

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber),

25 October 2018 (*)

(Reference for a preliminary ruling — Social policy — Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Clause 5 — Measures to prevent the misuse of successive fixed-term employment contracts or relationships — National legislation excluding the application of those measures in the sector of activity of operatic and orchestral foundations)

In Case C-331/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Roma (Court of Appeal, Rome, Italy), made by decision of 15 May 2017, received at the Court on 1 June 2017, in the proceedings

Martina Sciotto

v

Fondazione Teatro dell'Opera di Roma,

THE COURT (Tenth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Tenth Chamber, F. Biltgen (Rapporteur) and E. Levits, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2018,

after considering the observations submitted on behalf of:

- Ms Sciotto, by F. Andretta, M. Speranza, V. De Michele and S. Galleano, avvocati,
- the Fondazione Teatro dell'Opera di Roma, by D. De Feo, M. Marazza and M. Marazza, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Albenzio, avvocato dello Stato,
- the European Commission, by M. van Beek and G. Gattinara, acting as Agents,

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

gives the following

Judgment

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

2 The request has been made in proceedings between Ms Martina Sciotto and the Fondazione Teatro dell'Opera di Roma concerning a request that her successive fixed-term employment contracts concluded for services carried out between 2007 and 2011 be reclassified as an employment relationship of an indefinite duration.

Legal context

European Union law

3 In accordance with Article 1 of Directive 1999/70, the purpose of the directive is 'to put into effect the [Framework Agreement] concluded ... between the general cross-industry organisations (ETUC, UNICE and CEEP)'.

4 The second and third paragraphs in the preamble to the Framework Agreement are worded as follows:

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

This agreement sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations. It illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on a basis acceptable to employers and workers.'

5 Paragraphs 6 to 8 and 10 of the general considerations of the Framework Agreement are worded as follows:

'6. Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance;

7. Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;

8. Whereas fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers;

...

10. Whereas this agreement refers back to Member States and social partners for the arrangements for the application of its general principles, minimum requirements and provisions, in order to take account of the situation in each Member State and the circumstances of particular sectors and occupations, including the activities of a seasonal nature.'

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

7 Clause 2 of the Framework Agreement, entitled 'Scope', provides, at point 1:

'This Agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

8 Clause 3 of the Framework Agreement, entitled 'Definitions', provides:

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

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

9 Clause 4 of the Framework Agreement, headed 'Principle of non-discrimination', provides, at point 1:

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

10 Clause 5 of the Framework Agreement, entitled 'Measures to prevent abuse', states, at point 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.'

Italian law

11 Article 3 of legge n. 426 — Provvedimenti straordinari a sostegno delle attività musicali (Law No 426 laying down exceptional measures to support musical activities) of 22 July 1977 (GURI No 206 of 28 July 1977) prohibits, on pain of nullity, 'renewals of employment relationships which, on the basis of legislative or contractual provisions, would involve the transformation of fixed-term contracts into contracts of indefinite duration'.

12 Article 1 of decreto legislativo n. 368 — Attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES (Legislative Decree No 368 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) of 6 September 2001 (GURI No 235 of 9 October 2001), in the version applicable at the time of the facts in the main proceedings ('Legislative Decree No 368/2001') provides, in paragraph 01 thereof, that employment contracts of indefinite duration are to constitute the usual form of employment relationship, in paragraph 1 thereof, that a term may be set for technical, production-related, organisational or replacement reasons, and, in paragraph 2 thereof, that those reasons must be in the written form.

13 Article 4 of Legislative Decree No 368/2001 provides that the term of a fixed-term contract can be extended, with the worker's consent, only when the initial duration of the contract is less than three years.

The extension is to be permitted once, provided that it is done on objective grounds and relates to the same activity. The burden of proving objective grounds is a matter for the employer.

14 In accordance with Article 5 of Legislative Decree No 368/2001, where, by operation of successive contracts, the employment relationship exceeds, as a whole, a duration of 36 months, the employment relationship is considered to be of indefinite duration.

