OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 22 April 2010[1]

I – Introduction

1. This reference for a preliminary ruling concerns the interpretation of clause 8 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.[2]

2. The reference was made in the course of proceedings brought by Ms Sorge against her employer, Poste Italiane SpA ('Poste Italiane'), in connection with a clause in her employment contract which stipulated that the contract was concluded for a fixed term but which did not include the names of the workers replaced or the reasons why the latter were absent. According to the national legislation pre-dating the transposition of Directive 1999/70, those details should have been included in an employment contract of this kind. However, under Legislative Decree No 368 of 6 September 2001[3] ('Legislative Decree 368/2001'), which was applicable *ratione temporis* to the contract at issue, such an obligation no longer exists.

3. This reference provides the Court with an opportunity to set out and develop the case-law it adopted in *Mangold* and *Angelidaki and Others*.[4] It is asked to assess the relationship between the abovementioned change to the national legislation and the concept of 'reducing the general level of protection afforded to workers in the field of the [framework] agreement' as provided for in clause 8(3) of that agreement. The national court also asks the Court of Justice to clarify the effects on the main proceedings of any lack of conformity on the part of the national legislation with the framework agreement.[5]

1 — Original language: French.

2 — OJ 1999 L 175, p. 43.

3 — Legislative decree implementing Directive 1999/70 (GURI No 235 of 9 October 2001, p. 4).

4 — Respectively Case C-144/04 [2005] ECR I-9981 and Joined Cases C-378/07 to C-380/07 [2009] ECR I-3071.

5 — The Tribunale di Trani recently made a reference to the Court of Justice for a preliminary ruling in proceedings involving *Poste Italiane* and likewise relating to Legislative Decree 368/2001 and clause 8 of the framework agreement: see Case C-20/10 *Vino*, still pending before the Court.

II – Legal framework

A – *European Union law* [6]

4. Directive 1999/70 is based on Article 139(2) EC [7] and its purpose, in the words of Article 1 thereof, is 'to put into effect the framework agreement … concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'. [8]

5. It is apparent from recitals 3, 6, 7 and 13 to 17 in the preamble to that directive, as well as from the first to third paragraphs in the preamble to, and points 3, 5 to 8 and 10 of the general considerations of, the framework agreement that:

— the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community through an approximation of these conditions while the improvement is being maintained, as regards in particular forms of employment other than open-ended contracts, in order to achieve a better balance between flexible working time and job security;

— the objectives of this directive cannot be sufficiently achieved by the Member States and it has therefore been considered appropriate to resort to a legally binding Community measure, drawn up in close cooperation with representatives of management and labour;

— the parties signatory to the framework agreement recognise that, on the one hand, contracts of an indefinite duration are, and will continue to be, the general form of employment relationship, since they contribute to the quality of life of the workers concerned and the improvement of their performance, but that, on the other hand, fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers;

— the framework agreement sets out the general principles and minimum requirements relating to fixed-term work, by establishing, in particular, a general framework for ensuring equal treatment

6 — Since the main proceedings concern the interpretation of a legislative decree dating from 6 September 2001, the provisions of the EC Treaty will be referred to using the numbering applicable prior to the entry into force of the Treaty on the Functioning of the European Union.

7 — Article 139(2) EC provides that management and labour may make a joint request for agreements concluded at Community level to be implemented by a Council decision on a proposal from the Commission.

8 — Namely the European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe (called BUSINESSEUROPE since 2007) and the European Centre of Enterprises with Public Participation.

for fixed-term workers by protecting them against discrimination and for preventing abuse arising from the use of successive fixed-term employment relationships, whilst referring back to Member States and social partners for the detailed arrangements for the application of those principles and requirements, in order to take account of the realities of specific national, sectoral and seasonal situations;

— the Council of the European Union thus took the view that the proper instrument for implementing the framework agreement is a directive, since it binds the Member States as to the result to be achieved, whilst leaving them the choice of form and methods;

— with regard more specifically to the terms used in the framework agreement but not specifically defined there, Directive 1999/70 allows Member States to define such terms in conformity with national law or practice, provided that the definitions in question respect the framework agreement; and

— according to the parties signatory to the framework agreement, the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse detrimental to workers.

6. Clause 1 of the framework agreement establishes its twofold objective, by referring, on the one hand, to the application of the 'principle of non-discrimination', set out in clause 4, and, on the other hand, to measures to prevent the abusive use of successive fixed-term employment contracts or relationships, which are the subject of clause 5.

7. The scope of the framework agreement is laid down in clause 2 as follows: 'fixed-term workers' – which term is defined in clause 3 – 'who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'.

8. Clause 8 of the framework agreement, concerning '[p]rovisions on implementation', provides:

'1. Member States and/or the social partners can maintain or introduce more favourable provisions for workers than set out in this agreement.

…

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

…

5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practice.

…'

B – *National legislation*

– The legislation repealed

9. Article 1(1) to (4) of Law No 230 of 18 April 1962 laying down the rules governing fixed-term employment contracts [9] ('Law 230/1962'), as subsequently amended, provided:

'An employment contract shall be considered to be an open-ended contract, without prejudice to the exceptions set out below.

