Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

24 June 2021 *

(Reference for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term employment concluded by ETUC, UNICE and CEEP – Clause 5 – Measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships – Successive fixed-term employment contracts in the construction sector, known as '*fijos de obra*' – Concept of 'objective reasons' justifying the renewal of such contracts – Directive 2001/23/EC – Article 1(1) – Transfer of an undertaking – Article 3(1) – Safeguarding of employees' rights – Taking over of employment contracts in accordance with the terms of a collective agreement – Collective agreement limiting the rights and obligations of the transferred workers to the rights and obligations arising from the last contract concluded with the outgoing company)

In Case C-550/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 14 de Madrid (Labour Court No 14, Madrid, Spain), made by decision of 4 July 2019, received at the Court on 17 July 2019, in the proceedings

EV

v

Obras y Servicios Públicos SA,

Acciona Agua SA,

THE COURT (Seventh Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, P.G. Xuereb and I. Ziemele, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

– EV, by F. Luján de Frías, abogado,

– Obras y Servicios Públicos SA, by F.J. Berriatua Horta, abogado,

– Acciona Agua SA, by J. Revoiro Mingo, abogado,

– the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,

– the European Commission, by M. van Beek, B.-R. Killmann and N. Ruiz García, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Clause 4(1) of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), and Article 1(1) and the first subparagraph of Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

2 The request has been made in proceedings between EV, on the one hand, and Obras y Servicios Públicos SA, his former employer, and Acciona Agua SA, his current employer, on the other, concerning the recognition of his period of service for the years of service completed and of his employment relationship as permanent.

Legal context

EU law

The framework agreement

3 Clause 4 of the framework agreement, under the heading 'Principle of non-discrimination', provides, in paragraph 1 thereof:

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

4 Clause 5 of the framework agreement, under the heading 'Measures to prevent abuse', provides, in paragraph 1 thereof:

'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.'

Directive 2001/23

5 Recital 3 of Directive 2001/23 states that 'it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

6 Article 1(1)(a) and (b) of that directive is worded as follows:

'(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

7 The first subparagraph of Article 3(1) of that directive provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.'

Spanish law

Law 32/2006

8 Ley 32/2006 reguladora de la subcontratación en el sector de la construción (Law 32/2006 on subcontracting in the construction sector) of 18 October 2006 (*BOE* No 250 of 19 October 2006, p. 36317) provides, in the third additional provision thereof:

'In order to improve the quality of employment of workers taking part in construction works and thus improve their health and safety at work, collective bargaining at the national level in the construction sector may adapt the detailed rules of the contract for a well-defined work or service provided for generally by standard provisions ensuring greater stability in the employment of workers, in terms similar to those currently regulated in this area of negotiation.'

The Workers' Statute

9 The Estatuto de los Trabajadores (Workers' Statute), in the version resulting from the Real Decreto legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Workers' Statute) of 23 October 2015 (*BOE* No 255 of 24 October 2015, p. 100224; 'the Workers' Statute'), provides, in the third additional provision thereof:

'The provisions of Article 15(1)(a) and (5) and Article 49(1)(c) shall be without prejudice to what is established or what may be established in collective bargaining, in accordance with the third additional provision of [Law 32/2006], as regards the '*fijo de obra*' employment contract, including compensation for termination.'

10 Article 15 of the Workers' Statute, entitled 'Duration of the contract', sets out, in paragraphs 1 and 5 thereof:

'1. An employment contract may be concluded for an indefinite period or for a fixed term.

A fixed-term contract may be concluded in the following cases:

(a) Where the worker is employed in order to complete a task or service which is specific, autonomous and separable from the undertaking's activity as a whole, the performance of which, while limited in time, is, in principle, for an unclear period. Such contracts may not be for a period of more than 3 years, which may be extended by up to 12 months by a national sectoral collective agreement or, if there is no such agreement, by a lower-level sectoral collective agreement. On the expiry of those periods, workers shall acquire the status of permanent workers of the employer.

…

5. Without prejudice to the provisions of paragraphs 1(a), 2 and 3, workers who have been engaged, with or without interruption, for longer than 24 months over a period of 30 months in the same or a different work position with the same undertaking or group of undertakings on two or more temporary contracts, regardless of whether the workers have entered into the contracts directly or have been supplied by temporary employment agencies or whether the same

or different fixed-term conditions apply to the said contracts, shall acquire the status of permanent workers.

The provisions of the previous paragraph shall also apply where one undertaking succeeds another or in the case of the transfer of workers in accordance with provisions laid down by statute or in collective agreements.

…'

The general collective agreement for the construction sector

11 The Convenio colectivo general del sector de la construcción (general collective agreement for the construction sector), registered and published by the Resolución de la Dirección General de Empleo (Resolution of the Directorate-General for Employment) of 21 September 2017 (*BOE* No 232 of 26 September 2017, p. 94090), in the version applicable at the time of the facts in the main proceedings ('the collective agreement at issue'), provides, in Article 24 thereof, entitled 'Fixed-term employment contract for a well-defined work in the construction sector, known as "*fijos de obra*"':

'…

2. That contract is generally concluded for a specific construction project, irrespective of its duration, and comes to an end when the works to be carried out in respect of that specific construction project and falling within the profession and category to which the worker belongs are completed. That agreement is always evidenced in writing.

   The provisions of the first subparagraph of Article 15(1)(a) [of the Workers' Statute] shall therefore not apply, irrespective of the duration of the contract, and employees retain the "*fijo de obra*" status both in the cases referred to in that provision and in the event of a transfer of an undertaking, within the meaning of Article 44 [of the Workers' Statute], or of a transfer of staff referred to in Article 27 of this collective agreement.

