OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 30 June 2005 [1]

1. By order of 26 February 2004, the Arbeitsgericht (Labour Court) München ('the Arbeitsgericht') referred to the Court under Article 234 EC three questions on the interpretation of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [2] and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [3] (hereinafter referred to as 'Directive 1999/70' and 'Directive 2000/78', or collectively as 'the directives').

2. Essentially, the national court wishes to know whether — in the context of a dispute between private parties — those directives preclude a national rule allowing older people to be employed on fixed-term contracts with no restrictions.

1 — Original language: Italian.

2 — OJ 1999 L 175, p. 43.

3 — OJ 2000 L 303, p. 16.

I — Relevant legislation

A — *Community law*

Directive 1999/70, which gives effect to the framework agreement on fixed-term work entered into by ETUC, UNICE and CEEP

3. On 18 March 1999, having agreed that 'employment contracts of an indefinite duration are the general form of employment relationships', while also acknowledging that 'in certain sectors, occupations and activities' fixed-term employment contracts 'can suit both employers and workers' (general considerations, paragraphs 6 and 8), the Community-level federations of trade unions and employers (ETUC, UNICE and CEEP) entered into a framework agreement on fixed-term work ('the framework agreement'), which was subsequently implemented in accordance with Article 139(2) EC by Directive 1999/70.

4. Of particular relevance for present purposes is Clause 5(1) of the framework agreement, which provides as follows:

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships'.

5. Clause 8(3) is in the following terms:

'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'.

Directive 2000/78

6. The purpose of Directive 2000/78 is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' (Article 1).

7. Having defined the concept of discrimination in Article 2(2), the directive provides at Article 6(1) that:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reason-

ably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

....'

8. According to the first paragraph of Article 18, transposition of the directive had to take place by 2 December 2003. However, the second paragraph provides as follows:

'In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. ...'.

9. Since Germany chose to exercise that option, transposition into German law of the age and disability provisions of Directive 2000/78 must take place by 2 December 2006 at the latest.

B — *National law*

10. Prior to the transposition of Directive 1999/70, German law placed two curbs on fixed-term contracts of employment, requiring an objective reason justifying the fixed term or, alternatively, imposing limits on the number of contract renewals (a maximum of three) and on total duration (a maximum of two years).

11. Those restrictions did not apply to contracts with older people however. German law permitted fixed-term contracts, even without the above restrictions, if the employee was *aged 60* or over (see Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to Promote Employment), of 26 April 1985,[4] as amended by the Law to Promote Growth and Employment of 25 September 1996).[5]

12. That situation changed partly with the enactment of the Law on Part-Time Working and Fixed-Term Contracts of 21 December 2000, transposing Directive 1999/70 ('the TzBfG').[6]

13. Paragraph 14(1) of the TzBfG re-enacted the general rule whereby a fixed-term contract must be based on an objective reason.[7] In the absence of an objective reason, according to Paragraph 14(2), the maximum total duration of the contract is again limited to two years and, subject to that limit, up to three renewals are again permitted.

14. However, according to Paragraph 14(3) of the TzBfG:

'The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of *58* by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months'.[8]

15. That provision was amended following a report by a government commission which found that 'an unemployed person over the age of 55 has about a one-in-four chance of reemployment'. The First Law for the Provision of Modern Services on the Employment

4 — BGBl. 1985, I, p. 710.

5 — BGBl. 1996, I, p. 1476.

6 — Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen, of 21 December 2000 (BGBl. 2000, I, p. 1966).

7 — Paragraph 14(1) of the TzBfG provides as follows: 'A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:
(1) the manpower requirements of the relevant undertaking are only temporary;
(2) the fixed term takes place further to a period of training or study in order to facilitate the employee's entry into subsequent employment;
(3) one employee replaces another;
(4) the fixed term is justified by the particular nature of the work;
(5) the fixed term is a probationary period;
(6) reasons relating to the employee personally justify the fixed term;
(7) the worker is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis, or
(8) the term is fixed by common agreement before a court.'

8 — Emphasis added.

Market of 23 December 2002 (known as the 'Hartz Law') provides:

'... For the period to 31 December 2006, the age-limit referred to in the first sentence hereof shall be 52 instead of 58'. [9]

II — Facts and procedure

16. The dispute in the main proceedings is between Mr Mangold and Mr Helm, who is a lawyer.

17. On 26 June 2003, at the age of 56, Mr Mangold was hired by Mr Helm on a fixed-term contract of employment.

18. Clause 5 of the contract of employment reads as follows:

'Fixed term of employment

1. The term of employment shall be fixed, commencing on 1 July 2003 and ending on 28 February 2004.

2. The fixed term is based on the statutory provision facilitating the fixed-term employment of older workers set out in the fourth sentence, in conjunction with the first sentence, of Paragraph 14(3) of the TzBfG (Law on Part-Time and Fixed-Term Employment), given that the employee is over the age of 52.

3. The parties agree that the reason set out in the preceding paragraph is the sole reason on which this fixed-term clause is based. The other reasons contemplated by statute and case-law as justifying a fixed term are expressly excluded and form no part of this fixed-term clause'.

19. A few weeks after commencing employment, Mr Mangold brought proceedings against his employer before the Arbeitsgericht claiming that Paragraph 14(3) of the TzBfG was contrary to Directives 1999/70 and 2000/78 and that the clause fixing the term of his employment was therefore void. As the Arbeitsgericht also had doubts as to the interpretation of the directives, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Clause 8(3) of the Framework Agreement (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) to be interpreted as prohibiting, when

9 — BGBl., I, p. 4607. Emphasis added.

transposed into national law, a reduction of protection following from the lowering of the age limit from 60 to 58?

