OPINION OF AVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 19 June 2008 [1]

I — Introduction

1. The Højesteret (Supreme Court) (Denmark) has referred questions to the Court of Justice concerning the interpretation of Article 8 of Directive 91/533/EEC [2] in the context of employment proceedings in which the applicant, Mr Andersen, claims that a collective agreement transposing that directive is inapplicable and detrimental to him because, unlike national law, it permits an employer to correct a defective letter of engagement after notification to that effect by the employee.

2. In that connection, the referring court asks whether membership of a union is essential for extending the application of an agreement transposing Directive 91/533 to an employee. The first two questions referred relate to that point.

3. Mr Andersen also invokes the allegedly 'temporary' nature of his employment relationship, which, he argues, exempts him from the obligation to notify the employer, laid down in Directive 91/533. The referring court has doubts as to the meaning of the expression 'temporary contract or employment relationship' used in the second subparagraph of Article 8(2) of that directive, since no Community legislation has used that wording before, and, by its third question, asks whether the expression refers to all fixed-term employment relationships or only to short-term relationships.

II — Legal framework

A — *Community law*

4. Directive 91/533, which implements points 9 and 17 of the Community Charter of Fundamental Social Rights for Workers, [3]

1 — Original language: Spanish.

2 — Council directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

3 — Adopted at the Strasbourg European Council on 9 December 1989.

was adopted in order to harmonise within the European Union the obligation, already imposed by a number of Member States, to make employment relationships subject to certain formalities designed to protect employees against possible infringements of their rights (second and sixth recitals). In particular, it is aimed at removing differences between the laws of the Member States with regard to the information to be provided about the essential aspects of the contract or employment relationship.

5. In accordance with Article 1 thereof, Directive 91/533 applies to 'every paid employee having a contract or employment relationship' (Article 1(1)), although the Member States may exclude its effects: (a) where the total duration of the contract or employment relationship does not exceed one month, and/or the working week does not exceed eight hours, or (b) in the case of casual contracts, where its non-application is justified by objective considerations.

6. Article 2 requires an employer to notify an employee of 'the essential aspects of the contract or employment relationship' (Article 2(1)), including, in the case of a temporary contract or employment relationship, the expected duration thereof (Article 2(e)). That notification must be in writing, in one of the forms provided for in Article 3 of Directive 91/533.

7. Article 8, with which the questions referred for a preliminary ruling are concerned, governs the protection of the rights conferred by Directive 91/533 and calls on Member States to ensure that individuals may exercise their rights before the courts (Article 8(1)). Article 8(2) provides that legal proceedings may be commenced where the employer fails to reply within 15 days to a notification from the employee. However, that formality is not required in the case of expatriate employees, workers with 'a temporary contract or employment relationship' or employees not covered by any collective agreements.

8. Under Article 9 of Directive 91/533, Member States were to adopt the laws, regulations and administrative provisions necessary to comply therewith no later than 30 June 1993 or to ensure 'by that date' that the employers' and workers' representatives had introduced the required provisions 'by way of agreement', the Member States taking the necessary steps enabling them at all times to guarantee the results imposed by that directive.

B — *Danish legislation*

9. The Danish legislature opted for a twofold method of transposing Article 9 of Directive 91/533 into national law. First, it adopted a

law on the obligation of the employer to inform the employee of the conditions applicable to the employment relationship; [4] secondly, it concluded collective agreements in a number of sectors.

(a) The Danish Law on proof of appointment

10. The Danish Law on proof of appointment provides that an employee may seek redress in the courts directly, without giving prior notification to the employer.

11. Paragraph 1(3) of the Law acknowledges that it is merely subsidiary in nature and provides that preference must be given to the application of any collective agreement requiring the employer to inform the employee about the employment relationship, provided that it contains rules which are compatible with Directive 91/533.