3. However, since the status of single contract remains applicable, the workers "*fijos de obra*" may, without losing that status, provide services to the same undertaking in different places of business in the same province, provided that an express agreement has been concluded for each of the various successive places of business for a maximum period of 3 consecutive years, unless the works which fall within their specialisation on the last construction project continue beyond that period, in which case they shall accept, for that purpose, the corresponding document in accordance with the model set out in Annex II and they shall enjoy the corresponding compensation payments for their travels. In that case, the provisions of the first subparagraph of Article 15(1)(a) and Article 15(5) of the Workers' Statute are also not applicable, irrespective of the total duration of the payment, and workers retain the "*fijo de obra*" status as stated.

…

5. Hiring for different posts, with or without interruption, through at least two "*fijos de obra*" contracts concluded with the same undertaking or with the same group of undertakings during the period and within the period laid down in Article 15(5) [of the Workers' Statute] shall not therefore imply the acquisition of the status of permanent worker provided for in that provision.

…

Nor shall the status of permanent worker be acquired in the event of a transfer of an undertaking, within the meaning of Article 44 [of the Workers' Statute], or of the transfer of staff referred to in Article 27 of this collective agreement.

…'

12 Article 27 of the collective agreement at issue, entitled 'Transfer of staff in public contracts for the maintenance of roads or railways, water networks, or municipal concession of maintenance and renovation of footpaths, pavements, public roads and sewer networks', provides, in paragraph 2 thereof:

'In all cases of finalisation, loss, cancellation or sale of a public contract, and in any other circumstance or situation involving the replacement of the entities or of the natural or legal persons carrying out the activity concerned by the contract, the workers of the outgoing undertaking assigned to that contract shall be transferred to the new undertaking or entity called upon to carry out the activity concerned, that undertaking being required to respect the rights and obligations granted to the workers of the undertaking which it replaces.

Where the transfer provided for in this article involves an improvement in the legislation in force, it is expressly provided that those rights and obligations are to be limited exclusively to the rights and obligations arising from the last contract concluded by the worker with the undertaking which vacates the public contract, without the undertaking which enters into it being bound by any previous contract or agreement, particularly for the purposes of years of service, compensation for termination of a contract or any other mechanism which takes into account the duration of the provision of services, unless the worker has already been granted such rights by a judgment having the force of *res judicata* prior to the transfer and those rights have been communicated to the incoming undertaking within the time limit and in accordance with the detailed rules laid down in this article.

…'

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

13 On 8 January 1996, the applicant in the main proceedings concluded, with Obras y Servicios Públicos, an initial fixed-term employment contract for a well-defined full-time work in the construction sector, known as '*fijo de obra*', which ended on 16 January 1997. From 24 January 1997, those two parties concluded five further contracts of the same type, which succeeded each other without interruption. Obras y Servicios Públicos granted to that applicant seniority calculated as from 1 January 2014, that is to say, from the date on which the last of those contracts was concluded, which has still not come to an end.

14 On 3 October 2017, Acciona Agua was substituted by Obras y Servicios Públicos, as the employer of the applicant in the main proceedings, after being awarded a public contract known as 'Urgent renovation and repair work to the supply and reuse system of Canal de Isabel II Gestión SA' (file

No 148/2016, lot 2)', which had been performed, until that date, by Obras y Servicios Públicos. In the context of that substitution, Acciona Agua took over a major part, in terms of numbers and skills, of the workers who had been employed by Obras y Servicios Públicos for the performance of that public contract.

15 Approximately one month before that substitution, namely on 5 September 2017, the applicant in the main proceedings brought an action before the Juzgado de lo Social No 14 de Madrid (Labour Court No 14, Madrid, Spain) for a declaration of rights against those two companies, seeking (i) recognition of his period of service from 8 January 1996, that is to say, from the date of the conclusion of his initial contract with Obras y Servicios Públicos, and (ii) a declaration that his employment relationship was of indefinite duration.

16 According to the referring court, a situation such as that at issue in the main proceedings, in which a public contract has been re-awarded to an undertaking and in the context of which that undertaking has taken over a major part of the staff which the outgoing undertaking had assigned to the performance of that public contract, falls within the scope of Directive 2001/23 under Article 1(1) thereof.

17 In that regard, that court takes the view, in particular, that an activity, such as that at issue in the main proceedings, which does not require specific equipment may be regarded as an activity based essentially on manpower. Consequently, a group of workers engaged in a joint activity of renovation and repairs on a permanent basis may, in the absence of other production factors, correspond to an economic entity which retains its identity, within the meaning of Article 1(1)(b) of that directive, provided that the transferee takes over a major part of the staff of that entity, which is the case here.

18 Moreover, the first subparagraph of Article 3(1) of that directive should be interpreted as meaning that the incoming undertaking is required to take into account not only the last contract concluded between the workers it has taken over and the outgoing undertaking, but also all the years of service completed by the transferred staff, in so far as that obligation arises from the employment relationship between those staff and that undertaking.

19 As regards Clause 4(1) of the framework agreement, that court maintains, in particular in response to the request for information sent to it by the Court on 7 October 2019, that fixed-term workers who acquire the status of permanent workers through the conclusion of successive fixed-term contracts for specific tasks of longer than three years are in a situation comparable to that of fixed-term workers who, like the applicant in the main proceedings, have concluded a series of successive '*fijos de obra*' contracts.

20 The referring court also claims that the collective agreement at issue, which excludes the application of the Workers' Statute, is applicable to the dispute in the main proceedings and states that there are no objective grounds justifying contravention of Article 15(1) and (5) of that statute.

21 In that context, that court has doubts as to whether Article 24(2) and (5) and Article 27 of that collective agreement are in conformity with Clause 4(1) of the framework agreement and with Article 3(1) of Directive 2001/23.

