OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 15 September 2011 [1]

I — Introduction

1. This reference for a preliminary ruling from the Landesarbeitsgericht Köln (Higher Labour Court, Cologne, Germany) concerns the interpretation of clause 5(1) and clause 8(3) of the framework agreement on fixed-term work concluded on 18 March 1999 ('the framework agreement'), 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. [2]

2. The reference has been made in proceedings brought by Ms Jansen against her employer, the judicial administration department of the Land Nordrhein-Westfalen, in respect of the termination of the last in the series of fixed-term contracts under which she worked, without interruption, for almost nine years with the Landgericht Köln (Regional Court, Cologne); that contract stipulated that it was concluded for reasons relating to temporarily available budget funds.

3. The national court points out that the main proceedings relate to a type of case which is not atypical and which constantly arises. At the hearing, Ms Jansen's representative stated that there is a marked increase in employment under fixed-term contracts owing to exploitation of the provisions at issue and that, according to his estimation, there are 100 000 persons in the same position as the party concerned, namely affected by contracts concluded on the basis of identical budgetary reasons.

4. In essence, the Landesarbeitsgericht Köln is asking the Court a totally new question: whether it is necessary to take into account the number or total duration of fixed-term contracts concluded successively between the same parties in order to assess whether there is an objective reason for concluding such a contract, within the meaning of clause 5(1)(a) of the framework agreement.

1 — Original language: French.
2 — OJ 1999 L 175, p. 43.

5. The Court is also asked to state whether it is possible under clause 5(1) of the framework agreement to restrict to employers in the public sector the use of a reason, in this case an economic reason, to establish such an objective reason and to what extent budgetary measures taken by the public authority concerned may be used as a tangible basis in that regard.

6. Finally, the national court raises a question similar to questions referred for a preliminary ruling already dealt with by the Court, which concerns the requirements of clause 8(3) of the framework agreement, usually called 'the non-regression clause' by legal writers, and the legal conclusions to be drawn in the event that those requirements are not satisfied.

II — Legal context

A — *European Union law*

7. Directive 1999/70 is founded on Article 139(2) EC (now Article 155(2) TFEU) and its purpose, as provided in Article 1 thereof, is 'to put into effect the framework agreement … concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP), annexed hereto'.

8. Recital 17 in the preamble to Directive 1999/70 states: '[a]s 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'.

9. The second paragraph in the preamble to the framework agreement states:

'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.'

10. According to the third paragraph in that preamble, the framework agreement sets out the general principles and minimum requirements relating to fixed-term work, establishing, in particular, 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.

11. 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'.

12. Under clause 1(b) of the framework agreement, its purpose is to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

13. Clause 5(1) of the framework agreement, entitled 'Measures to prevent abuse', states:

'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.'

14. Clause 8(3) of the framework agreement provides:

'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.'

B — *National law*

1. The Law relating to fixed-term contracts

15. Directive 1999/70 was transposed into the German legal system by the Federal Law on part-time working and fixed-term contracts [3] of 21 December 2000 ('the TzBfG').

16. Paragraph 14(1) of that law, which is entitled 'Possibility of limiting the duration of contracts', provides:

'A fixed-term employment contract may be entered into if there are objective reasons for doing so. Objective reasons exist in particular where:

1. the operational manpower requirements are only temporary;

2. the fixed term follows a period of training or study in order to facilitate the employee's entry into subsequent employment;

3. one employee replaces another;

4. the particular nature of the work justifies the fixed term;

3 — Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen (BGBl. 2000 I, p. 1966). That law came into force on 1 January 2001. It has been the subject of subsequent amendments (see, inter alia, Case C-109/09 *Deutsche Lufthansa* [2011] ECR I-1309, paragraphs 8 to 11), which are not relevant to the circumstances of the main proceedings.

5. the fixed term is a probationary period;

6. reasons relating to the employee personally justify the fixed term;

7. the employee is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis;

8. the term is fixed by common agreement before a court.'

17. Paragraph 16 of the TzBfG provides that, where a fixed-term contract is invalid, it is reclassified as a contract of indefinite duration.

2. The Law determining the budget of the Land Nordrhein-Westfalen

18. The first sentence of Paragraph 7(3) of the Law determining the budget of the Land Nordrhein-Westfalen for the financial year 2004-05 [4] of 3 February 2004 ('the Law determining the budget of the Land') states:

'For periods during which personnel are temporarily unpaid or not paid in full the job quotas of both civil servants and persons working in the public sector covered by a collective agreement may be used to employ auxiliary civil servants and temporary staff ("Aushilfskräften") [5] to the extent that such personnel quotas are not filled.'

III — The dispute in the main proceedings and the questions referred for a preliminary ruling

19. From 3 July 1997, Ms Jansen was employed as a full-time contract worker by the judicial administration department of the Land Nordrhein-Westfalen, more specifically with the Landgericht Köln, under successive fixed-term contracts. Those contracts, which

4 — Gesetz über die Feststellung der Haushaltspläne des Landes Nordrhein-Westfalen für die Haushaltsjahre 2004/2005 (GV. NRW. 2004, No 4, of 6 February 2004, p. 64).

5 — The term "Aushilfskraft" may be translated into French either by "agent contractuel", as in the order for reference (OJ 2010 C 274, p. 4), or by "agent intérimaire", as in the Report for the Hearing, or, more literally, by "personnel auxiliaire" [all translated into English as "temporary staff"]. Where there is doubt and in order to avoid any risk of confusion, particularly with the concept of temporary agency work, to which the framework agreement is not intended to apply (see recital 13 in the preamble to Directive 1999/70 and the fourth paragraph in the preamble to the framework agreement), I shall opt, in this Opinion, for the formulation used above, putting the German term in brackets.

were renewed a total of eight times without interruption, had been concluded in order to fill vacancies created by parental leave, special leave and a temporary reduction in working time, taken by the employees of that court.

20. In the last fixed-term contract concluded between the defendant in the main proceedings and her employer from 12 December 2005 to 30 June 2006, the use of that form of contract was justified by temporarily available budgetary funds in accordance with Paragraph 7(3) of the Law determining the budget of the Land.

21. On 3 May 2006, Ms Jansen brought an action against her employer before the Arbeitsgericht Köln (Labour Court, Cologne) seeking inter alia a declaration that the employment relationship between them would not end on the expiry date set in the contract of 12 December 2005 but should be reclassified as a contract of indefinite duration. By a judgment given at first instance on 31 August 2006, Ms Jansen's claim was allowed.

22. The Land Nordrhein-Westfalen appealed against that decision before the referring court, the Landesarbeitsgericht Köln. In support of its claims, it stated that the fixed term of Ms Jansen's employment relationship under her last employment contract was justified by an 'objective reason' within the meaning of German substantive law. It pointed out that, under the second sentence of Paragraph 14(1) of the TzBfG, which was designed to transpose Directive 1999/70, it is lawful to conclude a fixed-term contract where there is an objective reason for doing so, in particular where, under Paragraph 14(1)(7), 'the employee is paid out of budgetary funds provided for fixed-term employment and... is employed on that basis'. It stated that, in the main proceedings, Ms Jansen had been employed as 'temporary staff ("Aushilfskraft")' under the budgetary rule laid down by Paragraph 7(3) of the Law determining the budget of the Land and that she had been paid on the basis of the personnel quota temporarily made available by permanent employees of the Land Nordrhein-Westfalen. It maintained that it had to be taken into account that those employees, at the end of the fixed-term reduction in their working time or special leave, would return to their jobs on a full-time basis.

