A COMPARATIVE STUDY OF THE REGULATION GOVERNING THE USE OF FIXED-TERM CONTRACTS IN THREE EU MEMBER STATES

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TABLE OF ABBREVIATIONS

CJEU Court of Justice of the European Union
CGT Confédération Générale du Travail
CNE Contrat Nouvelle Embauche
Commission Commission of the European Communities
Council Council of the European Communities
CPE Contract Première Embauche
DTI Department of Trade and Industry
EAT Emloyment Appeal Tribunal
ECHR European Convention on Human Rights
ECR European Court Reports
EEC European Economic Community
EES European Employment Strategy
ERA Employment Rights Act
ETUC European Trade Union Confederation
EU European Union
EU Charter Charter of Fundamental Rights of the European Union
FTER Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations
HL House of Lords
ICR Industrial Court Reports
ILJ Industrial Law Journal
ILO International Labour Organisation
KKO Finnish Supreme Court
LFS Labour Force Survey
NAP National Action Plan
OJ Official Journal of the European Communities
Soc Chambre Social de la Cour de Cassation
SOSR Some Other Substantial Reasons
TEC Treaty Establishing the European Community
TEU Treaty on European Union
TFEU Treaty on the Functioning of the European Union
TT Finnish Labour Court
TURERA Trade Union Reform and Employment Rights Act
UKSC United Kingdom Supreme Court
UNICE Union of Industrial and Employers’ Confederations of Europe
A COMPARATIVE STUDY OF THE REGULATION GOVERNING THE USE OF FIXED-TERM CONTRACTS IN THREE EU MEMBER STATES
I GENERAL PART – THE RESEARCH FRAMEWORK

1 ABOUT THE OBJECTIVES OF THE RESEARCH IN GENERAL

A common feature of many Western European countries is that they have adopted regulations on protection against unjustified termination of employment contracts of indefinite duration. This has resulted in the need to prevent the circumvention of employment protection related to contracts of indefinite duration by using fixed-term contracts. As a result, many countries have deemed it important to restrict the use of fixed-term contracts.

A fixed-term employment contract means a contract the end of which is determined by objective reasons, such as reaching a specific date, completing a specific task, or the occurrence of a specific event. In Finland, the duration of fixed-term contracts is stipulated, so that an employment contract is valid until further notice unless it is concluded for fixed-term on objective reasons. The use of fixed-term contracts is restricted by the Employment Contracts Act (työsopimuslaki) so that fixed-term contracts concluded on an employer's initiative without an objective reason as well as successive fixed-term contracts concluded without objective reasons are deemed contracts of indefinite duration. Therefore, the precondition for concluding fixed-term contracts is the existence of an objective reason determined by the law. Furthermore, it is required that fixed-term contracts are not used for the purposes of circumventing protection against unjustified dismissal related to contracts of indefinite duration. The use of fixed-term contracts is not permitted when the employer’s need for labour is permanent. This general criterion has, however, seemed to be relatively difficult to interpret.

In Finland, attention has been paid to the number of contracts, the total duration in the case law of the Supreme Court and the Labour Court, as well as the question of whether the tasks have remained similar during the contract periods. The preconditions for the use of successive contracts are very ambiguous and the

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2 The grounds for fixed-term contracts concluded on the employer's initiative have been determined by a detailed but not exhaustive list in the Government proposal for the Employment Contracts Act 157/2000.
The Framework Agreement lays down optional means of preventing the abuse of successive fixed-term contracts. These are objective reasons, the number of renewals and the maximum total duration. The Directive lays down a binding objective of preventing abuse arising from successive contracts but optional means to achieve this objective. In this regard, broad discretion is left to the Member States. According to the Framework Agreement, the Member States may introduce more favourable provisions governing the use of fixed-term contracts but the implementation of the agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement. The Directive is ambiguous concerning the realisation of its objective. The CJEU has taken the view that the intention of the Directive is not to lay down minimum material protection for individuals to rely upon before national courts, and has accepted the use of successive contracts for years in the same tasks without there being abuse. The Court has not interpreted the preconditions for use of fixed-term contracts very strictly, and its case law partly contradicts the objective of the Directive.

This research assesses how the Framework Agreement on Fixed-Term Work is implemented with respect to the limits on the use of successive fixed-term contracts, and analyses its effects on national law in the research countries. How has the demarcation between prohibited and accepted use of fixed-term contracts developed in national law since implementation of the Directive? To what extent do national laws permit the use of a notice period in fixed-term contracts?

The research assesses how it has been possible to prevent the abuse of successive contracts by national laws implementing the Directive in the research countries and how the Directive achieves its objective in this regard. As to direct effect, the possible problems in effective enforcement of the Directive are also examined.

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3 KKO 2010:10: An employer’s nursery activity had been based on yearly renewed subcontracts. On this ground, the employer was deemed to have an objective reason for concluding a fixed-term contract with the employee for one year at a time for five years. TF 2006:69, where the need for labour was deemed to be permanent after nine fixed-term contracts concluded within two and half years.

4 This procedure, adopted for the first time in the Treaty of Maastricht, is currently incorporated in TFEU Article 155.
As protection against abuse of successive fixed-term contracts laid down by the Directive is relatively weak, the relation between the Directive and the fundamental rights of the European Union are examined in order to justify the notion that the rights of fixed-term employees should be strengthened by specifying the grounds on which fixed-term contracts can be concluded in EU law.

The research also explores the regulation model adopted by ILO convention No. 158 and Recommendation No. 166 and examines how the CJEU’s case law on the interpretation of Clause 5 of the Framework Agreement on Fixed-Term Work corresponds with the restrictions on the use of fixed-term contracts laid down by the above-mentioned ILO regulation.

2 THE SCOPE OF THE RESEARCH, ITS BASIS AND THE MAIN RESEARCH TASKS

The methodological basis of the research is comparative, aiming to compare the law governing fixed-term contracts in Finland, France, and the United Kingdom. These countries belong to different legal traditions, the development of which the EU legal order, with its common objectives, has attempted to approximate. However, the differences in legal traditions must be taken into account when common regulations are developed at the EU level, to prevent some trajectory effects occurring in the implementation of the EU law at national level.

Finland belongs to the Scandinavian legal tradition, mostly of Roman-German origin, in which written law has a central position as a source of law.

The legal order of the United Kingdom belongs to the Anglo-American legal tradition, where precedents have traditionally had a central role as a legal source. The legal orders, however, have been approximated because legislative power has been transferred to the parliament and because of the overly stressed role of the CJEU in developing the EU law.5

French law belongs to the continental Roman-German legal family, where written law and individual rights included in civil codes traditionally create a principal source in various areas of private law, although the role of the Court of Cassation in developing the legal system is increasing.6

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This research contains a country-specific analysis of the regulations on the conclusion and renewal of fixed-term contracts in Finland, France and the United Kingdom. This includes a presentation of the legal position, the regulations, case law, and applicable parts the labour market practices of the research countries.\textsuperscript{7} The development of the case law of the research countries and the background factors that have affected it are described. The first purpose is to determine how the fixed-term employment was restricted in national regulation before the Directive on Fixed-term Work was introduced. The aim is to describe what kind of experienced labour problems and practical working life needs have been in the background of the regulations governing the use of fixed-term contracts and how the regulations are formed in the social and legal practice of these countries.

The research examines how the acceptable use of fixed-term contracts has been shaped in the CJEU’s case law and how the Non-Regression Clause of the Framework Agreement has affected the interpretation of national law governing the use of successive fixed-term contracts in the CJEU’s case law. Moreover, the research analyses how the principle of non-discrimination, as well as secondary legislation on discrimination and equality have affected the acceptable use of fixed-term contracts in the CJEU’s case law. As fixed-term contracts are recognised as an employability tool in EU employment policy and the acceptable use of such contracts is affected by the legislation on discrimination, along with the Framework Agreement, the possible tensions between the EU employment policy and the EU employment law are examined. In this regard, the position of fixed-term contracts in the employability part of the employment guidelines is explored. Furthermore, the research explores how the countries concerned have taken fixed-term contracts into account in their national action plans.

At the national level, the research explores whether and how the legal conditions of successive fixed-term employment contracts has changed in the case law of national courts since the implementation of the Directive on Fixed-Term Work. Have the problems associated with using fixed-term employment contracts been solved at the national level? Has the legal status of countries converged in this respect, and do they correspond with the CJEU’s case law? Has the legal development corresponded with the purpose of the Directive, or are there still discernible areas of abuse or grievances? Has the legal situation in the research countries converged or diverged as a result of the Directive? As far as case law in the research countries has shaped the research countries’ legal situation in various ways, the research seeks to find explanatory factors for this development.

\textsuperscript{7} At this point, however, it is important to note that the use of fixed-term contracts in the research countries is restricted by a generally applicable law of individual rights.
By these means, the research aims to explore the entirety of the legal systems of the research countries and the existing EU law and to clarify how the abuse of successive fixed-term employment periods has been prevented. Furthermore, the research considers whether the national legal position corresponds with the objectives adopted by the EU employment policy guidelines regarding fixed-term contracts.

