An overview of recent judgments of the ECJ in the area of atypical workers, fixed-term, part time and agency workers.

Aindrias Ó Caoimh

In the field of labour/employment law the Court of Justice is engaged essentially in providing preliminary rulings on questions referred by the court of the Member States of the European Union under the provisions of Article 267 of the Treaty on the Functioning of the European Union (TFEU). In the context of direct actions, typically taken by the European Commission against a Member State, the Court also interprets provisions of law.

The vast majority of cases coming to the Court in the field of employment law, which is classified in the case-law of the Court under the rubric of ‘social policy’, is in the context of reference from the Courts of the Member States. For example, in 2014 there were 25 cases in the area of which 20 (80%) were by way of references for preliminary ruling.

Treatment of cases in the field of labour/employment law.

An examination of cases dealt with by the Court in the field of Social Policy within the past three years reveals a number of areas where a large number of references from Member States have been made to the Court. In this regard one may mention:

- The Framework Decision on Fixed Term Contracts and Directive 1999/70/EC where the Court has delivered 10 judgments and 6 reasoned orders.
- Age Discrimination (Council Directive 2000/78) which has arisen in 10 cases
- Protection of Part-Time Workers (Council Directive 97/81 and Framework agreement) in which 4 cases were dealt with.
- Working Time Directive (Directive 2003/88) which has been the subject of 3 judgments and one Order.
- Protection of Workers in the case of Transfer of Undertakings (Directive 2001/23/EC) in which there was 1 judgment.
- Parental Leave (Directive 96/34 and Framework Agreement.
- Discrimination between men and women - in which 3 judgments were given
- Discrimination on grounds of handicap
- Cases of entitlement to parental leave.
**Fixed-Term Work.**

In the past few years there has been a series of cases decided by the Court of Justice in the field of the social policy of the European Union touching upon Article 155 paragraph 2 of the Treaty on the Functioning of the European Union, involving dialogue between trade unions and management and more particularly the framework agreement on fixed term work of 1999.

The framework agreement on fixed-term work concluded on the 18th March, 1999, (‘the framework agreement’) is annexed to Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by the European social partners (‘the Directive’).

According to recital 14 in the preamble to the Directive, the legal basis for which was Article 139 (2) EC now Article 155 (2) TFEU, the signatory parties of the framework agreement have demonstrated their desire to improve the quality of fixed term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships. Article 1 of the Directive indicates its purpose ‘to put into effect the framework agreement …’

Clause 1 of the framework agreement indicates its purpose to

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships’.

(I) Scope of the Framework Agreement

The scope of the Directive has been addressed in a series of cases in recent times.

Clause 2 of the framework agreement on fixed-term work provides:

1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.

2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:

(a) initial vocational training relationships and apprenticeship schemes;

(b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.'
In Case C-177/10 *Rosada Santana*, pronounced on 8 September 2011, the issue arose as to the scope of the Directive to civil servants in the context of a difference of treatment between interim civil servants and career civil servants.

In this case the Court addressed the obligation on Member States under Article 4 (3) TEU to apply the principle of loyal co-operation and to dis-apply, if necessary, a provision of national law contrary to the requirements of EU law.

The Court referred to its existing case law including the Case C-212/04 *Adeneler and Others* and Case C-456/09 *Gaviero Gaviero and Iglesias Torres* to the effect that the provisions of the framework agreement are intended to apply to fixed-term employment contracts and relationships concluded with public authorities and other public sector bodies. The Court also reiterated its case law to the effect that no discrimination could be justified on the basis that the employment at issue is for a fixed term.

This led the Court to rule that the Directive must be interpreted, on the one hand, as applying to contracts and relationships concluded with the public authorities and other public-sector bodies and, on the other, as precluding any difference in treatment as between career civil servants and comparable interim civil servants of a Member State, based solely on the ground that the latter are employed for a fixed term, unless different treatment is justified on objective grounds for the purposes of clause 4(1) of the framework agreement.

In Case C-157/11 *Sibilio*, pronounced on 15 March 2012, the Court indicated that Clause 2 should be interpreted as not precluding national legislation which provides that the relationship between socially useful workers and the public authorities for whom they carry out their activities does not fall within the scope of that framework agreement where those workers are not covered by an employment relationship as defined by national law, collective agreements or practice in force, or the Member States and/or social partners have exercised the option granted to them under point 2 of that clause. In its ruling, the Court largely followed what it had previously stated at paragraphs 61 to 63 of Case C-212/04 *Adeneler*, which was decided by the Grand Chamber of the Court. (This judgment is available only in French and Italian).