15 Pursuant to Article 11(4) of Legislative Decree No 368/2001, the rules laid down in Articles 4 and 5 thereof are not to apply to the artistic and technical personnel of musical foundations.

16 Article 3(6) of decreto-legge n. 64 — recante disposizioni urgenti in materia di spettacolo e attività culturali (Decree-Law No 64 laying down urgent measures regarding the entertainment industry and cultural sector) of 30 April 2010 (GURI No 100 of 30 April 2010), converted into law, with amendments, by legge n. 100 (Law No 100) of 29 June 2010 (GURI No 150 of 30 June 2010, p. 2), provides that Article 3(4) and (5) of Law No 426 of 22 July 1977 laying down exceptional measures to support musical activities will continue to apply to operatic and orchestral foundations notwithstanding their transformation into entities governed by private law and, moreover, that the provisions of Article 1(01) and (2) of Legislative Decree No 368/2001 are not to apply to operatic and orchestral foundations.

The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

17 Ms Sciotto was employed as a ballet dancer by the Fondazione Teatro dell'Opera di Roma under multiple fixed-term contracts which were renewed on the basis of various artistic performances programmed during the period from 26 June 2007 to 30 October 2011.

18 Taking the view that she had been a permanent member of the theatre's staff and that she had performed the same roles as those of employees on contracts of indefinite duration, the applicant in the main proceedings brought proceedings, on 20 April 2012, before the Tribunale di Roma (District Court, Rome, Italy), claiming that her employment contracts did not indicate the existence of specific technical, organisational or production-related requirements which justified the fixed term to the employment contracts. In connection with that action, she sought to have the fixed terms applied to those contracts declared unlawful, the conversion of her employment relationship into a contract of unlimited duration and compensation for the loss incurred.

19 By judgment of 22 November 2013, the Tribunale di Roma (District Court, Rome) dismissed that action on the ground that the specific national rules applicable to operatic and orchestral foundations exclude the application to those foundations of rules governing common law employment contracts and thus preclude the conversion of the employment contracts concluded by those foundations into employment relationships of indefinite duration.

20 In her appeal brought before the Corte d'appello di Roma (Court of Appeal, Rome, Italy), Ms Sciotto claims, relying on the judgment of the Court of Justice of 26 February 2015, *Commission v Luxembourg* (C-238/14, EU:C:2015:128), that the specific national rules applicable to operatic and orchestral foundations are incompatible with EU law.

21 The referring court observes that the rules specific to the sector of activity of operatic and orchestral entities are highly complex and have been through three periods, during which those entities changed their legal form, passing successively from the status as a legal person governed by public law to the status as a public economic entity, then to the status as a legal person governed by private law in the form of a foundation.

22 According to the referring court, Legislative Decree No 368/2001, adopted during the third period, provides, in Article 11(4) thereof, that the provisions set out in Articles 4 and 5 of that legislative decree are not to apply to the artistic and technical personnel of musical foundations. Moreover, Article 11 of

decreto-legge n. 91 — recante Disposizioni urgenti per la tutela, la valorizzazione e il rilancio dei beni e delle attività culturali e del turismo (Decree-Law No 91 laying down urgent measures to protect, promote and relaunch cultural assets and activities and tourism) of 8 August 2013 (GURI No 186 of 9 August 2013), converted into law, with amendments, by legge n. 112 (Law No 112) of 7 October 2013 (GURI No 236 of 8 October 2013, p. 1), entitled ‘Urgent measures for the reorganisation of operatic and orchestral foundations and the relaunch of the national music system of excellence’, provides, in paragraph 19 thereof, that employment relationships of indefinite duration with operatic and orchestral foundations are to be concluded solely by means of appropriate public selection procedures.

23 The referring court raises the question of whether the protection of workers who have concluded, with operatic and orchestral foundations, successive fixed-term employment contracts for a total period exceeding three years complies with the requirements of EU law, where the national legislation applicable to that sector does not require a statement of the objective reasons justifying the renewal of the contracts, does not mention the maximum duration of the contracts, does not specify the maximum number of times those fixed-term contracts may be renewed, does not contain any legislative measures and does not restrict the conclusion of fixed-term contracts in that sector to reasons of replacement.