A contract may state the date on which it is to end:

…

(b) where the recruitment takes place in order to replace absent workers who are entitled to retain their post, provided that the fixed-term employment contract gives the name of the worker replaced and the reason for his replacement;

…

Any date stated on which the contract is to end shall be ineffective unless recorded in writing.

The employer must provide the employee with a copy of the written document.

…'

– The legislation in force

10. Article 11(1) of Legislative Decree 368/2001 repealed in full Law 230/1962 from 24 October 2001, the Italian Government

9 — GURI No 125 of 17 May 1962, p. 2010.

having acted on the basis of a law enabling it to adopt the rules necessary for the transposition of acts of Community law such as Directive 1999/70. [10]

11. Article 1(1) to (3) of that legislative decree, in the version applicable to the present case, [11] are worded as follows:

'1. An employment contract may state the date on which it is to end for technical, production or organisational reasons, or for the purpose of replacing employees.

2. The fixing of the term of the contract shall be ineffective unless recorded, directly or indirectly, in a written document specifying the reasons set out in paragraph 1.

3. The employer must send the employee a copy of the written document within five working days from the commencement of employment. …'

10 — The preamble to Legislative Decree 368/2001 states that it was adopted pursuant to Enabling Law No 422 of 29 December 2000, in particular Article 1 thereof and Annex B thereto, which concerns Directive 1999/70 (GURI No 16 of 20 January 2001, p. 5).

11 — The contract at issue was concluded before the entry into force of Law No 247 of 24 December 2007 (GURI No 301 of 29 December 2007, p. 3), which added, at the beginning of Article 1 of Legislative Decree 368/2001, a paragraph stating that 'an employment contract shall be concluded, in principle, for an indeterminate term'.

III – The main proceedings and the reference for a preliminary ruling

12. On 29 September 2004, Ms Sorge concluded with Poste Italiane a fixed-term employment contract under which she was employed 'for reasons of replacement relating to the specific need to replace staff assigned to the delivery department of the Puglia Basilicata mail office during the period from 1 October 2004 to 15 January 2005'.

13. By application of 18 February 2008, Ms Sorge brought an action against Poste Italiane seeking an order from the Tribunale di Trani – Sezione Lavoro (Trani District Court – Employment Division) (Italy) ('the Tribunale di Trani') that the clause imposing a fixed term contained in that contract was unlawful. In support of her application, she claimed that the clause did not contain the names of the workers replaced and the reasons for their replacement, whereas Legislative Decree 368/2001 still required those details to be given when staff are recruited on fixed-term contracts for the purposes of replacement.

14. Poste Italiane disputed the existence of such an obligation, contending that Article 1(2)(b) of Law 230/1962 had been repealed by Article 11(1) of Legislative Decree 368/2001, which is applicable *ratione temporis*, and had not been replaced by any comparable provision.

15. By order of 9 June 2008, the Tribunale di Trani decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling: [12]

'(1) Must [c]lause 8 of the framework agreement put into effect by Directive 1999/70/EC be interpreted as precluding domestic rules (such as those laid down by Articles 1 and 11 of Legislative Decree … 368/2001) which, in implementation of Council Directive 1999/70/EC …, repealed Article 1(2)(b) of Law 230/1962, according to which it was "permitted to impose a time-limit on the duration of the contract … when the recruitment" took "place in order to replace absent workers" who "retained the right to their post, provided that in the fixed-term contract" "an indication was given of the name of the worker replaced and the reasons for his replacement", substituting for it a provision which no longer imposes that obligation to give details?

(2) If the answer to the foregoing question is affirmative, is the national court required to disapply the national legislation that conflicts with Community law?'

16. Both written and oral observations have been made by the claimant and the defendant in the main proceedings, the Italian Government and the European Commission. The Netherlands Government has submitted only written observations.

IV – Analysis

A – *Introduction*

17. In her written observations, lodged on 1 July 2009, [13] the claimant in the main proceedings submits that this case raises a particularly important issue in so far as, on the one hand, there are almost 15 000 cases pending between Poste Italiane and its employees, and, on the other hand, the Italian courts of first, second and last instance have already given, or are in the process of giving, rulings on the legislation with which the order for reference is concerned.

18. In support of its reference, the national court also highlights the fact that the legislative decree at issue has been interpreted, in

12 — By order of 21 April 2008, the Tribunale di Trani had already raised a question of constitutionality concerning Articles 1 and 11 of Legislative Decree 368/2001, on which the Corte costituzionale ruled by Decision No 214 of 8 July 2009.

13 — It should be pointed out that the parties' observations all post-date the judgment in *Angelidaki and Others*, unlike the order for reference.

widely differing ways, in a considerable number of lower-court decisions. In addition to the numerous decisions annexed to the written observations submitted by Ms Sorge, reference was also made at the hearing to several decisions recently delivered in this connection by the Corte suprema di cassazione (Supreme Court of Cassation) and the Corte costituzionale (Constitutional Court). [14] In fact, the information provided by the national court and the various documents added to the case-file by the interested parties have given rise to some confusion as to the sense of the relevant national law.

