions, secondly, whether the fact that Mr Sánchez Ruiz agreed to that situation, in so far as he did not contest the unlawfulness of his second appointment or his situation more generally, is capable of validating the Community of Madrid's conduct, in the event that it appears that that conduct is contrary to the Framework Agreement, and of thus depriving the interested party of the rights granted to him by that agreement. That court notes, in that respect, that Mr Sánchez Ruiz is in a stable situation, which he may terminate by requesting the publication of a vacancy notice or by participating in a competition in order to access the status of permanent statutory personnel.
- 23 Thirdly, that court states that, according to the case-law of the Tribunal Supremo (Supreme Court, Spain), the renewal of fixed-term employment contracts or relationships is possible to the extent that such a renewal responds to the reasons for recruitment set out in Article 9(1) of the framework regulations. Since the public sector is characterised by the need to provide the services which are essential to a functioning society, the conditions provided for in that provision are automatically satisfied and it is never possible to find the existence of abusive conduct resulting from the use of such employment contracts or relationships.

- 24 The Spanish public health sector has for a long time been characterised by the distortion of fixed-term employment relationships. Fixed-term workers have a succession of several employment relationships, working all or almost all of the days of the year, over several years, since the reason for their recruitment continues to persist. Those workers perform the same functions as those performed by permanent regulated staff. They therefore cover, in reality, permanent staffing needs. There is therefore, in that branch of the Spanish public sector, a structural problem to the extent that there is a high percentage of temporary workers, whose contribution is essential to the proper functioning of that sector, that there is no maximum limit to the number of successive fixed-term employment relationships and that there is a failure to comply with the legal obligation to fill posts temporarily occupied by those staff by recruiting workers employed with contracts of indefinite duration. Approximately 75% of the workers in Mr Sánchez Ruiz's professional category are employed in the context of fixed-term employment relationships.
- 25 The referring court considers, in that regard, that, in order to be able to find the existence of an 'objective reason', for the purposes of Clause 5(1)(a) of the Framework Agreement, justifying the renewal of such employment relationships, the use thereof must not only respect the reasons for recruitment set out in Article 9(1) of the framework regulations, but also be ad hoc, circumstantial and sporadic.
- 26 Fourthly, the referring court questions whether, under Spanish law, there exist measures capable of preventing and, where appropriate, punishing abuses resulting from the use of successive fixed-term employment contracts or relationships.
- 27 In that regard, that court points out that, under Spanish law, there are no limits to the number of appointments as a member of the temporary regulated staff. Moreover, in the event of a failure by a public employer to fulfil its obligations resulting from Articles 10 and 70 of the basic regulations relating to public employees, it is not possible to subject it to measures applicable to private employers. The applicable national legislation and case-law hinder access to the status of permanent regulated staff other than by successfully completing the selection procedure.
- 28 The possibility to convert temporary regulated staff into non-permanent staff of indefinite duration, following from the case-law of the Tribunal Supremo (Supreme Court, Spain), is not a measure capable of combatting the abuse resulting from the use of successive fixed-term employment relationships, because it would be possible to terminate the post occupied by the worker concerned or to terminate his or her functions if that post is assigned to a permanent regulated worker.
- 29 The possibility for the public administration to consolidate employment in posts occupied by interim civil servants or temporary staff by means of tests, provided for by the Fourth Transitional Provision for the Public Employees' Basis Status, is the sole measure capable of combatting the abusive use of successive fixed-term employment relationships. However, that measure is designed merely as an option for public employers and depends on its sole will.
- 30 Fifthly, according to the referring court, the main proceedings concern final administrative decisions such as appointments, decisions terminating functions and notices of competition, as well as final judgments delivered by courts ruling at first and final instance. The final character of those decisions and judgments impedes the reporting, by fixed-term workers, of irregularities committed by the administration and, therefore, the achievement of the objectives pursued by Directive 1999/70. The question thus arises whether, in the circumstances of the case in the main proceedings, EU law requires final judgments or administrative acts to be reviewed.

31 In those circumstances, the Juzgado Contencioso-Administrativo No 8 de Madrid (Administrative Court No 8, Madrid), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Can a situation such as that described in the present case (in which the public-sector employer fails to observe the statutory time limits and thus either permits successive temporary contracts or preserves the temporary nature of the appointment by changing the nature of the appointment from occasional to interim or replacement) be considered an abusive use of successive appointments and therefore be regarded as a situation described in Clause 5 of the Framework Agreement?
- (2) Must the provisions in the Framework Agreement, in conjunction with the principle of effectiveness, be interpreted as precluding national procedural rules that require a fixed-term worker actively to challenge or appeal against all the successive appointments and terminations of employment as the only way in which to benefit from the protection of Directive 1999/70 and claim the rights conferred on him by EU law?
- (3) In view of the fact that, in the public sector and in the provision of essential services, the necessity of filling vacant posts and providing cover for annual leave, sick leave, and other types of leave is essentially ‘permanent’, and given that the concept of ‘objective reason’ justifying a fixed-term appointment has to be delimited:
 - (a) Can it be held to be contrary to [Clause 5(1)(a) of the Framework Agreement] and, therefore, that there is no objective reason, when a fixed-term worker is employed under an uninterrupted succession of ‘contratos de interinidad’ (temporary replacement contracts), working all or nearly all the days of the year, under a succession of consecutive appointments/engagements that continue on a completely stable basis for years, and the stated grounds for engaging the worker are always satisfied?
 - (b) Must the need be considered permanent rather than temporary, and therefore not to be covered as an ‘objective reason’ within the meaning of Clause 5(1)(a) [of the Framework Agreement], having regard either to the parameters described above, that is to say, the existence of countless appointments and engagements that extend over a period of years, or to the existence of a structural defect that is reflected in the percentage of temporary appointments in the sector in question, when those needs are as a general rule always met by temporary workers, so that this has become an essential and long-term element of the operation of the public service?
 - (c) Or is it to be understood that, in essence, in order to determine the permitted limit for temporary appointments, regard must be had only to the letter of the legislation that covers the employment of such fixed-term workers, when it states that they may be taken on grounds of necessity, urgency or for the development of programmes of a temporary, cyclical or extraordinary nature: in short, that in order for an objective reason to be deemed to exist, such employment must meet these exceptional circumstances, and that this ceases to be the case, and use therefore constitutes misuse, when it is no longer isolated, occasional or ad hoc?
- (4) Is it compatible with the Framework Directive to regard grounds of need, urgency or the development of programmes of a temporary, interim or extraordinary nature as an objective reason for appointing and successively reappointing IT specialists on temporary regulated terms where these public employees are performing the normal functions of permanent regulated employees on a permanent and regular basis, and the employing Administration neither establishes maximum limits to such appointments nor fulfils its legal obligations to use permanent staff to cover these posts and meet these needs, and no equivalent measure is established to prevent and avoid misuse of successive temporary appointments, with the result that IT specialists employed on temporary regulated terms continue to carry out these duties for periods that, in the present case, amount to an uninterrupted duration of 17 years?