24 In those circumstances, the Corte d’appello di Roma (Court of Appeal, Rome) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are the national rules (in particular under Article 3(6) of Decree-Law No 64 of 30 April 2010 [laying down urgent measures regarding the entertainment industry and cultural sector], converted into law, with amendments, by Law No 100 of 29 June 2010, in so far as they determine that “the provisions of Article 1(01) and (2) of Legislative Decree [No 368/2001] shall not apply to operatic and orchestral foundations”) incompatible with Clause 5 of the [Framework Agreement]?’

Consideration of the question referred

25 By its question, as it is formulated, the referring court asks the Court of Justice to rule on whether certain provisions of national law are compatible with EU law.

26 The defendant in the main proceedings claims that such request is inadmissible since the Court of Justice does not have jurisdiction to rule on the interpretation of national law.

27 In that connection, it must be recalled that the system of cooperation established by Article 267 TFEU is based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of rules of national law with EU law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to rule on the compatibility of national rules with EU law (judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea*, C-352/14 and C-353/14, EU:C:2015:691, paragraph 21 and the case-law cited).

28 Although it is true that, on a literal reading of the referring court’s questions, the Court is being asked to rule on the compatibility of a provision of national law with EU law, there is nothing to prevent the Court from giving an answer that will be of use to the national court, by providing the latter with guidance as to the interpretation of EU law which will enable that court to rule itself on the compatibility of the national rules with EU law (judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea*, C-352/14 and C-353/14, EU:C:2015:691, paragraph 22 and the case-law cited).

29 Therefore, the question referred must be understood as asking essentially whether Clause 5 of the Framework Agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships and

intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration where the employment relationship goes beyond a specific date are not applicable to the sector of activity of operatic and orchestral foundations.

30 It should be recalled that the purpose of Clause 5(1) of the Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, which are regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 63; 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 72; and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 25).

31 As is apparent from the second paragraph of the preamble to the Framework Agreement and from paragraphs 6 to 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 (judgments 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 73; of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 36; and of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 27).

32 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. The measures listed in Clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (judgments of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 74; of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 37; and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 26).

33 The Member States enjoy a certain discretion in this regard since they have the choice of relying on one or more of the measures listed in Clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures (see, to that effect, judgments of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 75; of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 38; and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 27).

34 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 (judgments of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 76; of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 39; and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 28).

35 Moreover, Clause 5(1) of the Framework Agreement, the third paragraph of its preamble and paragraphs 8 and 10 of its general considerations give Member States the discretion, when implementing the agreement, to take account of the particular needs of the specific sectors and/or categories of workers involved, provided that that is justified on objective grounds (judgments 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 70 and the case-law cited, and of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 40).

36 In this case, it is established that the national legislation at issue in the main proceedings allows the recruitment, in the sector of operatic and orchestral foundations, of workers by means of successive fixed-

term employment contracts, without providing for any of the limits referred to in Clause 5(1)(b) and (c) of the Framework Agreement regarding the maximum total duration of those contracts or the number of renewals of such contracts. In particular, it is clear from the order for reference that the employment contracts in that sector are expressly excluded from the scope of the national provision which permits the transformation of successive fixed-term employment contracts beyond a certain duration into an employment relationship of indefinite duration.

