Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 22 May 2014[1]

Case C-221/13

Teresa Mascellani
v
Ministero della Giustizia

(Request for a preliminary ruling from the Tribunale ordinario di Trento (Italy))

(Social policy — Directive 97/81/EC — Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC — Conversion of a part-time employment contract into a full-time employment contract against the worker's will)

1. Is it compatible with Directive 97/81/EC[2] for a Member State to provide for rules allowing an employer to modify an employment relationship unilaterally, thereby requiring the worker to change from part-time to full-time employment against the worker's own wishes? That, in essence, is the question upon which the Court is requested to rule in the present case.

I – **Legal framework**

A – *EU legislation*

2. Directive 97/81 incorporates into EU law the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC ('the framework agreement'). The framework agreement itself can be found in the Annex to Directive 97/81.

3. As reiterated in recital 5 in the preamble to Directive 97/81, the conclusions of the Essen European Council stressed the need to take measures to promote employment and equal opportunities for women and men, and called for measures to increase the employment-intensiveness of growth, in particular through a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition.

4. Recital 11 in the preamble to Directive 97/81 states:

'… the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working; … they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike'.

1 — Original language: English.

2 — Council Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

5. The second recital in the preamble to the framework agreement states:

‘Recogni[s]ing the diversity of situations in Member States and acknowledging that part-time work is a feature of employment in certain sectors and activities, this [framework agreement] sets out the general principles and minimum requirements relating to part-time work. It illustrates the willingness of the social partners to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working on a basis acceptable to employers and workers.’

6. According to general consideration 5 to the framework agreement, the parties thereto attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, and take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises.

7. Clause 1 of the framework agreement (‘Purpose’) provides:

‘The purpose of this [f]ramework [a]greement is:

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organi[s]ation of working time in a manner which takes into account the needs of employers and workers.’

8. Clause 3.2 of the framework agreement (‘Definitions’) defines the term ‘comparable full-time worker’. That term denotes a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills. Clause 3.2 goes on to state that, where there is no comparable full-time worker in the same establishment, the comparison must be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

9. Clause 4.1 of the framework agreement (‘Principle of non-discrimination’) provides:

‘In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.’

10. Clause 5 of the framework agreement (‘Opportunities for part-time work’) provides:

‘1. In the context of Clause 1 of this [a]greement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

2. A worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned.

3. As far as possible, employers should give consideration to:

(a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;

…

(d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility;

…'

11. Clause 6 of the framework agreement ('Provisions on implementation') sets out certain rules. Under Clause 6.1, Member States may introduce provisions more favourable than those set out in the framework agreement. Moreover, under Clause 6.2:

'Implementation of the provisions of this [a]greement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States … to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances, and does not prejudice the application of Clause 5.1 as long as the principle of non-discrimination as expressed in Clause 4.1 is complied with.'

B – *Italian legislation*

12. Under Article 16 of Italian Law No 183 of 4 November 2010 [3] ('Law No 183/2010'), it is possible for certain public authorities, when applying for the first time the rules adopted under Legislative Decree No 112 of 25 June 2008 ('Legislative Decree No 112/2008'), [4] to re-evaluate decisions granting the conversion of full-time employment relationships into part-time employment relationships where such decisions were adopted prior to the entry into force of Legislative Decree No 112/2008. Such re-evaluation must be made within 180 days of the entry into force of Article 16 of Law No 183/2010 and are subject to the principles of fairness and good faith.

13. A ministerial circular was adopted by the Italian Department of the Civil Service to provide guidelines for the application, inter alia, of Article 16 of Law No 183/2010. [5] According to the circular, that provision is justified by the stricter budgetary limits applicable within the context of the global financial crisis. The circular also states that the unilateral power of public employers to order an employee to return to full-time work is to be regarded as exceptional and must be exercised within the limits referred to in point 12 above.

14. The interpretation of Article 16 of Law No 183/2010, as set out in that ministerial circular, has since been confirmed by the Corte costituzionale (Constitutional Court) (Italy). [6]

3 — GURI No 262 of 9 November 2010, Ordinary Supplement No 243.