22 In those circumstances, the Juzgado de lo Social No 14 de Madrid (Labour Court No 14, Madrid, Spain) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Clause 4(1) of the framework agreement … and Directive 2001/23 be interpreted to the effect that there is no objective ground to justify the collective agreement [at issue] (Article 24(2) of which provides that the first paragraph of Article 15(1)(a) of the [Workers' Statute] is not to apply, irrespective of the length of the general project contract for a given construction project, and that workers are to retain the status of "workers on a fixed-term contract for a specific construction project", both in the circumstances referred to in that provision and where one undertaking succeeds another, as provided for in Article 44 of the Workers' Statute, or in the case of the transfer of workers under Article 27 of the collective agreement) contravening Spanish national legislation (under which, pursuant to Article 15(1)(a) of the Workers' Statute, "*such contracts may not be for a period of more than 3 years, which may be extended by up to 12 months by a national sectoral collective agreement or, if there is no such agreement, by a lower-level sectoral collective agreement. On the expiry of those periods, workers shall acquire the status of permanent workers of the employer*")?

(2) Must Clause 4(1) of the framework agreement … and Directive 2001/23 be interpreted to the effect that there is no objective ground to justify [that] collective agreement … (Article 24(5) of which provides that where a worker is hired for different work positions [with or without interruption], on two or more ["*fijos de obra*"] contracts [concluded] with the same undertaking or group of undertakings within the period and for the duration laid down in Article 15(5) of [the Workers' Statute], the said worker is not to acquire the status of permanent worker provided for in that provision, both in the circumstances referred to in that provision and where one undertaking succeeds another, as provided for in Article 44 of [that statute], or in the case of the transfer of workers under Article 27 of the collective agreement) contravening Spanish national legislation (under which Article 15(5) of the Workers' Statute provides that "*Without prejudice to the provisions of paragraphs 1(a), 2 and 3, workers who have been engaged, with or without interruption, for longer than 24 months over a period of 30 months in the same or a different work position with the same undertaking or group of undertakings on two or more temporary contracts, regardless of whether the workers have entered into the contracts directly or have been supplied by temporary employment agencies or whether the same or different fixed-term conditions apply to the said contracts, shall acquire the status of permanent workers. The provisions of the previous paragraph shall also apply where one undertaking succeeds another or in the case of the transfer of workers in accordance with provisions laid down by statute or in collective agreements*")?

(3) Must Article 3(1) of Directive 2001/23 be interpreted as precluding a situation in which, under the collective agreement [at issue], the rights and obligations that are to be respected by the new employing undertaking or entity that is taking on the contracted activities are to be restricted solely to those arising under the last contract concluded by the worker with the outgoing undertaking, and as meaning that that does not constitute an objective ground that justifies the collective agreement of the construction sector contravening Spanish national legislation, under which, pursuant to Article 44 of the Workers' Statute, all rights and obligations of the previous employer are transferred, not merely those arising under the most recent contract?'

Consideration of the questions referred

Jurisdiction of the Court

23 The Spanish Government has doubts as to the jurisdiction of the Court to rule on the request for a preliminary ruling, on the ground that, by its questions, the referring court seeks, in reality, to obtain an interpretation of the relationship between various provisions of national law.

24 In that regard, it should be borne in mind that it is apparent from the settled case-law of the Court that it is not for the Court, in preliminary ruling proceedings, to interpret national legislation or regulations (judgment of 30 September 2020, *CPAS de Liège*, C-233/19, EU:C:2020:757, paragraph 23 and the case-law cited).

25 However, in the present case, the request for a preliminary ruling must be understood as meaning that the referring court is not asking the Court for an interpretation of the relationship between the collective agreement at issue and the Workers' Statute, but is asking whether Clause 4(1) of the framework agreement and Article 3(1) of Directive 2001/23 must be interpreted as precluding national legislation such as Article 24(2) and (5) and Article 27(2) of that collective agreement.

26 Moreover, in order to establish whether the Court has jurisdiction to answer the questions referred, it is necessary to verify that the case in the main proceedings has a connection with EU law (judgment of 7 May 2020, *Parking and Interplastics*, C-267/19 and C-323/19, EU:C:2020:351, paragraph 27).

27 In that regard, it is sufficient to state that, at the very least, Directive 2001/23 is not manifestly inapplicable to the dispute in the main proceedings, such that it constitutes the factor that connects it to EU law, which justifies the Court's jurisdiction to answer the questions raised by the referring court (see, by analogy, judgment of 7 May 2020, *Parking and Interplastics*, C-267/19 and C-323/19, EU:C:2020:351, paragraph 28).

28 It follows from the foregoing that the Court has jurisdiction to rule on the request for a preliminary ruling.

Admissibility of the questions referred

29 The Spanish Government and the European Commission take the view that the questions referred are inadmissible on account of their hypothetical nature, the absence of factual elements enabling the Court to answer them and the incomplete description of the national legal framework.

30 In that regard, it should be noted that, in accordance with settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 30 January 2020, *I.G.I.*, C-394/18, EU:C:2020:56, paragraph 56 and the case-law cited).

31 It also follows from settled case-law that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 30 January 2020, *I.G.I.*, C-394/18, EU:C:2020:56, paragraph 57 and the case-law cited).

32 In the present case, the referring court adequately sets out, in its request and in its reply to the request for information sent to it by the Court, not only the reasons which led it to ask the Court as to the manner in which Clause 4(1) of the framework agreement and Article 3(1) of Directive 2001/23 should be interpreted, but also the grounds making that interpretation necessary in order to decide the dispute in the main proceedings.

33 That court takes the view that those provisions of EU law preclude provisions of national law, such as Article 24(2) and (5) and Article 27(2) of the collective agreement at issue, respectively, which appear to be relevant for the purposes of deciding the dispute in the main proceedings, in so far as the applicant in the main proceedings has concluded six successive '*fijos de obra*' contracts in total, the last of which has been in force for more than seven years. Thus, first, both Article 24(2) of that collective agreement, according to which the '*fijos de obra*' contract is of indefinite duration, and paragraph 5 of that article, which provides for the conclusion of successive contracts of that type, are applicable in the present case, according to that court. Second, it is apparent from the order for reference that a transfer of staff in the context of public contracts for the maintenance of water networks, for the purposes of Article 27 of that collective agreement, has taken place.