(b) The KTO Agreement

12. The collective agreements transposing Directive 91/533 into national law include the agreement concluded on 9 June 1993 between the Amtsråtsforeningen (Federation of Provincial Councils), the Kommunernes Landsforening (National Association of Municipalities), the municipal councils of Copenhagen and Frederiksberg, and the Kommunale Tjenestemænd og Overenskomstansatte (Union of Public Employees and Municipal Contractual Workers) ('the KTO Agreement'). According to the Højesteret, Danish municipal councils apply that agreement to all their employees, irrespective of whether they are members of a union organisation. [5]

13. Under the KTO Agreement, if a local authority fails to deliver the required letter of engagement in time or provides an incomplete or defective document, it then has a period of 15 days to draw up the document again after having been notified to that effect by the employee. If the employer fails to do so, the employee may take action in the courts to enforce his rights.

4 — Consolidated text approved by Law No 385 of 11 May 1994 (Antsættelsesbevislov) ('Law on proof of appointment').

5 — The representatives of the Danish Government and the Kommunernes Landsforening confirmed that point at the hearing.

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

14. As a recipient of social-assistance cash benefits, Mr Andersen took part in individual job training schemes in Skælskør Kommune (Skælskør municipality) over five periods. The five relevant contracts were concluded for terms of between 1 and 12 months, although none of them lasted more than a month, owing to the applicant's repeated absences.

15. For each of those posts, Mr Andersen received a letter of engagement which did not satisfy the requirements of Article 2(2) of Directive 91/533. After notifying the municipality of that fact, he received suitably corrected letters within 15 days.

16. However, Mr Andersen took the view that the KTO Agreement did not apply to him. [6] Accordingly, relying on the Danish Law on proof of appointment, he brought an action for damages directly before the courts. That law does not require the prior notification of the employer provided for in the KTO Agreement and, consequently, in the applicant's view, the correction effected by Skælskør municipality was not valid.

17. Following the dismissal of his action at first instance, Mr Andersen appealed to the Højesteret, which took the view that the outcome of the dispute turns on the interpretation of Directive 91/533 and referred three questions to the Court of Justice for a preliminary ruling pursuant to Article 234 EC:

'(1) Is Article 8(1) of … Directive 91/533/EEC to be interpreted as meaning that a collective agreement which is intended to implement the provisions of the directive cannot be applied to an employee who is not a member of an organisation party to that agreement?

(2) If Question 1 is answered in the negative, are the words in Article 8(2) of the directive, "employees not covered by a collective agreement or by collective agreements relating to the employment relationship", to be interpreted as meaning that provisions in a collective

6 — At the hearing, Mr Andersen's lawyer did not call into question the right to apply the agreement to workers who are not union members but maintained that, in Mr Andersen's case, the agreement should not be applied because it does not provide for penalties. He also stated that he did not consider the transposition of the directive effected by the KTO Agreement to be incorrect.

agreement or the obligation of prior notification of the employer cannot be applied to an employee who is not a member of an organisation party to that agreement?

(3) Do the words "temporary contract" and "temporary … employment relationship" in Article 8(2) of the directive refer to short-term employment relationships or to something else, such as all fixed-term employment relationships? If the former, which criteria should be used to determine whether an employment relationship is temporary (short-term)?'

IV — Procedure before the Court

18. The reference for a preliminary ruling was lodged at the Registry of the Court of Justice on 3 July 2007.

19. Written observations were submitted by the parties to the main proceedings, the Commission of the European Communities and the Italian and Swedish Governments.

20. At the hearing on 15 May 2008, oral argument was presented by the representatives of Mr Andersen, the Kommunernes Landsforening, the Kingdom of Denmark and the Commission.

V — Analysis of the questions referred for a preliminary ruling

A — *The first question*

21. By the first question, the Højesteret seeks to ascertain whether, under Article 8(1) of Directive 91/533, a collective agreement transposing that directive into national law applies only to employees who are members of one of the union organisations which negotiated the agreement.

22. All the parties who submitted observations in these preliminary ruling proceedings propose a negative reply to that question. Article 8(1) of Directive 91/533 imposes on Member States the obligation to introduce into their national legal systems the measures necessary to enable all employees to pursue their claims by judicial process. Community law does not prescribe the type of legal instrument to be used to attain that objective.