4 — See Article 73 of Legislative Decree No 112 of 25 June 2008 (GURI No 147 of 25 June 2008, Ordinary Supplement No 152/L), converted into Law No 133 of 6 August 2008 (GURI No 195 of 21 August 2008, Ordinary Supplement No 196).

5 — Circular No 9/2011 of 30 June 2011.

6 — Judgment No 224/2013 of 16 July 2013. In its judgment, the Corte costituzionale analysed the relationship between that provision and Clause 5.2 of the framework agreement.

II – **Facts, procedure and the questions referred**

15. Ms Mascellani is an official of the Italian Ministry of Justice and holds a position at the referring court. Since 28 August 2000, she has worked part-time in accordance with a weekly timetable whereby 50% of normal working hours are spread over three days a week (a 'vertical part-time employment relationship').

16. Following the entry into force of Law No 183/2010, the Ministry of Justice, acting through the intermediary of the Director of Administration of the Trento Court, adopted Decision No 20384 of 8 February 2011 and Decision No 1882 of 21 March 2011 ('the contested decisions'). The contested decisions unilaterally re-evaluated and revoked Ms Mascellani's part-time working arrangements, pursuant to Article 16 of Law No 183/2010, and instructed her to work full-time, on the basis of full working hours spread over six days a week, as from 1 April 2011.

17. Objecting to that conversion of her employment contract, Ms Mascellani brought an action before the Labour Division of the referring court seeking annulment of the contested decisions and a declaration that her part-time employment could not be converted into a full-time employment relationship against her wishes. She argues that the conversion is unlawful under Directive 97/81.

18. According to Ms Mascellani, working part-time has enabled her to use her time both to care for her family and to undertake vocational training. She has been registered with the Trento roll of lawyers, has graduated from a specialist college for legal professions, and has also enrolled in the University of Padua for a three-year degree course for workplace training instructors. Working part time has also enabled Ms Mascellani to provide assistance to her only surviving parent — now more than 90 years old — who lives with her and has no other relative nearby.

19. The Ministry of Justice opposes the action brought by Ms Mascellani. It contends that, under Article 16 of Law No 183/2010, the Ministry can terminate a part-time employment relationship and impose full working hours, even against the wishes of the employee. According to the Ministry, Directive 97/81 does not preclude such a provision.

20. Entertaining doubts as to the interpretation of Directive 97/81, the referring court decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) In so far as it provides that "[t]he refusal by a worker to be transferred from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to the possibility, under national laws, collective agreements and practice, of termination for other reasons such as may arise from the operational requirements of the establishment concerned", must Clause 5.2 of the [framework agreement] be construed as meaning that provision may not be made in the legislation of Member States for employers to be able to convert a part-time employment relationship into a full-time relationship even where the worker does not consent?

(2) Does [Directive 97/81] preclude a provision of national law (such as Article 16 of [Law No 183/2010]) under which employers may convert a part-time employment relationship into a full-time employment relationship even where the worker does not consent?'

21. Written observations have been submitted by the Italian and Czech Governments, and by the Commission. At the hearing on 20 March 2014, oral argument was presented by Ms Mascellani, the Italian Government, and the Commission.

III – **Observations submitted to the Court**

22. According to *Ms Mascellani*, Clause 5.2 of the framework agreement should be interpreted as preventing an employer — whether in the private sector or in the public sector — from changing the employment relationship without the express consent of the worker. As the framework agreement is intended to prevent discrimination against part-time workers, this would be the only suitable reading of that clause.

23. The *Italian Government* places emphasis on the transitional nature of Article 16 of Law No 183/2010. That government observes that, under the regime previously applicable to the public sector,[7] workers had a well-nigh unlimited right to obtain a reduction in working hours. The current regime under Legislative Decree No 112/2008, however, intends to strike a fair balance between the rights of the employer, on the one hand, and the rights of the worker, on the other. A public sector employer may now refuse a request for reduced hours where granting the request would, inter alia, impair the functioning of the public body. Accordingly, Article 16 of Law No 183/2010 governed the transition from the previous regime to the one currently in force. The aim of Article 16 of Law No 183/2010 is to balance the diverging interests of public sector employers and public sector workers. Another aim is to place workers who had made a request to work part-time under the former regime on an equal footing with those who have made a similar request under the current regime.