- (5) Are the provisions in the Framework Agreement and the interpretation of that Agreement by the CJEU compatible with the case-law of the Tribunal Supremo (Supreme Court, Spain), in so far as it fixes the existence of an objective reason for an appointment by reference to the time limit to the appointment, without regard to other parameters, or finds that there can be no comparison made with a career public official because of the different legal rules covering them and different access routes or because career officials are permanently established but employees recruited to cover vacancies hold temporary appointments?
- (6) If the national courts find that there is abuse arising from the use of successive appointments of temporary regulated staff to cover vacancies in the [Community of Madrid] and that they are being used to cover permanent structural needs in the provision of services by permanent regulated employees, given that domestic law contains no effective measure to penalise such misuse and eliminate the consequences of the breach of EU legislation, must Clause 5 of the Framework Agreement be interpreted as requiring the national courts to adopt effective deterrent measures to ensure the effectiveness of the Framework Agreement, and therefore to penalise that misuse and eliminate the consequences of the breach of that EU legislation, disapplying the rule of domestic law that prevents it from being effective?

If the answer should be affirmative, as held by the Court in paragraph 41 of its judgment of 14 September 2016, *Martínez Andrés and Castrejana López* (C-184/15 and C-197/15, EU:C:2016:680):

As a measure to prevent and penalise the misuse of successive temporary contracts and to eliminate the consequence of the breach of EU law, would it be consistent with the objectives pursued by Directive 1999/70 to convert the temporary interim/occasional/replacement regulated relationship into a stable regulated relationship, the employee being classified as a permanent official or an official with an appointment of indefinite duration, with the same security of employment as comparable permanent regulated employees?

- (7) If there is abuse of successive temporary contracts, can the conversion of the temporary regulated relationship into an indefinite [non-permanent] or permanent relationship be regarded as satisfying the objectives of Directive 1999/70 and the Framework Agreement only if the temporary regulated employee who has been the victim of this misuse enjoys exactly the same working conditions as permanent regulated employees (as regards social security, promotion, opportunities to cover vacant posts, training, leave of absence, determination of administrative status, sick leave and other permitted absences, pension rights, termination of employment and participation in selection competitions to fill vacancies and obtain promotion) in accordance with the principles of permanence and security of employment, with all associated rights and obligations, on equal terms with permanent regulated IT specialists?
- (8) In the circumstances described here, is there an obligation under EU law to review final judgments/administrative acts when the four conditions laid down in the judgment of 13 January 2004, *Kühne & Heitz NV* [(C-453/00, EU:C:2004:17)] are met: (1) Under Spanish national law, the authorities and the courts may review decisions (even if the restrictions involved make it very difficult or even impossible); (2) The contested decisions have become final as a result of a judgment of a national court issued in sole or final instance; (3) That judgment is based on an interpretation of EU law inconsistent with the case-law of the CJEU and adopted without a question being referred to the CJEU for a preliminary ruling; and (4) The person concerned applied to the administrative body as soon as it knew of the relevant case-law?

- (9) May and must national courts, as European courts that must give full effect to EU law in the Member States, require and order the internal administrative authority of a Member State – within its respective area of jurisdiction – to adopt the relevant measures in order to eliminate rules of domestic law incompatible with EU law in general, and with Directive 1999/70 and the Framework Agreement in particular?’

Case C-429/18

- 32 Mrs Fernández Álvarez and Others have worked for the health service of the Community of Madrid for between 12 and 17 years as the case may be, as temporary regulated staff members. In those posts, they perform functions as dental surgeons and have been subject to between 82 and 227 successive appointments, as the case may be.
- 33 The Community of Madrid did not include the posts temporarily occupied by Mrs Fernández Álvarez and Others in the offer of employment corresponding to the years of their respective appointments or during the following years or, in any event, at the latest within a three-year period following those appointments, as is required by Articles 10 and 70 of the basic regulations relating to public employees. A single publication of a notice of competition relating to the professional category of specialist dentists was published during the 15 years preceding the order for reference, in the present case, in 2015.
- 34 On 22 July 2016, Mrs Fernández Álvarez and Others requested the Community of Madrid to recognise their status as members of the permanent regulated staff or, in the alternative, as public employees enjoying a similar status, to which the principles of permanence and security of employment apply, on the ground that their situation was incompatible with the requirements of the Framework Agreement.
- 35 On 26 August 2016, the Community of Madrid rejected their request. On 23 November 2016, it also dismissed the administrative appeal that they had brought against the decision of 26 August 2016.
- 36 Mrs Fernández Álvarez and Others brought an action before the referring court, the Juzgado Contencioso-Administrativo No 14 de Madrid (Administrative Court No 14, Madrid, Spain) against that decision to reject. In support of that action, they claim that their employer made abusive use of fixed-term employment relationships, in order to meet permanent structural needs and renewed them without objective reasons.
- 37 The referring court notes that it is undisputed that Mrs Fernández Álvarez and Others were recruited in the context of a variety of successive employment relationships and that the functions they perform in that context are identical to those performed by the permanent regulated staff. Furthermore, although those employment relationships are concluded for the reasons referred to in Article 9(1) of the framework regulations, the recruitment of Mrs Fernández Álvarez and Others seeks to cover the permanent and regular staffing needs of the Community of Madrid, since it offsets a structural deficit of dentists with a permanent regulated staff status. Only 38.77% of workers in the professional category of specialist dentists are employed as permanent regulated staff.
- 38 That court raises the question of whether there exists, under Spanish law, measures capable of preventing and, where appropriate, punishing abuses resulting from the use of successive fixed-term employment contracts or relationships. It questions in particular whether, in the situation of Mrs Fernández Álvarez and Others, the organisation of a selection procedure and the grant of compensation equal to that paid in the event of unfair dismissal are capable of constituting such measures. In that regard, the referring court notes that the effectiveness and dissuasiveness of the organisation of a selection procedure is doubtful, since it would have no negative effects for the public

employers who are responsible for the abuse. By contrast, the grant of compensation equal to that paid in the event of unfair dismissal would meet the requirements of proportionality and effectiveness and would be dissuasive.