23. In keeping with Article 137(3) EC, Article 9 of Directive 91/533 entrusts to the Member States the choice of the manner in which to transpose its provisions, permitting them to do so either directly, by adopting the necessary laws, regulations and administrative provisions, or to leave it to the employers' and workers' representatives to conclude collective agreements. [7]

24. The Court has examined that possibility of 'delegating' responsibility for transposing provisions of Community law to workers' and employers' representatives on a number of occasions. [8] In particular, the Court has pointed out that that possibility does not discharge Member States from the obligation of ensuring, by appropriate laws, regulations and administrative provisions, that workers are afforded the full protection provided for by the directive, adding that, where transposition has been effected by statute and by one or more collective agreements, that 'State guarantee' must cover all cases where effective protection is not ensured by other means, for whatever reason.

25. Accordingly, there is nothing to preclude the transposition of Directive 91/533 from being effected by means of a collective agreement, provided that the Member State concerned ensures that the rights flowing from the provisions of that directive may be relied on by all the intended beneficiaries, through an agreement or a national measure which is subsidiary in nature.

26. Furthermore, Directive 91/533 does not delimit the scope *ratione personae* of any agreements or national implementing measures, nor does it preclude the application of a collective agreement of the kind in question to workers who are not members of the unions which negotiated it.

27. Moreover, it may not be inferred from case-law that Community law prohibits workers who are not union members from having access to protection under a collective agreement. Indeed, in the cases cited above, the Court specifically referred to a number of cases in which the 'State guarantee' (laid down in the implementing law) must be used: '*where the workers in question are not union members*, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay'.

28. Based on that reasoning, the Court pointed out that it is ultimately for each Member State to ensure that no group is excluded from the protection of Directive 91/533, by setting out a number of examples of situations in which an employee has no protection other than that afforded by statute. Those situations include where there

7 — The same statement is contained in the final recital in the preamble to the directive.

8 — Case 143/83 *Commission* v *Denmark* [1985] ECR 427; Case 215/83 *Commission* v *Belgium* [1985] ECR 1039; Case 235/84 *Commission* v *Italy* [1986] ECR 2291; and Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713.

is no collective agreement, where the existing collective agreement does not refer to all the rights provided for in that directive, and where the agreement does not apply to certain categories of workers in the sector, such as non-union members.

29. In short, each legal system must define the extent to which collective agreements are binding and their scope. By adopting such a provision, the Community legislature responded to the requirements of logic, since the coexistence within the Union of very different definitions of collective bargaining makes a solution governed by anything other than national law alone extremely difficult. [9]

30. With the notable exception of the United Kingdom, where collective agreements have no legislative or even contractual force, [10] the description made famous by Carnelutti is still pertinent in the majority of Member States: 'the collective agreement is a hybrid with the soul of a statute and the body of a contract'. [11]

31. Greater disparities are evident in connection with the effectiveness of such agreements and, in particular, the possibility of extending their scope *ratione personae* beyond the contracting parties (to workers who are not members of the unions which concluded the agreement or to those who belong to organisations which did not negotiate the agreement, for example). A number of Member States completely prohibit such an extension of the scope *ratione personae* of collective agreements, while others provide for a variety of methods of effecting it (by administrative or judicial decision, by becoming a union member, or automatically as a result of the high representative authority of the signatories). [12]

32. If, as occurs in some Member States, a collective agreement may not be relied on by workers who are not union members, the national provision adopted for that purpose takes effect; otherwise, the implementing law only takes effect at a subsidiary level. That appears to be the case in the dispute which has given rise to the present reference for a preliminary ruling, [13] although it is a point which the national court must determine.

9 — As Díez-Picazo rightly states, the origin of provisions or sources of law reflects the distribution of power in any society, 'a problem which is, on the one hand, eminently political and, on the other, sociological' (Díez-Picazo y Ponce de León, L.M., *Experiencias jurídicas y teoría del Derecho*, 3rd edition, Ariel, 1993, p. 136).

10 — In that connection, Deakin and Morris state that the basis for the legislative effect of a collective agreement rests at the level of an individual contract of employment, since the former lacks the 'regulatory effect' conferred on it in other legal systems (Deakin, S. and Morris, G., *Labour Law*, 2nd edition, Butterworths, 1998, p. 261). On the same subject, Pitt observes that that particular feature of industrial relations in the United Kingdom is virtually unique in the European Union, which occasionally gives rise to difficulties in the transposition of directives (Pitt, G., *Employment Law*, 5th edition, Thomson — Sweet & Maxwell, 2004, p. 120).