19. As a preliminary point, I shall also reiterate a number of basic principles which may inform the interpretation of rules adopted in the field of social policy. It follows from Article 136 EC et seq. that the Member States retain competence in this field and that the measures taken in this regard must take account of the diverse forms of national practices, as well as the need to maintain the competitiveness of the Community economy.

20. Article 139 EC is intended to promote collective bargaining at Community level and even to confer a degree of rule-making power on management and labour. The framework agreement on fixed-term contracts, which was adopted on the basis of that provision, sets only minimum requirements and pursues apparently contradictory objectives which therefore require compromises, that is to say, in particular, to achieve a better balance between flexible working time for companies and job security for workers, [15] while also taking account of the realities of specific national, sectoral and seasonal situations. [16]

21. It is important not to lose sight of those various considerations when analysing the content of the provisions relevant to the reference for a preliminary ruling. I take the view that, whereas national rules of employment law intended to provide protection, like stipulations in individual employment contracts, must, in the event of doubt, be interpreted for the benefit of the weaker party, and, therefore, the worker, provisions in collective agreements must nevertheless be interpreted strictly so as not to distort the combined wishes of the contracting parties. [17] Thus, the criteria restricting the application

14 — Following the hearing, the representative of Poste Italiane sent to the Court Decision No 214 delivered on 8 July 2009 by the Corte costituzionale, as well as three judgments delivered by the Corte suprema di cassazione – Sezione Lavoro (judgment of 26 November 2009 and 14 January 2010, No R.G.N. 22536/2008; judgment of 26 November 2009 and 14 January 2010, Nos R.G.N. 21956/2008 and 22465/2008; judgment of 10 December 2009 and 27 January 2010, No R.G.N. 20577/2006).

15 — Two objectives combined in the neologism 'flexicurity', which is used, in particular, in Commission documents such as the communication of 27 June 2007, COM(2007) 359 final.

16 — See, in this regard, the preamble to and the general considerations of the framework agreement.

17 — Indeed, the existence of European collective agreements as legally binding instruments, and, consequently, the existence of a collective European law of employment, depends on the confidence which management and labour have in the fact that their interpretation and application will be faithful to the compromises negotiated.

of the framework agreement as set out in its wording cannot, in my view, be disregarded without good reason.

B – *The admissibility of the questions referred*

22. Poste Italiane has raised, as a preliminary point, objections as to the inadmissibility and irrelevance of the questions referred by order of 9 June 2008 on the ground that the Court had, in the meantime, answered similar questions in *Angelidaki and Others* on 23 April 2009, [18] thus providing the Tribunale di Trani with useful parameters for giving an independent judgment.

23. I consider there to be no doubt as to the admissibility of the questions referred, as the Commission observed at the hearing. After all, the newness of a question referred is in no way a condition of its admissibility. There is nothing to prevent a national court from resubmitting to the Court a question which it may already have answered.

24. In such a situation, the Court may give a ruling by way of a reasoned order under the first subparagraph of Article 104(3) of its Rules of Procedure. [19] It is clear from the wording of that provision that the fact that the questions raised in the order for reference are similar to some of those subsequently answered by the Court in *Angelidaki and Others* is not in itself a ground for inadmissibility. In fact, the Court has applied that procedural provision specifically in cases where the answer to an identical question appeared in the abovementioned judgment and could be transposed to the question referred, in those instances before judgment was given. [20]

25. Moreover, according to settled case-law, in the context of the procedure laid down by Article 234 EC, the national court – which alone has direct knowledge of the facts of the case before it and which must assume responsibility for its decision on the substance of the case – is, with regard to the particular circumstances of the case, in the best position to assess both the need for a preliminary ruling to enable it to give judgment and the relevance of the questions it refers to the Court. When those questions concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling, subject, however, to an examination of the circumstances in which the case was referred

18 — In particular, in paragraphs 126 and 208 to 212.

19 — 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law'.

20 — See the orders of 24 April 2009 in Case C-519/08 *Koukou* and of 23 November 2009 in Joined Cases C-162/08 to C-164/08 *Lagoudakis and Others*.

to it by the national court, in order to assess whether it has jurisdiction. [21]

26. It appears that the Tribunale di Trani has substantiated its reference for a preliminary ruling in a manner sufficient to demonstrate its relevance, (1) by defining the factual context in which the reference arises, (2) by providing useful information on the relevant national legal framework, (3) by setting out the arguments put forward by the parties to the main proceedings and the uncertainties in relation to national case-law which have prompted questions on its part as to the interpretation of European Union law, and (4) by explaining how an answer to the two questions referred is necessary to enable it to give judgment in the main proceedings. Accordingly, on the day on which the case was referred to the Court, the interpretation of European Union law which was sought did actually respond to an objective need inherent in the outcome of a case pending before the national court. [22]

27. In the light of all the foregoing, I am of the opinion that the objections raised by the defendant in the main proceedings cannot be upheld and that this reference for a preliminary ruling is admissible.

21 — See, in particular, *Mangold*, paragraph 34 et seq., and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 39 et seq.

22 — See *Mangold*, paragraph 38.