In Case C-290/12 *Della Rocca*, pronounced on 11 April 2013, the Court ruled that the Directive and the Framework Agreement must be interpreted as not applying either to a fixed-term employment business or to the employment relationship between such a worker and a user undertaking, these areas having been expressly excluded from the term of the Directive and the Framework Agreement at the time of their enactment in anticipation of subsequent legislation covering these areas.

**II** **Clause 4: The principle of non-discrimination**

The principle of equality is enshrined in Article 4 of the framework agreement entitled ‘Principle of non-discrimination’, provides:

1. 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. Period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of-service qualifications are justified on objective grounds.’

Coming back to Case C-177/10 Rosada Santana, the Court indicated that, according to the settled case-law of the Court, the concept of ‘objective grounds’ for the purposes of clause 4(1) of the framework agreement must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement. It added that concept of ‘objective grounds’ requires the unequal treatment found to exist be justified by the existence of precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term 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 (see, inter alia, Del Cerro Alonso, paragraphs 53 and 58; and Gavieiro Gavieiro and Iglesias Torres, paragraph 55). Based on this same case-law the Court indicated that no reliance could be placed on the mere temporary nature of the employment as constituting an ‘objective ground’ as this would render the objectives of the Directive and the framework agreement meaningless.

This led the Court to interpret the framework agreement as precluding a national law which did not take account of periods of service completed as an interim civil servant in a public administration for the purposes of permitting such a person, who has subsequently become a career civil servant, to obtain an internal promotion available only to career civil servants, unless that exclusion is justified by objective grounds for the purposes of clause 4(1) of that agreement. The mere fact that the interim civil servant completed those periods of service under a fixed-term employment contract or relationship does not constitute such an objective ground.

This ruling was followed by a reasoned order in Case C-556/11 Lorenzo Martínez, pronounced on 9 February 2012, which interpreted Clause 4(1) of the Framework Agreement as precluding national legislation, such as that at issue in the main proceedings, which restricts, in the absence of any objective justification, the right to receive a six-yearly continuing professional education increment solely to teachers employed as established (career) civil servants, to the exclusion of those working as temporary officials, where, in respect of the receipt of that increment, those two categories of workers are in comparable situations.

In Joined Cases C-302/11 to C-304/11 Valenza and Others, pronounced on 18 October 2012, the Court added that Clause 4 of the framework agreement on fixed-term work must be understood as precluding national legislation, which completely prohibits periods of service
completed by a fixed-term worker for a public authority, being taken into account in order to
determine the length of service of that worker upon his recruitment on a permanent basis by
that same authority as a career civil servant under a stabilisation procedure specific to his
employment relationship, unless that prohibition is justified on ‘objective grounds’ for the
purposes of clause 4(1) and/or (4). The mere fact that the fixed-term worker completed those
periods of service on the basis of a fixed-term employment contract or relationship does not
constitute such an objective ground.

In Case 393/11 Bertazzi, pronounced on 7 March 2013, the Court ruled on reference from the
Council of State of Italy that Clause 4 of the framework agreement on fixed-term work must
be understood as precluding national legislation, which completely prohibits periods of
service completed by a fixed-term worker for a public authority being taken into account in
order to determine the length of service of that worker upon his recruitment on a permanent
basis by that same authority as a career civil servant under a stabilisation procedure specific
to his employment relationship, unless the functions carried out under fixed-term
employment contracts are not the equivalent of those carried out by a career civil servant
belonging to the relevant category of that authority or, if not, that that prohibition is justified
on ‘objective grounds’ for the purposes of clause 4(1) and/or (4), which was for the referring
court to determine. The mere fact that the fixed-term worker completed those periods of
service on the basis of a fixed-term employment contract or relationship does not constitute
such an objective ground.

In Case C-38/13 Nierodzik, pronounced on 13 March 2014, the Court ruled that Clause 4(1)
of the Framework Agreement must be interpreted as precluding a national rule which
provides that, for the termination of fixed-term contracts of more than six months, a fixed
notice period of two weeks may be applied regardless of the length of service of the worker
concerned, whereas the length of the notice period for contracts of indefinite duration is fixed
in accordance with the length of service of the worker concerned and may vary from two
weeks to three months, where those two categories of workers are in comparable situations.