(b) Is Clause 5(1) of the Framework Agreement (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) to be interpreted as precluding a provision of national law, such as the provision at issue in this case, which contains none of the three restrictions set out in Clause 5(1)?

(2) Is Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as precluding a provision of national law, such as the provision at issue in this case, which authorises the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 or over, contrary to the principle not requiring justification on objective grounds?

(3) If one of those three questions is answered in the affirmative, must the national court refuse to apply the national provision which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?'

20. In the ensuing proceedings, written observations were submitted by the parties to the main proceedings and by the Commission.

21. On 26 April 2005 the Court held a hearing at which the parties to the main proceedings, the German Government and the Commission were represented.

III — Legal analysis

(1) *The suggestion that the dispute in the main proceedings is contrived*

22. Before entering into the merits of the questions referred by the Arbeitsgericht, I must first address the doubts raised by the German Government as to whether the dispute which gave rise to the main proceedings is 'genuine' or in fact 'contrived', doubts which, if well founded, could call into question the admissibility of the reference. I would add, for the sake of completeness, that two objections to admissibility were also raised by the Commission, but since they relate to very specific points, I will deal with them when I come to consider the questions to which they relate.

23. To focus for the time being on the doubt expressed by the German Government, I note that at the hearing the German Government drew the Court's attention to a number of rather unusual features of the dispute from which the main proceedings arose. In particular, it made much of the fact that Mr Helm's opinion of the German legislation at issue here was no different from that of Mr Mangold, since Mr Helm too had spoken out publicly against it on several occasions. In the German Government's view, that coincidence of views could justify some suspicion as to the true nature of the main proceedings. It might be surmised, in other words, that the plaintiff (Mr Mangold) and the defendant (Mr Helm), united by the common cause of having Paragraph 14(3) of the TzBfG struck down, had brought a collusive action with the sole purpose of achieving that end.

24. I will say at once that, in the light of that and other aspects of this case (as to which see point 29 below), the German Government's doubts do not appear to me entirely unfounded. I do not believe, however, for the reasons I will now set out, that they are sufficient to sustain a ruling of inadmissibility in respect of the questions referred to the Court. Besides, the German Government did not go so far as to formally request a ruling to that effect.

25. The first thing that needs to be said on this matter, in my view, is that under Article 234 EC, a national court may request the Court of Justice to give a ruling on a question if it considers that a decision on that question is 'necessary' to enable it to give judgment.

26. In the allocation of functions contemplated by the Treaty, it is therefore for the national court, which 'alone has direct knowledge of the facts of the case' and is therefore 'in the best position' to do so, to assess 'whether a preliminary ruling is necessary'. [10] Where the national court considers it 'necessary' to refer a question, the Court is therefore, 'in principle, bound to give a ruling'. [11]

27. It is also the case, however, that the Court's function 'is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions'. In order to uphold that function, the Court has always reserved the right 'to examine the conditions in which the case has been referred to it by the national court', [12] and in exceptional

10 — Cases 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25, C-186/90 *Durighello* [1991] ECR I-5773, paragraph 8, and C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23.

11 — Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20.

12 — Case 149/82 *Robards* [1983] ECR 171, and *Meilicke*, paragraph 25.

cases has gone so far as to rule a reference inadmissible, where it is *'quite obvious'* [13] that the interpretation of Community law sought does 'not correspond to an objective requirement inherent in the resolution of a dispute'. [14]

28. It was in the exercise of this exceptional power of review that in a number of cases, which have become famous, the Court declined to give an answer to a national court precisely because the questions arose in collusive actions. [15] But even in other more recent and less well-known cases where the Court did entertain the reference, it did so only because it had found that it was 'not *manifestly apparent* from the facts set out in the order for reference that the dispute is in fact fictitious'. [16] And in the same vein, but taking a less rigid attitude, the Court has more recently made clear that the fact 'that the parties to the main proceedings are in agreement as to the result to be obtained makes the dispute no less real' and therefore does not make a reference inadmissible if it proves to be 'objectively necessary to the outcome of the main proceedings'. [17]

29. In the light of all that, and turning to the case in hand, I first have to say that objectively there are a number of elements in the file which appear to bear out the suspicions of the German Government as to the contrived nature of the dispute in the main proceedings. I am thinking, for example, of the fact, which came out at the hearing, that Mr Mangold's contract of employment required him to work for only a few hours a week. I am thinking also of the fact that the contract spelled out in perhaps excessive detail the fact that the fixed-term clause was based solely on Paragraph 14(3) of the TzBfG, excluding any other possible justification that might have been available under German statute and case-law. Finally, it was certainly unusual for Mr Mangold to go to the Arbeitsgericht just a matter of weeks after starting work seeking to have that clause of his contract declared void.

30. As the Commission pointed out, however, the national court had already taken cognisance of the above circumstances and had itself therefore considered the possibility that the dispute in the main proceedings was contrived by the parties. The Arbeitsgericht dismissed that possibility, however, having considered all the other evidence before it and having examined Mr Mangold directly.

31. In the light of that specific finding by the national court, the Commission concludes that the main proceedings cannot be

13 — Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20. See also Case C-343/90 *Lourenço Dias* [1992] I-4673, paragraphs 17 and 18; *Meilicke*, paragraph 25; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52. Emphasis added.

14 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18.

15 — Case 104/79 *Foglia* v *Novello* [1980] ECR 745; Case 244/80 *Foglia* v *Novello*, cited above.

16 — Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 12. Emphasis added.