24. According to the Italian Government, Clause 5.2 of the framework agreement cannot be interpreted as requiring that a conversion from part-time to full-time work must necessarily be consensual. That provision aspires only to limit the possibility of dismissal where the worker does not agree to such a conversion, but it does not prohibit less intrusive measures taken by the employer. Furthermore, that provision is framed in non-binding terms and therefore does not provide the worker with an enforceable right.

25. The Italian Government further contends that Directive 97/81 cannot be construed as generally requiring that the worker's consent be obtained for changes in working hours. Not to require consent does not amount to discrimination between full-time and part-time workers under Clause 4 of the framework agreement; nor does it limit the possibility of working part-time. Indeed, under Clause 1(b) of the agreement, it would appear to the Italian Government that it is only the transition from full-time to part-time work that must be undertaken on a voluntary basis, as that transition involves economic loss for the worker.

26. In the view of the *Czech Government*, an employment relationship which has previously been on a part-time basis cannot be modified unilaterally by the employer against the worker's wishes. To do so would hamper the development of part-time work in disregard of the will of the worker, contrary to the aim of the framework agreement under Clause 1(b) thereof and as specified in the fifth general consideration thereto. The Czech Government also considers that, contrary to the other aim of that agreement as set out in Clause 1(a) thereof, such a possibility creates unjustified discrimination against part-time workers, as full-time workers do not face the same risk. More generally, that government refers to the principle of freedom of contract, the prohibition on forced labour enshrined in Article 5(2) of the Charter of Fundamental Rights of the European Union,[8] and contends that public sector employers should not enjoy greater rights than others.

7 — Previously governed by Article 1(58) of Law No 662 of 23 December 1996, GURI No 303 of 28 December 1996, Ordinary Supplement No 233.

8 — Article 5(2) of the Charter of Fundamental Rights provides that '[n]o one shall be required to perform forced or compulsory labour'.

27. The *Commission*, which proposes giving a joint answer to the two questions, observes that Clause 5.2 and Clause 5.3(a) of the framework agreement are loosely worded. It goes on to state that the framework agreement does not grant workers the right to remain under a part-time employment scheme. In particular, Clause 5.2 does not exclude the possibility of dismissing a worker who refuses conversion to a full-time employment relationship where the operational requirements of the establishment concerned require this. This is confirmed by the aim of the framework agreement, which — as stated in Clause 1(b) — is to contribute to the flexible organisation of working time in a manner which takes into account the needs both of employers and of workers.

28. Nevertheless, the Commission argues that it follows from Clause 1(b) of the framework agreement, read in conjunction with Clause 5.2 thereof, that the employer is required to consult the worker and to take his needs into consideration; to evaluate other possibilities; and to grant the worker a period of time to adapt to the new scheme. Dismissal may be contemplated only where it is necessary in order to meet the operational requirements of the establishment concerned. In the view of the Commission, by not providing that dismissal is to be the automatic consequence of a refusal and by making conversion of the employment relationship subject to the principles of fairness and good faith, the Italian legislation complies with the requirements of the framework agreement.

29. Lastly, referring to recitals 5 and 11 in the preamble to Directive 97/81, the preamble to the framework agreement annexed thereto, paragraph 5 of the general considerations thereof, and Clauses 1, 4 and 5 thereof, the *referring court* considers Article 16 of Law No 183/2010 to be incompatible with Directive 97/81. In its view, Article 16 of Law No 183/2010 permits discrimination against part-time workers, who, unlike full-time workers, are exposed to the risk that their working hours might be changed. Moreover, according to the referring court, it follows from Clause 5.2 of the framework agreement that a part-time employment relationship cannot be converted into a full-time relationship (or vice versa) unless the worker consents. If termination is considered to be illegal under that clause, then the worker's refusal to agree to the change must be lawful and, accordingly, the worker's consent must be acquired.