Since the preconditions for the use of fixed-term contracts and employment security related to contracts of indefinite duration are intertwined with each other and together constitute the equilibrium between flexibility and security at the national level, the role of fixed-term contracts as a flexibility tool is also compared to the employment security level of permanent contracts. Is there a more stringent regulation governing the use of fixed-term contracts in countries of high employment security related to contracts of indefinite duration and, vice versa, are there looser restrictions for the use of fixed-term contracts in the low employment security countries? In this way, whether the regulation (or legal conditions more generally) supports the use of fixed-term contracts as a means of flexibility in the high employment security countries can be clarified, and whether the conclusion that fixed-term contracts are an alternative instrument of flexibility compared to the employment security related to contracts of indefinite duration can be drawn.

The research will evaluate whether the regulation of fixed-term contracts has been justified by the EU employment policy arguments at the national level. Whether the use of regulations on the conditions and practices of fixed-term employment has promoted the role of fixed-term employees on route to permanent employment contracts and how the regulation has contributed to the weaker person’s opportunities to enter the labour market will be examined. Furthermore, in countries where labour mobility is limited, the research clarifies what regulatory efforts have been put in place to support the fixed-term worker’s re-employment. The purpose is to find out whether a threshold on concluding fixed term contracts has been lowered in order to support employment.

The research explores the regulatory sanctions associated with violating the limitations on the use of successive fixed-term employment contracts and their legal development. Finally, whether the national regulation is fulfilling the requirement of effectiveness set by the Directive will be assessed, and the extent to which the sanctions have prevented the abuse of fixed-term contracts in each research country will be evaluated.
2.1 RESEARCH LIMITATIONS

The research focuses on legislation on use of fixed-term employment contracts mainly in private sector. The special legislation on fixed-term contracts in public sector has been excluded. The research also excludes the effects of the directive on the collective agreements, exploring only the impacts of the Directive on the legislation and case law.

Temporary agency work has been entirely excluded from this research because a specific EU regulation applies to it.\(^8\) Neither does the research address the use of fixed-term contracts from the perspective of equal treatment between men and women. Moreover, the research deals with the equal treatment of fixed-term employees (the non-discrimination principle in the Framework Agreement) only to the extent that the principle on prevention of abuse of fixed-term contracts requires.

As the scope of regulation restricting the use of fixed-term contracts is relatively narrow in the UK, a considerable proportion of fixed-term contracts become under assessment in accordance with the regulations determining fair grounds for dismissal in employment relationships valid until further notice. For this reason fair grounds for dismissal in the UK law are examined in the research. Correspondingly, as the scope of regulations restricting the use of fixed-term contracts in the Finnish and the French law is relatively extensive, protections against unfair dismissal is excluded from the research.

Finally, the effects of the EU enlargement and new Member States on EU employment policy are not explored.

2.2 THE METHODOLOGICAL ASSUMPTIONS OF THE RESEARCH

2.2.1 Comparative Method

The comparative method is deemed to have an important role in exploring national interpretations and enforcement models, especially when the directives leave extensive discretion to the Member States in respect of implementation.\(^9\) This concerns prevention of abuse arising from the use of successive fixed-term contracts, as the Framework Agreement lays down three optional measures to achieve this objective. This is a typical feature of the EU labour law directives, which obliges the Member States to achieve the common objectives, leaving the forms and means for the Member States to decide. The country-specific regulations have common objectives determined by the directives, the interpretation of which is governed by the CJEU. This justifies the use of the comparative method in the research.

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\(^9\) Liukkunen, Ulla: Globalisaatio, EU ja Henkilöstön Osallistuminen (2005), pg 50 - 51.
The EU legislation is often based on national regulation models that are used as a basis for the EU law and are then spread from one Member State to another by implementation of the EU law. In implementing the EU law the question is thus always about adopting elements of foreign regulation, which are related to a particular country’s internal legal culture and its political and societal background. These backgrounds may, however, differ substantially from one to another. In these circumstances, unifying regulation by means of harmonisation might be restricted by a different interpretation environment with different concepts, principles and judicial decision-making. Social and economic sector policies adopted by the EU are not necessarily accepted by the Member States solely for the sake of integration, which may cause difficulty in the correct enforcement of supranational legislation at national level.¹⁰

Achieving the objectives of the directives and harmonising the regulations is somewhat dependent on whether those objectives and means set by the directives are in contradiction with traditions, custom, and economic, cultural and political factors included in the national legal systems. Some difficulties related to harmonisation are avoided by resorting to minimum standard setting. In accordance with this, instead of converging the national law by enforceable rights, individuals benefit only from some generally determined social protection, leaving space for diversity and self-regulation either by management and labour at the national level or by some optional minimum standards which the Member States follow, as is the state of affairs concerning Clause 5 of the Framework Agreement on Fixed-Term Work.¹¹

This research explores the effects of such regulation from the perspective of the use of fixed-term contracts. The content of the Framework Agreement has been determined by the European social partners in social dialogue. The results of the research indicate how this has affected on the implementation of the Framework Agreement in the research countries and the CJEU’s interpretation of the Agreement.

Despite the fact that the EU law creates its own independent legal system with its interpretation methods and the CJEU’s case law in particular, because of its significant role in approximating or harmonising process, the EU law is evolving and needs to be developed in continuous interaction with the law of the Member States. This interaction is considered to require that in developing the EU law, the underlying national historical, cultural, social, and political change must be taken into account. This is important in avoiding problems caused by foreign legal transplants in to national legal systems via implementation of the EU law, the interpretation problems and national rejection effects deriving from those transplants. Correspondingly, the


¹¹ Syrpis, Phil: EU Intervention in Domestic Labour Law (2006), pgs 135 - 137
national legal principles and interpretation methods, as well as the background of a country’s legal system and its characteristics, should be taken into account in the EU law-making process as well as in comparing national laws with each other.\footnote{Kahn-Freund, Otto: Selected Writings, London 1978, pgs 296-297 and 319. Brostein, Arturo: International and Comparative Labour Law (2009), pgs 92 - 93. Liukkunen Ulla: Globalisaatio, EU ja Henkilöstön Osallistuminen (2005), pg 52.}

The crucial role of the comparative law is to compare the regulations of different countries with regard to certain research questions for the purposes of supranational law-making such as the EU law.\footnote{Liukkunen Ulla: Globalisaatio, EU ja Henkilöstön Osallistuminen (2005), pgs 49 - 50.} As the EU law spreads the influences of regulation from one country to another, the role of comparative law is crucial in the development of the EU law. By using a comparative method, it is possible to determine what national legal models and solutions are possible in the Member States which EU regulation is addressed to.

For this purpose, it is important to gather sufficiently meaningful information on national law, its origin and its application environment. This allows us to determine whether the legal systems are comparable with each other. In comparative law, it has been traditionally considered that the legal rules serving the same purpose only are comparable in their entirety.\footnote{For instance, norms concerning fixed-term contracts the aim of which is to prevent circumventing the employment security of permanent contracts.} In order to produce comparable research information, it is important to examine the intention of regulation, its societal background factors and its application environment as an entirety.\footnote{Zweigert, Konrad - Kötz, Hein: An Introduction to Comparative Law (1987) pgs 11-12.} This creates the conditions for the second function of comparative law, which is a comparison of the Member States with a comprehensive understanding of the legal phenomena and their interpretation in order to provide useful information and for regulatory convergence of the Member States.\footnote{Zweigert, Konrad - Kötz, Hein: An Introduction to Comparative Law (1987) pgs 17, Van Gerven, Walter: Comparative Law in a Texture of Communaritazion of National Laws and Europeanization of Community law, pgs 436 and 438.}

The function of comparative law is also to protect sufficient coherence governing the same legal phenomenon at the EU and national levels. This coherence is challenged by tension between the EU law applied by the CJEU and national legal traditions with the established customs developed by the national courts. The broad discretion left to the Member States in the EU law with regard to implementation of the directives can also cause fragmentation of law instead of its harmonisation or convergence in respect of the same legal phenomenon.\footnote{Lamponen, Helena (2008), pg 13.} This fact provokes criticism of the direction in which the EU law is going, where flexible regulation containing optional measures is prioritised over norms containing unambiguous and directly
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enforceable rights. This research provides an example of challenges in interaction between the EU law and national law from the perspective of law governing fixed-term contracts. As the regulation on the use of fixed-term contracts is linked to the protection against unjustified dismissal related to the contracts of indefinite duration in the legal systems of the research countries, the research examines whether it is justified to strengthen the rights of fixed-term employees by specifying the grounds on which fixed-term contracts can be concluded.

In comparative law, it has been considered to be important to examine the EU law and the similarities and differences between countries, the concepts and principles, the legal decision-making and the legislative functions of finding solutions to the same problems, and, above all, to consider what explains the differences where similar regulation is applied in different ways in between national legislatures. This also means assessing the traditional differences in national legal decision-making and in adopting the Union regulation and implementation.