23. In those circumstances, the Landesarbeitsgericht Köln decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Question 1

(a) When conducting a legal assessment as to whether an agreement for the renewal of a fixed-term contract is justified in a particular case for objective reasons within the meaning of clause 5(1)(a) of the framework agreement... in the annex to … Directive 1999/70 …, is it compatible with the spirit and purpose of clause 5(1) of the framework agreement to have reference only to circumstances obtaining at the date of conclu-

sion of that renewal agreement without having regard to how many fixed-term contracts have already preceded that agreement, or

(b) Does the spirit and purpose of clause 5(1)(a) of the framework agreement, which is to prevent abuse arising from the use of consecutive short-term employment contracts, necessitate the imposition of stricter requirements in relation to "objective reasons" the greater the number of successive fixed-term employment contracts that have already preceded the one that is to be assessed or the longer the period during which the employee concerned has already been employed under successive fixed-term contracts?

Question 2

Does clause 5(1) of the framework agreement... preclude the application of a provision of national law such as Paragraph 14(1)(7) [of the TzBfG] which justifies successive fixed terms of employment contracts in the public sector alone for the "objective reason" that the employee is paid out of budgetary funds provided for fixed-term employment, whereas in the case of employers in the private sector such economic reasons are not recognised as "objective reasons"?

Question 3

(a) Is the provision on fixed-term contracts referred to in the second question (Paragraph 14(1)(7) [of the] TzBfG) compatible with the framework agreement if the budgetary rule to which Paragraph 14(1)(7) [of the] TzBfG refers constitutes a sufficiently specific purpose for the fixed term with a particular connection to the activity in question and the conditions under which it is carried out (see point 1 of the operative part of the judgment in Case C-212/04 *Adeneler* [*and Others*] [2006] ECR I-6057)?

If Question 3(a) is answered in the affirmative:

(b) Is there such a sufficiently specific purpose if the budgetary rule, such as Paragraph 7(3) of the Law determining the budget of the Land... in this case, merely provides that the budgetary funds are intended for a fixed-term activity as "temporary staff ("Aushilfskraft")"?

If Question 3(b) is answered in the affirmative:

(c) Does this apply even if the activity of "temporary staff ("Aushilfskraft")" in this sense is understood to mean not only an activity that serves to cover either a temporary increase in work or the temporary loss of a core member of staff but also where the term "temporary staff ("Aushilfskraft")" is also deemed applicable if the employee is paid out of budgetary funds that are available because of the temporary loss of a core member of staff working in the same department, although the "temporary staff member ("Aushilfskraft")" is employed to do work that is categorised as falling within the ambit of the employer's fixed and permanent needs and has no substantive connection with the activity of the core member of staff lost, or

(d) Does interpretation of the term "temporary staff ("Aushilfskraft")" in the manner described in Question 3(c) run counter to the spirit and purpose of the framework agreement..., which is to prevent abuse arising from the use of consecutive short-term employment contracts, and to the principle, laid down in *Angelidaki* [*and Others*] (point 2 of the operative part of the judgment in Joined Cases C-378/07 to C-380/07 [2009] ECR I-3071), that clause 5(1)(a) of the framework agreement... precludes the application of national legislation "in such a way that the renewal of successive fixed-term employment contracts in the public sector is deemed to be justified by "objective reasons" within the meaning of that clause solely on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to meet certain temporary needs when, in fact, those needs are fixed and permanent"?

Question 4

Is a Member State in breach of clause 8(3) of the framework agreement... if it introduces into its national legislation implementing Directive 1999/70 … a budgetary reason for a fixed term such as that described in Question 2, which is of general application to the whole of its public sector but under its national legal system prior to the adoption of Directive 1999/70 … only existed in comparable form in small pockets of the public sector (higher education)? Does such a breach mean that the national rule can no longer be applied?'

IV — Procedure before the Court

24. The reference for a preliminary ruling submitted to the Court in this case was received at the Registry on 29 June 2010.

25. A related case was joined to it, and subsequently disjoined. [6]

26. Written observations were lodged by the Land Nordrhein-Westfalen, by Ms Jansen, by the German Government and by the European Commission.

27. At the hearing, held on 25 May 2011, they all presented oral pleadings.

6 — A case, registered under number C-312/10, also concerning the Land Nordrhein-Westfalen, gave rise to another reference for a preliminary ruling from the Landesarbeitsgericht Köln also relating to the interpretation of clauses 5(1) and 8(3) of the framework agreement. In view of the connection between Cases C-312/10 and C-313/10, they were joined, but after the national court withdrew its reference for a preliminary ruling in the former case, the President of the Court decided, by order of 7 February 2011, that that case would be disjoined from Case C-313/10 and removed from the register of the Court.

V — Analysis

A — *Assessment with reference to temporal factors of the objective reasons for renewing successive fixed-term contracts*

28. The first question concerns whether it is necessary to take into account, when assessing an objective reason within the meaning of clause 5(1)(a) of the framework agreement annexed to Directive 1999/70, of the number or total duration of the fixed-term contracts successively concluded before the contract which is the subject of the dispute.

29. In order to give reasons for its reference for a preliminary ruling, the national court, whose analysis appears to tend towards an affirmative reply to the question raised, states that, by contrast, the Bundesarbeitsgericht (Federal Labour Court) [7] now takes the view that, when assessing whether the requirements of an objective reason are satisfied, it is irrelevant whether or not an employee taken on for a fixed term has already been employed by his current employer under

7 — That court cites in that regard the decision of the Bundesarbeitsgericht of 25 March 2009 (7 AZR 34/08, NZA 2010, paragraph 34 et seq.), and those, reflecting the previous case-law, of 21 April 1993 (AP § 620, BGB Befristeter Arbeitsvertrag No 149) and 30 November 1977 (AP § 620, BGB Befristeter Arbeitsvertrag No 44).

fixed-term employment contracts. Moreover, even a large number of fixed-term employment contracts previously concluded with the same employee does not mean that particularly strict requirements apply to the objective reason. [8]

30. It is true, as the German Government claims, that, in matters of social policy, the Member States have retained a certain degree of legislative competence. Under Article 151 TFEU et seq. (formerly Article 136 EC et seq.), the measures adopted by the European Community and the Member States in that domain must take account of the diversity of national practices. [9] Accordingly, Directive 1999/70 provides that the Member States have a wide discretion, with regard to the choice of form and methods, in adopting the measures to be taken in order to implement the framework agreement annexed thereto, and points out that that agreement lays down only minimum requirements and general principles in respect of fixed-term work. [10]

31. However, it is not disputed that even in the spheres of competence which they have retained, the Member States must act in a way which respects the wording and objectives of European Union law, as is apparent inter alia from the third paragraph of Article 288 TFEU (formerly the third paragraph of Article 249 EC). [11] Therefore, although the framework agreement on fixed-term work is designed only to establish a general framework in the matter, in accordance with its title, it has nevertheless had a strong impact on the law of the Member States, as is reflected in the numerous references to the Court for a preliminary ruling regarding the interpretation of the provisions of that legislation.