39 In those circumstances, the Juzgado Contencioso-Administrativo No 14 de Madrid (Administrative Court No 14, Madrid), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is the referring court's interpretation of the Framework Agreement correct and is it correct to take the view that the employment of [Mrs Fernández Álvarez and Others] on temporary appointments constitutes abuse in so far as the public employer uses different contractual models, all of which are temporary, to ensure, on a permanent and stable basis, performance of the ordinary duties of permanent regulated staff and to cover structural defects and needs which are, in fact, not temporary but fixed and permanent? Is the type of temporary appointment described therefore not justified as an objective reason for the purposes of Clause 5(1)(a) of the Framework Agreement, in that such use of fixed-term contracts conflicts directly with the second paragraph of the preamble of the Framework Agreement and with general considerations 6 and 8 of that agreement, since there are no circumstances which would justify the use of such fixed-term employment contracts?
- (2) Is the referring court's interpretation of the Framework Agreement correct and is it correct to take the view that, in line with that interpretation, the holding of a conventional selection procedure, with the features described, is not an equivalent measure and cannot be regarded as a penalty, since it is not proportional to the abuse committed, the consequence of which is the termination of the temporary worker's appointment, in breach of the objectives of [Directive 1999/70], and the continued unfavourable situation of temporary regulated employees, nor can it be regarded as an effective measure in so far as it does not create any detriment to the employer, and nor does it fulfil any deterrent function, and therefore it is not compatible with the first paragraph of Article 2 of [that directive] in that it does not ensure that the Spanish State achieves the results imposed by the directive?
- (3) Is the referring court's interpretation of the first paragraph of Article 2 of Directive 1999/70 and of the judgment of the Court [of 14 September 2016, *Pérez López* (C-16/15, EU:C:2016:679)] correct and is it correct to take the view that, in line with that interpretation, the holding of a selection procedure that is open to external candidates is not an appropriate measure to penalise abuse arising from the use of successive temporary appointments, since Spanish legislation does not provide for an effective, dissuasive penalty mechanism which puts an end to the abuse arising from the appointment of temporary regulated staff and does not enable those permanent posts created to be filled by the staff who were the victims of the abuse, such that the precarious situation of those workers continues?
- (4) Is it correct to take the view, as the referring court does, that granting a temporary worker, who has been the victim of abusive behaviour by his employer, the status of a worker having an appointment 'of indefinite duration but not permanent' is not an effective penalty, in so far as a worker classified in this way may have his appointment terminated either because his post has been filled in a selection process or because his post has been abolished, and therefore that penalty is incompatible with the Framework Agreement for the purposes of preventing misuse of fixed-term contracts, since it does not comply with the first paragraph of Article 2 of Directive 1999/70 in that it does not ensure that the Spanish State achieves the results imposed by the directive?

In the light of that situation, it is necessary in the circumstances described to repeat the following questions referred by the Juzgado Contencioso-Administrativo No 8 de Madrid (Administrative Court No 8, Madrid) [in the context of Case C-103/18]:

- (5) If the national courts find that there is abuse arising from the use of successive appointments of temporary regulated staff to cover vacancies in the [Community of Madrid] and that they are being used to cover permanent structural needs in the provision of services by permanent regulated employees, given that domestic law contains no effective measure to penalise such misuse and eliminate the consequences of the breach of EU legislation, must Clause 5 of the Framework Agreement be interpreted as requiring the national courts to adopt effective deterrent measures to ensure the effectiveness of the Framework Agreement, and therefore to penalise that misuse and eliminate the consequences of the breach of that EU legislation, disapplying the rule of domestic law that prevents it from being effective?

If the answer should be affirmative, as held by the Court in paragraph 41 of its judgment of 14 September 2016, *Martínez Andrés and Castrejana López* (C 184/15 and C 197/15, EU:C:2016:680):

As a measure to prevent and penalise the misuse of successive temporary contracts and to eliminate the consequence of the breach of EU law, would it be consistent with the objectives pursued by Directive 1999/70/EC to convert the temporary interim/occasional/replacement regulated relationship into a stable regulated relationship, the employee being classified as a permanent official or an official with an appointment of indefinite duration, with the same security of employment as comparable permanent regulated employees?

- (6) If there is abuse of successive temporary contracts, can the conversion of the temporary regulated relationship into an indefinite [non-permanent] or permanent relationship be regarded as satisfying the objectives of Directive 1999/70 and the Framework Agreement only if the temporary regulated employee who has been the victim of this misuse enjoys exactly the same working conditions as permanent regulated employees (as regards social security, promotion, opportunities to cover vacant posts, training, leave of absence, determination of administrative status, sick leave and other permitted absences, pension rights, termination of employment and participation in selection competitions to fill vacancies and obtain promotion) in accordance with the principles of permanence and security of employment, with all associated rights and obligations, on equal terms with permanent regulated IT specialists?
- (7) Taking into account the existence, if any, of improper use of temporary appointments to meet permanent staffing needs for no objective reason and in a manner inconsistent with the urgent and pressing need that warrants recourse to them, and for want of any effective penalties or limits in Spanish national law, would it be consistent with the objectives pursued by Directive 1999/70/EC to grant, as a means of preventing abuse and eliminating the consequence of infringing EU law, compensation comparable to that for unfair dismissal, that is to say, compensation that serves as an adequate, proportional, effective and dissuasive penalty, in circumstances where an employer does not offer a worker a permanent post?