On the other hand, because solutions in EU law-making derive from national law, it is important to examine the national legislative solutions and their application in order to clarify the EU law. Only once this complements EU law does it form a comparable entirety. Comparative method is used in this research for these reasons.

Moreover, in this research, the comparative method is used not just for describing the legal development of fixed-term contracts, but also for assessment of the legal similarities and differences and to clarify their causes. On this basis, it is possible to determine the extent to which the current legal situation in the countries researched is comparable in terms of the use of the fixed-term contracts and whether the judicial status corresponds with the objectives laid down by the Directive on Fixed-Term Work. This, and in particular the EU’s flexicurity development in the 21st century, enables description of the direction in which the regulation of use of fixed-term contracts is going.

2.2.2 Legal Dogmatics

The purpose of legal dogmatism is to create a coherent body of legal rules by interpretation and systematisation of its context. The interpretation of legislation aims at giving integrated meaning to legal concepts and texts within the limits

of legislation’s objectives. Interpretation is limited by the wording of the rules, their intention, comments in the jurisprudence, national case law and that of the CJEU and, finally, the EU directives.\textsuperscript{21} There are two trends in legal dogmatism. The point of departure in predominant legal dogmatism is to produce justified interpretation of valid legal rules and principles that correspond with the notions of courts on valid law without including value comments or similar external elements.\textsuperscript{22} The function of jurisprudence is thus to produce information on how the courts apply legal rules, and to create predictability.\textsuperscript{23}

In this research, predominant jurisprudential method is used in order to examine differing legal positions and traditions and to assess whether they correspond with the objective of the Directive on Fixed-Term Work.

\subsection*{2.2.3 Conclusions}

The results on the EU law within the framework of the research questions are gathered together in the concluding part of the thesis. The crucial part of the conclusions concentrates on how the Directive succeeds in its goal of preventing the abuse of successive fixed-term contracts and what the possible explanations of the current position are. While the shortcomings of Clauses 5 and 8 on non-regression are analysed by the nature, content and structure of the clauses and by the case law of the CJEU, an evaluation is made as to whether the directive and its application environment correspond with the notions adopted by the EU Employment policy in respect of the use of fixed-term contracts and the idea of upwards harmonisation. At the same time, explanations of differences in regulation between research countries, and the extent to which the systems of the countries researched are comparable in respect of their similarity are assessed. Finally, a comparison of the legal position in the use of fixed-term contracts in the research countries is made within the framework of the research questions.

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\end{thebibliography}
2.3 DISPOSITION OF THE RESEARCH

I General Part – Research Framework

In the first part, the research goals are presented with the crucial research tasks. The methodological assumptions, covering interpretation and legal comparison, are discussed.

II The EU Law in the Research Context

In this part, the Directive on Fixed-term Work is presented firstly in its historical, legal and EU employment policy context. Secondly, the provisions of the directive governing the conclusion of fixed-term contracts are discussed in the light of the CJEU’s case law. We see how the principle of non-discrimination and secondary legislation on equality and non-discrimination restrict the acceptable use of fixed-term contracts. Moreover, the possible tension between the EU employment law and employment policy is discussed. The Framework Agreement’s relation to fundamental rights is considered, since the protection provided by the Directive against abuse of successive fixed-term contracts is relatively weak. Comparison between the ILO Convention 158 and Recommendation 166 and the Framework Agreement on Fixed-Term Work is also outlined.

III – V National law on the use of fixed-term contracts

These parts cover national law and evaluation in the research framework. General principles governing the use of fixed-term contracts are introduced. The Finnish, British and French law on the use of fixed-term contracts in the research context is discussed and evaluated with conclusions.

VI – The sixth part covers the final remarks, conclusions and the summary.
II EU LAW IN THE RESEARCH CONTEXT

1 THE USE OF FIXED-TERM CONTRACTS IN THE EU LABOUR MARKET AFTER THE IMPLEMENTATION OF DIRECTIVE 1999/70/EC IN THE LIGHT OF STATISTICS

Making international comparisons on the prevalence of fixed-term work is difficult because of variations among the Member States concerning what are accounted fixed-term contracts and how fixed-term contracts are determined by the national statistics. According to Statistics Finland, a fixed-term employee is determined as a person who is not under an employment relationship until further notice and is not a public servant. The majority of public sector personnel is under an employment relationship.\(^{24}\)

Fixed-term work is increasing in Europe. During the 1990s, the proportion of employed people under contracts of limited duration rose in almost all the Member States. In 2004, the average the EU proportion rose to 13.7 per cent (from 13 per cent in the previous three years). However, the proportion of fixed-term workers in individual Member States varies greatly, ranging from a few per cent (in Estonia, Malta, Ireland, Luxembourg, Slovakia and the United Kingdom) to well above 30 per cent in Spain and above 20 per cent in Poland and Portugal. There are also great variations between different groups and sectors on the national labour markets. Fixed-term work is, for example, heavily concentrated among young people (close to 40 per cent for individuals aged 15 – 24). It also appears that the prevalence of fixed-term work is highest for those with the lowest education level and that it is more important in the primary and the construction sectors than in manufacturing.\(^{25}\)

Fixed-term employment relationships have increased in Member States from 2000 to 2005 among women, from 14.1 per cent to 14.9 per cent, and correspondingly, from 12.5 per cent to 13.9 per cent among men.\(^{26}\) According to 2009 data, the proportion of fixed-term employees in the EU was 13 per cent among men and over 14 per cent among women.\(^{27}\) However, there are great country-specific differences in the prevalence of fixed-term employment relationships. In the EU


\(^{26}\) Men and women employed on fixed-term contracts involuntarily, Eurostat 2007, pg. 1.

\(^{27}\) Eurostat, European Labour Force Survey (2009), EU-27: Men, 12.7 per cent and women 14.3 per cent.
Member States, fixed-term employment relationships are being used most in Spain (25.4 per cent), Poland (25.7 per cent), Portugal (21.5 per cent) and Slovenia (14.1 per cent) and less frequently in the UK (5.4 per cent) and Slovakia (4.0 per cent).  

2 INTRODUCTION

In the period of economic crisis in the 1970s, when many European countries that had previously reacted suspiciously to temporary and part-time employment contracts discovered their value as a remedy for job creation and labour flexibility. On the other hand, there was a need to guarantee a flexible use of the workforce in industry and other sectors.  

In this phase, many European countries facilitated preconditions for concluding and renewing fixed-term contracts and introduced the principle of non-discrimination applicable to this form of work in their legislation. This was aimed at encouraging employers and employees to recourse to fixed-term contracts to reduce unemployment. These elements were widely developed and structured in detailed legal terms in the middle and late 1990s. Fixed-term contracts, among other flexible forms of work, were not seen simply as an instrument to employ the fringes of employment, but also as a factor that could contribute to the increase of employment rates and to the overall efficiency of European economies.

As fixed-term work became more prevalent in the 1980s, there were attempts to improve the protection of atypical workers at the EU level. In the background of these attempts to create protective regulation for atypical contracts was a general tendency by which many Western-European countries had incorporated protection against unjustified dismissal of contracts of indefinite duration into their legislation.

The Commission introduced the first proposal for the directive in 1982. This proposal specified the grounds upon which the use of temporary work could be used: fixed-term employees were only to be hired to meet specific business needs, a temporary reduction in the work force, a temporary or exceptional increase in activity, to carry out a clearly defined “occasional task of a temporary nature” where

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30 For instance, France introduced a law in 1985 which allowed an agreement for fixed-term for whatever reason when the job-seeker had been registered as unemployed for the previous 12 months. Germany introduced a new law in 1996 that emphasised the job creation aims of fixed-term work. This legislative amendment allowed up to three renewals without a justifying reason provided that overall duration of the relationship did not go beyond the two-year maximum, while if the worker was 60 years old or more even that maximum would not apply.
the work was of a “special nature”, or in connection with a “new activity of uncertain duration”.

In the event of any breach of these conditions, the proposal specified that the contract of employment would be deemed as a contract of indefinite duration. Each assignment was to be limited to three months, and could be renewed only once, except where the competent national authority granted an exemption in exceptional circumstances. The use of temporary workers in order to break strikes was expressly forbidden. Undertakings using temporary workers would be required to supply very detailed information to worker representatives on the use of such workers, including the reasons for their use, full details of their pay, working conditions and qualifications. Furthermore, worker representatives had to be informed of the use of directly hired temporary staff. The proposal was based on Article 115 of the TFEU (ex. TEC 94), and unanimous agreement could not be reached within the Council on its adoption.

Since the 1980s, enhancing the legal position of fixed-term workers has continually been a focus of European social policy discussions. Community social policy has covered a wide range of areas, including equal opportunities, health and safety matters, employment and labour law related matters, issues of social protection and social security, as well as action focused on specific points such as poverty and the role of the disabled. The EU social policy has been developed both through the evolution of the treaties and by social and economic change, and has drawn on a variety of instruments, depending on the objective. In this respect, one of the major functions of the EU social policy is to provide a legal framework in specific areas of the Treaty designed to connect the social partners in dialogue and thereby to contribute to the development of fundamental social rights for workers at various levels.