C – *The scope of the so-called 'non-regression' clause*

28. In its order for reference, the national court expresses its doubts as to the conformity of Legislative Decree 368/2001 with Directive 1999/70 and the framework agreement annexed to it. By its first question, the national court asks, in particular, whether the provisions of Articles 1 and 11 of the legislative decree have given rise to a prohibited reduction of the general level of protection afforded to workers within the meaning of clause 8 of the framework agreement. In the light of the disparate arguments which have been put forward in this case, it seems necessary to begin by defining the context of the ruling to be given and, therefore, of this Opinion. The ambit of clause 8(3) of the framework agreement will also have to be defined before I go on to interpret its wording.

1. Restricting the scope of the answer to the scope of the question

29. It is true that the wording of the first question is such that it appears to seek the interpretation of all the provisions contained in clause 8 of the framework agreement. However, the Tribunale di Trani has also expressly stated that it sought clarification from the Court in order to establish whether Articles 1

and 11 of Legislative Decree 368/2001 infringe the clause, usually described as a 'non-regression' clause, contained in clause 8 of the framework agreement, more specifically, in paragraph 3 thereof.

30. In so far as some observations, in particular those submitted by Ms Sorge, contain arguments relating to clauses 4 and 5 of the framework agreement or to provisions of Legislative Decree 368/2001 other than those referred to by the Tribunale di Trani, [23] it is appropriate to point out that the scope of the proceedings before the Court is determined by the order for reference and not by any guidance given by the parties.

31. It is settled case-law that there is no need for the Court to examine any arguments put by the parties to the main proceedings or by parties having submitted observations concerning issues not covered by the questions referred. [24] Moreover, responding to the supplementary arguments put forward by the claimant in the main proceedings in her written observations would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties. [25]

32. Furthermore, it is not disputed that the main proceedings concern the conclusion of a single fixed-term contract, not a contract forming part of a succession of fixed-term contracts. As only the latter situation is covered by clause 5(1) and (2) of the framework agreement, there is no need to give an interpretation of that provision, in particular the reference it contains to 'objective reasons' by way of justification for the renewal of such contracts. [26] Similarly, in *Mangold*, [27] after establishing that the contract concerned was the one and only employment contract concluded between the parties, the Court ruled that the interpretation of clause 5(1) of the framework agreement was obviously irrelevant to the outcome of the main proceedings.

23 — Ms Sorge refers not only to Article 1(1), (2) and (4) of Legislative Decree 368/2001, but also to Article 2(1a), Article 4, Article 4a and Article 5(3) and (4a) thereof.

24 — In a reference for a preliminary ruling, it is for the national court alone to assess the relevance of such arguments and to make a fresh request to the Court if it considers that it is necessary to obtain a further ruling on the interpretation of Community law for the purpose of delivering its judgment. See, in particular, Case 311/84 *CBEM* [1985] ECR 3261, paragraph 9 et seq., and Case C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* [1992] ECR I-2111, paragraph 18 et seq.

25 — See, in particular, Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 14, and Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 24.

26 — In connection with this term, see, in particular, *Adeneler and Others*, paragraph 66 et seq., and the order of 12 June 2008 in Case C-364/07 *Vassilakis and Others*, paragraph 88 et seq.

27 — Paragraphs 40 to 43.

33. Clause 4 of the framework agreement, which is also relied on by Ms Sorge, is not the subject of the reference for a preliminary ruling either. However, I would point out that those provisions relating to non-discrimination, which are of general application, seem to me to be applicable to all fixed-term employment contracts, including a first or single contract such as the one at issue here.

2. The ambit of clause 8(3) of the framework agreement

34. Determination of the ambit *ratione materiae* of the framework agreement is particularly important because clause 8(3) provides that the prohibition laid down in that provision concerns only 'the field of the agreement'. Clauses 1 and 2 of the framework agreement define its purpose and scope respectively. I take the view that the effect of those general provisions clearly extends to clause 8. In other words, the scope of the so-called 'non-regression' clause is the same as that of the framework agreement containing it.

35. However, the sphere of application of special provisions such as clause 5 of the framework agreement, which relates specifically to the prevention of abuse arising from the use of successive fixed-term employment contracts, must be distinguished from the ambit of the framework agreement as a whole and the ambit of clause 8 in particular.

36. It is true that, as the Commission has observed, the framework agreement makes no mention of reasons capable of justifying the conclusion of a first fixed-term contract, in contrast to the obligation imposed on Member States by clause 5(1)(a) to take measures in this regard when such contracts are renewed. The Court has indeed ruled that the framework agreement does not compel the Member States to adopt a measure requiring every first or single fixed-term employment contract to be justified by objective reasons within the meaning of clause 5(1) of the framework agreement, for such contracts do not fall under that provision. [28]

37. However, it seems wrong to me to infer from this, as the Italian Republic does, that the national provisions taken into consideration by the national court do not relate to the field covered by the framework agreement, on the grounds that the obligation to justify the first and single fixed-term contract by reference to objective reasons and the nature of those reasons are matters unrelated to the framework agreement, and that the amendments made by Legislative Decree 368/2001 could not therefore constitute a reduction prohibited by clause 8(3) of that agreement.

28 — See *Mangold*, paragraphs 41 to 43, and *Angelidaki and Others*, paragraph 90.