17 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 14 and 15.

regarded as 'manifestly' bogus and that the reference arising from those proceedings should therefore be held admissible, having regard to the Court's case-law cited above (see point 28), which requires the collusion to be manifest in order to attract a ruling of inadmissibility.

32. For my part, I agree with that conclusion, but I think it preferable to base it on the more recent approach taken by the Court which, for the purposes of deciding on admissibility, plays down the relevance of any collusion between the parties as to the outcome of the main proceedings and emphasises instead the actual relevance of the question referred to the resolution of the main proceedings (see point 28 above).

33. In my view, that approach is more in keeping with the allocation of functions between the Court of Justice and the national court contemplated by the Treaty and, above all, more consistent with that 'spirit of cooperation' between them which is implicit in Article 234 EC [18] and has always been emphasised by this Court. It seems to me that that approach cannot but entail an attitude of presumptive trust in the findings of the national court and a presumption that it is not 'a mere "instrument" in the hands of ... the parties', [19] which they use at will for their own ends.

18 — *Leclerc-Siplec*, paragraph 12

19 — See Opinion of Advocate General Tesauro in Case C-408/95 *Eurotunnel* [1997] ECR I-6315, point 10.

34. It also seems to me that, for the purpose of upholding the role of the Court, rather than attempting to establish the degree to which the collusion is manifest, which, by definition, will often be difficult and open to doubt, what matters most, especially if the case is 'suspect', is establishing that the interpretation of Community law sought genuinely corresponds 'to an objective requirement inherent in the resolution of a dispute'.

35. In the light of those considerations, I therefore am of the opinion that the alleged collusive nature of the main proceedings cannot of itself have the effect of rendering the reference inadmissible, and that the focus must instead be directed, and with particular rigour, at assessing the relevance of the questions referred.

(2) *Directive 1999/70*

(i) Clause 5

36. By Question 1(b), which falls to be considered first, the referring court asks whether Clause 5 of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, which lays down no restrictions for fixed-term contracts of employment with workers over the age of 52.

37. Adopting the rigorous approach I have advocated above, I can say at once that, in my view, the Commission is correct in arguing that the question is inadmissible.

38. It is clear from its letter and purpose that Clause 5 applies where there are several fixed-term contracts in succession and, accordingly, the interpretation of that provision is of no relevance whatsoever to the facts of this case, which concerns the first and only contract of employment between Mr Mangold and Mr Helm.

39. In terms of the letter of the provision, the clause requires Member States to introduce into national law measures concerning 'objective reasons justifying the *renewal* of fixed-term contracts' (subparagraph (a)), 'the maximum total duration' of '*successive*' employment contracts (subparagraph (b)), or 'the number of *renewals*' of successive contracts (subparagraph (c)). The provision thus requires restrictive measures where *several successive* contracts are involved but has no application in the case of a worker engaged for a single fixed-term contract.

40. The literal argument is confirmed by the directive's purpose, which is 'to establish a framework to prevent abuse arising from the use of *successive* fixed-term employment contracts or relationships' (14th recital). What it is sought to regulate is not therefore the first-time fixed-term contract but rather the repeated use of fixed-term contracts, which is considered open to abuse.

41. Yet as Mr Mangold and Mr Helm have confirmed, their contract is a *first* and *only contract* of employment. It follows, in the light of the above discussion, that Clause 5 has no application to this contract and that therefore the interpretation of that clause is manifestly irrelevant to the resolution of the dispute in the main proceedings.

42. On that ground, I propose that the Court should rule that it has no jurisdiction to express a view on Question 1(b).

(ii) *Clause 8(3) (the 'non-regression clause')*

43. By Question 1(a), the Arbeitsgericht asks whether Clause 8(3) of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, which

in transposing Directive 1999/70 lowered the age at which fixed-term contracts of employment can be entered into without restrictions from 60 to 58.

Preliminary points

44. For a better understanding of this question, I should first recap the chronology of legislative provisions enacted in Germany:

— the 1985 Law to Promote Employment, as amended by the 1996 Law to Promote Growth and Employment, which allowed workers *over the age of 60* to be employed on fixed-term contracts with no restrictions;

— Paragraph 14(3) of the TzBfG, giving effect to Directive 1999/70, which in 2000 lowered the relevant threshold from age 60 to *58*;

— the Hartz law which amended that provision of the TzBfG, further lowering the threshold to *52*.

45. Given the above legislative chronology, the Commission argues that an issue of admissibility could also arise in relation to Question 1(a). It notes that Mr Mangold was not hired after reaching the age of 58, on the basis of the original version of Paragraph 14 (3) of the TzBfG (by reference to which the national court asks the question), but rather at the age of 56, as permitted under the subsequent Hartz Law which amended that provision. According to the Commission, it is therefore only in relation to the latter law that a ruling by the Court would be relevant.

46. For its part, the Arbeitsgericht gave a cursory explanation that an interpretation of the original version of Paragraph 14(3) of the TzBfG would still be useful, since a ruling of incompatibility in relation to that provision would automatically also strike down the later provision of the Hartz Law, relied upon by Mr Helm as justifying the fixed term in Mr Mangold's contract of employment.

47. However, under the rigorous scrutiny which I have proposed to bring to bear in this case (see point 35 above), that explanation appears incomplete and unconvincing. It does not give the Court to understand the reasons why, instead of asking the question by reference to the provisions applicable to the facts of the case (those resulting from the

amendments introduced by the Hartz Law), the national court chose to frame the question by reference to the law previously in force which appears not to be strictly relevant to this case.