8 — However, this account is contested by the Land Nordrhein-Westfalen and the German Government. According to them, it is not true that the Bundesarbeitsgericht has abandoned its former case-law, which took account of the number and total duration of the previous fixed-term contracts – and not only of the content of the last contract –, in the light of all the objective reasons provided for by Paragraph 14(1)(1) to (8) of the TzBfG, as the national court seems to think, which goes beyond the situation in the present case, which relates to an objective reason concerning the replacement of a worker, the only type of case expressly referred to by the aforementioned decision of 25 March 2009. I would point out that the Bundesarbeitsgericht has referred a question to the Court for a preliminary ruling, still pending, concerning this latter type of objective reason (see Case C-586/10 *Kücük*, OJ 2011 C 89, p. 5).

9 — Paragraph 10 of the general considerations of the framework agreement.

10 — The third paragraph in the preamble to the framework agreement and paragraph 10 of the general considerations of the agreement. See, also, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 70.

11 — See, inter alia, *Adeneler and Others*, paragraph 68; the Opinion of Advocate General Kokott in that case, point 56; *Angelidaki and Others*, paragraph 79, and more recently, *Deutsche Lufthansa*, paragraphs 36 and 37.

32. As regards terms used in the framework agreement but not specifically defined therein, [12] Directive 1999/70 and the aforementioned agreement allow Member States to define such terms in conformity with national law or practice, provided that the definitions adopted at national level respect the content of the framework agreement [13] and do not undermine its purpose, its aims or its effectiveness. [14] In particular, clause 5(1)(a) of the framework agreement does not define what is meant by 'objective reasons' within the meaning of that provision. The lack of guidance from the authors of the framework agreement has created uncertainties as to the meaning and scope of that term. The Court has held that the term must be interpreted taking account of the objectives pursued by the framework agreement and of the context of that clause. [15]

33. In the present case, the main aim of the provision of which the interpretation is sought is to prevent abuse arising from the use of successive fixed-term employment contracts. [16] It is designed to prevent the use of multiple contracts of this kind being diverted from its usual function.

34. First of all, I would point out that clause 5 of the framework agreement does not in itself prohibit the renewal, or even several renewals, of fixed-term contracts between the same parties. It merely provides for the adoption of measures designed to limit such use, [17] in order to prevent a person taken on in a fixed-term employment relationship being kept for too long in a precarious situation which risks weakening his position [18] and being deprived of the protection which the provisions against dismissal offer persons employed under contracts of an indefinite duration. [19] The Court has stressed that the benefit of stable employment, as the framework agreement makes clear, constitutes a major element in the protection of workers' interests. [20] I note that the European Union Civil Service Tribunal has adhered to this view and held that, although

12 — The framework agreement gives only sparse definitions, in clause 3, of the terms it uses, namely that of 'fixed-term worker' and 'comparable permanent worker'.

13 — Recital 17 in the preamble to Directive 1999/70.

14 — See, inter alia, *Impact*, paragraphs 90 and 91.

15 — See, inter alia, the order of 12 June 2008 in Case C-364/07 *Vassilakis and Others*, paragraph 81 and the case-law cited.

16 — Clause 5(1) *in limine* and clause 1(b) of the framework agreement, and also recital 14 in the preamble to Directive 1999/70.

17 — See, inter alia, *Adeneler and Others*, paragraph 63, and *Impact*, paragraph 88.

18 — Paragraph 6 of the general considerations of the framework agreement points out that, on the other hand, employment contracts of an indefinite duration contribute to the quality of life of the workers concerned and improve performance.

19 — Relying on the provisions of the framework agreement and the related case-law of the Court of Justice, the Civil Service Tribunal has pointed out that it is not possible to terminate contracts of an indefinite duration, which by their very nature guarantee some job security, without stating the reasons for the termination (see Case F-1/05 *Landgren* v *ETF* [2006] ECR-SC I-A-1-123 and II-A-1-459, paragraph 68).

20 — See Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 64, and the order in *Vassilakis and Others*, paragraph 83 and the case-law cited.

stable employment cannot be regarded as having been established, by the signatory parties to the framework agreement, as a binding general rule of law, it nevertheless constitutes an objective pursued by those parties. [21]

35. Only the abusive use of a series of fixed-term contracts, for the purposes of covering long term the employer's permanent needs, is reprehensible and deemed to be prevented by the adoption of one or more of the restrictive measures provided for in that clause; it is stipulated that the Member States have the obligation to implement them but may choose between the three categories of measures laid down.

36. In its case-law, the Court does indeed attribute great importance to the specific situation created by the repeated conclusion of fixed-term contracts, [22] but it has never ruled on the question of whether or not it is necessary to take into consideration temporal factors unconnected with the last of those contracts, for the purposes of assessing whether there is an objective reason, within the meaning of clause 5(1)(a) of the framework agreement, for resorting to such a form of employment relationship.

37. In that regard, I share the point of view of the national court, which is supported by Ms Jansen and the Commission, that the objective of that clause, which is to prevent abuses linked to the use of successive fixed-term contracts, can be achieved only if, for the purposes of applying that provision, the more numerous the successive fixed-term employment contracts that have already preceded the one at issue or the longer the period of time during which the employee concerned has already been employed under successive fixed-term employment contracts, the stricter the requirements placed on 'objective reasons'.

38. In practice, the longer the time an employee has been employed under renewed fixed-term contracts, the more likely it is that there has been abuse, above all if, as in the case in the main proceedings, [23] the party concerned has assumed similar duties, which are part of the employer's normal and

21 — See Case F-65/07 *Aayhan and Others* v *Parliament* [2009] ECR-SC I-A-1-1054 and II-A-1-567, paragraph 114 et seq.; Joined Cases F-134/07 and F-8/08 *Adjemian and Others* v *Commission* [2009] ECR-SC I-A-1-149 and II-A-1-841, paragraph 99 et seq.; and Joined Cases F-69/07 and F-60/08 *O* v *Commission* [2009] ECR-SC I-A-1-349 and II-A-1-1833, paragraph 74 et seq.

22 — See the order of 24 April 2009 in Case C-519/08 *Koukou*, paragraph 45 et seq. and the case-law cited.

23 — It is apparent from the order for reference that Ms Jansen, who was employed by the Landgericht Köln from 3 July 1997 to 30 June 2006, carried out the same duties during all those years, namely tasks relating to the permanent day-to-day work of the offices of the 23rd Civil Chamber of that court.

permanent activity, during several years of working for that employer. In such a situation, it is all the more important for the employer to establish that he has indeed acted for objective purposes, and, more specifically, that, by means of successive fixed-term contracts, he has covered an employment need which was actually provisional and not constant. If the employer does not adduce specific evidence of justification, it will appear that the use of such contracts was abusive in that its purpose was to fill a post responding to structural manpower needs with a person placed in a precarious professional situation even though that post could have been filled permanently by employing a person under a contract of indefinite duration. In order to assess the compatibility of national legislation with the objectives of clause 5 of the framework agreement, the Court's case-law requires the national courts to examine the 'reality' of the needs covered by the use of successive fixed-term contracts, without limiting itself to the objective reasons set out in that legislation. [24]

39. Merely to examine the situation only at the time of the conclusion of the last employment contract and to review the wording of the objective reason stated in it, without reference to the employment contracts previously concluded between the parties, as suggested by the Land Nordrhein-Westfalen and the German Government, would deprive clause 5(1)(a) of the framework agreement of its effectiveness. [25] I consider that, by definition, the employment contract at issue is not isolated, but forms part of a series of fixed-term contracts, because otherwise it would not fall within the scope of that provision. [26] As a matter of fact, it is an accumulation, for no objective reason, of fixed-term contracts which is prohibited, and not the lawful use of that form of contract by an employer. An uninterrupted succession [27] of fixed-term contracts covering a particularly long period, in order that the same worker regularly carries out identical tasks, whatever position is being covered, constitutes evidence of the abusive nature of those repeated contracts. It is therefore necessary, in my view, to take into account all the circumstances, including the temporal factors, surrounding the last employment contract, in order to assess whether it complies with the requirements of European Union law.