11 — Carnelutti, F., *Teoria del regolamento collettivo dei rapporti di lavoro*, Padua, 1927, p. 108.

12 — A comparative analysis of the legal status of collective agreements in the 27 Member States, and of whether it is possible to extend their scope, is contained in the study 'Industrial Relations in Europe 2006 (Table 2.1: Normative function of collective bargaining: legal status and extension procedures as examples)', drafted by the Commission and relied on by the defendant in the main proceedings.

13 — Paragraph 1(3) of the Danish Law on proof of appointment provides that that law is subsidiary vis-à-vis collective agreements implementing Directive 91/533; according to the Højesteret, the so-called KTO Agreement applies to all municipal employees, whether or not they are union members.

33. Accordingly, Article 8(1) of Directive 91/533 allows Member States to extend the application of a collective agreement which is intended to transpose the provisions of that directive into national law to a person who is not a member of any of the union organisations which negotiated the agreement. If a collective agreement which correctly transposes Directive 91/533 is applicable to an employee, whether or not he is a union member, in principle, reliance on the agreement would exclude reliance on the national law, which is subsidiary in nature.

B — *The second question*

34. Article 8(2) of Directive 91/533 allows the Member States to provide for an employer to be given an additional period of 15 days to respond to a notification from the employee concerned before legal proceedings may be taken to enforce the rights conferred. However, the second subparagraph of Article 8(2) lays down three exceptions: notification is not required in the case of expatriate employees, workers with 'a temporary contract or employment relationship', or employees 'not covered by a collective agreement or by collective agreements relating to the employment relationship'. The national court seeks guidance on the scope of those exceptions and their interpretation.

35. The considerations set out in respect of the first question are also relevant to the second question. By that question, the Højesteret asks whether the expression 'employees not covered by a collective agreement or by collective agreements relating to the employment relationship' in the second subparagraph of Article 8(2) of Directive 91/533 means that workers who are not members of the union organisations which participated in the negotiation of a collective agreement are exempt from the obligation of notification.

36. In my opinion, the reply must be in the negative because, under Article 8(2) of Directive 91/533, union membership is not regarded as a decisive factor in order for an employee to be eligible for protection under a collective agreement transposing that directive.

37. The wording of the provision is clear. It states: 'employees *not covered by* a collective agreement or by collective agreements relating to the employment relationship'. [14] For the reasons set out in Part V.A of this

14 — The French ('non couverts par'), Spanish ('que no estén cubiertos') and German ('Regelung unterliegt') versions are equally clear.

Opinion, it is not appropriate to construe that phrase as referring solely to employees who belong to a union. Directive 91/533 does not specifically delimit the scope *ratione personae* of collective agreements implementing its provisions, a matter which it leaves to the national legislatures. Accordingly, Article 8(2) does not preclude the application of the terms of a collective agreement to workers who are not union members, including, where applicable, terms which impose the obligation of notification of the employer as a condition for bringing judicial proceedings.

38. It remains to be determined whether that view is compatible with the aim of Directive 91/533 in laying down the requirement of prior notification.

39. The *travaux préparatoires* do not shed any light on that point, since the obligation of notification was included at the conclusion of the legislative procedure and therefore the opinions of the Economic and Social Committee [15] and the European Parliament [16] did not address the subject. However, as the Commission rightly notes in its written observations, it is not difficult to identify that the purpose of the measure is to avoid litigation through the resolution of disputes using less expensive and less complex procedures than judicial ones. The higher objective of Directive 91/533, namely the protection of workers' interests, takes precedence over that generic aim of procedural economy; that is why Article 8(2) seeks to prevent the obligation of notification from becoming an onerous formality which, in practice, hinders the protection of employees who are in a less favourable position.

40. In those circumstances, it is logical that a worker not covered by a collective agreement for the sector concerned is not required to notify the employer before bringing legal proceedings. The fact that a worker is not covered by the provisions of an agreement places him in a weaker position, a situation exacerbated if that worker is required to give the employer a second chance to correct his errors.