In 1989, the Community Social Charter identified a need for action to ensure improvement in the conditions of employees who worked under fixed-term, part-time, temporary and seasonal contracts. This apparent social policy rationale was coupled with the economic rationale of preventing the “development of terms of

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38 Some of the most important social policy articles of the TEC include Article 136 relating to the improvement of working and living conditions, Article 137, Article 141 on equal treatment between men and women, Article 139 on the development of the social dialogue between the social partners at European level, and Article 146 of the European Social Fund.
39 COM (93) 551, pg 9.
atypical employment such as to cause problems of social dumping, or even distortion of competition, at Community level”.

Following the Charter, three proposals for new directives were made, in which the “temporary employment” was handled alongside temporary agency work and part-time work. Only one directive, however, regarding health and safety requirements in temporary and fixed-term work was accepted. The purpose of the two other proposals was to ensure equal treatment in atypical work compared to permanent employees regarding working conditions, social security and to restrict the use of temporary employment contracts.

According to one of the proposals for a directive mentioned above, the Member State had three optional means of restricting the use of fixed-term contracts. In the first, a Member State had an obligation to ensure that the total duration of successive fixed-term employment contracts did not exceed a maximum to be laid down by the Member States themselves. The second option was that no more than two successive fixed-term contracts were allowed. The third option required objective grounds for fixing the term of the employment and its duration. The Member States had to ensure that national laws provided a limit on the renewal of temporary employment relationships of 12 months or less, so that the total period of employment did not exceed 36 months. In addition, an equitable allowance had to be paid in the event of an unjustified break in the employment relationship before the end of the fixed term.

This proposal for a Council Directive was based on the approximation of the laws of the Member States with regard to distortions of competition whose judicial basis is currently included in Article 116 of TFEU (ex. TEC 96). However, no unanimity was reached under the valid decision procedures except the Directive 91/383/EC on health and safety at work.

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42 Directive 91/383/EC.
43 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 13 - 14
44 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 13 - 14
45 COM(90) 228 final, 8.9.1990, pgs 6 and 8.
46 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 13 - 14

Before exploring the relevant employment policy objectives that determine the goals of the Framework Agreement on Fixed-Term Work, it is important to describe the valid Treaty bases during the periods when the policies were generated.

At the beginning of the 1990s, an important cornerstone for developing the European labour law and social policy was the Maastricht Treaty’s coming into force in 1993. This Treaty created a clear legislative competence for the Union in these fields. The annexed social protocol establishes the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and struggling against exclusion as the Community’s objectives. To achieve this, competence was established for the Council to support and complement the activities of the Member States to adopt directives, minimum requirements for gradual implementation in such fields as the working environment and protection of health and safety, working conditions, informing and consulting with workers, equality between men and women and, finally, integration of persons excluded from the labour market while diverse forms of national practices, especially in the contractual relations and the need to maintain the competitiveness of the Community economy, had to be taken into account.

The Social Protocol included in the Maastricht Treaty was accepted by eleven of the then twelve Member States excluding the United Kingdom, however. Despite this, the employment policy remained mainly the preserve of Member States. Despite the fact that the Commission had already exercised employment policy by non-binding policy documents and recommendations during this period, the role of the Commission in co-ordinating Member States’ employment policies by the employment guidelines was not established until the Treaty of Amsterdam.

When the European Labour market was facing the need for structural change, the Commission stressed the importance of maintaining and developing the social standards in the EU labour market further. The Commission viewed the role of Europe’s social policy as to influence the operation of free markets by enhancing social ground rules and by ensuring that there was a minimum floor of rights below which social standards should not fall in certain key areas. These ideas are

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47 Lamponen, Helena: The Principle on Employee Protection in a Merger and Transfer of an Undertaking (2008), pgs 106 - 107

48 Agreement on social policy concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, Articles 1 - 2, 29 July 1992.

enshrined particularly in Article 151 (ex. TEC 138) of the TFEU and were found in the Maastricht Agreement on Social Policy.\textsuperscript{50}

The Commission also considered that social dumping was compromising the proper operation of the single market. Although the need for flexibility due to the fierce competition between enterprises was recognised, competition within the Community on the basis of unacceptably low social standards rather than enterprise productivity was seen as undermining the economic objectives of the Union. The shared standards enshrined in existing Community legislation and those on the table in the action programme to implement the Social Charter of Fundamental Rights were deemed to constitute minimum standards. The Commission also took the view that granting fundamental social rights to workers played an integral part in the unprecedented economic and social progress since World War II. In this context, the Commission saw that legislation continued to have its proper place in achieving the objective shared by all the Member States in that European workers should have minimum standards on health, safety, and employment conditions. Completing the social action programme of the Charter should pursue that objective by exploiting the opportunities offered by the Social Agreement of the Maastricht Treaty.\textsuperscript{51}

High social standards, by which the Commission referred to a mix of working and living conditions, were seen as a clear objective of the European Community. According to the Commission, the European experience had shown that they were an integral part of a competitive model of economic development, because they were determined by a variety of government policies and by collective bargaining for a given level of economic development. The Commission saw this complementary approach as essential to the development of the democratic community. It was, therefore, a matter of concern that global economic competition and the resulting international trade in goods and services should improve and not reduce social and working standards. In particular, it would be a dangerous trend if unfair competition through unacceptably low standards should become widespread.\textsuperscript{52}

Bearing the minimum social standards in mind, the Commission saw the convergence of working and living standards as a key objective of European integration. According to the Commission, regardless of all the difficulties, the evidence was that standards were levelling up rather than down, as witnessed by the rising working and living standards in the less-developed parts of the Community. The question was not one of limiting the competition from countries and regions with lower labour costs, but of ensuring that their competitive power contributed to raise the standards for the workers who contribute to rising national income.

\textsuperscript{50} Ashiagbor, Diamond: The European Employment Strategy (2005), pgs 90 - 92, COM (93) 551, pgs 59 - 60.
\textsuperscript{51} COM (93) 551, pgs 59 - 60
\textsuperscript{52} COM (93) 551, pg 60.
This was a long-term trend, but the Commission saw that it had to be recognised that, under the present conditions of high unemployment, the social ground rules might need to be strengthened.\textsuperscript{53} These guidelines adopted by the Commission were a background justification for several upward harmonisation projects in labour law regulation in the 1990s, the idea of which was originally based on Article 117 of the EEC (now TFEU 151).\textsuperscript{54} The Commission also emphasised the role of social partners in this process by stating that:

\begin{quote}
“A most important contribution is likely to come from the deep involvement of the social partners in the process of European construction. For example, agreements between them at European level could facilitate the setting of social standards within the framework of the Social Charter.”\textsuperscript{55}
\end{quote}

As Barnard has stated in this Green Paper of 1993, the Commission emphasised the positive impacts of improved job security in the changing EC labour market and advocated extending its legislative action at Union level still further to include such matters as protection against individual dismissal.\textsuperscript{56}

Another important instrument that has guided the development of Community labour law before the mid 1990s was the White Paper published by the Commission in 1994. As Blanpain has noted, the Commission emphasised that the knowledge-based economy is founded on innovation and human capital and requires parties to employment to be able to adapt to change more rapidly. In this regard, the Commission paid attention to the increased need of undertakings for flexibility in managing their labour force, particularly because of the more rapid fluctuation in their demand. The Commission saw that temporary work could help undertakings to overcome a deficiency of permanent staff or a temporary increase in workload, which was deemed particularly important for small- and medium-sized enterprises. These companies especially could also have an increasing need for qualified workers with a wide range of skills and would need them on a temporary basis. But as Blanpain has noted, the benefits from the temporary work could be decreased if the sector concerned suffered from poor social standing and job quality. Therefore, temporary

\begin{footnotesize}
\textsuperscript{53} COM (93) 551, pgs 59 - 60
\textsuperscript{54} For the history of upwards harmonisation as a means to develop labour law, see Hellsten, Jari: On Social and Economical Factors in the Developing European Labour Law (2007) pgs 1 - 6.
\textsuperscript{55} COM (93) 551. pg 61
\textsuperscript{56} COM (93) 551 and Barnard, Catherine: EC Employment Law (2006) pg 614.
\end{footnotesize}
work of a high quality could provide a more effective response to economic need for flexibility.\textsuperscript{57}

The Commission noted that there had been dramatic shifts in the labour market, both in the production models and in the service sector, leading to more flexible forms of work contract (fixed-term, temporary and part-time). Therefore, the Commission considered that these flexible forms of work were to be generally accepted and this would require legislation to ensure that such workers were given working conditions equivalent to workers under permanent contracts.\textsuperscript{58}