IV – **Analysis**

A – *Reformulation of the questions referred*

30. The two questions posed by the Trento Court are clearly linked. By its first question, the referring court asks whether Clause 5.2 of the framework agreement precludes an employer from unilaterally converting a part-time employment relationship into full-time employment. By its second question, the referring court essentially asks for the same clarification, but without referring to any specific provision of Directive 97/81 or the framework agreement. Thus, the second question effectively covers the same issue as the first; yet it also appears to be of subsidiary nature, in case the first question is answered in the negative.

31. I agree with the Commission that the Court should provide a joint answer to both questions. However, in that process, I do believe — unlike the Commission — that it would be of use to the referring court to address in more general terms the compatibility of the rules at issue with the framework agreement, as that is the main issue raised in the second question. I will do so in the last part of this Opinion.

32. Therefore, I will reformulate the questions as follows:

'Does Directive 97/81 — and, in particular, Clause 5.2 of the framework agreement annexed thereto — preclude a provision of national law, such as Article 16 of Law No 183/2010, pursuant to which an employer may convert a part-time employment relationship into a full-time employment relationship without the worker's consent?'

B – *Consideration of the reformulated question*

33. The answer to the question thus reformulated turns on the protection properly to be afforded to workers under Clause 5.2 of the framework agreement. I will assess this by looking at the wording, context and purpose of that provision.

34. As concerns its *wording*, I would note from the outset — like the Italian Government and the Commission — that Clause 5.2 of that agreement has been drafted in such a way as to obscure its actual core meaning.

35. First, the language used in Clause 5.2 of the framework agreement appears to be deliberately vague. Under that provision, '[a] worker's refusal to transfer from full-time to part-time work or vice-versa *should not* in itself constitute a valid reason for termination of employment' (emphasis added). On the one hand, the impression gained is that, under that provision, such a refusal does not, prima facie, justify dismissing a worker who does not wish the employment relationship to be converted. On the other hand, however, the use of the terms 'should not' does not suggest that the worker's consent to the change in working hours is mandatory.

36. Second, Clause 5.2 of the framework agreement also provides that a refusal to transfer from part-time to full-time work may even be a valid reason for terminating an employment contract 'in accordance with national law, collective agreements and practice, *for other reasons such as may arise from the operational requirements of the establishment concerned*' (emphasis added). Again, it is difficult, in my view, when considering the highlighted part of the quoted passage from a rights perspective to conclude with certainty that it grants workers an unquestionable right to refuse conversion of the employment relationship. Indeed, the power to terminate an employment relationship due to the ever-changing operational requirements of the workplace would seem to negate from the outset the idea that Clause 5.2 grants any substantive protection.

37. From a *systemic* point of view, that consideration is borne out, first, by the way in which the remainder of Clause 5 has been drafted. Clause 5.1(a) and Clause 5.1(b) mention that the Member States, together with the social partners, '*should* identify' obstacles to part-time work and eliminate them '*where appropriate*'; Clause 5.3 states that '*as far as possible*, employers *should give consideration* to' a list of different measures, some of which are described in even more anodyne terms (emphasis added in all quotes).[9]

9 — See Clause 5.3(b) which, again, contains the word 'should'; Clause 5.3(d), which uses the terms 'where appropriate'; and Clause 5.3(e), where the word 'appropriate' is also used.

38. Second, it should not be overlooked that, under Article 288 TFEU, the framework agreement, as an annex to Directive 97/81, leaves it to the Member States to determine how the objectives of that instrument are to be implemented. According to Clause 6.1 of the framework agreement, the agreement only provides for minimum harmonisation. Furthermore, certain provisions of the directive and the framework agreement explicitly grant certain regulatory powers to the Member States.[10] The fact that so many unresolved issues are left to the discretion of the Member States lends support to the idea that the language used in Clause 5 of that agreement is of a non-binding character.