The request to have the oral procedure reopened

- ⁴⁰ Following the delivery of the Advocate General's Opinion, Mrs Fernández Álvarez and Others, by document lodged at the Court Registry on 6 November 2019, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

- 41 In support of their request, Mrs Fernández Álvarez and Others claim, in essence, that the Advocate General's Opinion is based on errors which should be rectified and contain formulations which either were not debated between the parties, or contradict what those parties acknowledged. Firstly, the compensation of public employees who are victims of an abusive use of successive fixed-term employment relations, which the Advocate General referred to in points 75 to 78 of her Opinion, does not exist under Spanish law. Likewise, the effective and dissuasive penalty mechanism, mentioned by the Advocate General in point 77 of her Opinion, is also lacking under that law, since the latter does not allow fines to be imposed on administrative authorities. Next, the position, allegedly expressed by the Advocate General in point 85 of her Opinion, according to which the conversion of fixed-term employment relationships into relationships of indefinite duration must be carried out, in the absence of other measures, according to a proper procedure, so as to clearly determine the order of appointments, constitutes a new element and it is essential that the parties have the possibility of presenting their point of view in that regard. Finally, in point 82 of her Opinion, the Advocate General introduced a new fact which had no basis in the national legislation at issue in the main proceedings, by finding that the temporary employees of the Community of Madrid who were victims of an abusive use of successive fixed-term employment relations cannot access stability of employment, because they have not shown their merits and their ability in the context of a selection procedure.
- 42 In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. The Court is not bound either by those submissions or by the reasoning underpinning those submissions (judgment of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 39 and the case-law cited).
- 43 It should also be noted, in that context, that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the parties or the interested persons referred to in Article 23 of that statute to submit observations in response to the Advocate General's Opinion. The fact that a party or such an interested person disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot therefore in itself constitute grounds justifying the reopening of the oral procedure (judgment of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 40 and the case-law cited).
- 44 It follows that, since the request of Mrs Fernández Álvarez and Others to have the oral part reopened is intended to enable it to respond to the findings made by the Advocate General in his Opinion, it cannot be granted.
- 45 It is true that, pursuant to Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order that the oral part of the procedure be reopened, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.
- 46 It should be noted, however, that, according to the Court's settled case-law, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference and does not have jurisdiction to interpret the internal law of a Member State (judgment of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 43 and the case-law cited).

- 47 However, the orders for reference contain the necessary information relating to the relevant provisions of Spanish law and, in particular, to the provisions applicable to Spanish public officials, on which the Court is required to rely.
- 48 Consequently, the Court, after hearing the Advocate General, considers that it has all the information necessary to answer the questions raised by the referring courts.
- 49 In the light of the foregoing, there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

The first question in Case C-103/18

- 50 By its first question in Case C-103/18, the referring court seeks to obtain clarification of the concept of ‘successive fixed-term employment contracts or relationships’, within the meaning of Clause 5 of the Framework Agreement.
- 51 It follows from the order for reference that that question concerns the fact that, in the present case, Mr Sánchez Ruiz was recruited by the Community of Madrid in the context of a fixed-term employment relationship in a vacant post until the latter is filled definitively, that that employer did not respect the deadline, provided for by Spanish legislation, for the organisation of a selection procedure seeking to fill that post definitively and that that employment relationship thus continued over several years. It follows, in addition, from that decision that, in those circumstances, it must be considered that the interested party’s employment relationship was implicitly extended from year to year. Moreover, the referring court states that, although Mr Sánchez Ruiz was, in November 1999 and December 2011, twice appointed by the Community of Madrid, he continuously occupied the same post and continuously performed the same functions in the service of that employer.
- 52 It follows therefrom that, by its question, the referring court asks, in essence, whether Clause 5 of the Framework Agreement must be interpreted as meaning that the concept of ‘successive fixed-term employment contracts or relationships’, within the meaning of that provision, covers a situation in which a worker recruited on the basis of a fixed-term employment relationship, namely until the vacant post to which he or she is recruited is definitively filled, occupied, in the context of several appointments, the same post continuously over several years and continuously performed the same functions, since the continuation of that worker in that vacant post is the result of the employer’s failure to comply with its legal obligation to organise within the relevant deadline a selection procedure seeking to definitively fill that vacant post and since his or her employment relationship was thereby implicitly extended from year to year.
- 53 In that regard, it should be noted that the purpose of Clause 5 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 (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 26 and the case-law cited).
- 54 As is apparent 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 can respond to the needs of both employers and workers (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 27 and the case-law cited).

- 55 Accordingly, Clause 5(1) of the Framework Agreement 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 (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 28 and the case-law cited).
- 56 It follows from the Court's settled case-law that Clause 5(1) of the Framework Agreement applies only where there are successive fixed-term employment contracts or relationships (judgments of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraphs 41 and 42; of 26 January 2012, *Küçük*, C-586/10, EU:C:2012:39, paragraph 45; and of 22 January 2020, *Baldonado Martín*, C-177/18, EU:C:2020:26, paragraph 70).
- 57 Clause 5(2)(a) of the Framework Agreement leaves it to the Member States and/or the social partners to determine the conditions under which fixed-term employment contracts or relationships are to be regarded as 'successive' (see, to that effect, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 81; of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 79; and of 22 January 2020, *Baldonado Martín*, C-177/18, EU:C:2020:26, paragraph 71).
- 58 While such a reference back to national authorities for the purpose of establishing the specific rules for application of the terms 'successive' for the purposes of the Framework Agreement may be explained by the concern to respect the diversity of the relevant national rules, it is, however, to be remembered that the margin of appreciation thereby left for the Member States is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the Framework Agreement. In particular, that discretion must not be exercised by national authorities in such a way as to lead to a situation liable to give rise to abuse and thus to thwart that objective (judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 82).
- 59 The Member States are required to guarantee the result imposed by EU law, as is clear not only from the third paragraph of Article 288 TFEU, but also from the first paragraph of Article 2 of Directive 1999/70 read in the light of recital 17 of that directive (see, to that effect, judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 68).
- 60 The limits on the discretion granted to the Member States, referred to in paragraph 58 of the present judgment, are particularly important in the case of a key concept, like the concept of 'successive' employment relationships, which is decisive for definition of the very scope of the national provisions intended to implement the Framework Agreement (see, to that effect, judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 83).
- 61 As was, in essence, noted by the Advocate General in point 44 of her Opinion, finding an absence of successive fixed-term employment relationships, within the meaning of Clause 5 of the Framework Agreement, on the sole ground that the worker concerned, although he was subject to several appointments, continuously occupied the same post over several years and continuously performed the same functions, although that worker's continuation in a vacant post on the basis of a fixed-term employment relationship is the consequence of the employer's failure to comply with its legal obligation to organise, within the relevant deadline, a selection procedure seeking to definitively fill that vacant post and his employment relationship was thereby extended from year to year, risks compromising the object, the aim and the practical effect of that agreement.
- 62 Such a narrow definition of the concept of 'successive fixed-term employment relationships' would allow insecure employment of workers for years (see, by analogy, judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 85).