- 37 In so far as it is also clear from the order for reference that that national legislation does not contain, so far as concerns staff employed on a fixed-term basis in the sector of activity of operatic and orchestral foundations, any legal measure equivalent to those set out in Clause 5(1) of the Framework Agreement, it needs to be verified whether the recourse, in that sector, to successive fixed-term employment contracts may be justified by an objective reason within the meaning of Clause 5(1)(a) of the Framework Agreement.
- 38 As is apparent from paragraph 7 of the general considerations in the Framework Agreement, the signatory parties to that agreement took the view that the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse (see, to that effect, judgments 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 86 and the case-law cited, and of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 43).
- 39 In that regard, the concept of ‘objective reasons’ must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State (judgments 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 87 and the case-law cited, and of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 44).
- 40 On the other hand, a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation does not accord with the requirements stated in the previous paragraph. Such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. Such a provision therefore carries a real risk that it will result in misuse of that type of contract and, accordingly, is not compatible with the objective of the Framework Agreement and the requirement that it have practical effect (judgments 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 88 and the case-law cited, and of 26 February 2015, *Commission v Luxembourg*, C-238/14, EU:C:2015:128, paragraph 45).
- 41 The Italian Government submits that the national legislation at issue in the main proceedings does not establish a general and abstract authorisation to have recourse to successive fixed-term employment contracts, but contains, on the contrary, specific and precise provisions in that connection.
- 42 The Italian Government essentially notes, first of all, that operatic and orchestral foundations such as the defendant in the main proceedings are comparable to public entities notwithstanding the fact that they take the form of legal persons governed by private law. It then relies on the fact that employment contracts in the sector of activity of those foundations are traditionally concluded for a fixed period and, in particular, emphasises in that context the constitutionally protected objective of the development of Italian culture and the safeguarding of Italian historic and artistic heritage. It also emphasises characteristics peculiar to that sector, in that each artistic performance is of a particular nature and employment contracts concluded for the purpose of an artistic performance must be distinguished from those concluded for the purpose of previous artistic performances. Lastly, the Italian Government explains that the statutory prohibition on

transforming fixed-term employment contracts into employment relationships of indefinite duration in that sector is based on two considerations closely linked to the inherently public nature of entities such as the defendant in the main proceedings, one relating to the need to contain public expenditure linked to the financing of such entities, and the other seeking to avoid circumvention of the rule that the recruitment of workers for an indefinite duration is made subject to the organisation of competitions. The Italian Government takes the view that adequate protection of workers is guaranteed by the engagement of the liability of directors of operatic and orchestral foundations when they have recourse to contracts contrary to the applicable legal provisions.

43 As regards, in the first place, the argument pertaining to the public nature of operatic and orchestral foundations such as the defendant in the main proceedings, the Court notes that such a public nature has no bearing on the protection enjoyed by a worker under Clause 5 of the Framework Agreement. According to settled case-law, Directive 1999/70 and the Framework Agreement are also intended to apply to fixed-term employment contracts concluded with public authorities and other public-sector bodies (see, to that effect, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 54, and of 7 September 2006, *Vassallo*, C-180/04, EU:C:2006:518, paragraph 32), since the definition of the concept of ‘fixed-term workers’ within the meaning 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 (see, to that effect, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 56; 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 of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 24).

44 So far as concerns, in the second place, the argument that employment contracts in the sector of activity of operatic and orchestral foundations are traditionally concluded for a fixed period, it must be held that allowing a Member State to invoke a continuity of the rules over time in order to be able to avoid complying with the general obligation incumbent on it under Clause 5(1) of the Framework Agreement, namely the effective and binding adoption of at least one of the measures listed in that provision designed to prevent the misuse of successive fixed-term employment contracts, not only finds no legal basis in the provisions of the Framework Agreement, but it would also clearly be contrary to one of the objectives pursued by the Framework Agreement, noted in paragraph 31 of the present judgment, namely stable employment, which is viewed as a major element in the protection of workers, and would therefore significantly reduce the categories of persons that could benefit from the protective measures provided for in that clause.

45 In addition, it should be noted that, even if the development of Italian culture and the safeguarding of Italian historic and artistic heritage may be regarded as objectives which are worthy of constitutional protection, the Italian Government does not explain how the pursuit of those objectives would require employers in the cultural and artistic sector to take on only fixed-term staff. It does not appear that that sector, unlike other public utility services such as national health or education, requires the number of workers who are employed there to be constantly in keeping with the number of potential users, or that it must cope with childcare services that must be ensured permanently or other factors which it is difficult to foresee.

46 In the third place, with regard to the argument relating to the characteristics peculiar to the sector of activity of operatic and orchestral foundations, it is indeed the case that the annual programming of artistic spectacles necessarily entails temporary recruitment needs for the employer.