In Case C-89/13 D’Aniello, pronounced on 30 April 2014, the Court ruled by order that clause
4(1) of that framework agreement must be interpreted as meaning that it does not require
identical treatment of the economic consequences granted in cases of the unlawful setting of
an expiry date for an employment contract and those paid in cases of the unlawful
termination of an employment contract of unlimited duration.

(III) Clause 5: Successive part-time contracts

Clause 5 of the Framework Agreement, entitled ‘Measures to prevent abuse’, states:

‘1. 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:

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(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.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
   (a) shall be regarded as “successive”;
   (b) shall be deemed to be contracts or relationships of indefinite duration.’

In Case C-586/10 Kükük, pronounced on 26 January 2012, the Court interpreted Clause 5 of the Framework Agreement. In this case, the applicant, Ms. Kükük, was employed in Germany under a total of 13 successive fixed-term employment contracts as a clerk in a court office of the civil procedural division of the Amtsgericht, Köln. Those contracts were always concluded because of temporary leave, including parental leave and special leave, having been granted to court clerks employed for an indefinite duration and served in each case to replace them.

The applicant contended that, in her circumstances, the further conclusion of a fixed term contract was not justified and contended that there was no objective reason for same. The applicant sought a ruling that her final fixed term contract had not been terminated. On an application for a preliminary reference to the Court of Justice under Article 267 TFEU from the Bundesarbeitsgericht the Court construed the question posed by the referring court as asking whether in the circumstances there could be an objective reason for temporary replacement staff.

The Court referred to its previous case-law on the issue of Clause 5 of the Framework Agreement including Case C-212/04 Adeneler and Others, Joined Cases C-378/07 to C-380/07 Angelidaki and Others and Case 3/10 Affatato in indicating that the purpose of clause 5(1) of the FTW Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure, and that this Clause 5(1) requires Member States, in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, actually to adopt in a binding manner one or more of the measures listed where domestic law does not include equivalent legal measures. The measures listed in clause 5(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 fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships and that the concept of ‘objective reasons’ for the purposes of clause 5(1)(a) of the FTW Framework Agreement must, as the Court has already held, 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.

In ruling on the case the Court interpreted Clause 5 (1) (a) of the Framework Agreement as meaning that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

In Case C-251/11 Huet, pronounced on 8 March 2012, the Court ruled that Clause 5 of the Framework Agreement on fixed-term work must be interpreted as meaning that a Member State, which provides in its national legislation for conversion of fixed-term employment contracts into an employment contract of indefinite duration when the fixed-term employment contracts have reached a certain duration, is not obliged to require that the employment contract of indefinite duration reproduces in identical terms the principal clauses set out in the previous contract. However, in order not to undermine the practical effect of, or the objectives pursued by, Directive 1999/70, that Member State must ensure that the conversion of fixed-term employment contracts into an employment contract of indefinite duration is not accompanied by material amendments to the clauses of the previous contract in a way that is, overall, unfavourable to the person concerned when the subject-matter of that person’s tasks and the nature of his functions remain unchanged.

In Case C-50/13 Papalia, pronounced on 12 December 2013, the Court ruled that the framework agreement on fixed-term work must be interpreted as precluding measures provided for by national legislation, which, in the event of misuse by a public employer of successive fixed-term employment contracts, provides solely for the right for the worker concerned to obtain compensation for the damage which he considers himself to have therefore incurred, without any transformation of the fixed-term employment relationship into an employment relationship for an indefinite period, where the right to that compensation is subject to the obligation on that worker to prove that he was forced to forego better work opportunities, although the effect of that obligation is to render impossible in practice or excessively difficult the exercise by that worker of rights conferred by European Union law.

It is for the referring court to assess to what extent the provisions of domestic law aimed at penalising the misuse by the public administration of successive fixed-term employment contracts or relationships comply with those principles.
In Case C-190/13 Márquez Samohano, pronounced on 13 March 2014, the Court ruled that Clause 5 of the framework agreement on fixed-term work must be interpreted as not precluding national rules which allow universities to renew successive fixed-term employment contracts concluded with associate lecturers, with no limitation as to the maximum duration and the number of renewals of those contracts, where such contracts are justified by an objective reason within the meaning of clause 5(1)(a), which is a matter for the referring court to verify. However, it is also for that court to ascertain that the renewal of the successive fixed-term employment contracts at issue was actually intended to cover temporary needs and that rules such as those at issue in the main proceedings were not, in fact, used to meet fixed and permanent needs in terms of employment of teaching staff.