- 63 Moreover, that restrictive definition risks not only excluding, in practice, a large number of fixed-term employment relationships from the benefit of the protection of workers sought by Directive 1999/70 and the Framework Agreement, largely negating the objective pursued by them, but also of permitting the misuse of such relationships by employers in order to meet fixed and permanent staffing needs of the employer.
- 64 In the light of the above considerations, the answer to the first question in Case C-103/18 is that Clause 5 of the Framework Agreement must be interpreted as meaning that the Member States and/or the social partners cannot exclude from the concept of ‘successive fixed-term employment contracts or relationships’, within the meaning of that provision, a situation in which a worker recruited on the basis of a fixed-term employment relationship, namely until the vacant post to which he or she is recruited is definitively filled, occupied, in the context of several appointments, the same post continuously over several years and continuously performed the same functions, since the continuation of that worker in that vacant post is the result of the employer’s failure to comply with its legal obligation to organise within the relevant deadline a selection procedure seeking to definitively fill that vacant post and since his or her employment relationship was thereby implicitly extended from year to year.

The third to fifth questions in Case C-103/18 and the first question in Case C-429/18

- 65 By their third to fifth questions in Case C-103/18 and first question in Case C-429/18, which should be examined together, the referring courts ask, in essence, whether Clause 5 of the Framework Agreement must be interpreted as precluding national legislation and case-law in accordance with which the successive renewal of fixed-term employment relationships is considered to be justified for ‘objective reasons’, within the meaning of paragraph 1(a) of that Clause, on the sole ground that that renewal responds to the reasons for recruitment referred to by that legislation, namely grounds of necessity, urgency or for the development of programmes of a temporary, cyclical or extraordinary nature.
- 66 In that regard, it follows from the Court’s case-law that the concept of ‘objective reasons’, within the meaning of Clause 5(1)(a) of the Framework Agreement, 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 (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 38 and the case-law cited).
- 67 On the other hand, a national provision which merely authorises recourse to successive fixed-term 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 of the present judgment (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 39 and the case-law cited).
- 68 Such a purely formal provision 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. That 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 of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 40 and the case-law cited).
- 69 As regards the cases in the main proceedings, it should be noted that the relevant national legislation determines precisely the conditions under which successive fixed-term contracts or employment relationships may be entered. The use of such contracts is permitted, under Article 9(3) of the framework regulations, as appropriate, when it concerns the provision of certain services of a

temporary, auxiliary or extraordinary nature, when it is necessary in order to ensure the permanent and continuous operation of the healthcare institutions or when it concerns the provision of additional services in order to compensate for a reduction of normal working hours.

- 70 That provision also provides that, where more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, the competent authority shall examine the reasons for those appointments and decide whether to create an additional permanent post.
- 71 It follows that the national legislation at issue in the main proceedings does not lay down a general and abstract obligation to have recourse to successive fixed-term employment contracts, but limits the conclusion of such contracts for the purposes of satisfying, in essence, temporary requirements.
- 72 In that regard, it should be noted that the temporary replacement of a worker in order to satisfy the employer's temporary staffing requirements may, in principle, constitute an 'objective reason' within the meaning of Clause 5(1)(a) of the Framework Agreement (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 44 and the case-law cited).
- 73 It should be pointed out that, in a sector of the public services with a large workforce, such as the public health sector, it is inevitable that temporary replacements will be necessary due, inter alia, to the unavailability of members of staff on sick, maternity, parental or other leave. The temporary replacement of workers in those circumstances may constitute an objective ground within the meaning of Clause 5(1)(a) of the Framework Agreement, justifying fixed-term contracts being concluded with the replacement staff and the renewal of those contracts as new needs arise, subject to compliance with the relevant requirements laid down in the Framework Agreement (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 45 and the case-law cited).
- 74 Moreover, it should be noted that the obligation to organise the health services in such a way as to ensure that healthcare worker–patient ratios are constantly appropriate rests with the public authorities and is dependent on many factors that may reflect a particular need for flexibility which, according to the Court's case-law referred to in paragraph 68 of the present judgment, is capable, in that specific sector, of providing an objective justification, under Clause 5(1)(a) of the Framework Agreement, for recourse to successive fixed-term employment contracts (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 46).
- 75 By contrast, it cannot be accepted that fixed-term employment contracts may be renewed for the purpose of the performance, in a fixed and permanent manner, of tasks in the health service which normally come under the activity of the ordinary hospital staff (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 47 and the case-law cited).
- 76 The renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of Clause 5(1)(a) of the Framework Agreement, in so far as such use of fixed-term employment contracts or relationships conflicts directly with the premiss on which the Framework Agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 48 and the case-law cited).
- 77 In order for Clause 5(1)(a) of the Framework Agreement to be complied with, it must therefore be specifically verified that the successive renewal of fixed-term employment contracts or relationships is intended to cover temporary needs and that a national provision such as that at issue in the main

proceedings is not, in fact, being used to meet fixed and permanent staffing needs of the employer (judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 49 and the case-law cited).