34 Therefore, the interpretation sought is not manifestly unrelated to the actual facts or the purpose of the main proceedings and the issues raised are not hypothetical, but relate to the facts which are under discussion between the parties in the main proceedings, which it is for the referring court to define.

35 Moreover, the Court has before it the factual and legal material necessary to give a useful answer to the questions submitted by the referring court. It is established that the applicant in the main proceedings has concluded successive contracts with Obras y Servicios Públicos and it is apparent from the order for reference that those contracts are '*fijos de obra*' contracts. Furthermore, as regards the application of the relevant national law, the Court must proceed on the basis of the situation which that court considers to be established (see, to that effect, judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 36 and the case-law cited).

36 In the light of the foregoing considerations, the questions referred for a preliminary ruling are admissible.

Substance

The first and second questions

37 As a preliminary matter, according to the Court's settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to

decide the case before it. With that in mind, the Court may have to reformulate the questions referred to it. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)*, C-710/18, EU:C:2020:299, paragraph 18 and the case-law cited).

38 By its first and second questions, the referring court asks, in essence, whether Clause 4(1) of the framework agreement and Directive 2001/23 must be interpreted as precluding national legislation which permits, by way of derogation from the general rules laid down by national law, the conclusion of successive fixed-term '*fijos de obra*' contracts, irrespective of their duration.

39 In the first place, it should be noted that, although that court refers, in its first and second questions, to that directive, the grounds which it sets out in that regard relate, in reality, to the third question in so far as they concern Article 27(2) of the collective agreement at issue, such that the points raised by that court, which relate to that directive, will be examined in the context of that latter question.

40 In the second place, contrary to what the referring court considers, Clause 4(1) of the framework agreement cannot apply to a situation such as that at issue in the main proceedings.

41 That court – without, however, engaging in an in-depth analysis of the conditions which would make it possible to qualify the relevant reference group for the purposes of the comparison which it makes – invokes in breach of that clause discrimination against fixed-term workers who, like the applicant in the main proceedings, have concluded a series of successive '*fijos de obra*' contracts, as compared with fixed-term workers who have concluded contracts for specific tasks and acquire the status of permanent worker following the conclusion of a succession of such contracts, where the cumulative duration of those contracts is more than three years. Those two types of fixed-term workers are in a comparable situation, within the meaning of that clause.

42 It is apparent from the Court's case-law that, as the principle of non-discrimination has been implemented and specifically applied by the framework agreement solely as regards differences in treatment as between fixed-term workers and permanent workers in a comparable situation, any differences in treatment between specific categories of fixed-term staff are not covered by the principle of non-discrimination established by the framework agreement (judgment of 22 January 2020, *Baldonedo Martín*, C-177/18, EU:C:2020:26, paragraph 52 and the case-law cited).

43 By contrast, as the Commission maintains, the issue inherent in the dispute in the main proceedings lies in the possible abuse of fixed-term '*fijos de obra*' contracts. In those circumstances, and in the light of the information provided by the referring court, the first and second questions referred must be reformulated in order to provide that court with useful elements of interpretation.

44 It is apparent from the order for reference that the Juzgado de lo Social No 14 de Madrid (Labour Court No 14, Madrid) is in reality asking, with those questions, whether Clause 5(1) of the framework agreement must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, under which fixed-term '*fijos de obra*' employment contracts may be concluded successively, with the result that workers who have concluded such contracts retain their status as fixed-term workers for an indefinite period or, on the contrary, whether the renewal of those contracts can be regarded as being justified by 'objective reasons', within the meaning of paragraph 1(a) of that clause, on the sole ground that that national legislation provides that those contracts are concluded, as a general rule, for a specific construction project, irrespective of its duration.

45 In that regard, it must be recalled that Clause 5 of the framework agreement, the purpose of which is to implement one of the objectives pursued by that agreement, namely regulating the use of successive fixed-term employment contracts or relationships, requires, in paragraph 1 thereof, Member States to adopt one or more of the measures listed in a manner that is effective and binding, where domestic law does not include equivalent legal measures. The measures thus listed in Clause (1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such employment contracts or relationships, the maximum total duration of those successive employment contracts or relationships, and the maximum number of renewals of those contracts or relationships (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 54 and the case-law cited).

46 The Member States enjoy a certain discretion in that regard since they have the choice of relying on one or more of the measures listed in Clause 5(1)(a) to (c) of the framework agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers. In that way, Clause 5(1) of the framework agreement assigns to the Member States a general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the framework agreement (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraphs 55 and 56 and the case-law cited).

47 Clause 5 of the framework agreement does not lay down any specific penalties where instances of abuse have been established. In that case, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also are sufficiently effective and act as sufficient deterrent to ensure that the measures taken pursuant to the framework agreement are fully effective (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 57 and the case-law cited).

48 Accordingly, Clause 5 of the framework agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. The domestic law of the Member State concerned must nonetheless contain another measure that is effective to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 58 and the case-law cited).

49 Where the improper use of successive fixed-term employment contracts or relationships has taken place, a measure offering effective and equivalent safeguards for the protection of workers must be capable of being applied in order duly to penalise that abuse and to nullify the consequences of the breach of EU law. According to the very wording of the first paragraph of Article 2 of Directive 1999/70, Member States must 'take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [that] Directive' (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 59 and the case-law cited).

50 It should be borne in mind, moreover, that it is not for the Court to give a ruling on the interpretation of provisions of national law, that being exclusively for the national courts which have jurisdiction, which must determine whether the requirements set out in Clause 5 of the framework agreement are met by the provisions of the applicable national legislation (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 60 and the case-law cited).

51 It is therefore, in this instance, for the referring court to determine to what extent the conditions for application and effective implementation of the relevant provisions of domestic law constitute a measure that is adequate to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts or relationships (see, by analogy, judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 61 and the case-law cited).

52 The Court, when giving a preliminary ruling, may, nonetheless, offer clarification to guide that court in its findings (judgment of 11 February 2021, *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)*, C-760/18, EU:C:2021:113, paragraph 62 and the case-law cited).