39. As for its *purpose*, the overarching aim of Clause 5 of the framework agreement is stated explicitly in Clause 1(b), namely 'to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organi[s]ation of working time in a manner which takes into account the needs of employers and workers'. The flexibility referred to there is bipolar, as it encompasses both 'demand side'-flexibility for the employers and 'supply side'-flexibility for the workers,[11] *yet without leaning in favour of either.*[12]

40. In the light of those elements, some commentators take the view that, by contrast with Clause 4, Clause 5 of the framework agreement (and/or certain sub-clauses thereof) is worded in uncertain terms of a declaratory nature,[13] whilst others take the view that, quite simply, there is no right to part-time work.[14] Admittedly, however, not all share the view that Clause 5 does not lay down any legal obligations at all.[15]

41. I am not at all opposed to the view that dismissal ought only to be undertaken where it is necessary in order to meet the operational requirements of the establishment concerned. However, I doubt that a legal requirement exists to that effect, as a matter of EU law, under Clause 5.2. It would, in fact, appear to me that Clause 5.2 of the framework agreement is too vague to be cognisable by the courts. Apart from the observations made in points 34 to 39 above, I find such an interpretation to be supported by several elements, notably the framework agreement's legislative history and background.

10 — See, for instance, recital 16 in the preamble to Directive 97/81, according to which 'with regard to terms used in the [f]ramework [a]greement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the [f]ramework [a]greement'; see furthermore Clause 2.2; Clause 3.2, second sentence; Clause 4.3; Clause 4.4; and Clause 6.5 of the framework agreement.

11 — See, inter alia, Deakin, S., and Reed, H., 'The Contested Meaning of Labour Market Flexibility', in Shaw, J. (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, Oxford: 2000, p. 75.

12 — Recital 11 in the preamble to Directive 97/81 and the second recital in the preamble to the framework agreement both mention that the aim of that agreement is to contribute to developing the potential for part-time work on a basis which is mutually acceptable for employers and workers. Similarly, recital 5 in the preamble to the directive refers to a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition.

13 — See, inter alia, Rodière, P., *Droit social de l'Union européene*, L.G.D.J., Paris: 2002 (2nd ed.), according to whom '[e]n dehors de la règle de non-discrimination, l'accord-cadre prend une tournure recommandationnelle'; Barnard, C., *EU Employment Law*, Oxford University Press, Oxford: 2012 (4th ed.), p. 437, according to whom '[m]uch of the remainder of Directive 97/81 has the feel of an exhortatory resolution rather than a hard law measure'; Jeffery, M., 'Not Really Going to Work? Of the Directive on Part-Time Work, "Atypical Work" and Attempts to Regulate It', 3(27) 1998 *Industrial Law Journal* 193, at pp. 198 and 203, where it is stated that 'the wording of [Clause 5.2] is vague, and leaves the applicability of the general rule highly uncertain'.

14 — See, in this respect, Hepple, B., and Barnard, C., 'Substantive Equality' 3(59) 2000 *Cambridge Law Journal* 562, at p. 582, according to whom 'there is no obligation to create part-time jobs or job-shares'; Nielsen, R., *European Labour Law*, DJØF, Copenhagen: 2000, p. 152, where it is stated that '[Directive 97/81] establishes no right for workers who might wish to do so to work part-time'.

15 — See Kilpatrick, C., and Freedland, M., 'The United Kingdom: how is EU governance transformative?' in Sciarra, S., Davies, P., and Freedland, M. (eds.), *Employment Policy and the Regulation of Part-time Work in the European Union. A Comparative Analysis*, Cambridge University Press, Cambridge: 2004, p. 329 et seq., where, referring to Clause 5.2, it is stated that '[Clause] 5 cannot be dismissed out of hand as a purely soft law provision, containing only aspirational social protection aims and promotional employment goals'.

42. When the European Parliament was in the process of considering the Commission's proposal for a directive, the parliamentary Committee on Employment and Social Affairs issued a report on that proposal. In the report, the Committee stated that Clause 5 of the framework agreement is 'not legally binding' as regards any of the points to which it refers.[16] The parliamentary resolution on the Commission proposal in the wake of that report endorsed the criticism made by the report.[17] Nevertheless, the content of the framework agreement was not modified as suggested.