24 — See, inter alia, *Angelidaki and Others*, paragraph 103.

25 — Comparable to the definition of the successive nature of several consecutive fixed-term contracts, of which the Court has said that too inflexible and restrictive an approach would allow insecure employment of workers for years (*Adeneler and Others*, paragraph 85).

26 — In *Mangold*, after having found that the contract concerned was that first and only employment contract concluded between the parties, the Court stated that the interpretation of clause 5(1) of the framework agreement was clearly irrelevant to the case.

27 — Or even a quasi-continuous succession, as was the case in the Greek legislation which provided that a relatively short interval, namely 20 working days, was sufficient for fixed-term contracts not to be regarded as successive, a provision which, according to the Court, was liable to give rise to abuse (*Adeneler and Others*, paragraph 77 et seq.).

40. Finally, I reject the German Government's argument concerning the wording of the aforementioned clause 5(1) that if the authors of the framework agreement had intended account to be taken of temporal criteria in order to verify the existence of an objective reason, they would have expressly said so.

41. For its part, the national court has explained the first question it has referred for a preliminary ruling by stating that, in its view, the measures described in clause 5(1)(a) to (c) of the framework agreement should in principle be considered equivalent measures, [28] but that the measures in clause 5(1)(b) and (c) are distinguishable from those in clause 5(1)(a) by the fact that their application directly, or at least indirectly, ensures that a succession of short fixed-term employment contracts with one and the same employer is permissible only for a limited total period.

42. It is true that the structure of that legislation might suggest that the three categories of restrictive measures laid down therein should be separated, since it states that the Member States must introduce one or more of the legislative options mentioned into national law.

43. If that approach were taken, it might be considered that there is no need to take account of the total maximum duration in the event of a succession of fixed-term contracts as envisaged in clause 5(1)(b), nor of the number of renewals of such contracts as envisaged in clause 5(1)(c), in order to evaluate the requirement for objective reasons justifying renewal laid down in the aforementioned clause 5(1)(a).

44. However, I do not consider that the framework agreement intends to split up the three types of preventive measures listed in clause 5(1). On the contrary, it requests the Member States to adopt, as they see fit, 'one or more of the... measures'. They are not alternative measures, where one is excluded as opposed to the other two, but are complementary and may even all be applied concurrently, [29] in order to attain the objective of prevention concerned. I would point out that, in practice, the effectiveness of a national rule limiting the number of renewals risks being reduced unless it is supplemented by a provision fixing in addition a maximum duration for each contractual period renewed, [30] and vice versa. In the light of their interaction, [31] it therefore seems to me that the criteria of legality relating to the overall

28 — I note that the Court has indeed held that the terms of clause 5(1) of the framework agreement themselves unequivocally show that the various measures envisaged by that provision are intended to be 'equivalent' (see *Impact*, paragraph 76).

29 — Thus, it is apparent from the case-law that, in Greek law, Articles 5 and 6 of Presidential Decree 164/2004 had implemented, with regard to the public sector, all the measures designed to prevent the abusive use of successive fixed-term employment contracts listed in clause 5(1)(a) to (c) of the framework agreement (order of 18 January 2011 in Case C-272/10 *Berkizi-Nikolakaki*, paragraph 73 and the case-law cited).

30 — For example, it is pointless to limit the number of renewals to two successive fixed-term contracts if each of those contracts can last several years.

31 — To be compared with paragraph 77 of the judgment in *Impact*.

duration and number of fixed-term contracts concluded between the same parties, which form an integral part of the last two of those three provisions, may also serve to clarify the interpretation of the first of them.

B — *The possibility of using an objective reason for renewing successive fixed-term contracts which is only available to employers in the public sector*

46. The national court is asking, in essence, whether it is possible for a Member State, in the light of the provisions of clause 5(1) of the framework agreement, to impose an objective reason for using successive fixed-term contracts which is based on an availability of budgetary funds which is limited in time and which may be used only by employers in the public sector.

45. The framework agreement is designed to be applied indirectly, by means of provisions to be transposed into national law by the Member States and/or the social partners, which have significant freedom of action for that purpose. However, that freedom is not unlimited, since the measures taken at national level cannot undermine the *raison d'être* of the framework agreement. [32] Accordingly, the concept of objective reason must be interpreted taking into account all the relative factors and taking a teleological approach. In order to determine whether such a reason exists in the case, the national court must therefore analyse the employment relationship concerned specifically and in its entirety. Furthermore, it must ensure that the objective of preventing abusive practices is indeed achieved at the end of that analysis. There too, the effectiveness of clause 5(1) of the framework agreement is subject to compliance with the aforementioned requirements.

1. The previous case-law of the Court

47. First of all, it should be pointed out that it is apparent from the wording of Directive 1999/70 and of the framework agreement, as well as from their background and purpose, that the provisions laid down can apply to fixed-term contracts concluded with the public authorities and other public sector bodies, as well as to those concluded with employers in the private sector. [33]

32 — See, inter alia, *Adeneler and Others*, paragraph 82.

33 — Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 25 and the case-law cited.

48. The Court has accepted that these two categories of employment may be subject to different treatment, within the interpretation of clause 5 of the aforementioned framework agreement, in these words: '[that clause] does not preclude, as such, a Member State from treating abuse of successive fixed-term employment contracts or relationships differently according to whether those contracts or relationships were entered into with a private sector or public sector employer'. [34] It reached that decision in view of the margin of discretion given to Member States in the matter by that clause, [35] but does not state the reasons which justify such differentiation between the private and public sectors. [36]

49. I note that the Court used a general formula, which does not state clearly whether that observation applies to clause 5(1) or clause 5(2) of the framework agreement, or to both. However, although both of those provisions concern measures designed to prevent the abusive use of successive fixed-term employment contracts or relationships, [37] they nevertheless have a separate purpose, in that clause 5(1) relates to preventive measures, whereas clause 5(2) concerns sanctions. Moreover, they lay down different schemes, since the former states that the Member States must introduce one of the types of legal measure listed where there are no equivalent measures in their national legal system, whereas the latter provides only that the Member States have the power to determine under what conditions fixed-term employment contracts shall be regarded as successive or reclassified as contracts of indefinite duration. [38]

50. That previous case-law does not allow for a direct reply to the question raised in the present case, because the judgments given by the Court concerned the legal sanctions applicable in a Member State where excessive use was made of successive fixed-term contracts, whereas the present case relates to issues arising in the initial stages, namely the specifying of objective reasons for which the repeated recourse to such contracts may be authorised within the meaning of clause 5(1)(a) of the framework agreement. In other words, in the cases brought before it up to now, the Court has ruled on the special treatment which may be reserved to the public sector in respect of the consequences of an

34 — Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 48; Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 33; and order of 1 October 2010 in Case C-3/10 *Affatato*, paragraph 40 and the case-law cited.

35 — *Marrosu and Sardino*, paragraph 47, and order in *Vassilakis and Others*, paragraph 121.

36 — On the other hand, Advocate General Poiares Maduro, in points 27 to 50 of his joint Opinion in *Marrosu and Sardino* and *Vassallo*, set out to determine for what reasons differences may be justified between the public sector and the private sector, as regards penalties for any abuses.