41. The fundamental criterion for determining whether it is appropriate to require prior notification is not, therefore, whether the employee is a member of a union, but rather whether the collective agreement applies to that employee, a matter which, as I explained at length in Part V.A of this Opinion, is independent of whether or not he is a union member. Irrespective of whether or not he is unionised, a worker covered by a collective agreement enjoys sufficient protection which is not weakened by allowing the employer an additional period of 15 days. However, a worker who is not covered by a collective agreement (because he has not joined a union or for another reason) must be given the opportunity to seek redress directly in the courts.

42. The literal and teleological interpretations of the provision in issue lead to the conclusion that the decisive factor for ruling

15 — OJ 1991 C 159, p. 32.
16 — OJ 1991 C 240, p. 21.

out the obligation to notify is not whether a worker is a union member, but rather whether that worker is covered by a collective agreement, with the higher level of protection that that instrument affords.

C — *The third question*

43. The third question referred by the Højesteret seeks guidance on the scope of another of the exceptions to the obligation of notification laid down in Article 8(2) of Directive 91/533.

44. The uncertainty arises as a result of the use of the expression 'temporary contract or employment relationship', an expression hitherto not used in Community law. The national court asks whether, in using that expression, Directive 91/533 refers to all fixed-term employment relationships or only to short-term employment relationships.

1. The second subparagraph of Article 8(2) does not refer to all fixed-term contracts or employment relationships

45. The legal classification 'fixed-term employment relationship' exists in many national legal systems and was incorporated into Community law by Directives 75/129/EEC, [17] 91/383/EEC [18] and 1999/70/EC. [19]

46. As regards contracts for an indefinite duration, which constitute the most common form of relationship between employers and employees, contracts concluded for a specific period are to a certain extent exceptional, in that they satisfy the actual needs of an employer or of the market. Despite the current trend of making social law more 'flexible', [20] labour law in many Member States is based on the principle of stability in employment, which restricts the use of fixed-term contracts. The Spanish Estatuto de los Trabajadores (Workers' Statute), [21] for example, limits the conclusion of fixed-term contracts to the cases provided for in Article 15 thereof. Article L.1242-1 of the French Code du travail (Labour Code) stipulates that fixed-term contracts may not be used on a long-term basis to govern a post connected with the normal, permanent activity of an undertaking, and restricts the

17 — Council directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29).

18 — Council directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19).

19 — Council directive of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

20 — According to Alonso Olea, one of its most striking features is the broad acceptance of fixed-term recruitment, since 'as a result, the employer partially releases himself from the risk stemming from the level of economic activity, by adjusting the size of his workforce — generally rather than in specific cases — in line with variations in that level'. The writer acknowledges, however, that the decline of the principle of stability has recently slowed down as a result of assistance for contracts for an indefinite duration (Alonso Olea, M. and Casas Baamonde, M.E., *Derecho del Trabajo*, 19th edition, Civitas, Madrid, 2001, p. 251).

21 — Consolidated text of the Law on the Workers' Statute, approved by Royal Legislative Decree 1/1995 of 24 March 1995 (BOE of 29 March 1995).

use of such contracts to the situations listed in Article L.1242-2, for the performance of 'a specific, temporary task', in the particular circumstances referred to in Article L.1242-3.

47. That protective dimension balances the rights of so-called 'permanent' employees and employees with fixed-term contracts. Community law unreservedly confirms that approach in the framework agreement of 18 March 1999 on fixed-term work. [22] The preamble to the agreement refers to the willingness of the social partners 'to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination'. That rule of equality is contained, for example, in Article 15(6) of the Spanish Workers' Statute, Article L.1242-14 of the French Labour Code, the United Kingdom Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, and the municipal framework agreement on fixed-term employment which transposes Directive 1999/70 into Danish law. [23]

48. As I observed in Part V.B of this Opinion, the exceptions to the obligation of prior notification provided for in the second subparagraph of Article 8(2) of Directive 91/533 are intended to prevent a situation where the fulfilment of formalities prior to judicial proceedings impedes the protection of the most disadvantaged workers. It follows that exempting all workers with a fixed-term contract from that obligation is not justified since, if they have the same rights, they should also have the same procedural obligations.