43. In addition, Clause 5 of the framework agreement appears to be inspired by Articles 9 and 10 of Convention No 175 of the International Labour Organisation (ILO) concerning Part-Time Work ('the ILO Convention').[18] Indeed, the EU legislature acknowledged that account must be taken of the principles of the ILO Convention.[19] In addition, the Recommendation adopted to complement the ILO Convention[20] — which should, according to point 1 thereof, be considered in conjunction with the provisions of the convention — contains, in points 17 to 19 thereof, provisions which are fairly similar to those of the framework agreement.

44. In this regard, it has been argued — convincingly, to my mind — that the general level of protection afforded to part-time workers under Directive 97/81 is lower than that under the ILO Convention and the accompanying Recommendation.[21] If so, I find it even more difficult to imagine how Clause 5.2 of the framework agreement could allow a worker who has previously worked part-time to refuse being transferred to full-time work, when the wording of a corresponding provision in the instrument of international law that had prompted the framework agreement does not explicitly provide for such a right either.

45. That said, I am aware that the Court has held in *Michaeler and Others* that Clause 5.1(a) of the framework agreement precludes national rules which require, on pain of a fine, that copies of part-time employment contracts be sent to the authorities within 30 days of their signature.[22] The Court thus implicitly acknowledged that a clause of that kind has a core content which national legislation must respect.[23] However, although one may agree that the bureaucratic rules at issue in that case made it more difficult to work part-time, I must admit to not fully understanding how the word 'should' in Clause 5.1(a) of the framework agreement — even when read against the aim of Directive 97/81 — could be interpreted as giving rise to a legally binding obligation.[24] *Michaeler and Others*, in any event, did not concern Clause 5.2 of the framework agreement. Moreover, it is not a suitable precedent for the case under consideration, as the main proceedings here do not concern the

16 — Report of 6 November 1997 on the Commission Proposal for a Council Directive concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (A4-0352/97, p. 16). The relevant passage states: 'This Clause 5 of the framework agreement is not legally binding as regards any of the above points. The use of the word "should" does not, in fact, establish any specific obligation on the Member States, the social partners or, in particular, employers. The provision remains merely a declaration or statement of intent, so that the actual wording of the agreement cannot achieve the second objective set out in the preamble, namely to make part-time work more attractive and thereby to promote the development of part-time jobs.'

17 — Resolution of the European Parliament on the Commission Proposal for a Council Directive concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1997 C 371, p. 41), at p. 62, points 7 to 9: 'The European Parliament: … 7. Considers it crucial that the transfer of workers to "part-time work" should not be imposed; 8. Regrets the fact that the European [framework] agreement concluded by the social partners does not follow the 1994 [International Labour Organisation] Convention concerning Part-Time Work in explicitly prescribing the implied gradual reduction of exceptions; 9. Finds that the actual substance of the agreement, once the declaratory elements have been removed, does not always do justice to its stated purpose, since the agreement does not eliminate discrimination against part-time workers and does not contribute to making part-time work more attractive.'

18 — At the time of writing, the ILO Convention had been ratified by nine out of 28 Member States (Cyprus, Finland, Hungary, Italy, Luxembourg, the Netherlands, Portugal, Slovenia and Sweden).

19 — See Commission Proposal of 23 July 1997 for a Council Directive concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, COM(97) 392 final, point 5. See also the above-mentioned resolution of the European Parliament, point 8.

20 — Recommendation No 182 of the ILO concerning Part-Time Work ('the Recommendation').

21 — See Hepple, B., and Barnard, C., *supra*, at p. 580, and Jeffery, M., *supra*, p. 200. See also the above-mentioned resolution of the European Parliament, point 8.

22 — See the operative part of the judgment in Joined Cases C-55/07 and C-56/07 *Michaeler and Others* [2008] ECR I-3135.

23 — Curiously, the Italian rules at issue in *Michaeler and Others* were adopted in order to implement Directive 97/81, and the Italian Government claimed that they promoted the protection and encouragement of part-time work; see paragraphs 6, 7 and 22 of that judgment.

24 — See *Michaeler and Others*, paragraph 21.

imposition of 'administrative, financial and legal constraints in a way that would hold back the creation and development of small and medium-size undertakings'.[25] Rather, should the Court follow the reasoning of *Michaeler and Others* in the present case by requiring the worker's formal consent to a change in the employment relationship, precisely such constraints would be created.