The main purpose of the White Paper was to preserve and develop the European social model by evolving guiding principles and applying a range of instruments for action. The Commission therefore tried to set the limits within which the Community actors were expected to operate and to achieve common objectives. Doing so would enable Europe to maintain a social consensus, adapt its social policies through greater flexibility in the labour market, increase competitiveness compared to its global competitors and ensure basic social rights for all workers. By investing in a world-class labour force, it would still be possible to encourage high standards in a competitive Europe.\textsuperscript{59}

In the main purpose mentioned above, the Commission presented four guiding principles and objectives for the future role of the Union. Firstly, employment was the key to social and economic integration. High social standards can be reconciled with the capacity to compete on world markets only by creating new jobs.\textsuperscript{60} Secondly, the Commission considered that competitiveness and solidarity were two sides of the same coin. Maintaining social standards would be dependent on continuing productivity benefits.\textsuperscript{61} Thirdly, although the Commission admitted that the total harmonisation of social policies would not be an objective of the Union, the Commission saw it as important to converge the goals in this field by fixing common objectives. Thus the Commission recommended the convergence of objectives and policies by fixing objectives that would permit the various national systems to progress in harmony towards the fundamental objectives. Furthermore, according to the Commission common minimum standards should be created that would take the relative economic strength of the various Member States into account.\textsuperscript{62}

\textsuperscript{57} COM (93) 551 pg 29 and Blanpain, Roger: European Labour Law (2003), pg 347.
\textsuperscript{58} White Paper, COM (94) 333, July 1994, pg 22
\textsuperscript{59} COM(94) 333 Ch II-III. See also Sciarra, Silvana: European Law Journal (1995), pg 45.
\textsuperscript{60} COM(94) 333, Introduction, para 16.
The intention of the common minimum standards was to create a barrier against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness. It was also an expression of the political will to maintain the momentum of social progress. However, those minimum standards should not over-stretch the economically weaker Member States, and should not prevent the more developed Member States from implementing higher standards.\(^{63}\)

After 1994, these four principles, along with promoting employment and social protection, guided the development of the Union employment law and social policy. The emphasis was now on social objectives to be achieved rather than social rights furthered by harmonisation.\(^{64}\)

In order to reinforce this new approach, the Council passed a resolution on the Union social policy in December 1994,\(^{65}\) which introduced further developed guidelines for the social dimension and the strengthening role of the two sides of industry as an essential precondition for combining market freedom and social balance.\(^{66}\) Secondly, the Council emphasised the importance of strong and sustainable growth and the role of an efficient labour market and specific measures to facilitate renewed growth that would create as many jobs as possible.\(^{67}\) Thirdly, according to the Council, the Union’s international competitiveness had to be strengthened so that, in the framework of corporate competition with regard to the location of undertakings, any economic success would be used for the purpose of sustainable social progress.\(^{68}\)

In order to consolidate these policy standards, the Council emphasised that its proposals for minimum standards in social legislation would have to include an assessment of their impact on employment and on small- and medium-sized enterprises.\(^{69}\) The purpose was to proceed at a cautious pace with an emphasis on specific proposals designed to build up a core of minimum standards instrumentally to facilitate a gradual convergence, respecting both the economic capabilities of


\(^{67}\) Ibid.

\(^{68}\) Ibid.

Member States and helping to meet the expectations of workers, while calming fears about social dumping in the Union.\textsuperscript{70}

Despite the earlier discoveries concerning the need to regulate atypical forms of work dating back to the 1994 White Paper and even further, the political impetus for the making of the Fixed-Term Work Directive is derived from the early stages of the European Employment Strategy.\textsuperscript{71} This is also expressed in the preamble to the Framework Agreement according to which the agreement intends to make an immediate contribution to the European Employment Strategy and endeavour to balance better between flexibility and security.\textsuperscript{72}

\subsection*{2.2 EMPLOYMENT POLICY AND SOCIAL POLICY SINCE THE TREATY OF AMSTERDAM}

A new employment chapter, constituting a new power for the Union to approve common employment guidelines for the first time in a treaty text, was introduced in the Treaty of Amsterdam. This was done in order to promote a skilled, trained and adaptable workforce, and labour markets responsive to economic change in cooperation with Member States.\textsuperscript{73} This also meant an annual procedure for the creation of employment guidelines that started with the adoption by the European Council of \textit{review} on the employment situation in the Union based on a common report prepared by Commission and Council. On this basis, the Commission proposes employment policy guidelines within the context of economic guidelines, which are finally accepted by the Council by a qualified majority after consulting the European Parliament and the Economic and Social Committee. The Member States must take these guidelines into account in the formulation of their national employment policies in order to achieve the objectives laid down by the treaty.\textsuperscript{74}

The Member States are also urged to report annually to the Commission and Council via national action plans on the measures they have taken to implement the Union’s Employment Policy.\textsuperscript{75} The first time guidelines were accepted was by the Council meeting in December 1997, wherein all the political objectives

\begin{footnotesize}
\begin{itemize}
\item[72] See para. 1 of the preamble to the Framework Agreement on Fixed-Term-Work
\item[73] TFEU Articles 145 - 150 (ex. TEC Articles 125-130).
\item[75] TFEU Article 148 (ex.128), Ashiagbor, Diamond: The European Employment Strategy (2005), pgs 105-106.
\end{itemize}
\end{footnotesize}
elaborated up to that point were pulled together in what became known as the four-pillar-based European Employment Strategy (EES) approach. This consisted of improving employability, developing entrepreneurship, encouraging business adaptability and that of their employees and finally strengthening the equal opportunity policies. However, as Ahsiagbor has stated, despite a clear Treaty basis the guidelines are not a legally binding instrument like directives. The legislative competence in employment issues remained within the Member States and the role of the Union was only to contribute and to complement their actions.

Measures taken by the Council in employment issues were not intended to harmonise the laws and regulations of the Member States. However, as Sminsmans has stated, with its use of soft law mechanisms, which were intended to have an impact on the policies of Member States, the Employment Strategy has come to represent a middle course between full harmonisation and mutual recognition and regulatory competition. Thus this procedure, which is called the open method of coordination (OMC), implied more benchmarking and coordinating of national employment policies rather than converging national policies without speaking of harmonisation of laws and regulations. Alongside the Treaty of Lisbon coming into force, these provisions are included in the Employment Chapter of the Treaty on the Functioning of the European Union (TFEU).

The period of validity of the Treaty of Amsterdam featured flexibility for companies and security for employees. Flexicurity was elaborated further in the Modernising the Organisation of Work document from 1997, in which reconciling the needs of firms for flexibility and the needs of employees for security was seen as an important measure for promoting competitiveness, employment and productivity as central objectives of the EU. Flexibility was seen as a factor to increase productivity and the quality of working life, whilst security for workers could also offer benefits to enterprises in the form of

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76 Ashiagbor, Diamond: European Employment Strategy (2005), pg 106
78 Ashiagbor, Diamond: The European Employment Strategy (2005), pg 106.
79 TFEU, Article 147 (ex. TEC 127).
80 TFEU 149 (ex. TEC 129).
83 TFEU, Title IX- Employment, Articles 145-150.
a more stable, versatile and motivated workforce.\textsuperscript{85} The main measures to promote these objectives consisted of flexible working arrangements such as part-time work.\textsuperscript{86} Further consideration was proposed for developing new forms of contractual relationships and career paths while providing security for workers in terms of employment continuity, social security coverage and training opportunities. The other elements that were deemed to affect labour market regulation directly were equal treatment and training in the sense of life-long learning. The idea seemed to be to facilitate the opportunity for employers to recruit replacements while the permanent workers were being trained.\textsuperscript{87}

As Contouris has stated, the roots of the flexibility and security included in the Framework Agreement on Fixed-Term Work are at least partly derived from the European Employment Strategy which The Green Paper - Partnership for a New Organisation of work from 1997 had crucially influenced.\textsuperscript{88}

The Green Paper strongly emphasised the fact that in a modern economy where cyclical restructuring and reorganisation occur, flexibility and security must go hand-in-hand.\textsuperscript{89} In the green paper, the authors stated that:

\begin{quote}
"The key issue for workers, management, the social partners and policy-makers alike is to strike the right balance between flexibility and security. This balance has many aspects. The reorganisation of work often causes uncertainty. Workers need, above all, to be reassured that after the changes have been made, they will still have a job and that this job will last for a reasonable time. At the same time, once the changes are made, the new organisation of work can offer to workers increased security through greater involvement in their work, more job satisfaction and the possibility of developing skills and long-term employability. This security for workers can also provide employers with increased security in the form of a more stable, versatile and contended labour force. Employers need greater flexibility in order, in particular, to cope with fluctuations in demands for their greater goods and services. In particular, they are often looking for interchangeable skills and adaptable working patterns, including working time arrangements. Such flexible arrangements can also have advantages for employees, provided that they are negotiated: for
\end{quote}

\begin{footnotesize}
\textsuperscript{86} The European social partners had just established a Framework Agreement for Part-Time Work.
\textsuperscript{89} Countouris, Nicola: The Changing Law of the Employment Relationship (2007), pg 213
\end{footnotesize}
Moreover flexible forms of work were seen as important to develop firstly by means of enhancing job rotation wherein the existing workforce is able to upgrade its professional skills in order to achieve better quality, higher productivity and new forms of work organisation, which raises a need to recruit substitutes while workers are being trained. This recruitment could provide good entry jobs for young and unemployed people.91