48. Nevertheless, since the referring court has still provided the Court with all the legal details necessary for a useful answer to its queries, I agree with the Commission that question 1(a) should not be held inadmissible but that the Court might instead follow the practice, which it frequently adopts in these cases, of rephrasing the question so as to clarify what it is actually useful for the national court to know. The question would then become whether or not Clause 8(3) of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, *as amended by the Hartz Law*, which, *following the transposition of Directive 1999/70*, lowered the age at which fixed-term contracts of employment can be entered into without restrictions from 58 to 52.

Observations of the parties

49. With Question 1(a) rephrased accordingly, I note that the submissions relating to that question focused considerable attention on the meaning and effect of Clause 8(3), according to which '[i]mplementation of [the] [framework] agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.

50. The parties that made observations in relation to that clause went to some lengths to show that by enacting the provisions referred to above the German legislature reduced (or did not reduce) the general level of protection provided to workers by national law prior to the transposition of Directive 1999/70.

51. According to Mr Mangold, a reduction did take place, as the age at which the restrictions on fixed-term contracts cease to apply was lowered considerably. The German Government disagrees, arguing that the lowering of the age-limit complained of was more than offset by the introduction of new safeguards for fixed-term employees such as a general prohibition of discrimination and the extension of the fixed-term contract restrictions to small businesses and to short-term work.

52. For my part, I am not sure whether the parties have correctly identified the key issue. They appear to take for granted that Clause 8 (3) is to be read as a binding provision, which

absolutely prohibits Member States from reducing the general level of protection already in place. It seems to me, however, that the matter of the nature and effect of such clauses is anything but settled and is in fact a source of lively contention among commentators.

53. An analysis of the nature and effect of such clauses is therefore required.

The legal nature of the clause

54. I will begin by noting that we are concerned here with provisions, traditionally described as *non-regression clauses*, which began to be included in the Community's social affairs directives at the end of the 1980s, [20] so as to provide, albeit by different forms of words, that the implementation of a particular directive should not constitute a 'justification', 'ground' or 'reason' for providing less favourable treatment than that already available in the various Member States. [21]

55. For the purposes of this analysis, two categories of non-regression clauses may be distinguished: those included only in the recitals to the relevant acts, [22] and those set out in the body of the directives or Community-level agreements negotiated by the social partners and given effect by directives. [23]

20 — A clause of this kind is also to be found in the Community Charter of the Fundamental Social Rights of Workers, the final recital of which states that 'the solemn proclamation of fundamental social rights at European Community level may not, when implemented, provide grounds for any retrogression compared with the situation currently existing in each Member State'.

21 — For a description of such clauses, see generally Martin, P., 'Le droit social communautaire: droit commun des États membres de la Communauté européenne en matière sociale?' in *Revue trimestrielle de droit européen*, 1994, No 4, p. 627.

22 — See, for example, the second recital to Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1); the fourth recital to Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (16th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) — Joint Statement by the European Parliament and the Council (OJ 2002 L 177, p. 13); and the fifth recital to Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 2004 L 159, p. 1).

23 — See, for example, Article 18(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18); Article 16 of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work (OJ 1994 L 216, p. 12); Article 6 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6); Clause 6(2) of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9); Article 6(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); Article 8(2) of Council Directive 2000/78/EC; Article 9(4) of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees (OJ 2002 L 80, p. 29); Article 23 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9)

56. This second category, to which Clause 8 (3) of the framework agreement belongs, has *binding legal character* according to the majority view among legal writers. Others commentators, however, regard it as quintessentially political: a mere exhortation, in effect, to national legislatures not to reduce the protection already provided in national law when transposing directives in the field of social policy.

57. For my part, I tend to the former view, both in general and in this particular case, on grounds both literal and schematic. [24]

58. As regards the literal argument, the form of the verb used ('Implementation of [the] [framework] agreement *shall not constitute* valid grounds for reducing the general level of protection') [25] suggests, in the light of the usual canons of construction applied in these cases, [26] that a mandatory provision was intended, imposing on Member States a full-blown negative *obligation* not to use transposition as a ground for reducing the protection already enjoyed by workers under existing national law.

59. That interpretation appears borne out also by the placement of the clause within the scheme of the directive. It was not included among the recitals (as similar clauses had sometimes been), but in the actual body of the directive. Like all the other normative provisions of the directive, therefore, the clause in question, in accordance with the third paragraph of Article 249 EC, is binding on Member States as to the result to be achieved, which in this case is to avoid the possibility of transposition providing a legitimate basis for rowing back on existing protections at national level.

The effect of the 'non-regression' obligation

60. That having been clarified, I will now attempt to analyse the effect of the obligation laid down by Clause 8(3).

61. In that regard, let me say at once that, contrary to what Mr Mangold argues, this is not a standstill clause absolutely prohibiting

24 — A view shared by the Italian Constitutional Court, which held, in its judgment 45/2000, that the non-regression clause of Clause 6(2) of Directive 97/81 gives rise to a 'specific obligation under Community law' (Constitutional Court Judgment No 45 of 7 February 2000, in Mass. giur. Lav., 2000, p. 746 et seq.).

25 — Emphasis added.

26 — To that effect, see, for example, Case C-245/03 *Merck, Sharp & Dohme* [2005] ECR I-637, paragraph 21.

any lowering of the level of protection that exists under national law at the time of implementation of the directive.

62. It is rather, in my opinion, a *transparency clause*, in other words a clause which, in order to guard against abuses, prohibits Member States from taking advantage of the transposition of the directive to implement, in a sensitive area such as social policy, a reduction in the protection already provided under their own law, while blaming it (as unfortunately all too often happens!) on non-existent Community law obligations rather than on an autonomous home-grown agenda.