37 — See the heading of clause 5 of the framework agreement and the beginning of clause 5(1).

38 — Clause 5(2) of the framework agreement leaves it to the Member States to determine the 'appropriate' nature of their intervention in those areas. With regard to the distinction between the binding effects of clause 5(1) and clause 5(2), see, inter alia, point 72 et seq. of the Opinion of Advocate General Kokott in *Adeneler and Others*.

abuse, whereas the issue here is to provide for such treatment from the perspective of the possible existence of an abuse. [39]

2. The wording of the legislation

51. For the purpose of interpreting clause 5(1) of the framework agreement, it is necessary first of all to analyse its wording. In order to maintain that differentiation between public sector employment and private sector employment is expressly authorised, the German Government points out that that clause calls upon the Member States to take account 'des besoins de secteurs spécifiques' ('of the needs of specific sectors'), according to the wording in the French version of that provision. That government adds that paragraph 10 of the general considerations of the framework agreement [40] and the third paragraph in the preamble to the framework agreement [41] are to the same effect.

52. It is true that clause 5(1) of the framework agreement clearly authorises the Member States to take account of the characteristics of certain sectors, which form part of the specific activities which they generate. The flexibility provided for by that clause is designed to enable national measures to keep in touch with the specific situations of a particular professional environment. Nevertheless, the provision does not expressly provide that employment in the public sector may be covered by a preferential scheme of this kind.

53. In view of the different language versions of clause 5(1) of the framework agreement, [42] I would point out that the German text uses

39 — It seems reasonable to me that a special treatment may be reserved for the public sector in the application of clause 5(2) of the framework agreement since, in that sector, the employment relationship is likely to take the legal form of a unilateral administrative act, and not of a contract, with the consequence that the sanction of any abuse of such an act cannot be the extension in time of the worker's employment, which would require a new administrative act, contrary to what happens in the case of reclassification of a fixed-term contract as a contract of indefinite duration. Advocates General Poiares Maduro (Opinion in *Marrosu and Sardino*, point 42 et seq.) and Kokott (Opinion in *Angelidaki and Others*, point 117) have pointed out other specific features of public employment.

40 — '[T]his 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' (emphasis added).

41 — '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*' (emphasis added).

42 — Namely the versions in Spanish ('distintos sectores'), Danish ('bestemte sektorer'), German ('bestimmter Branchen'), Greek ('ειδικών τομέων'), English ('specific sectors'), French ('secteurs spécifiques'), Italian ('settori … specifici'), Dutch ('bepaalde sectoren'), Polish ('szczególnych gałęzi'), Portuguese ('sectores … específicos'), Finnish ('erityisten alojen') and Swedish ('särskilda branscher').

an expression, 'bestimmter Branchen', which may be translated into French by 'branches déterminées' ('particular fields'), and not 'secteurs spécifiques' ('specific sectors') as in the French text. As the Commission pointed out at the hearing, in reply to the question I put to it in that regard, that terminology refers to occupational subdivisions such as industry, car manufacturing, the steel industry, banking, insurance, and also, in my view, the metalworking industry, shipping, retail trade, healthcare, and so forth, rather than to a network which sets the private sector against the public sector.

54. It seems to me that the term employed in clause 5 must also be interpreted by reference to the relevant criteria of the law of collective agreements, since the economic concept 'field' is used inter alia to determine the professional scope of collective agreements. In my view, a differentiation based only on provisions of budgetary law or administrative law do not fulfil such criteria.

55. I therefore consider that the legal status of the employer, in so far as it is a person of private law or public law, is irrelevant to the application of the aforementioned clause.

3. The objective of the provision

56. Furthermore, it is not disputed that, to interpret a provision, it is necessary to take into account, in addition to its wording, the general objectives of the legislation of which it forms part and the particular spirit and purpose which prevailed when it was adopted. [43]

57. As pointed out by the national court, which refers to the content of paragraph 6 of the general considerations of the framework agreement, [44] the framework agreement proceeds on the basic premiss that, as a rule, the contract of indefinite duration is the usual form which employment relationships must take. That advice reflects a certain reservation on the part of the signatories to that agreement with regard to fixed-term employment, which is confirmed by the main provisions of

43 — I reject from the outset the application of the principle of non-discrimination, as provided by recital 3 in the preamble to Directive 1999/70, the third paragraph in the preamble to the framework agreement and clause 4 of that agreement, which is invoked by Ms Jansen. The objective of that rule is to offer employees working under a fixed-term contract the same treatment as that enjoyed by those working under a contract of an indefinite duration, not to ensure equality between workers who are all employed under a fixed-term contract, but some of whom work in the public sector and others in the private sector.

44 — The general law character of employment under a contract of an indefinite duration is also proclaimed in the first sentence of the second paragraph in the preamble to the framework agreement. See, also, recital 15 in the preamble to Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

the agreement, [45] contrary to the perspective which prevailed in the framework agreement on part-time work, which tends to favour this latter form of employment. [46] Admittedly, it is possible to conclude or renew a fixed-term contract. However, such a possibility, which derogates from the general rule, must be conceived restrictively, as stated in paragraph 8 of those general considerations [47] and the second paragraph in the preamble to the framework agreement, [48] which are highlighted in the case-law of the Court. [49]

58. It will be for the national court to ensure that, in the present case, the provisions of Paragraph 14(1)(7) of the TzBfG do not in practice deprive of its substance the guiding principle that contracts of indefinite duration must predominate, or jeopardise the balance between the interests in play as conceived by European Union law, in as much as those provisions grant employers in the public sector too great a power of access to successive fixed-term contracts. [50]

59. In my view, there is no valid reason why, for example, a council worker should be placed in a different position, as regards the possibility of working under a contract of indefinite duration, from that of an employee working for a private company, or even for a non-profit-making legal person, where the duties of the parties concerned are equivalent. Accordingly, the public sector, as implicitly referred to by Paragraph 14(1)(7) of the TzBfG, should not be covered by the concept of 'specific sectors' within the meaning of clause 5(1) of the framework agreement, since tasks which are identical may be carried out by employees in the public sector and by those in the private sector. It is therefore not justified for economic circumstances similar to those provided for by that paragraph not to be recognised as objective reasons in respect of employers in the private sector.

60. Moreover, an interpretation of clause 5(1)(a) of the framework agreement which reserves a particular treatment for employment in the public sector is likely to lead to a

45 — Namely, in accordance with the dual objective of the framework agreement as defined in clause 1, the principle of non-discrimination between fixed-term workers and permanent workers and the limitation of recourse to fixed-term work in order to prevent it being misused.

46 — Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1997 L 14, p. 9). See, in particular, paragraph 5 of the general considerations of that framework agreement.

47 — '[F]ixed-term employment contracts are a feature of employment in *certain sectors, occupations and activities* which can suit both employers and workers' (emphasis added).

48 — 'The parties to this agreement recognise... that fixed-term employment contracts respond, *in certain circumstances*, to the needs of both employers and workers' (emphasis added).

49 — Regarding the need for the national court to carry out a specific examination of the effects produced by the national provision, see, inter alia, the order in *Affatato*, paragraph 50 and the case-law cited.