The idea of job rotation appeared to be that while workers are participating in these the training periods to upgrade their skills, other young and unemployed workers, whose skills are regarded as sufficient to perform the tasks, would temporarily replace them. As some commentators have stated, this kind of job rotation model is deemed to come from an active labour market policy concept based on a Danish company, according to which the skills of the employees are upgraded and, at the same time, the work is carried out in the enterprise while the employees are away on training courses.92

The Green Paper was built around the idea of rights and responsibilities. If workers accept more responsibility in order to be flexible, they are rewarded with greater security. For society to give security with flexibility, there would have to be a review of the foundations of the systems of labour law, industrial relations, wage regulation and especially social security. In particular, the traditional labour law was deemed to be insufficiently responsive to the challenges of diversification of work in the form of downsizing, outsourcing, subcontracting, teleworking and joint ventures, and the role of atypical work included therein.93

In analysing flexibility and security with respect to the use of fixed-term contracts, the Commission focused not on job security but on employment security, as Barnard has pointed out. Employment security means staying in employment within the same enterprise or a new enterprise. The philosophy behind flexicurity is that workers are more prepared to make moves in the labour market, which includes a good safety network. The emphasis is not on deregulation but on investment in employment and skills with a social safety net in order to promote worker readiness

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91 ibid, para. 70.
for transition. According to the Commission, this is the way to maintain and improve competitiveness while reinforcing the European social model.94

The European Council gave political support to the proposals included in the Green Paper in November 1997. The third pillar of the Employment guidelines, adaptability, emphasises the importance of the organisation of work and invites the social partners to play a leading role in respect of this development.95

Furthermore, Member State legislators were urged to examine the possibility of more adaptable types of contract in their law, taking into account the fact that forms of employment are increasingly diverse. Those who are working under contracts of these kinds should, at the same time, enjoy adequate security and higher occupational status. This is deemed to be compatible with the needs of businesses as well.96 Moreover, the guidelines encouraged the Member states to examine any new regulations to make sure they would contribute to reducing barriers to employment and help the labour market adapt to structural change in the economy.97

The central part of the 1998 Employment Guidelines is improving employability. The Member States were urged, for example, to adopt measures to influence youth and long-term employment so that unemployed young people were offered a new start before reaching six months and adults before 12 months of unemployment in the form of training, retraining or work practice. The Member States were urged to review their training systems in co-operation with social partners to increase the possibilities for training, work experience, traineeships and other measures likely to promote employability.98

In the next Employment Guidelines adopted by the Commission on February 1999, the social partners at all appropriate levels were urged to negotiate agreements to modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings more productive, more able to employ, competitive and achieving the required balance between flexibility and security. In accordance with this, flexibility was defined later as the capacity for firms to adjust to market demand. The Commission divided flexibility into external and internal flexibility. External flexibility was understood as the flexibility of companies to “hire and fire”,

whereas internal flexibility implied the reorganisation of the existing work force for instance, in terms of working time, working methods, training, and mobility. These forms of flexibility were intended to complement each other and had both advantages and disadvantages for individuals, firms and societies. Security was divided into static and dynamic approaches, the former focusing on stability in the employment relationship and the availability of a safety net in the case of unemployment.\textsuperscript{99} The dynamic variant focused on non-discrimination between different forms of working contracts and arrangements and the acquisition and preservation of employability. These aimed at facilitating the adaptation to change and mobility within and between jobs. As Countouris has stated, primary concerns were access to training and career development.\textsuperscript{100} The examination of the Commission ends with the statement that server the interests of both employers and employees. This implied that while an integrative approach to flexibility and security was deemed to be possible, it was not stressed that they should be designed in a mutually reinforcing way, nor did the Commission suggest a method for designing integrative flexibility and security policies.\textsuperscript{101} Such a development was also deemed to be an indication of the link between the European Employment Strategy and the Fixed-Term Work Directive. This has also reflected on the Framework Agreement on Fixed-Term Work which, along with the Framework Agreement on Part-Time Work, seeks to establish a contribution towards achieving a better balance between flexibility in working time and security for workers.\textsuperscript{102} These tendencies in the EU flexicurity area were evidently affected by trends in many Member States during the 1980s and 1990s, according to which flexible working patterns were seen not merely as a way to employ fringe unemployed people, but also as a factor that could contribute to the expansion of employment rates and to improved efficiency in European economies. This has also affected the impetus and the content of the Framework Agreement on Fixed-Term Work concluded by the European social partners, according to whom fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities, and can suit both employers and workers.\textsuperscript{103}


\textsuperscript{100} Countouris, Nicola (2007) pgs 225-226.


\textsuperscript{102} Countouris, Nicola (2007), pgs 219-220.

\textsuperscript{103} Countouris, Nicola (2007), pg 88. General Considerations section 8 of the Framework Agreement on Fixed-Term Work.
However, as Contouris has stated, it has traditionally been perceived in Continental Europe that there has to be legislation which addresses both the unfairness present within the fixed-term work employment relationship; for instance, introducing rules ensuring non-discriminatory treatment and the unfairness deriving from the widespread and unregulated access to an inherently precarious and discontinuous employment relationship. The latter is typically done by restricting the cases and circumstances under which the use of fixed-term contracts was justified and lawful.\textsuperscript{104}

The guidelines of the European Employment Strategy have also affected the content of the Framework Agreement of Fixed-Term Work in several ways. The directive implementing the Framework Agreement referred to the conclusions of the Essen European Council\textsuperscript{105} and the Luxemburg summits,\textsuperscript{106} firstly by stressing the need for a coordinated employment policy, in particular by increasing the employment-intensiveness of growth, a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition and secondly by inviting the social partners at all appropriate levels to negotiate agreements to modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings more productive and competitive and achieving the required balance between flexibility and security.\textsuperscript{107} As Sciarra has noted, for the first time the aspiration of increasing employment in employment policies were linked to a more flexible organisation of work. Consequently, this Directive has been framed within employment policies which aimed at completion of the internal market by approximating legal standards in order to achieve their improvement even before the official establishment of the Open Method of Coordination.\textsuperscript{108}

The tendency seemed to be that while there was a common will to emphasise the role of fixed-term contracts as a flexicurity tool in structural change in the European Labour market in the name of productivity, competitiveness and


\textsuperscript{105} Council Resolution of 6 Dec 1994 on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union

\textsuperscript{106} Presidency Conclusion, Extraordinary European Council Meeting on Employment, Luxembourg, 20 and 21 November 1997

\textsuperscript{107} Paras 5-6 of the preamble to the Directive. See preamble to the fixed-term work agreement para. 3. According to the Commission, explanatory memorandum paragraph 36 of the Framework Agreement contributes to implement the conclusions of the Essen European Council in terms of the introduction of new, flexible ways of organizing work. Such flexibility must meet the needs of enterprises and help them to become more competitive to cope with the international competition. It must also take the interests of workers into account by preventing abuse arising from the use of successive fixed-term employment contracts or relationship. An agreement between the social partners on this matter as a result of negotiations between employers and workers is the right vehicle for reconciling the interest of the two parties.

\textsuperscript{108} Sciarra, Silvana: Fundamental Labour Rights after the Lisbon Agenda (2005), pp4-5.
increasing employment at the EU level, the use of fixed-term contracts had to occur on a socially acceptable basis, which also meant that they were intended only for tasks of a temporary nature.\textsuperscript{109} However, it is important to underline that in this approach, while pursuing the expansion of flexible employment contracts, their appropriate use must be maintained and improved. As Sciarra has stated, the language spoken by the employment policies explained above can be interpreted as a request for the Member States to create better jobs governed by improved and approximated standards in order to promote the efficient functioning of an integrated market.\textsuperscript{110} In other words, while the EU Employment Guidelines aim at promoting employability by allowing the use of fixed-term contracts in order to create pathways to employment, reduce unemployment, and increase productivity and competitiveness, it can be inferred from the Employment Guidelines that the purpose is not to permit the permanent use of successive fixed-term contracts. On the contrary, contracts of indefinite duration are prioritized. Therefore the attitude of the EU employment policy towards the use fixed-term contracts is has two aspects.

The provisions in the Treaty of Amsterdam included in the Maastricht Social Protocol were incorporated into the TEC.\textsuperscript{111} Alongside the Treaty of Lisbon coming into force, these provisions were included in Chapter X on social policy of the TFEU. According to Article 151 TFEU (ex. TEC 136), the Member States and Union, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions designed to enable harmonisation while the improvement is being maintained, including, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combatting of exclusion. To this end the Union and the Member States shall implement measures that take account of the diverse forms of national practices in particular in the field of contractual relations and the need to maintain the competitiveness of the community.