53 It is in that context that it must be determined whether the national legislation at issue in the main proceedings, namely Article 24(2) and (5) of the collective agreement at issue, which, according to the referring court, allows for the conclusion of successive fixed-term '*fijos de obra*' employment contracts in the construction sector, is capable of constituting one of the measures referred to in Clause 5(1) (a) to (c) of the framework agreement.

54 In the first place, it appears that Article 24 of that collective agreement does not provide, in paragraphs 2 and 5 thereof, concerning '*fijos de obra*' contracts, for 'the maximum total duration of successive fixed-term employment contracts or relationships', within the meaning of paragraph 1(b) of that clause. On the contrary, it is expressly stated in Article 24(2) of that collective agreement that '*fijos de obra*' contracts are concluded irrespective of their duration.

55 However, although the legislative and factual framework is defined under the responsibility of the referring court and it is not for the Court to verify its accuracy, as is apparent from the case-law cited in paragraphs 30 and 35 of this judgment, it should be noted that it is apparent from the written observations of the Spanish Government that Article 24(3) of the collective agreement at issue may constitute a measure seeking to prevent the abuse of successive fixed-term contracts, within the meaning of Clause 5(1) of the framework agreement, and, in particular, to fix 'the maximum total duration of successive fixed-term employment contracts or relationships' within the meaning of paragraph 1(b) of that clause, in that it limits the supply of services to the same company in different work centres within the same province to three consecutive years, except under specific conditions.

56 It is therefore for that court to determine, in accordance with the case-law cited in paragraph 51 of this judgment, whether that measure constitutes, in the present case, a measure that is adequate to prevent the abuse of successive fixed-term contracts, within the meaning of that clause.

57 In the second place, subject also to the verifications which it is for that court to carry out in respect of that type of contract, there is no national measure fixing a maximum 'number of renewals', within the meaning of Clause 5(1)(c) of the framework agreement.

58 In the third place, it must be ascertained whether the national legislation at issue in the main proceedings provides for a measure which falls within the 'objective reasons justifying the renewal' of successive fixed-term employment contracts or relationships, within the meaning of Clause 5(1)(a) of the framework agreement.

59 In that regard, it is apparent from the Court's case-law that the concept of 'objective reasons', within the meaning of Clause 5(1)(a) of the framework agreement, must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 66 and the case-law cited).

60 On the other hand, a national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner, by a rule of statute or secondary legislation, does not accord with the requirements stated in the previous paragraph of the present judgment (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 67 and the case-law cited).

61 Such a purely formal provision does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. That provision therefore carries a real risk that it will result in misuse of that type of contract and, accordingly, is not compatible with the objective of the framework agreement and the requirement that it have practical effect (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 68 and the case-law cited).

62 Furthermore, as the Court has repeatedly held, the renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of Clause 5(1)(a) of the framework agreement, in so far as such use of fixed-term employment contracts or relationships conflicts directly with the premiss on which the framework agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 76 and the case-law cited).

63 In order for Clause 5(1)(a) of the framework agreement to be complied with, it must therefore be specifically verified that the successive renewal of fixed-term employment contracts or relationships is intended to cover temporary needs and that a national provision such as that at

issue in the main proceedings is not, in fact, being used to meet fixed and permanent staffing needs of the employer (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 77 and the case-law cited).

64 It is necessary for that purpose to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term employment contracts or relationships, even those ostensibly concluded to meet a need for replacement staff, are not misused by employers (judgment of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 102 and the case-law cited).

65 As regards the dispute in the main proceedings, as the referring court states, it is apparent from Article 24(2) of the collective agreement at issue that '*fijos de obra*' contracts are generally concluded for a specific construction project, irrespective of its duration. Under paragraph 5 thereof, 'where a worker is hired for different work positions, [with or without interruption], on [at least] two ["*fijos de obra*"] contracts [concluded] with the same undertaking …, the said worker is not to acquire the status [of permanent worker]'.

66 Thus, Article 24 of that collective agreement permits the conclusion of successive fixed-term '*fijos de obra*' contracts, while limiting, in principle, the employment of the worker concerned, for each contract concluded, to a specific construction project. That limitation of contracts to a specific construction project is, according to the information provided by the referring court, the only measure provided for that type of contract which is capable of constituting an 'objective reason' within the meaning of Clause 5(1)(a) of the framework agreement.

67 In those circumstances, it is appropriate to take into account the observations made by Obras y Servicios Públicos, Acciona Agua and the Spanish Government, according to which the third additional provision of Law 32/2006 and the third additional provision of the Workers' Statute recognise the specificities of the construction sector and the need to establish more adequate specific criteria, by referring to collective bargaining, the objective of which is to adapt fixed-term employment contracts for a well-defined work or service by standard provisions ensuring greater stability in the employment of workers and greater safety and health at work. According to the referring court, it was while exercising that competence that the collective agreement at issue introduced the '*fijos de obra*' contract, which sets out, in the event of abusive use of successive contracts of that type, criteria intended to prevent abuse.

68 Even if the fact that a worker is assigned to 'a specific construction project' can, in the light of the specificities of the construction sector, be capable of constituting a 'precise and concrete circumstance characterising a given activity', within the meaning of the case-law cited in paragraph 59 of this judgment, it must be noted, subject to the verifications to be carried out by the referring court, that Article 24 of the collective agreement at issue cannot be considered to be capable of justifying the use of successive fixed-term employment contracts, within the meaning of the case-law cited in paragraphs 60 and 61 of this judgment, in so far as that article entails a specific risk of abusive use of that type of contract.

69 Under paragraph 2 of that article, the conclusion of a '*fijos de obra*' contract is 'generally' limited to a specific construction project, such that that provision does not preclude the possibility of concluding such a contract for several construction projects. Moreover, paragraph 5 of that article allows several contracts of that type to be concluded with the same undertaking for different work positions. Thus, it would appear that, if the limitation of the contract to a specific

construction project, provided for in that paragraph 2, applies to each '*fijos de obra*' contract taken separately, several contracts of that type may be concluded successively, under that paragraph 5, for different construction projects.