In Joined Cases C-362/13, C 363/13 and C-407/13 Fiamingo and Others, pronounced on 3 July 2014, the Court by judgment of the 3rd July 2014, on an application for a preliminary ruling from the Supreme Court of Cassation of Italy, ruled, inter alia, that Clause 5 of the Framework Agreement on fixed-term work must be interpreted as meaning that it does not preclude, in principle, national legislation which provides for the conversion of fixed-term employment contracts into employment contracts of indefinite duration only in circumstances where the worker concerned has been employed continuously under such contracts by the same employer for a period longer than one year, the employment relationship being considered to be continuous where the fixed-term employment contracts are separated by time lapses of less than or equal to 60 days. It was, however, for the referring court to satisfy itself that the conditions of application and the effective implementation of that legislation result in a measure that is adequate to prevent and punish the misuse of successive fixed-term employment contracts or relationships.

**Part-time workers**

The protection of part-time workers is governed by Directive 97/81 and the Framework Agreement between between the general cross-industry organisations, namely the Union of Industrial and Employers’ Confederations (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trades Union Confederation (ETUC), as it appears in the annex to that directive.

Clause 1 of that agreement provides:

‘The purpose of this framework agreement is:
(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;
(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.’

Clause 3 of the Framework Agreement states:

‘For the purposes of this Agreement

... (2) The term “comparable full-time worker” means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other
considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.’

Clause 4 of the Framework Agreement, entitled ‘Principle of non-discrimination’, provides:

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

Under Clause 5.2 of the Framework Agreement:

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

In Case C-221/13 Mascellani the Court ruled in October 2014 that the Framework Agreement, in particular Clause 5.2 thereof, must be interpreted as meaning that, in certain circumstances, it does not preclude national legislation pursuant to which the employer may order the conversion of a part-time employment relationship into a full-time employment relationship without the consent of the worker concerned.

The Court noted that the objective of the directive and the Framework Agreement was to promote part-time work and to eliminate discrimination between part-time and full-time workers. The Court did not consider as comparable a situation where full-time work is converted into part-time work without the consent of the worker concerned with that of the applicant because the reduction of working time does not involve the same consequences as an increase, in particular, as regards the worker’s remuneration.

In case C-415/12 Brandes the Court in June 2013 recalled that it had held that, in the case of part-time employment, EU law does not preclude a retirement pension being calculated pro rata temporis in the case of part-time employment, nor does it preclude paid annual leave from being calculated in accordance with the same principle.

The Court noted that in its case law, taking account of the reduced working time as compared with that of a full-time worker constituted an objective criterion allowing a proportionate reduction of the rights of the 1 workers concerned.

This led the Court to rule in Brandes that Clause 4.2 of the Framework Agreement on part-time work must be interpreted as meaning that the principle pro rata temporis applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time
worker pursuant to a collective agreement such as that in issue.1

In November 2014 in Case C-476/12 Österreichischer Gewerkschaftsbund the Court ruled that Clause 4.2 of the Framework Agreement must be interpreted as meaning that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time worker pursuant to a collective agreement such as that applicable to the employees of Austrian banks and bankers.

Most recently on the 11th November last in Case C-219/14 Greenfield the Court ruled that Clause 4.2 of the Framework Agreement on part-time work concluded on 6 June 1997, annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker’s new work pattern. A new calculation must, however, be performed for the period during which working time increased.

The Court further ruled that Clause 4.2 of the Framework Agreement and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.

**Agency Work**

A request has been made in proceedings between ‘AKT’, a trade union, and an employers’ association, and Shell Aviation Finland Oy (‘SAF’), an undertaking which is a member of the employers’ association, concerning temporary agency workers employed by SAF.

Article 4 of Directive 2008/104, entitled ‘Review of restrictions or prohibitions’, which forms part of Chapter I, entitled ‘General Provisions’, states:

1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.
2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.
3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have

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1 A similar ruling was given in November, 2014 in Case C-476/12 Österreichischer Gewerkschaftsbund.
negotiated the relevant agreement.

4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011.’