In respect of this, one of the main purposes of the Framework Agreement on Fixed-Term Work is to establish minimum standards for fixed-term work and to


\textsuperscript{111} Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, Articles 1-2, 29 July 1992. Title XI - Social Policy, education, vocational training and youth, TEC. Joutsamo, Kari-Aalto, Pekka-Kaila, Heidi-Maunu, Antti: Eurooppaoikeus (2000), pg 60.
create a framework for the future development of minimum fundamental rights of workers as laid down by the Community Charter of the Fundamental Social Rights of Workers in 1989. According to the Community Charter, the completion of the internal market must lead to an improvement in the living conditions of workers in the European Community. This process must result from approximation of these conditions while improvement in particular forms of employment other than open-ended contracts such as fixed-term contracts, part-time work, temporary work and seasonal work is being maintained.¹¹²

2.3 THE EU EMPLOYMENT POLICY IN THE 2000S

During the 2000s, the role of the European Union in developing and promoting flexicurity has turned from legally binding hard law measures into soft law where the Member States are given optional solution patterns for finding the right balance between flexibility and security in their national labour markets.¹¹³ Despite the Amsterdam Treaty’s coming into force, the connection and interaction between policies such as the Economic and Monetary policy and the Employment Policy remained relatively weak. The Lisbon Council, however, set a new strategic objective in 2000, which implied a significant new change in employment policy.¹¹⁴ This strategy, targeted the European Union to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion by the year 2010. The Social Agenda was approved by the Nice Council, which ruled that ambitious policy objectives are needed in order to return to full employment, reduce regional disparities, reduce inequality and improve job quality, complemented this objective. As Ashiagbor has stated, these decisions were deemed to imply a new step in which unambiguous links between social, employment and economic issues were established and all the various processes of the European Employment Strategy adopted by the Treaty of Amsterdam were put to more effective use in order to serve employability, entrepreneurship, competitiveness and other economic interests of the European Union. This was even deemed to imply that employment policy must hereafter be developed under conditions imposed by economic policy objectives.

¹¹² Preamble to the directive 99/70/EC, point 3 and Community Charter of the Fundamental Social Rights of Workers para 7.


and job creation. In respect of furthering employability, the Member States were urged to promote active ageing, notably by fostering conditions conductive to job retention and eliminating incentives for an early exit from the labour market.

In 2005, this radical change in the European Employment Strategy was relaunched after the report of the Employment Taskforce chaired by Wim Kok, which emphasised the fact that the European Union was at risk of failing in its ambitious goal, set at Lisbon in 2000. In order to achieve the Lisbon goals, the Taskforce suggested radical changes to the European Employment Strategy. Probably the most crucial changes included were in the part of the document dealing with “Promoting flexibility with security on the labour market”, where the report suggested that:

“In order to improve the responsiveness of EU economies to change requires a high degree of flexibility in the labour market, to the benefits of both workers and enterprises. Flexibility encompasses the terms and conditions of employment but also depends on a number of other factors, including work organisation and working time, wage setting mechanisms, the availability of different contractual arrangements and the occupational and geographical mobility of workers.”

“Employers must be able to adapt the size of their workforces by interrupting contracts without excessive delays or costs when other measures, such as working time flexibility or re-training of workers, have reached their limits. Overly protective terms and conditions under standard employment contracts can deter employers from hiring in an economic upturn or encourage them to resort to other forms of contracts, which can have a negative impact on the ability of less advantaged workers – notably young people, women and the long-term unemployed – to access jobs.”

Moreover, the report envisaged the increased need for flexibility by stating that:

“While not losing sight of the positive features of employment protection – such as fostering employee commitment and encouraging employers to invest in the training of their workforce – Member States should assess and where necessary alter the level of flexibility pro-

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117 Countouris, Nicola (2007), pgs 215-216
vided in standard contracts in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of dismissal. In order to stimulate job creation, it is important for both employers and workers to have access to a range of contractual arrangements to suit their needs. In parallel, the role of other forms of contracts may need to be reviewed, with a view to providing more options for employers and employees depending on their needs and adequate security for workers. In pursuing such reforms, it is important to take into account the interplay between the contractual framework and the many other factors that impact on the levels of flexibility and of security in the labour market, such as the social protection system, the availability and accessibility of active labour market measures, the role of collective agreements and access to lifelong learning opportunities.120

However, Taskforce draws special attention to the examples of the Netherlands, which has proven its value. The report states that:

“The Dutch approach relies on the availability of different contractual forms, carefully balancing rights and obligations for each individual contract form, while also providing for active measures for the unemployed. An important consideration under this approach is the need to prevent a two-tier labour market – where “insiders” benefit from a high level of employment protection, while “outsiders” are recruited under competing forms of contracts.”121

In order to prevent this, Taskforce recommended ensuring that there was adequate security for workers under all forms of employment contracts. According to this approach,

“long sequences of consecutive fixed-term contracts are considered an abuse. When a working relationship has acquired a more stable nature, legal provisions ensure that this is reflected in the contract. Another important aspect is the equal treatment of workers on different types of contract. Particularly important in this respect is access to training, entitlement to work-related insurance schemes such as health care or employment services and entitlement to social protection including the transferability of social protection rights.”122

120 ibid
121 ibid
122 ibid
Furthermore, as Ashiagbor has stated, Taskforce recommended removing the obstacles to setting up and developing temporary work agencies as effective and attractive intermediaries in the labour market, offering improved job opportunities and high employment standards. Taskforce also adopted the same commitment to scrutinising the existing regulatory framework, reducing impediments to employment and helping the labour market adapt to structural change in the economy, as already included in the Employment Guidelines of 2001, with the exception that there was now more attention paid to the improved quality of jobs and meeting the needs of workers as well as the need of businesses and to a greater partnership between the social partners. Taskforce did not directly propose actual amendments for the use of fixed-term contracts. The implication of the results of TaskForce is mainly that they gather together the arguments promoting employability adopted by the Commission in the 1998 Employment Guidelines. However, the emphasis on flexibility in the use of employment contracts implies a different and slightly one-sided notion of employability. As Ashiagbor has claimed, these results also partly rely on the notion that altering the level of job security and reducing employment costs increases job creation, a claim which cannot be deemed as an absolutely proven fact in the long term.

The measures introduced by Taskforce are partly based on the Lisbon Agenda, which urges enhancement of the adaptability of companies and workers in order to respond swiftly to fluctuation in demand and supply resulting from sterner economic competition. As Contouris has found, the Commission and the Council included the conclusions of the report in their Joint Employment Report for the Spring Council of 2004, which reaffirmed the need for decisive action by the Member States along the lines suggested by Taskforce and created the basis for the EES reform of 2005 in the integrated Employment Guidelines (2005). The Employment Guidelines of 2005 aimed at achieving full employment, improving quality and productivity at work and strengthening social and territorial cohesion. Raising employment levels was viewed as the most effective means of generating economic growth. In this regard, promoting an increased labour supply in all groups was also seen as important because of the decline in the working-age population. According to the Guidelines of 2005, special attention should be paid to tackling youth unemployment by building pathways for young people to employment and keeping older people

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in employment. On the other hand, attention was also paid to the quality of jobs, including pay and benefits, working conditions and employment security.\textsuperscript{126}

The Integrated Guidelines of 2005 urged the Member States to promote flexibility combined with employment security and to reduce labour market segmentation through the adaptation of employment legislation and by reviewing the different contractual and working time arrangements where necessary.\textsuperscript{127} Furthermore, since the Integrated Guidelines of 2005, the Member States have drawn up three-year national reform plans instead of national action plans.\textsuperscript{128}

As Ashiagbor has claimed, despite the fact that the results of the Taskforce report and the Lisbon Strategy are understood as implying a deregulatory agenda or having deregulatory implications for labour law, the attempts at ‘flexibilization’ adopted by those policy papers try directly to avoid the recommendation to deregulate as a way to achieve the results.\textsuperscript{129} The willingness to reconcile flexibility with security, and the belief that the Union’s economic and social goals can go side-by-side made the Commission reluctant to equate flexibility with deregulation.\textsuperscript{130} In accordance with this, the Commission pointed out in 1997 that the type of flexibility that will be required by the European economy in the context of a fully-functioning single market and economic and monetary union will be much more complex than simply deregulating markets.\textsuperscript{131}

As Ashiagbor has stated, the conclusions of the Employment Taskforce were endorsed in the Lisbon Strategy. The findings of the Employment Taskforce are apparently based on so-called supply-side and demand-side flexibility, which are both employer and employee friendly. In the Lisbon Strategy, supply-side orientation remained and flexibility or increased adaptability was regarded as important, principally to promote productivity, growth, and facilitate job creation in rapidly-growing sectors. However, it is arguable whether the Lisbon Strategy, with its focus on growth and jobs, fully captures the requirement of employee-friendly flexibility.\textsuperscript{132}

\begin{flushright}
\textsuperscript{129} Ashiagbor, Diamond (2005), The European Employment Strategy, pg 162.
\textsuperscript{130} Ashiagbor, Diamond (2005), The European Employment Strategy, pg 161.
\textsuperscript{132} Ashiagbor, Diamond (2005), The European Employment Strategy, pgs 164-166.
\end{flushright}
As Ashiagbor has stated, it is debatable whether creating jobs by atypical contracts in the name of productivity and competitiveness will result in better jobs, as over one-third of temporary contractual relationships are more or less involuntary.\(^{133}\)