63. This follows firstly from the letter of the clause, which does not preclude, as a general rule, any reduction in the level of protection enjoyed by workers, but rather provides that 'implementation' of the directive cannot itself constitute 'valid grounds' for undertaking such a reduction. Subject to compliance with the requirements of the directive, a curtailing of protections at national level is therefore entirely possible, but only on grounds *other than* the need to give effect to the directive, the existence of which grounds it is for the Member State to demonstrate.

64. On proper consideration, any other interpretation would not only do violence to the very clear language of the clause but would also be at odds with the scheme of allocation of responsibilities intended by the Treaty, which in the domain of social policy assigns to the Community the task of 'support[ing] and complement[ing] the activities of the Member States' in specified fields (Article 137 EC).

65. If the clause in question were to be interpreted not, as I have argued, as a transparency requirement, but rather as a fully-fledged standstill provision, then upon implementation of the directive Member States would find themselves denied the possibility not only — as is obvious — of contravening the obligations imposed by the directive but also of absolutely any rowing back, for good cause, in the area governed by the directive. But that would be neither to support nor to complement their activities but to tie their hands completely in the field of social policy.

66. That having been said, in terms of the effect of Clause 8(3), it remains to be determined whether the reference to 'implementation' of the directive means the 'first implementation' of the directive or, more generally, any legislation, including any later legislation, enacted within its sphere of application.

67. The German Government appears to favour the former interpretation. It argues that the clause in question constrains the national legislature only in relation to the *first* implementation of Directive 1999/70 and has no bearing on any subsequent interventions by the state. In the instant case, therefore, there could be no question of the clause being violated, since it had no bearing on the Hartz Law, the legislation at issue here, which was enacted only in 2002, two years after the formal transposition of the aforementioned directive via the TzBfG.

68. I take the view, however, that that argument cannot be accepted, and that Mr Mangold is correct, on both literal and teleological grounds, in urging the contrary interpretation.

69. As far as the language of the clause is concerned, I would point out that in providing that 'implementation' of the directive does not constitute valid grounds for regression, the clause uses a very broad term, capable of covering any domestic rules intended to achieve the results pursued by the directive. It is therefore not only the national provisions that give effect to the obligations flowing from the directive which must comply with the transparency requirement described above, but also any subsequent provisions that, to the same end, supplement or amend the rules already adopted.

70. As regards its objectives, let me say again that the clause is aimed at preventing national legislatures using Directive 1999/70 as grounds for reducing the safeguards enjoyed by workers, by blaming the directive for measures which are in fact the product of their own autonomous legislative choices.

71. Clearly, the risk of such behaviour on the part of the State is greatest at the time of first transposition, when a clear distinction, within the same legislation, between provisions enacted to meet Community law obligations and those having no such purpose is very difficult to discern and the temptation to 'dress up' the latter as the former can therefore be all the stronger.

72. However, it seems to me that the risk is still there afterwards, in particular when — as in the present case — the legislature supplements or amends the legislation of first transposition by inserting new provisions. It may be equally unclear in the case of such provisions, which are merged in with those previously enacted, whether they are still attributable to a requirement of Community law or to the domestic legislature's own agenda.

73. For that reason, it seems to me that laws, such as the Hartz Law in this case, enacted

subsequent to the legislation of first transposition, which amend or supplement that legislation, are also subject to the transparency requirement laid down by Clause 8(3). Since the Hartz Law amended the TzBfG, which was the legislation that gave effect to Directive 1999/70, it too must therefore be tested in that respect.

Application to the case in hand

74. In the light of all that, and turning now to the case in hand, I can say right away that to my mind Germany did not violate Clause 8(3) by enacting the Hartz Law.

75. The order for reference and the German Government's observations at the hearing disclose a number of factors to indicate that the ground on which the Hartz Law lowered from 58 to 52 the age at which fixed-term contracts may be entered into without restriction was the need to promote the employment of older people in Germany and was thus quite independent of the requirements of implementing Directive 1999/70.

76. The first such factor is the fact that both before and after the implementation of the directive various legislative interventions took place to gradually reduce the age threshold in question. These were, as noted earlier: in 1996, the Law *to Promote* Growth and *Employment*, which set the age-limit at 60; in 2000, the TzBfG, which dropped the age-limit to 58; and finally, in 2002, the Hartz Law, which further lowered it to 52. The German legislature, therefore, even before the implementation of the directive, decided autonomously to reduce the protection provided in this area to older workers, with a view to boosting their prospects of employment, and it persisted with this policy even after the implementation of the directive, thereby demonstrating its intention of pursuing its own economic and social policy agenda independently of Community constraints.

77. A second factor, which relates to the Hartz Law specifically, is the fact that that law was enacted in the wake of a report by a government commission which found that 'an unemployed person over the age of 55 has about a one-in-four chance of reemployment' (see point 15 above). The lowering of the age threshold was therefore clearly based on specific employment-related considerations and not an exploitation of the obligations imposed by the Community.

78. In the light of those factors, I therefore take the view that Clause 8(3) of the framework agreement does not preclude a national provision, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which,

for justified reasons of employment policy unconnected with the transposition of Directive 1999/70, lowered the age at which fixed-term contracts of employment can be entered into without restriction from 58 to 52.

79. It still remains to be examined, however, whether that lowering is compatible with the other directive (Directive 2000/78) cited by the national court in the second question referred, which I now turn to consider.

(3) *Directive 2000/78*

80. By its second question, the referring court asks whether Article 6 of Directive 2000/78 precludes a national provision, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which allows workers over the age of 52 to be employed on fixed-term contracts with no restrictions even where there is no objective reason, thereby departing from the general rule under domestic law that an objective reason is normally required.