50 — See *Impact*, paragraph 87, and *Deutsche Lufthansa*, paragraph 30 and the case-law cited.

level of protection for workers which will vary considerably between the Member States, in view of the differences which exist with regard particularly to the respective role of the public bodies and private bodies in the supply of services in the public interest. [51] Therefore, it is inappropriate, in the light of the European Union law objective of harmonising national legislations, to authorise a distinction between the private sector and the public sector in respect of the objective reasons for resorting to successive fixed-term contracts, because the scope of the concept of public sector fluctuates too widely according to the conceptions adopted in the various Member States, as the Court has already highlighted. [52]

61. Furthermore, it seems to me that employers in the public sector enjoy, under legislation such as that at issue in the main proceedings, a power which may lead them to abuse the conclusion of fixed-term contracts, since, in fixing their budgetary priorities, those employers may themselves create the reasons justifying the use of that form of contract and thus exempt themselves from complying with the basic principles of employment law. The impact of that risk is particularly great because there has been a sharp increase in the use of agents recruited under contract, and not agents having contracts of indefinite duration or the position of permanent civil servant, to cover the needs of the public sector, not only in Germany but in most of the Member States of the European Union. [53]

62. The German Government challenges that analysis by saying that no advantage is given to the public sector employers, with regard to defining what may represent an objective reason, since their situation is not comparable to that of private sector employers. [54] For its part, the Land Nordrhein-Westfalen considers that the acquisition of such an advantage by public sector employers is justified since it is an appropriate response to the particular budgetary constraints which they bear

51 — Those differences are related to national practices, as is the case, for example, of the posting of nurses mainly to public hospitals or to foundations having a purpose which is in the public interest.

52 — The order in Case C-519/09 *May* [2011] ECR I-2761, paragraph 24, citing Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5, points out that '[t]he Court has already held that, there being no distinction in the exception referred to in Article 45(4) TFEU, concerning employment in the public service, it is of no interest whether a worker is engaged as a workman (ouvrier), a clerk (employé) or an official (fonctionnaire) or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of European Union law'.

53 — See, inter alia, Fitte-Duval, A., 'Contrat à durée indéterminée dans la fonction publique: les risques d'une transposition inadaptée', *Actualité Juridique Fonctions Publiques*, 2007, p. 4 et seq.

54 — The German Government maintains that 'in the private sector, the employer himself defines the content and form of the work of his employees, taking into account the financial resources obtained on the market. This possibility does not exist in the public sector. The management of human resources can take place only within the framework of the budget allowed by the Finance law.... Fixed-term employment can be used only if the corresponding budgetary funds are available'.

and which need to be compensated by means of greater flexibility in the employment of workers. The national court raises this point, pointing out that a public sector employer is only permitted to enter into commitments that are covered by its budget and that budgetary plans are normally only drawn up for limited periods of time.

63. However, I note that the proposal which led to the adoption of Directive 1999/70 [55] states that the flexibility resulting from taking account of the 'needs of specific sectors', provided for in clause 5 of the framework agreement, must be linked to 'the special attention' clearly accorded to small and medium-sized enterprises (SMEs) when the framework agreement was drawn up, in accordance with Article 137(2) EC (now Article 153(2) TFEU). [56] In that proposal, the Commission states that the various provisions in the framework agreement to which it refers, including clause 5, 'show that the social partners have intended to leave room for manoeuvre in the implementation of the rights and obligations under the agreement which should allow for the specific needs of both workers and enterprises in specific sectors and categories of workers and enterprises to be taken into account, not least SMEs'. [57]

64. On the other hand, the *travaux préparatoires* make no mention of a special treatment intended for the public sector, in connection with the drafting of clause 5 of the framework agreement. It does not seem to me that the posts to be filled in that sector are traditionally or by nature temporary, contrary to what may occur for certain fields of activity.

65. It is apparent from all these considerations that, in my view, clause 5(1)(a) of the framework agreement is to be interpreted as precluding a national provision under which the conclusion of successive fixed-term employment contracts is authorised for budgetary reasons which are reserved exclusively to the public sector.

55 — Paragraphs 26 to 31 of the explanatory memorandum of the Proposal for a Council Directive concerning the framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC of 28 April 1999 (COM(1999) 203 final, pp. 6 and 7).

56 — That article provides that directives adopted in the field of social policy must 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. See, also, paragraph 11 of the general considerations of the framework agreement.

57 — Paragraph 30 of the explanatory memorandum of the aforementioned proposal for a directive, and page 26 of the annex thereto.

C — *The possibility of using an objective reason for renewing successive fixed-term contracts which is based on budgetary factors*

66. The third question referred for a preliminary ruling, which is subdivided into four consecutive parts, also relates to the interpretation of the term 'objective reasons' within the meaning of clause 5(1)(a) of the framework agreement.

67. The national court is asking the Court of Justice, in essence, whether that clause authorises the application of national provisions, such as those of the first sentence of Paragraph 7(3) of the Law determining the budget of the Land, read in conjunction with Paragraph 14(1)(7) of the TzBfG, which allow the renewal of successive fixed-term contracts with the sole justification that the employee is paid out of budgetary funds provided for fixed-term employment.

68. In particular, it wonders whether the criteria, relating inter alia to 'job quotas … used to employ … "temporary staff ("Aushilfskräften")'", which are contained in the first sentence of Article 7(3) of the Law determining the budget of the Land, are sufficient to fulfil the various conditions which make it possible, according to the case-law of the Court, to establish the existence of an objective reason within the meaning of clause 5 of the framework agreement, and to respect both the objective and the purpose of that agreement. The national court adds that the Bundesarbeitsgericht has held that, under the TzBfG, there does not have to be any connection between the tasks performed by the core member of staff temporarily absent and those performed by the employee taken on for a fixed term, tasks which may in fact fall within the ambit of the employer's normal and permanent activity. [58] I refer to the wording of the third question, cited above *in extenso*, for the detailed information it contains.

69. It is apparent from the established case-law of the Court that an objective reason for renewing successive fixed-term contracts, as conceived in 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

58 — I note that the law which was in force before the TzBfG transposed Directive 1999/70 into German law was more liberal as regards the possibility of concluding fixed-term contracts without establishing an objective reason linked to the employer's activity (in this regard, see point 10 et seq. of the Opinion of Advocate General Tizzano in *Mangold*).

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. [59]

70. The objective reason invoked by the employer must be directly linked to the activity carried out, in principle temporarily, by the employee taken on under a fixed-term contract. A provision which is of a purely formal nature and does not justify specifically the use of successive fixed-term employment contracts by the presence of objective factors relating to the particular features of the activity concerned and to the conditions under which it is carried out 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. [60]

71. In the present case, I consider, as do Ms Jansen and the Commission, that the first sentence of Paragraph 7(3) of the Law determining the budget of the Land, read in conjunction with Paragraph 14(1)(7) of the TzBfG, which base the use of fixed-term contracts only on the existence of budgetary funds provided for that purpose, are formulated in too general and abstract a manner, with no tangible link with the content of the activity concerned by the contract and the conditions under which it is to be carried out. In that regard, the national court points out that Paragraph 7(3) of the Law determining the budget of the Land makes reference to the activity of the employee to be taken on under a fixed-term contract only by use of the term 'temporary staff ("Aushilfskraft")'. I consider that that budgetary rule does not on its own constitute sufficiently precise justification for using fixed-term contracts, as required by the case-law of the Court, because the tasks to be carried out by the person employed are not clearly identified or identifiable. Provisions of this type do not make it possible to check that in this specific case the renewal of the fixed-term contract is actually more appropriate than its conversion into a contract of indefinite duration as a device for perpetuating the employment relationship.