In accordance with Article 11(1) of Directive 2008/104, the Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive by 5 December 2011, or to ensure that the social partners introduce the necessary provisions by way of an agreement.

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

SAG is an undertaking which supplies fuel to several airports in Finland. Its employees fuel aircraft and conduct quality controls and other auxiliary tasks in relation to the aircraft in those airports.

In accordance with a contract concluded in 2010 with the temporary-work agency Ametro Oy, SAF was required to use temporary agency workers provided by Ametro Oy to replace permanent workers on sick leave or to deal with peaks of work. Before 2010, SAF used the services of another temporary-work agency for the same purposes.

AKT brought an action before an Employment Tribunal seeking that an employers’ association and SAF be ordered to pay a financial penalty in accordance with Article 7 of the Law on collective agreements for having contravened Paragraph 29(1) of the applicable collective agreement. AKT submitted that, since 2008, SAF has employed temporary agency workers permanently and continuously to perform the exact same tasks as performed by its own workers, which is an improper use of temporary agency workers for the purposes of that provision. Those temporary agency workers are used to perform the undertaking’s normal activities alongside, and under the same management as, its permanent employees despite the fact that they do not have any specific technical expertise. It further submitted that those temporary agency workers represent a significant number of the undertaking’s workforce in terms of years of work per worker.

The defendants in the main proceedings contend that the use of temporary agency workers is justified by legitimate reasons, since they are used essentially to replace workers during periods of annual leave and sick leave. They further contend that Paragraph 29(1) of the applicable collective agreement is not in conformity with Article 4(1) of Directive 2008/104. Paragraph 29(1) concerns neither the protection of temporary agency workers, nor requirements of their health and safety. Neither does it ensure that the labour market functions properly, nor that abuses are prevented. In any event, Paragraph 29(1) of the applicable collective agreement contains prohibitions and restrictions of agency work which prevent employers from choosing the forms of employment best suited to their business and limit the opportunities of temporary-work agencies to offer their services to undertakings. Even if the directive does not expressly so provide, the national courts should disapply
prohibitions and restrictions of temporary agency work which are at odds with the aims of the directive.

By its first question, the national court asked, in essence, whether Article 4(1) of Directive 2008/104 must be interpreted as laying down an obligation on the authorities of the Member States, including the national courts, not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

The Court indicated, however, that in order to ascertain the exact meaning of Article 4(1) of Directive 2008/104, that article needs to be read as a whole, taking into account its context.

In that regard, the Court pointed out that Article 4, entitled ‘Review of restrictions or prohibitions’, forms part of the chapter on the general provisions of Directive 2008/104.

Thus, firstly, Article 4(2) and (3) of the directive provides that Member States shall, after consulting the social partners, or, if the prohibitions or restrictions on the use of temporary agency workers are laid down by collective agreements, the social partners which negotiated them, review any prohibitions or restrictions on the use of temporary agency work by 5 December 2011 ‘in order to verify whether they are justified on the grounds mentioned in Article 4(1)’.

Secondly, pursuant to Article 4(5), the Member States were required to inform the Commission of the results of the review by the same date.

It followed that, by imposing upon the competent authorities of the Member States the obligation to review their national legal framework, in order to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified on grounds of general interest, and the obligation to inform the Commission of the results of that review, Article 4(1), read in conjunction with the other paragraphs of that article, is addressed solely to the competent authorities of the Member States. Such obligations cannot be performed by the national courts.

Depending upon the result of that review, which had to be completed by the same date as that laid down in Article 11(1) of Directive 2008/104 for the transposition of the directive, the Member States, which are required to comply in full with their obligations under Article 4(1) of that directive, could have been obliged to amend their national legislation on temporary agency work.

The Member States are, to that end, free either to remove any prohibitions and restrictions which could not be justified under that provision or, where applicable, to adapt them in order to render them compliant, where appropriate, with that provision. It follows that, when considered in its context, Article 4(1) of Directive 2008/104 must be understood as restricting the scope of the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers and not as requiring any specific legislation to be adopted in that regard.
The Court ruled that Article 4(1) of Directive 2008/104 must be interpreted as meaning that:
– the provision is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified, and, therefore,

– the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

The effect of this judgment which is the first time the Court interpreted the directive in question is that, while an obligation rests on the Member States the provisions of the directive do not have direct effect such as to be capable of being invoked before the courts of the Member States by individuals.