81. It will be recalled that according to Article 6(1) of that directive 'Member States may provide that *differences of treatment* on grounds of age shall not constitute discrimination, if, within the context of national law, they are *objectively and reasonably justified by a legitimate aim,* including legitimate employment policy, labour market and vocational training objectives, and if *the means of achieving that aim are appropriate and necessary*'.

82. Under subparagraph (a) of that article, such differences of treatment may include, inter alia, 'the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for ... older workers ... in order to *promote their vocational integration* or ensure their protection'.

83. It may also be recalled that, even before the adoption of Directive 2000/78 and the specific provisions it contains, the Court had recognised the existence of a general principle of equality which is binding on Member States 'when they implement Community rules' and which can therefore be used by the Court to review national rules which 'fall within the scope of Community law'. [27] That principle requires that 'comparable situations

27 — Case C-442/00 *Caballero* [2002] ECR I-11915, paragraphs 30 to 32. Other cases in which the Court reviewed the compatibility with the general principle of equality of national rules adopted in pursuance of Community acts, in particular regulations, include Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraphs 9 to 10; Case C-351/92 *Graff* [1994] ECR I-3361, paragraphs 15 to 17; and Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraphs 35 to 40.

must not be treated differently and different situations must not be treated in the same way unless such *treatment* is *objectively justified*' [28] by the pursuit of a legitimate aim and provided that it 'is *appropriate and necessary* in order to achieve' that aim. [29]

84. As a comparison between them shows, both requirements — the specific requirement of the directive and the general requirement just described — are essentially identical, so that the analysis of the compatibility of a rule such as the German one could be carried out in the light of either requirement with similar results. The better option is perhaps to use the principle of equality — which was also raised, albeit indirectly, by the national court — since, being a general principle of Community law imposing an obligation that is precise and unconditional, it is effective against all parties and, unlike the directive, could therefore be relied upon directly by Mr Mangold against Mr Helm and could be applied by the Arbeitsgericht in the main proceedings.

85. But the result would be no different if the issue were dealt with on the basis of Article 6 of Directive 2000/78. In that case too, to determine whether a national rule such as Paragraph 14(3) of the TzBfG constitutes age-based discrimination would similarly require analysing whether there is a difference of treatment, and, if so, whether it is justified by a legitimate aim and is appropriate and necessary in order to pursue that aim.

86. Before embarking on that analysis, it may be recalled that Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, is in the following terms: 'An objective reason is not required for a fixed-term contract of employment if upon commencing the fixed-term employment the employee is aged 58 or over. A fixed term may not apply if there is a close objective connection with a previous permanent contract of employment between the same employee and the same employer ... For the period to 31 December 2006, the age-limit referred to in the first sentence hereof shall be 52 instead of 58.'

87. In that light, I therefore turn to the analysis described above, which, to repeat, entails establishing whether a difference of treatment exists and, if so, whether it is objectively justified and whether the principle of proportionality has been observed.

28 — Case C-56/94 *SCAC* [1995] ECR I-1769, paragraph 27; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61; and Case C 292 97 *Karlsson* [2000] ECR I-2737, paragraph 39.

29 — Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39.

88. As for the first point, it does not seem to me that there is much room for doubt. As the referring court noted, the possibility of entering into fixed-term contracts without restrictions, in particular in the absence of an objective reason, is available only in respect of workers over the age of 52. The difference in treatment based on age is therefore self-evident.

89. Notwithstanding the literal meaning of the provision in question, it also seems fairly clear to me that there is an objective justification, albeit implicit, for that difference.

90. If one looks beyond the in one sense misleading wording of the provision (which appears to dispense with the requirement of an 'objective reason' for fixed-term contracts with workers over the age of 52) and if one considers instead — as discussed above — the government commission report which led to the enactment of the Hartz Law (see points 15, 76 and 77 above), one realises that both the provision itself and its predecessors have a very specific justification. They are all aimed at enhancing the employability of unemployed older workers who, according to the official figures cited by the commission, have particular trouble finding new employment.

91. It is more difficult, however, to determine whether that aim has been pursued by appropriate and necessary means. I am impressed, however, by the analysis of this issue conducted by the national court, which came to a clear conclusion that Paragraph 14 (3) of the TzBfG goes beyond what is necessary in order to enhance the employability of unemployed older workers.

92. In the first place, the national court observed that the contentious provision allows 'a 52-year-old worker to be employed on a fixed-term contract for what is effectively an unlimited duration (13 years, for example, up to the age of 65)' or 'to be employed on an indefinite number of short fixed-term contracts with one or more employers' up to that age. [30]

93. The national court also pointed out that the age threshold of 52, which is lower, moreover, than the age threshold of 55 referred to by the aforementioned government commission (see point 15 above), is in practice reduced by a further two years, since the contentious provision prohibits a fixed-term hiring if the 52-year-old worker 'was previously employed under a contract *of*

30 — See Order for Reference, p. 15.

indefinite duration', but not if he or she was previously employed under a fixed-term contract, which, according to the other provisions of the TzBfG, [31] may last for up to two years. [32]

94. In short, according to the national court's analysis, the contentious provision ultimately means that workers hired on a fixed-term basis for the first time after turning 50 can thereafter be employed on a fixed-term basis without restrictions until their retirement.

95. In those circumstances, it seems to me that the national court is right in its view that this goes beyond what is necessary in order to enhance the employability of older workers. It does indeed make it easier for them to find a new job, but at the price of their being, in principle, *permanently* excluded from the safeguards that go with permanent employment, which, according to the intentions of the social partners endorsed by the Community legislature, must instead continue to be 'the general form of employment relationships' for all (paragraph 6 of the general considerations of the framework agreement annexed to Directive 1997/70; see point 3 above).