72. I note that, in the main proceedings, the last of the fixed-term contracts at issue is based not on the temporary replacement of a single absent employee but on the use of budgetary funds made available by special leave and by a reduction in working time for which several employees of the Landgericht Köln opted. It is clear that the flexibility thus obtained is used to employ Ms Jansen in order to cover that employer's permanent needs, and not by reason of the nature of the activity to be entrusted to the party concerned or the ways in which it is to be carried out.

59 — See, inter alia, the order in *Koukou*, paragraph 45 and the case-law cited.

60 — See *Angelidaki and Others*, paragraph 98 and the case-law cited, and *Deutsche Lufthansa*, paragraph 43 and the case-law cited.

73. Moreover, the lack of clarity of the provisions at issue and the freedom it gives to public sector employers may permit the abusive practices which the framework agreement is designed to combat since, as the Commission points out, the limitation of the duration of the contracts on the basis of budgetary rules is not an external circumstance, but a factor which the legislature may influence or amend, and therefore an internal factor which may be fashioned at will.

74. Finally, I note that those budgetary considerations do not fall within the scope of social policy objectives, as they apply in employment law. [61] It therefore cannot be considered that, in the context of the main proceedings, the use of successive fixed-term employment contracts is justified by particular circumstances resulting from the pursuit of such a lawful objective, in accordance with the case-law of the Court. [62]

75. For the sake of completeness, I should point out that I do not think it is possible to supplement the analysis thus made in the light of the case-law relating to the concept of 'objective reason' within the meaning of clause 5(1)(a) of the framework agreement, by applying here the case-law relating to the interpretation of the concept of 'objective grounds' contained in clause 4 of that agreement, [63] as was discussed at the hearing. It is true that the Court has acknowledged the proximity between the concepts in those two clauses and has defined them in a similar manner, [64] by following a line of reasoning by analogy. [65]

76. However, in clause 4 of the framework agreement, which relates to the 'principle of non-discrimination', the mention of 'objective grounds' is made in a very different context from that covered by clause 5 of that agreement, which relates to 'measures to prevent abuse' of fixed-term contracts. The subject-matter of the 'objective grounds/objective reasons' in those two clauses is therefore not the same. Moreover, it seems to me that the approximation of two concepts formulated in a similar way risks giving a tautological result. The interpretation given by the Court of one of those concepts cannot, in my view, provide

61 — For a recent example of a social policy objective which may be lawful, see the order of 7 April 2011 in Case C-151/10 *Dai Cugini*, paragraph 47 et seq.

62 — See, inter alia, *Angelidaki and Others*, paragraph 96 and the case-law cited.

63 — Under clause 4 of the framework agreement, only justification on objective grounds permits a fixed-term worker to be treated differently from a comparable permanent worker.

64 — Thus, in *Del Cerro Alonso*, paragraphs 56 to 59, concerning the 'identical concept of "objective grounds"' within the meaning of clause 4(1) of the framework agreement, the Court held that that concept requires the unequal treatment between fixed-term workers and permanent workers to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

65 — See Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraphs 42 and 43 and the case-law cited, in which, after referring to the import of its case-law relating to the concept of 'objective reasons' within the meaning of clause 5(1)(a) of the framework agreement, the Court held that '[t]he same interpretation is necessary, by analogy, regarding the identical concept of "objective grounds" within the meaning of clause 4(1) of the framework agreement on part-time work'.

assessment criteria which can be reproduced in identical form in respect of the other, because although they have, in the absolute, a similar meaning, they nevertheless have different referents. The main point is to determine which are the events which constitute 'objective grounds' under clause 4 or 'objective reasons' under clause 5 of the framework agreement.

77. In particular, the rule derived from clause 4 of the framework agreement, that 'rigorous personnel management is a budgetary consideration and cannot therefore justify discrimination'[66] does not seem to me capable of being applied unreservedly for the purpose of stating that budgetary considerations should not justify the use of successive fixed-term contracts. In my view, it cannot be automatically ruled out, as was the case with regard to discriminatory practices, that purely economic reasons may justify the repeated conclusion of fixed-term contracts. I consider that, admittedly, it is inconsistent with the aim of clause 5 of the framework agreement for an employer to be able to invoke budgetary limitations in a general way as 'objective reasons'. Nevertheless, it seems reasonable to me for economic constraints to be taken into account if they are linked to reasons of another kind, such as those relating to social policy objectives, the promotion of education or environmental protection, which stem from instructions given by the State. Therefore, where a specific budget has been made available with the aim of aiding return to employment, for example, for young unemployed persons, a public sector employer should be able to justify the repeated use of fixed-term contracts in respect of the persons concerned on the basis of such a budgetary factor, which has a specific purpose and the impact of which will be for a limited period.

78. What seems to me to be even more important, in the light of the case-law of the Court relating to the interpretation of clause 5(1)(a) of the framework agreement, is that the national court should check that the justification invoked does indeed have a direct and effective causal link with the activity supposed to be carried out by the employee taken on under those successive fixed-term contracts.

79. Be that as it may, in view of the insufficiently precise and specific wording of legislation such as that at issue, I consider that a negative reply should be given by the Court in respect of the first part of the third question referred, which is stated in point (a).

66 — See *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 46 and the case-law cited.

80. Consequently, I consider that there is no need to reply to the three subsidiary questions, which are stated in points (b) to (d) of that question.

1. The interpretation of clause 8(3) of the framework agreement

82. Clause 8(3) of the framework agreement provides that the implementation of the provisions of the agreement does not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.

D — *The non-regression clause*

83. First of all, I maintain, as I have already indicated in a previous case, [68] and as the German Government argues in this case, that it is a clause imposing an obligation of transparency in the reasons invoked to justify a legislative reform, rather than a clause imposing a status quo.

81. By its fourth question referred for a preliminary ruling, the national court essentially asks the Court whether German substantive law [67] infringes clause 8(3) of the framework agreement, inasmuch as the budgetary reason for successive fixed-term contracts has been extended to the whole of the public sector, and no longer applies only to the area of higher education, as was the case before the entry into force of Directive 1999/70, according to the order for reference. The court also raises the question of the legal conclusions it should draw, for the application of national law, from any non-compliance with the provisions of the non-regression clause.

84. In view of the fact that the provisions of the framework agreement constitute only minimum requirements, the intervention of the Member States in the matter is authorised, either to adopt measures more favourable than those imposed in the previous law, or even to introduce a reduction provided that the minimum threshold of protection provided by the framework agreement is respected and that that reduction cannot be described as general.

67 — It should be made clear that, in its grounds for reference, the national court refers both to the provisions of Paragraph 14(1)(7) of the TzBfG and to the case-law of the Bundesarbeitsgericht.

68 — See point 40 of my Opinion in Case C-98/09 *Sorge* [2010] ECR I-5837.

85. Clause 8(3) of the framework agreement does not prohibit a reduction in the protection afforded under national law in the field of fixed-term contracts. Such a reduction is permitted provided that it satisfies two criteria, which are cumulative, [69] from which it follows that a failure to satisfy one of those two conditions suffices for the national legislation to fall within the scope of the prohibition laid down in clause 8(3) of the framework agreement. [70] Those criteria are as follows:

— in order to be allowed, the reduction must not be linked to the implementation of the framework agreement, [71] which prevents the Member States from invoking the obligation to transpose the directive as an 'excuse' for explaining the amendments which they introduce into their national law, [72] and

— it must not adversely affect the general level of protection of fixed-term workers, that criterion to be assessed having regard to the number of workers concerned by the amendment, [73] and to all the protective legislation, in the knowledge that the reduction may be compensated *in toto* by other safeguards provided. [74]

86. The application of the former of these two criteria in the present case requires that the genuine purpose of the amendment introduced by the legislation at issue was to transpose Directive 1999/70 and the annexed framework agreement, and it is noted that even subsequent national provisions which supplement or amend the original transposing law may be taken into consideration in that regard.