38. It is true that situations, such as that of Ms Sorge, in which a single fixed-term contract is at issue are not covered by the special provision of clause 5 of the framework agreement, but they may none the less fall within the ambit of that agreement. Consequently, the national provisions governing initial or single fixed-term contracts cannot, solely by virtue of the restricted scope of clause 5, fall outside the so-called 'non-regression' clause, which, for its part, covers a field as general as that of the framework agreement.

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

39. It is common ground that, both in *Mangold* [29] and in *Angelidaki and Others*, [30] the Court ruled on the meaning of 'reduction' in clause 8 of the framework agreement in relation to workers who have entered into a first or single fixed-term employment contract. After holding that, in the light of the objectives pursued by the framework agreement, and in particular clause 8(3) thereof, that provision cannot be interpreted restrictively, [31] and after recalling the non-restrictive wording of clauses 2 and 3 of that agreement, [32] the Court expressly ruled that 'clause 8(3) of the framework agreement must be interpreted as meaning that the "reduction" with which that clause is concerned must be considered in relation to the general level of protection applicable in the Member State concerned both to workers who have entered into successive fixed-term employment contracts and to workers who have entered into a first or single fixed-term employment contract'. [33]

40. Clause 8(3) of the framework agreement is usually called the 'non-regression clause'. Even though it restricts the conditions for the exercise of national legislative competence, the purpose of that clause is not to prohibit a Member State absolutely from reducing the general level of protection afforded to workers by domestic law. However, if the Member

29 — Paragraph 44 et seq. In this case, the main proceedings concerned a single fixed-term contract (paragraph 20).

30 — Paragraph 108 et seq. In one of the three joined cases, namely Case C-378/07, the main proceedings concerned a series of single fixed-term contracts (paragraph 32).

31 — It should be pointed out that the context for interpretation is different here from that which I analysed in point 21 of this Opinion. While the field covered by clause 8(3) must not be construed more restrictively than that of the framework agreement, the wording of clauses 1 to 3 none the less indicates, in my view, that the terms used in the framework agreement cannot be construed extensively.

32 — *Angelidaki and Others*, paragraphs 111 to 116. As regards the broad scope of the framework agreement, see also Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 40 et seq.; Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 32; and Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 24 et seq.

33 — *Angelidaki and Others*, paragraph 121.

State does make such a reduction, it must take responsibility for that choice and not conceal the policy thus adopted at national level by taking refuge behind alleged obligations connected with the transposition of rules of European Union law. It would be more accurate to describe that provision as 'a transparency clause', as Advocate General Tizzano suggested in *Mangold* [34] after having shown that it was in no way a 'standstill clause'.

41. Angelidaki and Others, read in conjunction with Mangold, provides clear guidelines on how to assess whether or not the reform in question is prohibited within the meaning of that clause.

42. It is clear from the documents before the Court that the reduction referred to by the national court and alleged by the claimant in the main proceedings lies in the fact that Legislative Decree 368/2001 removed the obligation, previously laid down by Law 230/1962, for the fixed-term contract to give the name of the worker replaced, who was entitled to retain his post, and the reason for replacement.

43. I would point out straightaway that, in my opinion, such a reform is in every sense a reduction of the level of protection afforded to workers entering into fixed-term employment contracts. The obligation to give the name of the worker replaced enhances the ability of both workers and trade unions to verify that the restrictive provisions applicable to such contracts are observed by the employer. Moreover, the non-existence of such an obligation may give employers with a large workforce greater flexibility with regard to contracts for the replacement of staff. For, in those circumstances, it is no longer necessary for there to be an exact correspondence between periods of absence and periods of replacement in respect of workers identified by name; it is sufficient to have a net balance between the number of absences and the number of replacements. The removal of that requirement may make it easier for such employers to use fixed-term contracts to provide replacements, whereas they might otherwise have to have a reserve panel of staff on open-ended contracts to cover holidays, sick leave and every other broadly conceivable reason for absence.

44. However, that approach, which focuses on the fate of individual employment contracts, is not appropriate for determining whether there is an infringement of the non-regression clause contained in the framework

34 — Point 62 of the Opinion of Advocate General Tizzano in *Mangold*.

agreement. As the Court has pointed out, [35] it is necessary to consider to what extent the amendments introduced by the national legislation intended to transpose Directive 1999/70 and the framework agreement may be deemed to be connected to the 'implementation' of that agreement and, moreover, may relate to the 'general level of protection' afforded to workers within the meaning of clause 8(3).