31 — Paragraph 14(2) of the TzBfG.

32 — See Order for Reference, pp. 6 and 12.

96. Nor, for that matter, may it be objected that the lowering of the age threshold from 58 to 52 under the Hartz Law applies only until 31 December 2006. That objection is met by simply pointing out that by that date a large proportion of the workers covered by the Hartz Law (Mr Mangold among them) will have turned 58 and will therefore fall once more under the special rules laid down by Paragraph 14(3) of the TzBfG. Accordingly, for those workers at least, the exclusion from the safeguards of stable employment is already permanent and therefore disproportionate.

97. In the light of the Arbeitsgericht's analysis, it therefore seems to me that the aim of enhancing the employment prospects of older workers has been pursued by means which are clearly disproportionate and that therefore the treatment accorded workers over 52 by Paragraph 14(3) of the TzBfG constitutes full-blown discrimination on grounds of age.

98. On those grounds, I take the view that Article 6 of Directive 2000/78 and, more generally, the general principle of non-discrimination preclude a national rule, such as the provision at issue in this case, which allows persons over the age of 52 to be employed on fixed-term contracts with no restrictions.

(4) *The consequences of the interpretation adopted by the Court*

99. Before concluding, it remains to identify the legal consequences which the national court must draw from the Court's decision in circumstances, such as those in the main proceedings, in which an interpretation is sought of a directive in the context of a dispute between private parties.

100. It remains, that is, to answer the third question, by which the national court asks what the effect would be on the main proceedings of a declaration that a national rule such as that in issue was incompatible and, specifically, whether following such a declaration the national court could disapply that rule.

101. On close consideration, that question would be disposed of if the Court — following my suggestion — were to decide to declare incompatible a law, such as the law in issue, using as its yardstick of interpretation the general principle of equality, the clear, precise and unconditional content of which is binding on all legal persons and can therefore be relied upon by private parties both against the State [33] and against other private parties (see point 84 above). There is no doubt that in that eventuality the national court would have to disapply a national rule held contrary to that principle which is regarded as having direct effect.

102. The question regains all its significance, however, if the Court decides — as I have suggested as an alternative — to declare incompatibility in the light of the rule against discrimination laid down in Article 6 of Directive 2000/78. In that eventuality, the answer to the question would be complicated still further by the fact that at the material time the deadline for transposition of the directive had not yet passed (see points 8 and 9 above).

103. In that regard, the Arbeitsgericht and, in substance, the Commission too argue that if Directives 1999/70 and 2000/78 were to preclude a provision, such as Paragraph 14 (3) of the TzBfG, as amended by the Hartz Law, which allows workers over the age of 52 to be employed on fixed-term contracts with no restrictions, that provision would have to be disapplied and the general rule under Paragraph 14(1) of the TzBfG, which allows such contracts to be entered into only if objectively justified, applied in its place.

33 — See Case C-27/95 *Bakers of Nailsea* [1997] ECR I-1847, paragraph 21.

104. According to the Arbeitsgericht and the Commission, the contentious national provision would also have to be disapplied in the event it were found incompatible with Directive 2000/78 alone, albeit the deadline for transposition had not yet passed. In that case, if I understand them correctly, such a consequence would be the natural sanction for the breach of the obligation on Member States to refrain, prior to that deadline, from adopting measures — such as, in their opinion, the measure in issue — liable seriously to compromise the result prescribed by the directive.

105. It is true — the Commission goes on — that, being addressed to Member States, Community directives, including those whose transposition deadline has not yet passed, cannot give rise to 'horizontal' direct effect, in other words as against a private party, such as Mr Helm, being sued by another private party. However, in the present case, the application of the directives concerned would not give rise to such an effect: if Paragraph 14(3) of the TzBfG were to be set aside, it is another provision of national law, Paragraph 14(1) of the TzBfG, which would fall to be applied and not, of itself, any provision of the directives concerned.

106. Let me say at once that, in my opinion, that view cannot be upheld. It ignores the fact that in those circumstances the disapplication of the national rule in question would in reality constitute a direct effect of the Community act and it would therefore in fact be the Community act that prevented the party concerned from relying on the rights conferred on him by his own national law.

107. In the present case, for instance, the contrary view would mean Mr Helm being prevented by a directive from relying in the Arbeitsgericht on his right under national law to hire workers over the age of 52 on fixed-term contracts with no restrictions. [34]

108. That would clearly be at odds with the settled case-law of the Court according to which a directive, being formally addressed to Member States, 'cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual'. [35]

34 — That being so, it is therefore not possible to rely (and the Arbeitsgericht and the Commission do not seek to do so) on Case C-443/98 *Unilever* [2000] ECR I-7535, in which the Court allowed the disapplication of a national technical rule adopted during the period of postponement of adoption prescribed by Article 9 of Directive 83/189, but only because it found that that directive 'create[d] neither rights nor obligations for individuals' and therefore did 'not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it' (paragraph 51).

35 — See, in particular, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] ECR I-3565, paragraph 73

109. But that is not all. The above principle applies, as has been confirmed time and again, in cases where the deadline for transposition of the directive relied upon had already passed and the obligation on Member States was therefore in that respect unconditional. It must obviously apply with even greater force when the deadline has not yet elapsed.