70 In any event, it must be held, as did the Commission, that legislation such as that provided for in Article 24(2) and (5) of that collective agreement, under which each individual recruitment limits, in principle, the assignment of the worker concerned to a specific construction project but allows '*fijos de obra*' contracts to be renewed for an indefinite period, resulting from the cumulative effect of those successive contracts, or even from the addition of those contracts, reveals that that worker actually carries out, in a fixed and permanent manner, tasks falling within the normal activity of the entity or undertaking by which he or she is employed.

71 The situation at issue in the main proceedings illustrates that finding perfectly, since the applicant in the main proceedings has concluded six successive '*fijos de obra*' contracts with Obras y Servicios Públicos for a total duration of more than 25 years.

72 It follows, in accordance with the case-law cited in paragraphs 62 to 64 of this judgment, that national legislation, such as that at issue in the main proceedings, which allows the covering of needs which are not temporary in nature but, on the contrary, fixed and permanent, is not justified in the light of Clause 5(1)(a) of the framework agreement.

73 In those circumstances, unless there are 'equivalent legal measures to prevent abuse', within the meaning of Clause 5(1) of that framework agreement, which govern '*fijos de obra*' contracts, which it is for the referring court to verify, such legislation is not liable to prevent, within the meaning of Clause 5(1), abuse arising from the use of successive fixed-term employment contracts or relationships. As part of that examination, it is inter alia for that court to determine whether, as Obras y Servicios Públicos and Acciona Agua submit, compensation for termination is granted to fixed-term workers employed under a '*fijos de obra*' contract and, where appropriate, whether such compensation is adequate to prevent and, if necessary, penalise such abuse, and may be classified as an 'equivalent legal measure' within the meaning of that Clause 5(1).

74 In that regard, it should be recalled that the Court has held that, in order to constitute an 'equivalent legal measure', within the meaning of Clause 5 of the framework agreement, the grant of compensation must be specifically intended to offset the effects of the abusive use of successive fixed-term employment contracts or relationships. It is also necessary that the compensation granted be not only proportionate, but in addition sufficiently effective and dissuasive to ensure the full effectiveness of that clause (see judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraphs 103 and 104 and the case-law cited).

75 Furthermore, it should be noted that the Court has held that Clause 5(1) of the framework agreement is not unconditional and sufficiently precise to enable it to be relied upon by an individual before the national court. Thus, such a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it. Therefore, a national court is not required to disapply a provision of its national law which is contrary to Clause 5(1) of the framework agreement (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraphs 118 to 120 and the case-law cited).

76 That being said, it should be recalled that, when national courts apply domestic law they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, comply with the third paragraph of Article 288 TFEU (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 121 and the case-law cited).

77 Admittedly, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 123 and the case-law cited).

78 The principle that national law must be interpreted in conformity with EU law nonetheless requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraphs 124 and the case-law cited).

79 Thus, it is inter alia for the referring court to determine whether the case-law of the Tribunal Supremo (Supreme Court, Spain) permits such an interpretation of the national provisions at issue. According to the Commission, that court applies the time limits laid down in Article 15(5) of the Workers' Statute to '*fijos de obra*' contracts governed by the collective agreement at issue, with the result that, where a worker has concluded at least two contracts of that type and the statutory time limit laid down by that provision has been exceeded, he or she acquires the status of permanent worker.

80 In the light of the foregoing considerations, the answer to the first and second questions is that Clause 5(1) of the framework agreement must be interpreted as meaning that it is for the national court to assess, in accordance with all the applicable rules of national law, whether the limitation to three consecutive years, except under specific conditions, of the employment of fixed-term workers under contracts known as '*fijos de obra*' by the same undertaking at different workplaces located within the same province and the grant to those workers of compensation for termination, assuming that that national court finds that those measures are actually taken in respect of those workers, constitute adequate measures to prevent and, where appropriate, penalise abuse arising from the use of successive fixed-term employment contracts or relationships or 'equivalent legal measures' within the meaning of that Clause 5(1). In any event, such national legislation cannot be applied by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term '*fijos de obra*' employment contracts is considered justified by 'objective reasons', within the meaning of Clause 5(1)(a) of that framework agreement, on the sole ground that each of those contracts is generally concluded for a specific construction project, irrespective of its duration, in so far as such national legislation does not prevent, in practice, the employer concerned from covering, by means of such renewal, fixed and permanent staffing needs.

The third question

81 By its third question, the referring court asks, in essence, whether the first subparagraph of Article 3(1) of Directive 2001/23 must be interpreted as precluding national legislation according to which, in the event of a transfer of staff in the context of public contracts, the rights and

obligations of the transferred worker which the incoming undertaking is required to respect are limited exclusively to those arising from the last contract which that worker concluded with the outgoing undertaking.

82 In the first place, according to Article 1(1)(a) thereof, Directive 2001/23 is applicable to any transfer of an undertaking, business or part of an undertaking or business to another employer arising from a legal transfer or merger.

83 In that regard, it is apparent from the settled case-law of the Court that Directive 2001/23 is applicable whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the undertaking and entering into the obligations of an employer towards employees of the undertaking. There is thus no need, in order for Directive 2001/23 to be applicable, for there to be any direct contractual relationship between the transferor and the transferee, since the transfer may take place through the intermediary of a third party (judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraph 27 and the case-law cited).

84 In that context, it should be noted that, contrary to the arguments submitted, in essence, by Acciona Agua and the Spanish Government, the circumstance that, in the present case, there was a transfer of staff following the re-awarding of a public contract, in the context of which the incoming undertaking took over a major part of the staff which the outgoing undertaking had assigned to perform that public contract, does not preclude Directive 2001/23 from being applicable.

85 First of all, the Court has previously held that the fact that the transfer results from unilateral decisions of public authorities rather than from an agreement does not render Directive 2001/23 inapplicable (judgment of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraph 38 and the case-law cited).