45. As regards the first criterion, the Court has made clear that the concept of a connection with the 'implementation' of the framework agreement covers all domestic measures intended to ensure that the objective pursued by Directive 1999/70 may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted. [36] In this case, it seems to me that that first condition may have been satisfied, [37] taking into account the preamble to Legislative Decree 368/2001, which expressly refers to Directive 1999/70, and taking into account the provisions of the law which enabled the Italian Government to take action in this matter, which also refer to that directive. [38] However, such legislation cannot be regarded as conflicting with clause 8(3) of the framework agreement if the reduction it entails is justified not by the need to put the framework agreement into effect but by the need to encourage another objective, one that is distinct from that implementation. [39]

46. In this regard, I consider it useful to distinguish between three categories of national rules: first, those the purpose of which is to transpose the directive *stricto sensu*, which must of necessity comply with the requirements of that directive; second, those connected with the transposition of provisions such as those of the framework agreement which lay down only general principles and minimum requirements representing a threshold which the Member States are authorised to exceed; third, those with no connection to the content of the directive or the framework agreement. However, a single reform of domestic law may serve all three purposes. If a comparison of the legal provisions preceding transposition and the legal provisions resulting from transposition gives an entirely negative result, that outcome may reflect a general reduction within the meaning of clause 8(3) of the framework agreement. However, if that clause is conceived of as imposing an obligation of transparency, it would be possible to require that a Member State should have clearly declared its intention either to implement the framework agreement or to achieve another aim, when it introduced a particular amendment.

47. None of the parties concerned has furnished any probative evidence in this regard.

35 — *Angelidaki and Others*, paragraph 130.

36 — *Mangold*, paragraph 51.

37 — It is true that the Italian Republic argues that Articles 1 and 11 of that legislative decree do not fall within the field covered by the framework agreement, but I am not convinced by the arguments put forward in this regard, for the reasons set out above.

38 — See footnote 10 above.

39 — *Angelidaki and Others*, paragraph 133.

In any event, under the system of judicial cooperation established by Article 234 EC, it is the exclusive responsibility of the competent national courts to interpret domestic law. [40] According to the court seised of the main proceedings, '*downgrading* of the provisions regarding grounds for replacement is clearly closely connected with fulfilment of the obligation to bring Italian law into line with the abovementioned directive'. [41]

48. In the light of the information contained in the documents before the Court, the possibility cannot be ruled out that the fact that Legislative Decree 368/2001 no longer imposes the obligation to give the name of the worker replaced or the reason for his replacement is connected with the implementation of the framework agreement, but it is also possible that an entirely different objective from that of implementation gave rise to that reform. It will be for the national court, rather than the Court of Justice, to identify the rationale behind the adoption of the national provision in question. [42]

49. As regards the second condition laid down in *Angelidaki and Others*, that the reduction must relate to the 'general level of protection' afforded to fixed-term workers, this implies that only a reduction on a scale likely to have an effect overall on national legislation relating to fixed-term employment contracts is liable to be covered by clause 8(3) of the framework agreement. [43]

50. In this regard, it is appropriate to measure the scale of the impact which the amendments at issue have had on the level of protection afforded to workers taken on for a fixed term, as compared with the previous situation under domestic law.

51. The changes made by Article 1 of Legislative Decree 368/2001 to the previous national law do not appear to affect all workers on a fixed-term employment contract, but only those who have been employed for the purpose of replacing absent workers with a right to retain their post, since the latter category alone was covered by Article 1(2)(b) of Law 230/1962, which is referred to in the order for reference.

52. In accordance with the Court's case-law, [44] in so far as the workers who are taken on for the purpose of replacement do not represent a significant proportion of workers employed for a fixed term in the Member State concerned, which it is for the referring court to ascertain, the reduction in the protection afforded to that limited category of workers is not, in itself, likely to have an effect

40 — See, in particular, the order in *Vassilakis and Others*, paragraph 134; *Marrosu and Sardino*, paragraph 54; and the judgment of 7 May 2009 in Case C-553/07 *Rijkeboer*, paragraph 30.

41 — Section III of the order for reference. It should be noted that it is the Latin phrase 'reformatio in peius' which appears in italic in the original text.

42 — See, in this regard, *Angelidaki and Others*, paragraph 138.

43 — *Angelidaki and Others*, paragraph 140.

44 — *Angelidaki and Others*, paragraph 142.

overall on the level of protection applicable under the domestic legal order to workers bound by fixed-term employment contracts.

53. Furthermore, I would point out that the new legislation retains, first, the requirement that the grounds for using a fixed-term contract must be given, by reference to specific reasons relating to technical issues, production, organisation or employee replacement, and, second, the penalty attached to that requirement, namely that the fixed term is rendered ineffective. In the light of the information in the documents before the Court, it is reasonable to ask whether, as Poste Italiane argues, the amendments introduced could have been counterbalanced by other guarantees to such an extent that the level of protection available under the current rules would be comparable to, or even more favourable than, the previous level of protection, both overall and specifically, that is to say, with regard to the grounds for concluding a fixed-term contract.

54. As the Court has held, it must be concluded that amendments introduced by national legislation do not appear to constitute a reduction in the general level of protection afforded to fixed-term workers where those amendments may be offset by the adoption of other measures, such as measures to prevent the misuse of successive fixed-term employment contracts, [45] and I would add to this example measures intended to prevent discrimination against workers who have entered into fixed-term employment contracts.

45 — See *Angelidaki and Others*, paragraph 146.

55. In the abovementioned circumstances, the prohibition on reducing the general level of protection afforded to workers does not therefore mean that a worker or a category of workers will not be in a less favourable situation after transposition of the framework agreement.