110. Nor is that conclusion contradicted, in my view, by the case-law cited by the Arbeitsgericht and by the Commission, in which the Court held that Member States had an obligation to refrain, in advance of the deadline for transposition, from adopting measures liable seriously to compromise achievement of the result prescribed by a directive. [36] On the contrary, just recently the Court explained that the existence of that obligation did not give individuals the right (which is in fact expressly excluded) to rely on the directive 'before national courts to have a pre-existing national rule incompatible with the Directive disapplied'. [37] That statement obviously appears even more justified where, as here, the dispute in the main proceedings is between two private parties.

111. In my opinion, therefore, in the main proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, if it is held incompatible with Directive 1999/70 or — according to my proposal — with Directive 2000/78.

112. That said, however, I must add that — again according to settled case-law — this conclusion does not absolve the referring court of the duty to construe its own law in a manner consistent with the directives.

113. In cases where a directive cannot produce direct effect in the main proceedings, the Court has long held that the national court must none the less 'do whatever lies within its jurisdiction', 'having regard to the whole body of rules of national law', using all 'interpretative methods recognised by national law', in order to 'achieve

36 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58.

37 — Case C-157/02 *Rieser* [2004] ECR I-1477, paragraph 69.

the result sought by the directive'. [38] National courts, just like other Member State authorities, are subject to the obligation arising under the third paragraph of Article 249 EC, according to which directives have binding effect, and, more generally, under the second paragraph of Article 10 EC, which requires Member State authorities 'to take all appropriate measures, whether general or particular' necessary to ensure compliance with Community law. [39]

114. This duty to construe national provisions in conformity with Community law clearly applies in the case of Directive 1999/70, the deadline for transposition of which had already passed by the time Mr Mangold entered into Mr Helm's employ, which directive, however, is of no great relevance in my analysis, since it is my view that the questions relating to it must be either ruled inadmissible (Question 1(b), see point 42 above) or answered in the negative (Question 1(a), see point 78 above).

115. But, on proper consideration, the duty in question also applies in the case of directives, such as Directive 2000/78 (which is of greater relevance in my analysis: see point 98 above), which had already entered into force at the material time but the deadline for transposition of which had as of then not yet expired. [40]

116. Why this is so I will now consider.

117. It must first be recalled that the duty of consistent interpretation is one of the 'structural' effects of Community law which, together with the more 'invasive' device of direct effect, enables national law to be brought into line with the substance and aims of Community law. Because it is structural in nature, the duty applies with respect to all sources of Community law, whether constituted by primary [41] or secondary legislation, [42] and whether embodied in acts whose legal effects are binding [43] or not. Even in the case of recommendations, the Court has held, 'national courts *are bound* to take [them] into consideration in

38 — Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, paragraphs 113, 115, 116 and 118.

39 — See, in particular, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, *Faccini Dori*, paragraph 26, *Inter-Environnement Wallonie*, paragraph 40, and Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraph 48.

40 — See, to that effect, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 15 and 16.

41 — See Case 157/86 *Murphy* [1988] ECR 673, paragraph 11.

42 — See cases cited in footnotes 34 and 35.

43 — See cases cited in footnotes 34 and 35.

order to decide disputes submitted to them'. [44]

118. It is clear then that the same duty must be held to apply also in the case of directives for which the deadline for transposition has not yet elapsed, since these are one of the sources of Community law and produce effects not only as from that deadline but from the date of their entry into force, that is, in terms of Article 254 EC, on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

119. This is also borne out, moreover, by the case-law cited (see points 104 and 110 above), which holds that '[a]lthough the Member States are not obliged to adopt [the] measures [to implement a directive] before the end of the period prescribed for transposition', it follows from the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC that 'during that period they must refrain from taking any measures liable seriously to compromise the result prescribed'. [45]

120. There can be no doubt but that this negative duty, like the positive duty to take all measures necessary to achieve the result sought by the directive, is borne by *all Member State authorities*, including, within their sphere of responsibility, the national courts. It therefore follows that, in advance of the deadline for transposition, the national courts too must do everything possible, in the exercise of their powers, to avoid the result prescribed by the directive being jeopardised. In other words, they must also endeavour to favour the interpretation of national law which is most in keeping with the letter and spirit of the directive.

121. Coming now to the case at hand and drawing the conclusions from the above analysis, I take the view that in the proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, for being incompatible with the prohibition of age-based discrimination laid down by Article 6 of Directive 2000/78. However, even though the deadline for the transposition of that directive has not yet expired, the Arbeitsgericht is bound to take into consideration all rules of national law, including those having constitutional status, which contain the same prohibition, in order to arrive, if possible, at a result consistent with what the directive prescribes.

44 — See Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 18. Emphasis added.

45 — *Inter-Environnement Wallonie*, paragraph 45.

122. For all the reasons set out above, I therefore take the view that a national court hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive. However, in view of the duties that flow from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC, the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired.

IV — Conclusion

123. In the light of the foregoing considerations, I propose that the Court should reply to the Arbeitsgericht München as follows:

'1 (a) Clause 8(3) of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP does not preclude a national provision, such as Paragraph 14(3) of the Law on Part-Time and Fixed-Term Employment of 21 December 2000, (the TzBfG), as amended by the First Law for the Provision of Modern Services on the Employment Market of 23 December 2002 (known as "the Hartz Law"), which, for justified reasons of employment policy unconnected with the transposition of Directive 1999/70, lowers the age at which fixed-term contracts of employment can be entered into without restriction from 58 to 52.

(b) The Court has no jurisdiction to express a view on Question 1(b).

2. Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, more generally, the general principle of non-discrimination preclude a national rule, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which allows persons over the age of 52 to be employed on fixed-term contracts with no restrictions.

3. A national court, hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive.

However, in view of the duties that flow from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC, the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired'.