86 Next, the lack of a contractual link between the two undertakings successively entrusted with managing the surveillance of the buildings in question has no bearing on the question as to whether or not Directive 2001/23 is applicable to a situation such as that at issue in the main proceedings (see, to that effect, judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraph 28).

87 Lastly, although the re-employment of the staff was imposed on Acciona Agua by a collective agreement, that circumstance has no bearing on the fact that the transfer concerns an economic entity (see, by analogy, judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraph 38).

88 In the second place, under Article 1(1)(b) of Directive 2001/23, there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. The term ‘entity’ thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (judgment of 27 February 2020, *Grafe and Pohle*, C-298/18, EU:C:2020:121, paragraph 22).

89 It is apparent from the case-law of the Court that the decisive criterion for establishing the existence of such a transfer is the fact that the economic entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (judgment of 27 February 2020, *Grafe and Pohle*, C-298/18, EU:C:2020:121, paragraph 23 and the case-law cited).

90 In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including in particular the type of undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment of 27 February 2020, *Grafe and Pohle*, C-298/18, EU:C:2020:121, paragraph 24 and the case-law cited).

91 In particular, the Court has held that a national court, in assessing the facts characterising the transaction in question, must take into account, among other things, the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed according to the production or operating methods employed in the relevant undertaking, business or part of a business at issue (judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraphs 31 and 32 and the case-law cited).

92 The Court has previously stated that an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, and therefore the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets (judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraph 33 and the case-law cited).

93 The Court has thus held that, inasmuch as, in certain labour-intensive sectors, which is in particular the case when an activity does not require specific tangible assets, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his or her predecessor to that task. In those circumstances, the new employer takes over an organised body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559, paragraphs 34 and 35 and the case-law cited).

94 It follows from the foregoing that the classification as a transfer presupposes a number of factual findings, that question having to be assessed in actual fact by the national court in the light of the criteria laid down by the Court as well as the objectives pursued by Directive 2001/23, as set out, inter alia, in recital 3 thereof (judgment of 27 February 2020, *Grafe and Pohle*, C-298/18, EU:C:2020:121, paragraph 27 and the case-law cited).

95 Consequently, it is for the referring court to assess, in the light of the foregoing considerations and taking into account all the facts which characterise the transaction at issue in the main proceedings, whether that transaction must be regarded as constituting a transfer of an undertaking within the meaning of Directive 2001/23.

96 To that end, it is for the referring court, in particular, to ascertain whether, as it mentions in the order for reference, the activity at issue in the main proceedings does not require specific equipment and, therefore, is based essentially on manpower or whether, on the contrary, as Obras y Servicios Públicos and Acciona Agua argue, that activity cannot be classified as an activity based essentially on manpower, in so far as that activity constitutes a clearly ancillary element in relation to the tangible assets required for the performance of the public contract concerned and that those assets were not transferred.

97 In the light of those elements, it must be stated, first, that, in addition to the scenario in which the activity is based essentially on manpower, envisaged by the case-law cited in paragraph 93 of this judgment, in a situation in which tangible assets, such as buildings and movable property, are not essential to the proper functioning of the entity concerned, or even where manpower and those tangible assets are of equal importance for the proper functioning of that entity and the activity of the outgoing undertaking is pursued by the incoming undertaking and the major part of the staff has been taken over by that undertaking, the absence of a transfer of tangible assets does not preclude a finding that the identity of the economic entity is capable of being maintained beyond its transfer, such that a 'transfer of an undertaking' within the meaning of Article 1(1) of Directive 2001/23 should be considered to have taken place.

98 That approach is consistent not only with the logic of the objectives pursued by that directive, as set out, in particular, in recital 3 thereof, consisting in the protection of employees in the event of a change of employer, in order to ensure the maintenance of their rights, but is also consistent with the case-law cited in paragraph 92 of this judgment, according to which the maintenance of the identity of an economic entity, which can function without any significant tangible or intangible assets, following the transaction affecting it, cannot depend on the transfer of such elements.

99 Second, it is important to recall the case-law of the Court according to which the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity (see, to that effect, judgment of 25 January 2001, *Liikenne*, C-172/99, EU:C:2001:59, paragraph 42).

100 However, it cannot be inferred from that case-law that the transfer of tangible assets must be regarded in the abstract as the sole determining factor of whether an undertaking whose activity concerns a sector in which the tangible assets make an important contribution to the exercise of that activity has been transferred. Therefore, in order to determine whether the fact that the operating resources were not transferred precludes the classification as a transfer of an undertaking, the referring court must take account of the particular circumstances of the case before it (see, to that effect, judgment of 27 February 2020, *Grafe and Pohle*, C-298/18, EU:C:2020:121, paragraphs 30 and 31).

101 In the third place, the first subparagraph of Article 3(1) of Directive 2001/23 lays down the principle according to which the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are to be transferred to the transferee.

102 In that regard, it must be recalled, first of all, that Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by enabling them to continue to work for the new employer on the same terms and conditions as those with the transferor. The purpose of that directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer. However, that directive cannot with advantage be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking (judgment of 26 March 2020, *ISS Facility Services*, C-344/18, EU:C:2020:239, paragraph 25 and the case-law cited).

103 In addition, it must be stated that, although, in accordance with the objective of Directive 2001/23, the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his or her business, cannot be disregarded. That directive does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other (judgment of 26 March 2020, *ISS Facility Services*, C-344/18, EU:C:2020:239, paragraph 26 and the case-law cited).

104 In the present case, it is apparent from the first subparagraph of Article 27(2) of the collective agreement at issue that the incoming undertaking is required to respect the rights and obligations granted to the transferred employees in the context of the employment relationship with the outgoing undertaking. Furthermore, under the second subparagraph of Article 27(2) of that collective agreement, those rights and obligations are limited exclusively to those arising from the last contract concluded by that worker with the outgoing undertaking, without the incoming undertaking being bound by any previous contract or agreement, particularly for the purpose of taking over the years of service completed, unless the employee has already been granted such rights by a judgment having the force of *res judicata* prior to the transfer, and those rights have been communicated to the incoming undertaking within the time limit and in accordance with the detailed rules laid down in Article 27 of that collective agreement.