47 Thus, the temporary employment of a worker in order to satisfy the employer’s temporary and specific staffing requirements may, in principle, constitute an ‘objective reason’ within the meaning of Clause 5(1) (a) of the Framework Agreement (see, to this effect, judgments 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 91, and of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 44).

- 48 The artistic or technical requirements linked to the performance of a spectacle may be such that temporary employment is necessary. The same is true where the replacement of an unavailable artist or technician must be provided for, in particular on account of illness or maternity.
- 49 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 cultural establishments at issue which normally come under the activity of the sector of activity of operatic and orchestral foundations.
- 50 In that regard, compliance with Clause 5(1)(a) of the Framework Agreement requires that it be specifically verified that the renewal of successive fixed-term employment contracts or relationships is intended to cover temporary needs.
- 51 However, the national legislation at issue in the main proceedings does not provide any condition of that nature for the derogation which it introduced from the common law rules applicable to employment contracts and intended to penalise the misuse of successive fixed-term contracts.
- 52 Moreover, the conclusion of the successive employment contracts at issue in the main proceedings does not appear to have met the simple temporary needs of the employer, but it appears instead to have fallen within the employer's usual programming needs.
- 53 Although the annual programming of different spectacles might require the employment of specific or additional workers, it is not, however, apparent from the file before the Court how the artistic performances for which the contracts of the applicant in the main proceedings were concluded were specific or why they gave rise to only temporary staffing needs.
- 54 In addition, the various fixed-term employment contracts by which the applicant was employed gave rise to the performance of similar tasks over several years, with the result that that employment relationship could have satisfied a need which was not temporary but, on the contrary, long-term; this, however, is for the referring court to verify.
- 55 In the fourth place, with regard to the arguments concerning budgetary considerations, it should be borne in mind that, whilst such considerations may underlie a Member State's choice of social policy and influence the nature or scope of the measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts as referred to in Clause 5(1) of the Framework Agreement (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 110, and order of 21 September 2016, *Popescu*, C-614/15, EU:C:2016:726, paragraph 63).
- 56 In the fifth place, it must be borne in mind that national legislation permitting the renewal of successive fixed-term employment contracts to replace staff pending the outcome of competition procedures organised for the purposes of recruiting workers for an indefinite duration is not in itself contrary to the Framework Agreement and can be justified by an objective reason.
- 57 The actual application of that reason must, however, be consistent with the requirements of the Framework Agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out (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, paragraphs 91 and 99; and order of 21 September 2016, *Popescu*, C-614/15, EU:C:2016:726, paragraph 64).
- 58 However, in the present case, the file before the Court contains no information regarding the possibility for the applicant in the main proceedings of having been able to participate in the competition procedures organised by her employer, or indeed as to the very existence of such procedures.