49. The internal consistency of Community law necessitates such an approach. As I have observed above, Directives 75/129, 91/383 and 1999/70 refer, in different contexts, to 'fixed-term employment contracts' or equivalent expressions. Directive 91/383, which preceded Directive 91/533 by a mere few months, distinguishes a 'fixed-duration' employment relationship from that with a so-called 'temporary employment business', defining the former as a relationship arising from a contract the end of which is established by objective conditions, such as a specific date, a specific task or a specific event (Article 1). [24] It may be deduced from that provision that, if the Community legislature had intended to refer in the disputed directive to all fixed-term contracts, it would have done so by using those or equivalent words, as it did previously in Directive 91/383 and in Directive 75/129, [25] and as it would do some years later in Directive 1999/70. Accordingly, the defendant in the main proceedings was correct in stating that the use of the new

22 — Implemented by Directive 1999/70.

23 — According to the information provided in the order for reference, in Denmark, the conditions applicable to fixed-term contracts diverge from those applicable to contracts for an indefinite duration only in so far as there is a termination date for the former; in the event of dismissal, the same notice period applies and the same protection is provided for in the case of unfair dismissal. However, the Højesteret also points out that, in the case of so-called fixed-tenure contracts, normally concluded with individuals appointed to management posts for a period of five years, the employee receives a special annual supplement which increases his salary by between 15% and 25% in relation to the salary of an employee employed in an equivalent post for an indefinite term.

24 — The wording of Article 3 of the framework agreement concluded by ETUC, UNICE and CEEP is very similar.

25 — Article 1(2)(a) of which refers to 'contracts of employment concluded for limited periods of time or for specific tasks'.

wording 'temporary contract or employment relationship' is not the result of a mere linguistic evolution but rather must indicate a terminological difference.

50. The German version of Directive 91/533 gives rise to a number of uncertainties, since, like Directives 75/129, 1999/70 and 91/383, it uses the expression 'mit einem befristeten Arbeitsvertrag oder Arbeitsverhältnis', which is equivalent to the general category of 'fixed-term contracts'. However, that is a clear exception amongst the different versions of the provision, since wording similar to the Spanish 'contrato temporal' is used in the French ('contrat ou relation de travail temporaire'), English ('temporary contract or employment relationship'), Italian ('contratto o rapporto di lavoro temporaneo'), Portuguese ('contrato ou relação de trabalho temporários') and Finnish ('tilapäinen työsopimus') versions, from which it may be concluded that the German translation is probably a free translation and is not fully equivalent to the others.

2. The provision refers to 'short-term employment relationships'

51. If 'temporary contract' does not refer to any contract concluded for a predetermined period of time, it is necessary to determine which employment relationships are covered by that term, which has not been used in Community law until now.

52. The referring court proposes 'short-term employment relationships' as an alternative, submitting that in such circumstances the worker is generally in a less favourable situation.

53. The difficulty lies in the fact that this classification does not appear in the legal systems of all the Member States, which even sometimes use the terms 'temporary contract' and 'fixed-term contract' interchangeably. Danish law, however, does provide for a form of fixed-term employment relationship, which the Højesteret refers to in its order as 'temporary employment relationships' and describes as being of short duration, frequently paid by the hour and, most importantly, subject to less favourable conditions than those applied to other workers.

54. To my knowledge, with the exception of the directive in issue, the adjective 'temporary' has not been used in Community social law to refer to a separate category of contract, except in connection with relationships with a so-called 'temporary employment business'

(defined in Article 1 of Directive 91/383). One of the particular features of that special employment relationship (if not in law then at least in fact) is the lack of job security. [26] That factor, along with others, leads me to believe that the second subparagraph of Article 8(2) of Directive 91/533 is intended to ensure that workers appointed for a short period have direct, more straightforward access to the courts, owing to the fact that they are generally in a less favourable situation.

55. The repeated attempts of the Community and national legislatures to prevent the excessive use of temporary contracts and, in particular, to eradicate the practice of concluding a number of successive temporary contracts to cover a post indefinitely are strong evidence of the fact that, despite grand declarations of principle, a worker with a short-term contract is much more vulnerable and has much less protection than a worker with a long-term employment relationship.

56. Consequently, in my view, the fact that employees with short-term contracts have less protection emerges as an essential criterion for concluding that Article 8(2) of Directive 91/533 excludes that type of employment relationship from the scope of the obligation of prior notification.