56. Be that as it may, it is for the national court to ascertain whether there is a reduction in the general level of protection afforded to workers as prohibited by clause 8 of the framework agreement, and in particular to evaluate the specific impact resulting from the domestic law amendment at issue, as that court alone has sufficient knowledge of how the rules applicable to fixed-term contracts have developed under national law.

57. In short, it seems to me that amendments made by national rules which, like those at issue in the main proceedings, are intended to transpose Directive 1999/70 and the framework agreement do not constitute a reduction of the general level of protection afforded to fixed-term workers within the meaning of clause 8(3) of the framework agreement in so far as they relate to a limited category of workers having entered into a fixed-term employment contract or may be offset by the

adoption of other measures to protect workers having entered into such contracts, which it will be for the national court to ascertain.

D – *The inferences to be drawn from the interpretation of the so-called 'non-regression' clause*

58. By its second question, the national court asks whether it is required, under European Union law, to disapply national legislation, such as that at issue in the main proceedings, which is not consistent with that law. In essence, it wishes to ascertain whether, if Articles 1 and 11 of Legislative Decree 368/2001 infringe clause 8(3) of the framework agreement, it must apply instead the provisions which were in force before that legislative decree was adopted, that is to say, Article 1(2)(b) of Law 230/1962.

59. It must be pointed out that the Court answered a similar question in its judgment in *Angelidaki and Others* and that other useful information for answering this question can be found in the judgments in *Adeneler and Others* and *Impact*, and the order in *Vassilakis and Others*, [46] as was indicated in the order made at the same time in *Koukou*. [47]

60. First of all, the Court pointed out that its settled case-law concerning the vertical direct effect of directives [48] has been extended to agreements which, like the framework agreement on fixed-term contracts, have been negotiated between management and labour at Community level and have been implemented by a directive of the Council, of which they are thus an integral component, in accordance with Articles 139(1) and (2) EC. [49]

61. Next, it held that, taking into account the purpose of clause 8(3) of the framework agreement and its limited scope, and even in the light of its wording, individuals would not be able to infer from the prohibition laid down in that provision any right that would be sufficiently clear, precise and unconditional. [50]

46 — *Adeneler and Others*, paragraphs 108 to 124, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 69 to 80; order in *Vassilakis and Others*, paragraphs 56 to 72.

47 — Paragraph 125 et seq.

48 — See *Angelidaki and Others*, paragraph 193 et seq. and the case-law cited.

49 — See *Impact*, paragraph 58, which rules out the direct effect of clause 5(1) of the framework agreement, but recognises direct effect for clause 4(1).

50 — See *Angelidaki and Others*, paragraphs 208 to 211. Advocate General Kokott had also concluded that clause 8(3) of the framework agreement was not suitable for direct applicability because 'the provision employs undefined legal terms' and, above all, because 'the provision's purpose is not to grant individuals enforceable rights with which to defend their interests as workers' (points 125 to 127 of the Opinion in that case).

62. As I have already pointed out, any reduction in the level of protection experienced by a worker does not necessarily imply a reduction in the general level of protection within the meaning of clause 8 of the framework agreement. In other words, it is not inconceivable that an individual's situation will be less favourable than under the former legislation, though this does not mean that the new national provision is contrary to the framework agreement.

63. The Court inferred from the foregoing that that clause did not fulfil the conditions required in order to have direct effect, [51] which would have been vertical in that case, [52] whereas, in the instant case, there might be grounds for conferring horizontal direct effect on that clause, although the Court has always dismissed that possibility. [53]

64. It must be pointed out that Poste Italiane's status as a private or public entity was the subject of vigorous debate between the parties, although the documents before the Court do not contain sufficient information to enable me to take a definitive stance in this regard. In any event, there does not seem to be any need to clarify its status since the Court has expressly refused to confer even vertical direct effect on clause 8(3) of the framework agreement.

65. The Court went on to say that '[i]n that respect, it is for the national courts to interpret the provisions of national law, so far as possible, in such a way that they can be applied in a manner which is consistent with the objective [[54]] pursued by the framework agreement', and in particular to provide an interpretation that is consistent with clause 8(3) of the framework agreement. [55]

66. The specific implications of that case-law have been interpreted in different ways by the parties. Ms Sorge has inferred from it that the national court should substitute the provisions of Law 230/1962 for those of Legislative Decree 368/2001, which she considers to be contrary to the framework agreement, particularly in the light of decisions given by the Corte costituzionale and the Corte suprema di cassazione. Considering, conversely, that those decisions indicated that the contested

51 — *Angelidaki and Others*, paragraphs 208 to 211.

52 — The various sets of main proceedings had been brought by employees against the local government authorities employing them.

53 — According to settled case-law, a directive may not be relied upon against an individual, but it may against a State, regardless of the capacity in which the latter is acting, whether as employer or public authority. See, in particular, Case 152/84 *Marshall* [1986] ECR 723, paragraphs 48 and 49; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 24 and 25; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 109; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40; and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 46.

54 — Since the framework agreement, which is annexed to Directive 1999/70, has the same legal nature as that directive, the objective of that agreement must be fully observed by the Member States, pursuant to the third paragraph of Article 249 EC.