46. On that basis, I conclude that Clause 5.2 of the framework agreement does not preclude a national rule pursuant to which an employer may convert a part-time employment relationship into a full-time employment relationship without the worker's consent.

47. It remains to be determined whether this conclusion is in some way affected by other provisions of Directive 97/81.

C – *Further considerations*

48. From the outset, I would point out that Clause 5.2 of the framework agreement is the sole provision in Directive 97/81 which specifically addresses the issue raised by the referring court, namely the consequences of a refusal to transfer from part-time to full-time work. It therefore strikes me that, by virtue of the principle of *lex specialis derogat legi generali*, the issue which the Court has been asked to rule upon ought to be resolved only on the basis of that clause, and that it is not necessary to look any further. Should the Court nevertheless find it useful to do so, I will provide the following views.

49. To my mind, the fact that part-time workers alone are exposed to the risk of having to change over to full-time work does not give rise to any discrimination prohibited by Clause 4 of the framework agreement. Indeed, the rules in question do not involve less favourable treatment of part-time workers in respect of employment conditions as compared with full-time workers.

50. The relevant comparator at issue here is not pay, pensions or other 'traditional' employment conditions that are determined on the basis of the criterion of employment (that is to say, the employment relationship between a worker and his employer).[26] Rather, the comparative element on which the referring court wishes the Court to focus is the risk for the part-time worker that the daily amount of time devoted to working may be adjusted against his will. However, that is not a matter which can be tested for discrimination under that clause. Bearing in mind the definition set out in Clause 3.2 of the framework agreement, it is not feasible to compare the risk to a part-time worker of having his employment relationship converted into a full-time job with the risk that the same might happen to a comparable full-time worker, as the latter already works full-time.[27]

51. For the sake of argument, it is at any rate doubtful whether the situation of a part-time worker who faces the risk of having to work full-time against his will is, in fact, comparable to that of a full-time worker who risks having to work part-time. Being told to work more is not the same as being told to work less — at least from the point of view of a worker's livelihood. It is therefore open to debate whether a comparable full-time worker exists.[28]

25 — See *Michaeler and Others*, paragraph 22, referring to Article 2(2) of the Agreement on social policy concluded by the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 1), at p. 91, annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community.

26 — See, regarding the concept of 'employment conditions' in Clause 4(1) of the framework agreement, Case C-361/12 *Carratù* [2013] ECR, paragraphs 34 and 35. The Court has held that a contract providing for a 'work on demand' scheme comes within that concept; see Case C-313/02 *Wippel* [2004] ECR I-9483, paragraphs 30 and 32.

27 — In *Wippel*, the Court took the view that a quantitative upper limit to working hours, obviously of relevance mostly to full-time workers, did not constitute less favourable treatment of part-time workers in relation to comparable full-time workers. See paragraphs 49 and 50 of that judgment.

28 — See, to that effect, *Wippel*, paragraphs 57 to 62, where the Court held that the employment relationship of a typical full-time worker could not be compared, as to subject-matter and basis, to that of a part-time worker working on demand. See also, by way of analogy, *Carratù*, paragraphs 41 to 45, where the Court held that the compensation payable for the unlawful insertion of a fixed-term clause in an employment contract could not be compared to the compensation arising from the unlawful dismissal of a permanent worker.

52. Apart from the judgment in *Michaeler and Others*, the Court admittedly held, in *Bruno and Others*, that where national rules are in breach of Clause 4 of the framework agreement, they are also liable to breach Clause 5(1) of that agreement.[29] It is hard to disagree with that view, as the initial part of that provision explicitly refers, inter alia, to the principle of non-discrimination.[30] However, as I have already stated, I do not think that this case gives rise to an instance of discrimination. Furthermore, as alluded to above, that line of authority concerned obstacles of an administrative nature which may limit the opportunities for part-time work, which is not the position in the case before the referring court.