57. The term 'temporary contract or employment relationship' is also used in Article 2(2)(e) of Directive 91/533. That provision lists the information which an employer must, as a minimum, provide to an employee, and refers to 'the expected duration' of the employment relationship 'in the case of a temporary contract or employment relationship'. It would not be unusual if, in this instance too, Directive 91/533 sought to limit the protection to employees with contracts distinguished by their short duration, where it is more helpful for workers to be clearly aware from the outset of the date of expiry of the contract. The national legislature may, however, extend that obligation to provide information to all fixed-term contracts.

58. The criterion of the degree of stability in employment is linked to another, strictly chronological criterion, since it is reasonable that a worker whose contract of employment will terminate in the short term should not be made to wait another 15 days before he may seek redress in the courts. In short, the

26 — As Alonso Olea and Casas Baamonde state, the crude feature of these 'triangular' relationships is 'the price paid by the law in order to disguise its acceptance of private employment agencies' (Alonso Olea, M. and Casas Baamonde, M.E., op. cit. (footnote 20), p. 527).

intention is to preclude the formality in question from producing the perverse effect of an employee's contract having already expired by the time he is able to bring the relevant proceedings. [27]

59. Accordingly, the expression 'temporary contract or employment relationship', enshrined in Article 8(2) of Directive 91/533, does not include any type of fixed-term employment relationship, but only short-term employment relationships.

60. That conclusion does not appear to be inconsistent with the case-law of the Court which, on one occasion, referred to an individual as having 'worked for a temporary period' and to 'employment... of short duration' in connection with a job carried out for two and a half months. [28] That choice of terminology was perhaps made necessary by the wording of the reference for a preliminary ruling, but, in any event, the precedent draws attention to the fact that there is a certain internal consistency to the interpretation proposed.

27 — Article 3(3) of the directive, which provides that, where the employment relationship comes to an end before the expiry of a period of two months from the date of the start of work, an employee must be provided with the information about the contract at the end of that period at the latest, pursues the same aim.

28 — Judgment in Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraphs 18 and 25. In addition, in the Opinion in that case, Advocate General Geelhoed used the words 'employment relationship which is limited from the outset' (point 52).

3. Criteria for classifying an employment relationship as temporary (short-term)

61. The expression 'short-term contract' is, however, no clearer than the term 'temporary contract'. It is therefore essential, as indicated at the end of the question referred, to establish certain criteria in order to define the term more precisely.

62. To my mind, none of the replies proposed in that regard by those who have lodged observations in these preliminary ruling proceedings are entirely satisfactory.

63. The defendant in the main proceedings submits that, under the Danish version of Directive 91/533, anyone who is appointed for a short period, on conditions substantially less favourable than those enjoyed by workers who have a fixed-term contract, is a temporary worker. That reply is consistent with the criteria for interpretation set out above but, in my opinion, gives rise to a new interpretational difficulty, because it necessitates a case-by-case assessment of whether the working conditions agreed are sufficiently advantageous in order for the obligation of prior notification to be required.

64. The Italian Government proposes that the disputed term should be examined in the light of Article 1(2) of Directive 91/533, under which Member States may provide that the directive does not apply to contracts or employment relationships: (a) with a total duration not exceeding one month, and/or with a working week not exceeding eight hours, or (b) in the case of casual contracts, where the non-application is justified by objective considerations. That interpretation is not particularly in keeping with the wishes of the Community legislature, whose intention was to allow Member States to exclude certain types of employment relationships from the scope of Directive 91/533 (the cases referred to in Article 1(2)) and to exempt other types of contract — so-called 'temporary' contracts (in addition to the contracts of expatriate employees and of workers not covered by a collective agreement) — from any procedural requirements. For an employee working fewer than eight hours per week, albeit under a long-term contract (or even a contract unlimited as to time), not to be required to notify the employer before seeking redress in the courts would be devoid of all logic.