87. However, according to the Land Nordrhein-Westfalen and the German Government, this is not the case. They both refer to the case-law prior to Directive 1999/70 and state that the national law already authorised the budgetary rule at issue before the entry into force of the TzBfG, and in particular Paragraph 14(1)(7) of the TzBfG. They maintain that that legislation is merely a codification of the case-law developed by the Bundesarbeitsgericht, without any expansion whatsoever. Contrary to what the national court states, the Land Nordrhein-Westfalen and the German Government both maintain that the reason relating to a budgetary restriction already applied to the whole of the Civil Service. In support of that position, that government

69 — See, inter alia, *Sorge*, paragraph 37 and the case-law cited, and the order of 11 November 2010 in Case C-20/10 *Vino*, paragraph 32 and the case-law cited.

70 — See, for example, the order in *Berkizi-Nikolakaki*, paragraph 76.

71 — See, inter alia, the order in *Vino*, paragraph 37 and the case-law cited.

72 — See point 40 of my Opinion in *Sorge* and point 127 *in fine* of the Opinion of Advocate General Kokott in *Angelidaki and Others*.

73 — See, inter alia, the order in *Koukou*, paragraph 121.

74 — See the order in *Koukou*, paragraph 122 and the case-law cited.

refers to the *travaux préparatoires* which led to the adoption of the TzBfG, citing relevant extracts from the draft law.

88. The Commission, for its part, considers that there is no connection between the provisions at issue and the transposition of Directive 1999/70 and that, in any event, the obligation to transpose was not expressly mentioned by the German legislature to justify the contested amendment. Consequently, it considers, as the two previous authors of observations, that the contested provisions of the TzBfG are not inconsistent with European Union law. Only Ms Jansen takes a contrary view.

89. Be that as it may, the assessment of whether or not that first criterion is satisfied, which requires an examination of the development of German substantive law, falls within the jurisdiction of the national court, even though the information provided by the case-law of the Court of Justice must guide it in the conduct of that operation.

90. If the second criterion is applied in this case, which requires the first to have been satisfied after the analysis to be carried out by the national court, the amendment introduced by the legislation at issue must reduce the general level of protection for fixed-term workers.

91. According to Ms Jansen, there is a real reduction in that level in relation to the previous legislation, owing to the fact that the budgetary reason for using fixed-term contracts now applies automatically to the whole of the public sector, and no account is taken of the duration and content of the tasks carried out by the worker taken on in that context.

92. The German Government considers, on the contrary, that by codifying the extension of the scope of the budgetary reason which originally applied only to the area of higher education, the TzBfG clarified the content of the domestic substantive law and thus improved the protection afforded to workers who had entered into fixed-term contracts.

93. In the light of these paradoxical positions, it will also be for the Landesarbeitsgericht Köln to determine whether the second of the conditions for the application of clause 8(3) of the framework agreement is satisfied in the present case, bearing in mind that only a reduction on a scale likely to have an effect overall on national legislation relating to fixed-term employment contracts is capable of being covered by that clause. In that regard, that court must, in particular, verify that a significant proportion of the workers employed under fixed-term contracts in the Member State concerned are affected by the amendment at issue in the main proceedings, and assess the scope of the amendment in the light of all the other safeguards provided by

the TzBfG for the protection of that category of worker. [75]

2. The legal consequences of any non-compliance with clause 8(3) of the framework agreement

94. The last question raised by the Landesarbeitsgericht Köln is whether it is required to disapply the national rule if it is found to be incompatible with clause 8(3) of the framework agreement.

95. It is clear from the Court's case-law, [76] and as I have explained in previous Opinions, [77] that that clause cannot have direct effect, which would be vertical in this case. As the Land Nordrhein-Westfalen points out, clause 8 of the framework agreement does not impose specific obligations on the Member States and cannot be relied on by an individual before a national court, unlike, for example, clause 4(1) of the framework agreement, which appears, from the point of view of its subject-matter, unconditional and sufficiently precise for that purpose. [78]

96. Therefore, the national court is not directly required to rule out the application of the domestic law provisions the content of which is challenged on the basis of clause 8(3) of the framework agreement.

97. Nevertheless, since any national court, in order to comply with the third paragraph of Article 288 TFEU, has to interpret national law in such a way as to observe the requirements of European Union law, the Landesarbeitsgericht Köln must conform, as the Court has repeatedly held. [79] That means in particular that that court must interpret the legislation at issue, as far as possible, in the light of the wording and objective of the relevant provisions of the framework agreement, in order to obtain the result sought by the agreement. [80]

75 — See the order in *Koukou*, paragraph 119 et seq. and the case-law cited, and *Sorge*, paragraph 42 et seq. and the case-law cited.

76 — See, inter alia, *Sorge*, paragraph 50 and the case-law cited, and *Deutsche Lufthansa*, paragraph 51.

77 — See point 58 et seq. of my Opinion in *Sorge*.

78 — See, inter alia, *Impact*, paragraph 59 et seq.

79 — I would also point out that, under the first paragraph of Article 2 itself 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'.

80 — See paragraph 51 et seq. of the judgment in *Sorge*, point 65 et seq. of my Opinion in that case, and paragraph 52 et seq. of the judgment in *Deutsche Lufthansa*, and also the case-law cited.

VI — Conclusion

98. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Landesarbeitsgericht Köln as follows:

'(1) Clause 5(1)(a) of the framework agreement on fixed-term work concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, is to be interpreted as meaning that, in order to determine the existence of an "objective reason" within the meaning of that clause, a national court is not precluded from taking into account the number of fixed-term contracts which preceded the renewal of the contract under review, and the length of the period during which the employee concerned was already employed previously under successive fixed-term contracts.

(2) Clause 5(1) of the framework agreement is to be interpreted as precluding the drawing of a distinction between the public sector and the private sector in determining the existence of an "objective reason" within the meaning of that clause.

(3) Clause 5(1) of the framework agreement is to be interpreted as precluding legislation such as that at issue in the main proceedings which is based on budgetary reasons that are too general to satisfy the requirements of the Court's case-law concerning the objective reasons justifying the renewal of fixed-term contracts within the meaning of that provision.

(4) A Member State may be in breach of the provisions of clause 8(3) of the framework agreement, by introducing into its national legislation a budgetary reason for a fixed term which is of general application to the whole of its public sector but under its national legal system prior to the adoption of Directive 1999/70

only existed in comparable form in small pockets of the public sector, if, which it is for the national court to verify:

— the provisions which introduce such an amendment use as justification the transposition of that directive into national law, and

— that amendment involves a general reduction in the level of protection of fixed-term workers which is assessed according to the number of workers affected and in the light of the national legislation concerning fixed-term contracts viewed as a whole.

If the national court considers, in the light of those assessment criteria, that the national rule concerned does not comply with the provisions of clause 8(3) of the framework agreement, it is required not to disapply that rule but to interpret it in such a way as to comply with European Union law.'