- 78 In that regard, the referring courts noted that, in practice, the successive appointments of Mr Sánchez Ruiz and of Mrs Fernández Álvarez and Others did not meet the simple temporary needs of the Community of Madrid, but sought to meet lasting and permanent staffing needs within the health service of that community. It follows from the orders for reference that, at the time when they brought their actions, those workers had all been employed by the Community of Madrid for at least 12 consecutive years, that some of them had been the subject of more than 200 appointments and that they performed tasks falling under the normal activity of staff benefiting from a permanent status.
- 79 Moreover, that finding is corroborated by the fact that the referring courts refer to the existence of a structural problem in the Spanish public health sector, in the form of a high percentage of temporary workers, who constitute, for that reason, an essential element for the functioning of that sector and in the form of an absence of maximum limits to the number of successive fixed-term employment relationships and the failure to comply with the legal obligation to fill posts which are temporarily covered by that staff by appointing workers employed with contracts of indefinite duration.
- 80 In those circumstances, the answer to the third to fifth question in Case C-103/18 and to the first question in Case C-429/18 is that Clause 5 of the Framework Agreement must be interpreted as precluding national legislation according to which the successive renewal of fixed-term employment relationships is justified for ‘objective reasons’, within the meaning of paragraph 1(a) of that Clause, on the sole ground that that renewal responds to the reasons for recruitment covered by that legislation, namely grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, in so far as such national legislation and case-law does not prevent the employers concerned from responding, in practice, by such renewals, to fixed and permanent staffing needs.

The seventh question in Case C-103/18 and the second, third, fourth, sixth and seventh questions in Case C-429/18

- 81 By their seventh question in Case C-103/18 and the second, third, fourth, sixth and seventh questions in Case C-429/18, which should be examined together, the referring courts ask the Court, in essence, whether certain measures provided for by Spanish law can be considered to constitute adequate measures to prevent and, where appropriate, to punish abuses resulting from the use of successive fixed-term employment contracts or relationships, for the purposes of Clause 5 of the Framework Agreement.
- 82 In that regard, the referring courts refer, in particular, to the organisation of selection procedures seeking to definitively fill posts occupied temporarily by workers employed in the context of fixed-term employment relationships, to the conversion of the status of workers who were abusively employed in the context of successive fixed-term employment relationships into ‘non-permanent workers of indefinite duration’ and to the grant of compensation equal to that paid in the event of unfair dismissal.
- 83 It should be noted that Clause 5 of the Framework Agreement, the purpose of which is to implement one of the objectives of that agreement, namely to place limits on the use of successive fixed-term employment contracts or relationships, requires Member States, in paragraph 1 thereof, 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 listed in Clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such employment contracts or

relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 84 and the case-law cited).

- 84 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 Clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 85 and the case-law cited).
- 85 In that way, Clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the Framework Agreement (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 86 and the case-law cited).
- 86 Clause 5 of the Framework Agreement does not lay down any specific sanctions where instances of abuse have been established. In such a case, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the Framework Agreement are fully effective (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 87 and the case-law cited).
- 87 Therefore, Clause 5 of the Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. The domestic law of the Member State concerned must nevertheless include another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts (see, to that effect, judgment of 14 September 2016, *Martínez Andrés and Castrejana López*, C-184/15 and C-197/15, EU:C:2016:680, paragraphs 39 and 41 and the case-law cited).
- 88 Where abuse arising from the use of successive fixed-term employment contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to penalise that abuse and nullify the consequences of the breach of EU law. According to the very wording of the first paragraph of Article 2 of Directive 1999/70, Member States must ‘take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [that] directive’ (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 88 and the case-law cited).
- 89 It should be noted, moreover, that it is not for the Court to rule on the interpretation of provisions of national law, that being exclusively for the national courts having jurisdiction, which must determine whether the requirements set out in Clause 5 of the Framework Agreement are met by the provisions of the applicable national law (judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 89 and the case-law cited).
- 90 It is therefore, in this case, for the referring courts to determine to what extent the conditions for application and the actual implementation of the relevant provisions of national law render the latter an appropriate measure for preventing and, where necessary, punishing the misuse of successive fixed-term employment contracts or relationships (see, by analogy, judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 90 and the case-law cited).
- 91 The Court, when giving a preliminary ruling, may however provide clarification designed to give those courts guidance in their assessment (see, by analogy, judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraph 91 and the case-law cited).

- 92 In that regard, it should be noted, in the first place, that none of the national measures mentioned in paragraph 82 of the present judgment appear to be covered by one of the categories of measures referred to in Clause 5(1)(a) to (c) of the Framework Agreement designed to prevent the abusive use of successive fixed-term employment contracts or relationships.
- 93 Therefore, it is necessary to investigate, in the second place, whether those measures constitute ‘equivalent legal measures to prevent abuse’ for the purposes of that clause.
- 94 As regards, first of all, the organisation within the relevant deadlines of selection procedures seeking to definitively fill posts occupied temporarily by fixed-term workers, it should be noted that such a measure is capable of preventing the precarious situation of those workers from becoming entrenched, by ensuring that the posts they occupy are rapidly filled definitively.
- 95 Therefore, the organisation within the relevant deadlines of such procedures is, in principle, capable, in the circumstances at issue in the main proceedings, to prevent abuses resulting from the use of successive fixed-term employment relationships until those posts are definitively filled.
- 96 That being said, it is apparent from the orders for reference that, in the present case, despite the fact that the legislation at issue in the main proceedings provides for precise deadlines for the organisation of such procedures, in reality, those deadlines are not respected and those procedures are uncommon.
- 97 In those circumstances, national legislation which provides for the organisation of selection procedures seeking to definitively fill posts occupied temporarily by fixed-term workers as well as precise deadlines for that purpose, but which does not allow it to be ensured that such procedures are actually organised, does not appear capable of preventing the abusive use, by the employer concerned, of successive fixed-term employment relationships. Such legislation also does not appear to be capable of duly punishing the abusive use of such employment relationships and of nullifying the consequences of the infringement of EU law, since, as the referring courts noted, its application has no negative effects for that employer.
- 98 Consequently, subject to verification by the referring courts, such legislation does not seem to constitute a sufficiently effective and deterrent measure to ensure the full effectiveness of measures taken pursuant to the Framework Agreement, for the purposes of the case-law referred to in paragraph 86 of the present judgment and, therefore, an ‘equivalent legal measure’, for the purposes of Clause 5 of the Framework Agreement.
- 99 The same applies to the Fourth Transitional Provision for the Public Employees’ Basis Status, which provides for the possibility for the administration to consolidate employment in posts occupied by interim civil servants or temporary staff by means of tests. It is apparent from the information provided by the referring courts that that provision provides only for an option for the administration, such that the latter is not obliged to implement that provision, even where it has been held that it makes abusive use of successive fixed-term contracts or relationships.
- 100 Moreover, as regards the fact that the organisation of selection procedures provides the opportunity to workers who have been abusively employed in the context of successive fixed-term employment relationships of attempting to gain access to stable employment, since those workers could, in principle, participate in those procedures, that fact cannot relieve the Member States of their need to comply with the obligation to provide adequate measures to duly punish the abusive use of successive fixed-term employment contracts and relationships. As the Advocate General in essence pointed out in point 68 of her Opinion, such procedures, the outcome of which is moreover uncertain, are also accessible to candidates who have not been victims of such abuse.