53. On another note, the Czech Government is quite right to refer to the fact that the Court has held that a contract is characterised by the principle that the parties are free to arrange their own affairs.[31] However, that principle does not mean that the questions referred must be answered in the affirmative, as that government suggests. Indeed, legislative provisions, such as Article 18 of Law No 183/2010, may interfere with the freedom to contract. This is explicitly foreseen in Clause 5.2 of the framework agreement. In addition, a worker is always at liberty to end the employment relationship if he or she does not wish to work full-time. For that reason, I am rather perplexed by the comparison made by the Czech Government to a situation of forced labour.

54. Besides, I would also draw attention to the 'non-regression clause' in Clause 6.2 of the framework agreement. That clause explicitly grants Member States the right 'to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances, and does not prejudice the application of Clause 5.1 as long as the principle of non-discrimination as expressed in Clause 4.1 is complied with'. It seems to me that the *raison d'être* for that provision is to allow Member States to modify and, if need be, to reduce the level of protection afforded under their rules on part-time work in times of turmoil. At least, that provision makes clear that such rules are not immutable. In that connection, I have taken note of the fact that the Italian regime applicable as from 2008 appears to coincide with the surge of the global financial crisis.

55. I can appreciate the fact that, under Italian law, the possibility of instructing a part-time worker to return to a full-time job is of an exceptional nature and is limited, furthermore, by the principles of fairness and of good faith. However, unlike the Commission, I cannot discern any legal basis *in the framework agreement* requiring the employer to observe the safeguards suggested in point 28 above. The Commission suggests that such an approach follows from Clause 1(b), which sets out the purpose of the framework agreement, read in conjunction with Clause 5.2. However, a proper interpretation of Clause 5.2 on its own requires, in itself, an analysis of that very purpose (see point 39 above). Accordingly, Clause 1(b) cannot add anything else to that analysis.

29 — See Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119, paragraph 81. See, furthermore, order of 7 April 2011 in Case C-151/10 *Dai Cugini*, paragraph 56, and order of 9 December 2011 in Case C-349/11 *Yangwei*, paragraph 37.

30 — In point 112 of her Opinion in *Bruno and Others*, Advocate General Sharpston argues that '[t]he obligation in Clause 5 of the [f]ramework [a]greement … seems to me to be a specific application of the prohibition of discrimination in Clause 4'. Where, as it would appear from the facts of that case, the generic reference to 'Clause 5' is meant to be understood as Clause 5.1 of that agreement, I am inclined to share that view.

31 — See Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 23.

56. On that basis, it would seem to me that, in the absence of harmonisation to that effect,[32] it falls to the Member States to provide for such safeguards within the discretion afforded to them by Directive 97/81, on condition that they respect the principles of effectiveness and equivalence when implementing the directive, as well as the other general principles of EU law.[33] In Italy, such safeguards are not a purely theoretical possibility but, following the case-law of the Corte costituzionale, a matter of law.[34]

57. However, it is equally clear that any change in working hours — and, in particular, a reduction — when moving from full-time to part-time employment cannot diminish any rights *already acquired* that the worker has accumulated during the period of full-time employment.[35]

V – **Conclusion**

58. For the foregoing reasons, I propose that the questions referred by the Tribunale ordinario di Trento (Italy) be answered as follows:

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC must be interpreted as not precluding, in circumstances such as those of the case before the referring court, a national rule whereby an employer may order the conversion of a part-time employment relationship into a full-time employment relationship without the worker's consent.

32 — As for an employer's duty to inform the worker of the terms of the contract, that issue *is* in fact harmonised; see 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 (OJ 1991 L 288, p. 32).

33 — See, to that effect, Case C-393/10 *O'Brien* [2012] ECR, paragraph 34. In that sense, I find myself unable — unlike Advocate General Kokott in her Opinion in *Wippel*, points 108 and 109 — without a corresponding (positive) provision in the framework agreement or elsewhere to that effect, to interpret the objective of proper social protection, referred to inter alia in Article 151(1) TFEU, as imposing a legal obligation on employers to take certain steps vis-à-vis workers.

34 — See paragraph 3.3 of the judgment referred to in point 14 above.

35 — See, to that effect, Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraph 32, and Joined Cases C-229/11 and C-230/11 *Heimann* [2012] ECR, paragraph 35.