65. An alternative solution, with a view to defining a contract as 'temporary' for the purposes of the second subparagraph of Article 8(2) of Directive 91/533, would be to establish the maximum duration of a contract by setting a time-limit in accordance with the considerations set out in this part (V.C) of the present Opinion. It would, for example, be appropriate to set a threshold of one year for an employment relationship to be regarded as 'temporary', in that a worker who is engaged for a shorter period runs the risk of not being entitled to seek redress in the courts during the currency of the contract in the event that there is an occurrence which calls for judicial protection and he is required to allow the employer a 'period of grace' to make the necessary corrections. Similarly, persons employed for a period of less than 12 months are usually in a less secure position than those who have concluded, *rebus sic stantibus*, a contract of employment with the employer for a longer period.

66. However, I do not believe that it is for the Court to fill that legislative lacuna. Indeed, it is very rare for the Court to indicate a mandatory time-limit in place of the legislature. That did occur in *Grundig Italiana*, [29] a decision which I criticise in my Opinion in *Recheio — Cash & Carry*, [30] as the Court must interpret Community law and provide national courts with precise guidelines for applying it, 'but it is by no means empowered to become involved in the latter legal operation, lest it undermine the foundations of that instrument of collaboration between courts, which requires scrupulous observance of the scope of their respective jurisdictions. In fact, by making pronouncements of this kind, the Court of Justice behaves as in a direct action and assumes, regardless of the rules of the Treaty, unlimited jurisdiction which seriously affects the absolute jurisdiction of the national court to settle the main action' (point 35).

29 — Case C-255/00 [2002] ECR I-8003.
30 — Case C-30/02 [2004] ECR I-6051.

67. Therefore, where the Community legislature is silent, the national authorities must mark that boundary on a case-by-case basis, having regard to the usual periods in the sector of activity concerned and to the features of the contract.

68. Mr Andersen points out in his observations that the disputed collective agreements were concluded in the context of a scheme to assist unemployed persons, provided for in the Lov om aktiv socialpolitik (Law on active social policy measures). Under that law, job training contracts apply only to activities which cannot be carried out in the context of a normal contract of employment. The applicant in the main proceedings infers from that difference in nature that a job training contract is, by definition, temporary. In the present case, it is for the Højesteret to analyse the particular features of the employment relationship between Mr Andersen and Skælskør municipality, but the Court is unable to do anything other than draw attention to that aspect.

69. In its assessment of the facts of the proceedings before it, the referring court must take into account a number of cases concerning the Community law definition of worker. The judgments in all those cases were delivered in the context of the free movement of persons but they are also very useful for interpreting Community social law.

70. First, it is appropriate to refer to *Lawrie-Blum* and *Bernini*, [31] in which the Court held that a person engaged in preparatory training in the course of occupational training must be regarded as a worker, provided that the activities performed as an employed person are effective and genuine. That conclusion is not invalidated because the trainee's productivity is low, because he works only a low number of hours per week, or because he receives only limited remuneration. The Court did require, however, that the person concerned must have completed a sufficient number of hours of training in order to familiarise himself with the work.

71. Secondly, it is also appropriate to mention *Bettray* (although the facts of that case are not exactly the same as the facts of the present case). [32] In connection with the special scheme for recruitment under the Netherlands Social Employment Law, the Court stated that work carried out under that law was not effective and genuine economic activity, since it constituted merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal a life as possible.

31 — Case 66/85 [1986] ECR 2121 and Case C-3/90 [1992] ECR I-1071 respectively.

32 — Case 344/87 [1989] ECR 1621.

VI — Conclusion

72. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Højesteret, declaring that:

(1) Article 8(1) of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship allows Member States to extend the application of a collective agreement which is intended to transpose the provisions of that directive into national law to a person who is not a member of any of the union organisations which negotiated that agreement;

(2) the expression 'employees not covered by a collective agreement or by collective agreements relating to the employment relationship', in Article 8(2) of Directive 91/533, is not to be construed as meaning that the provisions of a collective agreement laying down an obligation to give prior notification to the employer are not applicable to an employee who is not a member of one of the unions which negotiated the agreement;

(3) the terms 'temporary contract' and 'temporary... employment relationship', in Article 8(2) of Directive 91/533, do not refer to any type of fixed-term employment relationship, but only to short-term ones. In order to determine whether an employment relationship is 'temporary', it is necessary to look to the usual duration of contracts concluded in the sector of activity concerned, and also the features and nature of the contract.