- 101 Therefore, since such procedures are organised irrespective of any consideration as to the abusive use of fixed-term contracts, it does not appear to be an appropriate means of duly penalising the improper use of such relationships and of nullifying the consequences of the breach of EU law. It therefore does not appear to allow the purpose of Clause 5 of the Framework Agreement to be fulfilled (see, by analogy, judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraphs 94 and 95 and the case-law cited).
- 102 As regards, next, the conversion of the status of workers who were recruited by abusively making use of successive fixed-term employment relationships as ‘non-permanent workers of indefinite duration’, it suffices to note that the referring courts themselves consider that that measure does not allow the objective pursued by Clause 5 of the Framework Agreement to be achieved. It is apparent from the orders for reference that that conversion is without prejudice to the possibility for employers to terminate the post or the duties of the fixed-term worker concerned where the replaced worker resumes his or her duties. Furthermore, as was noted by the referring courts, unlike the conversion, in the private sector, of successive fixed-term contracts into employment contracts of indefinite duration, the conversion of the status of the fixed-term workers concerned into that of ‘non-permanent workers of indefinite duration’ does not allow them to enjoy the same employment conditions as the permanent regulated staff.
- 103 As regards, finally, the grant of compensation equivalent to that paid in a case of unfair dismissal, it should be noted that, in order to constitute an ‘equivalent legal measure’, for the purposes of Clause 5 of the Framework Agreement, the grant of compensation must be specifically intended to offset the effects of the abusive use of successive fixed-term employment contracts or relationships (see, to that effect, judgment of 21 November 2018, *de Diego Porras*, C-619/17, EU:C:2018:936, paragraphs 94 and 95).
- 104 In accordance with the Court’s case-law noted in paragraph 86 of the present judgment, it is also necessary that the compensation granted be not only proportionate, but in addition sufficiently effective and dissuasive to ensure the full effectiveness of that Clause.
- 105 In those circumstances, in so far as Spanish law allows the grant of compensation equal to that paid in the event of unfair dismissal to temporary regulated staff members who are victims of the abusive use of successive fixed-term employment relationships, it is for the referring courts to determine whether such a measure is adequate to prevent and, where appropriate, punish such abuse.
- 106 In the light of the above considerations, the answer to the seventh question in Case C-103/18 and the second, third, fourth, sixth and seventh questions in Case C-429/18 is that Clause 5 of the Framework Agreement must be interpreted as meaning that it is for the referring court to assess, in accordance with all the applicable rules under its national law, whether the organisation of selection procedures seeking to definitively fill posts occupied on a temporary basis by workers employed in the context of fixed-term employment relationships, the conversion of those workers’ status into that of ‘non-permanent workers of indefinite duration’ and the grant to those workers of compensation equivalent to that paid in the event of unfair dismissal constitute measures which are adequate for the purposes of preventing and, where appropriate, punishing abuses resulting from the use of successive fixed-term employment contracts or relationships or equivalent legal measures, within the meaning of that provision.

The second question in Case C-103/18

- 107 It follows from the grounds for the order for reference in Case C-103/18 that, by its second question in that case, the referring court asks, in essence, whether the Framework Agreement must be interpreted as meaning that, in the event of abusive use, by a public employer, of successive fixed-term employment relationships, the fact that the worker concerned consented to the establishment of those

different employment relationships is not capable, from that perspective, of removing the abusive element from that employer's conduct, so that the Framework Agreement would not be applicable to that worker's situation.

- 108 In that regard, it should be noted that it follows from the wording itself of Clause 2(1) of the Framework Agreement that the scope thereof is conceived in broad terms, as it covers generally 'fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'. In addition, the definition of 'fixed-term workers' for the purposes of the Framework Agreement, set out in Clause 3(1) thereof, encompasses all workers without drawing a distinction according to whether their employer is in the public or private sector and regardless of the classification of their contract under domestic law (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 67 and the case-law cited).
- 109 The Framework Agreement therefore applies to all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer, in so far as they are linked by an employment contract or relationship within the meaning of national law, subject to the sole provisos of the margin of discretion conferred on Member States by Clause 2(2) of the Framework Agreement as to the application of the latter to certain categories of employment contracts or relationships and of the exclusion, in accordance with the fourth paragraph of the preamble to the Framework Agreement, of temporary agency workers (see, to that effect, judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 68 and the case-law cited).
- 110 There is nothing in those provisions to suggest that the application of the Framework Agreement is excluded where workers consent to the establishment of their employment relationships with a public employer.
- 111 On the contrary, such an interpretation would clearly undermine one of the objectives of the Framework Agreement, namely, as is apparent from paragraph 53 of the present judgment, 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.
- 112 That objective of the Framework Agreement is based implicitly but necessarily on the premiss that workers, as a result of their position of weakness vis-à-vis employers, are likely to be victims of an abusive use, by employers, of successive fixed-term employment relationships, even though they freely consented to the establishment and renewal of those relationships.
- 113 That position of weakness may dissuade a worker from explicitly claiming his rights vis-à-vis his employer, in particular, where doing so could expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to the worker (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 44 and 45 and the case-law cited).
- 114 Therefore, it cannot be concluded that fixed-term workers are deprived of the protection which the Framework Agreement guarantees them on the sole ground that they freely consented to the conclusion of successive fixed-term employment relationships, without completely depriving Clause 5 of that agreement of all effectiveness.
- 115 As results from the Court's case-law noted in paragraph 108 of the present judgment, the fact that those employment relationships were established by administrative acts due to the public nature of the employer is not relevant in that regard.