105 In that context, the referring court has doubts as to the compatibility of the second subparagraph of Article 27(2) of that collective agreement with the first subparagraph of Article 3(1) of Directive 2001/23.

106 In those circumstances, it must be held that limiting the recognition of the rights of a worker in the context of his or her employment relationship with the incoming undertaking to those arising from the last contract concluded by that worker with the outgoing undertaking amounts precisely to preserving those rights at the time of the transfer of staff, which corresponds to the objective pursued by that directive, which is to ensure that employees' rights are safeguarded in the event of a change of employer, by allowing them to remain in the service of the new employer under the same conditions as those agreed with the transferor. Moreover, that provision limits not only the rights but also the obligations of the worker transferred to those arising from the last contract which he or she concluded with the outgoing undertaking.

107 As regards, in particular, the period of service, it should be borne in mind that the Court has held that, in calculating rights of a financial nature, such as compensation for termination of a contract or salary increases, the transferee must take into account the entire period of service of the employees transferred, in so far as his or her obligation to do so derives from the employment

relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship (judgment of 6 April 2017, *Unionen*, C-336/15, EU:C:2017:276, paragraph 22 and the case-law cited).

108 In the present case, it is sufficient to find, in that regard, that it is not apparent from the order for reference that the period of service which is granted, under Article 27(2) of the collective agreement at issue, by the incoming undertaking to workers who are the subject of a transfer of staff, within the meaning of that provision, is less favourable for those workers than the period of service granted to them before that transfer by the outgoing undertaking.

109 On the contrary, it is apparent from that decision that Obras y Servicios Públicos has granted the applicant in the main proceedings a period of service calculated from 1 January 2014, which corresponds to the period of service arising from the last contract concluded by that applicant with that company. Therefore, in so far as the second subparagraph of that provision limits the period of service which Acciona Agua is required to grant the applicant in the main proceedings to that arising from the last contract which that applicant concluded with Obras y Servicios Públicos, the application of that provision means that the period of service granted to him by that company has been maintained in the context of his transfer.

110 On the other hand, the grant to that worker, in the transfer of staff, of rights – a period of service in particular – which he did not enjoy prior to that transfer, would constitute an improvement in his working conditions, which is not provided for by Directive 2001/23, as is apparent from the case-law cited in paragraph 102 of this judgment.

111 Moreover, the second subparagraph of Article 27(2) of the collective agreement at issue fits into that logic in so far as it provides for an exception to the limitation of the rights of the transferred employee to those arising from the last contract which he or she concluded with the outgoing undertaking, where the employee has already been granted such rights by a judgment having the force of *res judicata* prior to the transfer and those rights have been communicated, within the time limit and in accordance with the detailed rules laid down in Article 27 of that collective agreement, to the incoming undertaking. That exception makes it possible to ensure that the transferred worker retains the rights granted to him or to her in the context of the employment relationship with the outgoing undertaking.

112 In this context, the only question that arises for the referring court is to know the rights which the applicant in the main proceedings used to enjoy, at Obras y Servicios Públicos, prior to his transfer, in particular whether he was the victim of the abuse of successive fixed-term employment contracts, within the meaning of Clause 5(1) of the framework agreement, which is the subject matter of the first two questions, and whether he should therefore have acquired the status of permanent worker prior to his transfer, a status which, in that case, he should therefore have been entitled to continue to enjoy in the context of that transfer.

113 In that regard, it must be borne in mind that the Court has held that the applicability of Directive 2001/23 does not prejudice the protection that a worker may receive against the misuse of successive fixed-term employment contracts, under other provisions of EU law, in particular the framework agreement, or the interpretation to be given to those provisions by that directive (order of 15 September 2010, *Briot*, C-386/09, EU:C:2010:526, paragraph 36).

114 In the light of the foregoing considerations, the answer to the third question is that the first subparagraph of Article 3(1) of Directive 2001/23 must be interpreted as not precluding national legislation under which, in the event of a transfer of employees under public contracts, the rights and obligations of the transferred worker that the incoming undertaking is required to respect are limited exclusively to those arising from the last contract concluded by that worker with the outgoing undertaking, provided that the application of that legislation does not have the effect of placing that worker in a less favourable position solely as a result of the transfer, which it is for the referring court to determine.

Costs

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

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

1. **Clause 5(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Directive 1999/70 of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as meaning that it is for the national court to assess, in accordance with all the applicable rules of national law, whether the limitation to three consecutive years, except under specific conditions, of the employment of fixed-term workers under contracts known as '*fijos de obra*' by the same undertaking at different workplaces located within the same province and the grant to those workers of compensation for termination, assuming that that national court finds that those measures are actually taken in respect of those workers, constitute adequate measures to prevent and, where appropriate, to penalise abuse arising from the use of successive fixed-term employment contracts or relationships or 'equivalent legal measures' within the meaning of that Clause 5(1). In any event, such national legislation cannot be applied by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term '*fijos de obra*' employment contracts is considered justified by 'objective reasons', within the meaning of Clause 5(1)(a) of that framework agreement, on the sole ground that each of those contracts is generally concluded for a specific construction project, irrespective of its duration, in so far as such national legislation does not prevent, in practice, the employer concerned from covering, by means of such renewal, fixed and permanent staffing needs.**

2. **The first subparagraph of Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as not precluding national legislation under which, in the event of a transfer of employees under public contracts, the rights and obligations of the transferred worker that the incoming undertaking is required to respect are limited exclusively to those arising from the last contract concluded by that worker with the outgoing undertaking, provided that the application of that legislation does not have the effect of placing that worker in a less favourable position solely as a result of the transfer, which it is for the referring court to determine.**

[Signatures]