- 59 As regards, in the last place, the prohibition laid down by the national legislation on transforming, in the sector of operatic and orchestral foundations, fixed-term employment contracts into employment relationships of indefinite duration, it should be recalled that 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. Indeed, Clause 5(2) of the Framework Agreement in principle leaves it to the Member States to determine the conditions under which fixed-term employment contracts or relationships are to be regarded as contracts or relationships of indefinite duration. It follows that the Framework Agreement does not specify the conditions under which fixed-term contracts may be used (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 80, and order of 11 December 2014, *León Medialdea*, C-86/14, not published, EU:C:2014:2447, paragraph 47).
- 60 However, in order for national legislation such as that at issue in the main proceedings — which, in the sector of operatic and orchestral foundations, prohibits a succession of fixed-term contracts from being converted into a contract of indefinite duration — to be regarded as compatible with the Framework Agreement, the domestic law of the Member State concerned must include, in that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts (see, by analogy, judgments of 14 September 2016, *Martínez Andrés and Castrejana López*, C-184/15 and C-197/15, EU:C:2016:680, paragraph 41, and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 34).
- 61 However, it is established that, even in the case of abuse, workers in the operatic and orchestral foundations sector are not entitled to the transformation of their fixed-term employment contracts into an employment relationship of indefinite duration, nor do they benefit from other forms of protection such as the setting of a limit to the possibility of having recourse to fixed-term contracts.
- 62 It follows that the Italian legal system does not include, in the operatic and orchestral foundations sector, any effective measure, within the meaning of the case-law cited in paragraph 60 of this judgment, punishing the abuse of successive fixed-term contracts, despite staff in that sector not being entitled — unlike the workers at issue in the case giving rise to the judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166, paragraphs 35 and 36) — to claim the allocation of compensation for the loss incurred.
- 63 So far as concerns the engagement of the liability of directors, invoked by the Italian Government as an effective measure, it is important to recall that the national legislation obliges the authorities to recover from the directors responsible any sums paid to the workers by way of compensation for the loss incurred as a result of the infringement of provisions on recruitment and employment where that infringement is intentional or is the result of gross misconduct. That obligation placed on the authorities constitutes only one of the measures designed to prevent and punish the misuse of fixed-term employment contracts and it is for the referring court to determine whether the engagement of that liability is sufficiently effective and dissuasive to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective (see, to that effect, judgment of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraphs 52 and 53).
- 64 In that regard, where EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective (judgments of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 77 and the case-law cited, and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 29).
- 65 Therefore, where abuse of successive fixed-term employment contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of EU law (see, to that effect, judgments of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and

C-418/13, EU:C:2014:2401, paragraph 79 and the case-law cited, and of 7 March 2018, *Santoro*, C-494/16, EU:C:2018:166, paragraph 31).

66 Therefore, if the referring court were to find that, in the national law at issue in the main proceedings, there is no other effective measure to prevent and penalise abuses that may be identified in respect of staff employed in the operatic and orchestral foundations sector, such a situation would be likely to undermine the purpose and practical effect of Clause 5 of the Framework Agreement.

67 In accordance with settled case-law, the Member States' obligation, arising from a directive, to achieve the result envisaged by that directive, and their duty under Article 4 TEU to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (judgment of 14 September 2016, *Martínez Andrés and Castrejana López*, C-184/15 and C-197/15, EU:C:2016:680, paragraph 50 and the case-law cited).

68 Accordingly, it is for all the authorities of the Member State concerned to ensure that Clause 5(1) of the Framework Agreement is complied with, by ensuring that workers who have experienced abuse resulting from the use of successive fixed-term employment contracts are not deterred, in the hope of continued employment in the particular sector, from asserting before the national authorities, including the courts, the rights conferred upon them under national law which arise from the implementation by that law of all the preventive measures set out in Clause 5(1) of the Framework Agreement (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, paragraph 51 and the case-law cited).

69 More specifically, it is for the court seised of the case, so far as possible, and where there has been misuse of successive fixed-term employment contracts, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to penalise the abuse and to nullify the consequences of the breach of EU law (order of 11 December 2014, *León Medialdea*, C-86/14, not published, EU:C:2014:2447, paragraph 56).

70 In this case, given that the national law at issue in the main proceedings contains rules applicable to common law employment contracts which are intended to penalise the abuse of successive fixed-term contracts, by providing for the automatic transformation of a fixed-term contract into a contract of indefinite duration where the employment relationship goes beyond a specific date, an application of that rule in the case in the main proceedings could therefore constitute a measure preventing such abuse, as provided for in Clause 5 of the Framework Agreement.

71 In any event, as has been argued by the Commission, since the national law at issue in the main proceedings does not in any case allow, in the sector of activity of operatic and orchestral foundations, for the conversion of fixed-term employment contracts into a contract of indefinite duration, it is likely to lead to discrimination between fixed-term workers in that sector and fixed-term workers in other sectors, as the latter may become, after the transformation of their employment contract in the case of infringement of the rules on the conclusion of fixed-term contracts, comparable permanent workers within the meaning of Clause 4(1) of the Framework Agreement.

72 In the light of all the foregoing, the answer to the question referred is that Clause 5 of the Framework Agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.

Costs

- 73 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 (Tenth Chamber) hereby rules:

Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.

[Signatures]

* Language of the case: Italian.