116 In the light of the above considerations, the answer to the second question in Case C-103/18 is that Clause 2, Clause 3(1) and Clause 5 of the Framework Agreement must be interpreted as meaning that, in the event of abusive use, by a public employer, of successive fixed-term employment relationships, the fact that the worker concerned consented to the establishment and/or renewal of those employment relationships is not capable, from that perspective, of removing the abusive element from that employer's conduct, so that the Framework Agreement would not be applicable to that worker's situation.

The sixth and ninth questions in Case C-103/18 and the fifth question in Case C-429/18

117 By their sixth and ninth questions in Case C-103/18 and fifth question in Case C-429/18, which should be examined together, the referring courts ask, in essence, whether EU law must be interpreted as obliging a national court hearing a dispute between a worker and his or her public employer to disapply national legislation which is not compatible with Clause 5(1) of the Framework Agreement.

118 In that regard, it should be noted that Clause 5(1) of the Framework Agreement is not unconditional and sufficiently precise to enable it to be relied upon by an individual before the national court (see, to that effect, judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 80).

119 A provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it (see, by analogy, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 62).

120 Therefore, a national court is not required to disapply a provision of its national law which is contrary to Clause 5(1) of the Framework Agreement.

121 That being said, it must be noted that, when national courts apply domestic law they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, comply with the third paragraph of Article 288 TFEU (judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 108 and the case-law cited).

122 The requirement for national law to be interpreted in conformity with EU law is inherent in the system of the Treaty, 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 (judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 109 and the case-law cited).

123 Admittedly, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 110 and the case-law cited).

124 The principle that national law must be interpreted in conformity with EU law nonetheless requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 111 and the case-law cited).

125 In the light of the above considerations, the answer to the sixth and ninth questions in Case C-103/18 and to the fifth question in Case C-429/18 is that EU law must be interpreted as not obliging a national court hearing a dispute between a worker and his or her public employer to disapply national legislation which is not compatible with Clause 5(1) of the Framework Agreement.

The eighth question in Case C-103/18

126 By its eighth question in Case C-103/18, the referring court asks, in essence, whether EU law must be interpreted as imposing on Member States the obligation to provide for the possibility of reviewing judgments and administrative acts relating to the termination of functions and appointments as well as notices of competition which have become final in order to ensure the full effectiveness of EU law.

127 According to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (order of 12 June 2019, *Aragón Carrasco and Others*, C-367/18, not published, EU:C:2019:487, paragraph 53 and the case-law cited).

128 Moreover, the need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (order of 12 June 2019, *Aragón Carrasco and Others*, C-367/18, not published, EU:C:2019:487, paragraph 54 and the case-law cited).

129 In the present case, the referring court at no point stated that, in the main proceedings, it was called upon to review a judgment or to instruct an administrative body to alter a decision to terminate functions, an appointment decision or a notice of competition which have become final.

130 In that regard, it could be deduced from the reasoning for the order for reference in Case C-103/18, and from the observations submitted by the Spanish Government in that case, that the sole circumstances in which the Community of Madrid might possibly be called upon to alter appointment decisions or decisions to terminate functions which have become final would be the conversion of successive appointments of Mr Sánchez Ruiz into an appointment as a member of the permanent regulated staff, in order to punish the abusive use, by that employer, of successive fixed-term employment relationships. However, it is clearly apparent from the information provided by the referring court that such a conversion is categorically excluded under Spanish law, since access to the status of permanent regulated staff is possible only following the successful completion of a selection procedure.

131 In those circumstances, it seems clear that the problem raised by the eighth question in Case C-103/18 is hypothetical. That question is therefore inadmissible.

Costs

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

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

1. **Clause 5 of the Framework Agreement on fixed-term work, concluded on 18 March 1999, which 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, must be interpreted as meaning that the Member States and/or the social partners cannot exclude from the concept of ‘successive fixed-term employment contracts or relationships’, within the meaning of that provision, a situation in which a worker recruited on the basis of a fixed-term employment relationship, namely until the vacant post to which he or she is recruited is definitively filled, occupied, in the context of several appointments, the same post continuously over several years and continuously performed the same functions, since the continuation of that worker in that vacant post is the result of the employer’s failure to comply with its legal obligation to organise within the relevant deadline a selection procedure seeking to definitively fill that vacant post and since his or her employment relationship was thereby implicitly extended from year to year.**
2. **Clause 5 of the Framework Agreement on Fixed-Term Work, concluded on 18 March 1999 and annexed to Directive 1999/70, must be interpreted as precluding national legislation according to which the successive renewal of fixed-term employment relationships is justified for ‘objective reasons’, within the meaning of paragraph 1(a) of that Clause, on the sole ground that that renewal responds to the reasons for recruitment covered by that legislation, namely grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, in so far as such national legislation and case-law does not prevent the employers concerned from responding, in practice, by such renewals, to fixed and permanent staffing needs.**
3. **Clause 5 of the Framework Agreement on Fixed-Term Work, concluded on 18 March 1999 and annexed to Directive 1999/70, must be interpreted as meaning that it is for the referring court to assess, in accordance with all the applicable rules under its national law, whether the organisation of selection procedures seeking to definitively fill posts occupied on a temporary basis by workers employed in the context of fixed-term employment relationships, the conversion of those workers’ status into that of ‘non-permanent workers of indefinite duration’ and the grant to those workers of compensation equivalent to that paid in the event of unfair dismissal constitute measures which are adequate for the purposes of preventing and, where appropriate, punishing abuses resulting from the use of successive fixed-term employment contracts or relationships or equivalent legal measures, within the meaning of that provision.**
4. **Clause 2, Clause 3(1) and Clause 5 of the Framework Agreement on Fixed-Term Work, concluded on 18 March 1999 and annexed to Directive 1999/70, must be interpreted as meaning that, in the event of abusive use, by a public employer, of successive fixed-term employment relationships, the fact that the worker concerned consented to the establishment and/or renewal of those employment relationships is not capable, from that perspective, of removing the abusive element from that employer’s conduct, so that the Framework Agreement would not be applicable to that worker’s situation.**
5. **EU law must be interpreted as not obliging a national court hearing a dispute between a worker and his or her public employer to disapply national legislation which is not compatible with Clause 5(1) of the Framework Agreement on Fixed-Term Work, concluded on 18 March 1999 and annexed to Directive 1999/70.**

[Signatures]