55 — *Angelidaki and Others*, paragraphs 212 and 213, and points 122 to 128 of the Opinion of Advocate General Kokott in that case.

rules are consistent with clause 8(3) of the framework agreement, Poste Italiane takes the view that the Tribunale di Trani could not in any circumstances disapply those rules. Commenting on this matter only in the alternative, the Italian Republic states that the national court had various means at its disposal for interpreting Legislative Decree 368/2001 in such a way as to find it to be compatible with the level of protection sought by the framework agreement. For its part, the Netherlands Government considered that a consistent interpretation should not prompt the national court not to apply the provisions at issue, since that would have the effect of conferring direct effect on the non-regression clause, which the Court has refused to do. The Commission has not stated its position in this regard.

67. In *Angelidaki and Others*, the Court gives the national court guidance on the legal basis (paragraphs 197 and 198) and the limits of the obligation to interpret national law in conformity with Community law (paragraphs 200 to 202), in relation, by analogy, to clause 8(3) of the framework agreement. In particular, it points out that national courts, in the same way as all the bodies of the Member States, are required to do everything within their power to ensure that the directive in question is given full effect and to achieve an outcome consistent with the objective pursued by the directive. [56] However, in performing that task, the national court must not exceed its powers; in particular it must not give a *contra legem* interpretation of national law,

56 — The Court recently laid down these principles in *Kücükdeveci*, paragraph 48.

since the legislature alone has the power to amend the law.

68. I should add that, in my opinion, the obligation to interpret national law in conformity with European Union law cannot in any circumstances have the effect of rendering applicable national rules which are not formally valid and relevant either *ratione materiae* or *ratione temporis*. It is necessarily the applicable national provision which must be interpreted in conformity with Directive 1999/70 and the framework agreement, as well as with European Union law in general. While the primacy of European Union law may mean that a national provision is not applied, European Union law cannot grant formal validity or confer applicability *in casu* within the legal system of a Member State on a provision forming part of that legal system. I should stress that European Union law cannot 'bring back from the dead' a domestic provision which is no longer in force and which, in the absence of specific provisions to that effect, is not applicable *ratione temporis* to a dispute, as is the case with the repealed provisions of Law 230/1962.

69. A distinction must be drawn between the requirement defined above and that to the effect that the obligation to interpret national law in conformity with European Union law must relate to all relevant provisions of domestic law, whether adopted before or after

the directive in question. [57] Moreover, as the Court has held, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive. [58]

70. It must also be pointed out that the obligation to interpret national law in conformity with European Union law, as construed above, does not have the consequence de facto of conferring direct, vertical or even horizontal effect on clause 8(3) of the framework agreement as the Netherlands Government fears. In my view, the direct effect which a provision of this kind might, as such, have on individuals must not be confused with the impact it has on the legislative and judicial activities [59] of the Member States.

71. Consequently, the answer to the second question referred will be, on the one hand, that an individual cannot seek direct implementation of clause 8(3) of the framework agreement in order to have the provisions of Article 1 of Legislative Decree 368/2001 disapplied in favour of those, now repealed, of Article 1(2)(b) of Law 230/1962; but, on the other hand, that, in cases where the contested provisions are considered by the national court to be contrary to European Union law, that court is required to interpret the applicable provisions of domestic law in a manner consistent with both the wording and the purpose of that clause, in so far as this is possible and without going beyond the powers vested in that court.

57 — See *Angelidaki and Others*, paragraph 197. I take the view that this applies only to provisions with actual legislative effect in domestic law, not to repealed provisions which now exist only in fact, as part of the history of national law.

58 — See *Pfeiffer and Others*, paragraph 116.

59 — In this regard, I would emphasise that the framework agreement may be the subject of proceedings concerning not only individuals but also management and labour, at sectoral or even national level, and that the principle of an interpretation of legislative provisions and collective agreements which is in conformity with clause 8(3) of that framework agreement seems to me to be more relevant at this level than an assessment of the validity of stipulations contained in individual employment contracts.

V – Conclusion

72. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunale di Trani as follows:

‘(1) Clause 8(3) of the framework agreement on fixed-term work, concluded on 18 March 1999, must be interpreted as meaning that it does not preclude national rules, such as those laid down in Articles 1 and 11 of Legislative Decree No 368 of 6 September 2001, which, unlike a former provision of domestic law, such as Article 1(2)(b) of Law No 230 of 18 April 1962 laying down the rules governing fixed-term employment contracts, no longer impose an obligation for the employer to specify, in fixed-term contracts with the purpose of replacing absent workers with a right to retain their post, both the name of the worker replaced and the reasons for his replacement, provided that such amendments relate to a limited category of workers having entered into a fixed-term employment contract or are offset by the adoption of other measures of protection afforded to workers having entered into a fixed-term contract, which it is for the national court to ascertain.

(2) ’Clause 8(3) of the framework agreement on fixed-term work, concluded on 18 March 1999, does not fulfil the conditions required to produce a direct effect. In cases where a change to national rules, such as that introduced by Article 1 of Legislative Decree No 368 of 6 September 2001, is shown to be contrary to that clause, the national court must not disapply the relevant provisions of domestic law but must interpret those provisions, so far as possible, in a manner consistent with European Union law and, in particular, with the purpose of the framework agreement on fixed-term work.