In 2007, the European Expert Group on Flexicurity\(^{134}\) suggested in its report that flexicurity should be developed by reducing asymmetries between non-standard and standard employment and by fully integrating non-standard contracts into employment law, collective agreements, social security and life-long learning, making employment in standard contracts more attractive to firms.\(^{135}\) In this report, it was, however, recognised that asymmetries between contractual types could be carried out by diminishing the rights of employees who are in a stronger position in order to increase flexibility.\(^{136}\)

In the same report, the expert group suggested that successive use of fixed-term contracts should be limited.\(^{137}\) This tendency seems to have continued in the Joint Employment Report of 2011, which suggested that focusing on the reduction of segmentation in the labour market could be facilitated by altering employment protection legislation to extend the use of open-ended contractual arrangements with a gradual increase in protection rights in order to diminish the existing divisions between those holding atypical and permanent contracts.\(^{138}\)

### 3 THE FRAMEWORK AGREEMENT ON FIXED-TERM WORK

The Treaty of Maastricht and its annexed Protocol of Social Policy came into force on 1\(^{st}\) November 1993. According to the Protocol, the adoption of directives on working conditions was enabled by a qualified majority voting procedure. Moreover, such directives could be developed through a management and labour procedure.\(^{139}\) This procedure was seen to have a decisive influence on the secondary Union legislation by negotiated agreements between the European social partners. The procedure allowed the Commission temporarily to interrupt the legislative process, giving the social partners nine months to reach an agreement. This could then be made

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134 The Expert Group was established in July 2006 by the Directorate-General for Employment of the Commission.


139 Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, Articles 2-4. OJ C 191, 29 July 1992.
binding on the Member States by a decision of the Council; for example, in the form of a directive.\textsuperscript{140}

The European social partners (UNICE, CEEP and ETUC) used this procedure to conclude the Framework Agreement on Fixed Term Work on 18\textsuperscript{th} March 1999. The Framework Agreement adopted by the Council Directive on June 28\textsuperscript{th} 1999 made the earlier Framework Agreement legally binding on the Member States.

This was the third such agreement reached through the social dialogue at intersectional level by the European Union. The first two agreements were implemented through the directives on parental leave and part-time work.\textsuperscript{141}

The next section concentrates more closely on the regulations on using fixed-term contracts in the Framework Agreement (Clauses 1, 2, 3 and 5) and its interpretative framework in the directive, preamble, general considerations of the Framework Agreement, and other relevant Union law.

\textbf{3.1 ABOUT THE RESTRICTION IN THE SCOPE OF THE FRAMEWORK AGREEMENT}

In accordance with the Framework Agreement wording, it is applied to `fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.` In Clause 3, “fixed-term worker” is defined as a person having an employment contract or relationship entered into directly between an employer and a worker in which the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

However, there are three main exceptions to the scope of the Framework Agreement. The Preamble to the agreement states that it applies to fixed-term workers with the exception of those placed at the disposition of a user enterprise by a temporary work agency, since the social partners “consider the need” for a similar agreement relating to temporary agency work.\textsuperscript{142}

\textsuperscript{140} Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed Term Work in the EU (1999), pg 15.

\textsuperscript{141} The procedure is based on Articles 151 - 155 of the TFEU (ex. 136-139 TEC). According to Article 154, before submitting proposals in the social policy field, the Commission shall consult the European social partners on the possible direction and the nature of the Union action. Moreover, according to Article 154, on the occasion of such consultation the social partners may inform the commission of their wish to initiate the process provided for in Article 155. Agreements concluded at Union level shall be implemented when appropriate by a council decision, in practice by a directive. Alternatively, the social partners may leave the implementation of their agreement to the procedures and practices specific to management and labour and the Member States.

\textsuperscript{142} Preamble to the Framework Agreement on Fixed-Term Work, para. 4.
Secondly, the Member States, after consultation with the Social Partners and/or the Social Partners themselves, may provide that the Directive does not apply to:

(a) initial vocational training relationships and apprenticeship schemes; and
(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.

As Countouris has pointed out, the European Employment Strategy notions on flexibility and security, at least before the impact of the Wim Kok Taskforce findings published in 2003, included the equal treatment element that was also applied to some publicly supported job-creation programmes.143

The third, and probably the most important exclusion of the Framework Agreement relates to the first or single use of fixed-term contracts.

3.2 SUCCESSIVE FIXED-TERM CONTRACTS IN CLAUSE 5 OF THE FRAMEWORK AGREEMENT

In this section, the provision governing the use of successive fixed-term contracts is discussed in the light of the objectives of the social partners and the EC employment policy. Finally, a distinction is made between the main objectives of fixed-term work and part-time work.

According to Clause 5(1) of the Framework Agreement on Fixed-Term Work, the Member States are obliged to introduce measures to prevent abuse arising from the use of successive fixed-term contracts. The provision requires that each Member State shall, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, introduce one or more of the following measures to prevent such abuse arising from the use of successive fixed-term employment contracts or relationships, supposing that there are no equivalent legal measures to prevent abuse:

(a) objective reasons justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships; and
(c) the number of renewals of such contracts or relationships.

According to Clause 5(2), the Member States, after consultation with the social partners and/or the social partners shall, where appropriate, determine the conditions under which fixed-term employment contracts or relationships shall be regarded as “successive”.

The objectives of the social partners were, however, very different from each other in regulating fixed-term work in the Framework Agreement negotiation process. Perhaps the most important objective of the ETUC in this respect was to ensure the limitations on the use of fixed-term contracts and prevent them being used by employers to circumvent the obligations related to contracts of indefinite duration.

According to the objectives of the ETUC, the Framework Agreement had to require that the use of fixed-term contracts must in all cases be based on objective reasons, limit the maximum total duration of temporary employment to three years, limit temporary employment renewals to two, and define the circumstances under which fixed-term contracts shall be automatically transformed into open-ended contracts. Furthermore, the ETUC set out to protect temporary workers against redundancy. The ETUC however refused to discuss using fixed-term contracts as a mean of promoting and creating employment. Finally, the most important assumption for the ETUC was that contracts of indefinite duration be retained as the main form of employment.

The objective of the employer side in regard to the Framework Agreement was very different from the ETUC’s. The UNICE saw fixed-term contracts as a necessary component of functioning labour markets and, therefore, a source of employment and, in accordance with this intended to reduce obstacles to development of fixed-term work. For this reason, the UNICE resisted restrictions regarding the conditions under which fixed-term contracts may be concluded or ended. On the other hand, there was a common will between the social partners to prevent the abuse of fixed-term contracts.

The provision of Clause 5 is very flexible as to the measures chosen and the scope to which the measures shall be applied. Because there is no definition of abuse in

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144 The remaining objectives of the ETUC are related to guaranteeing equality of treatment with respect to individual and collective rights and working, including supplementary benefits such as complementary social protection schemes and continuing vocational training. This ensures that fixed-term workers are informed of vacant permanent positions offered by the employer and gives them priority in recruitment, ensuring that temporary workers were included when calculating the thresholds for employee representation and access to union voting and election rights, obliging employers to inform and consult bodies representing employees in advance on the use of fixed-term contracts and the justification for it and, finally, facilitating supervision of the use of such contracts. Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 21-22.

145 As far as the principle of non-discrimination was concerned, the employers aimed at ensuring different treatment on the grounds of the temporary nature of the work.

the Framework Agreement, the result attained also remains unclear.\textsuperscript{147} Clause 5 has been criticised over its failure to lay down the circumstances under which it is permissible to have recourse to fixed-term contracts. It also fails to impose precise limits on the maximum duration of the initial temporary contract or on the total duration of successive contracts. Moreover, no further restrictions are laid down for renewals of such contracts and it does not determine the grounds upon which such contracts can be extended. The CJEU has recognised the status of principle in some of the provisions of the directive (prevention of abuse arising from successive fixed-term contracts; contracts of indefinite duration is the main rule), but these ‘principles’ are addressed only to the Member States, which excludes the right of private persons to rely upon them before the courts. In this sense, it can be said that the outcome as far as the preconditions for the use of fixed-term contracts are concerned reflects the objectives of the employer side more than the employee side.\textsuperscript{148}

There is also some tension between the objectives laid down by general considerations of the Framework Agreement. For example, on the one hand, it is emphasised that contracts of indefinite duration are and will continue to be the general form of employment relationship and that these contracts contribute to the quality of life of the workers concerned and improve their performance.\textsuperscript{149} This reflects the ETUC’s objective of preventing recourse to fixed-term contracts, the intention of which is to circumvent employment security and other obligations related to contracts of indefinite duration and the refusal to recognise fixed-term contracts as an element in the promotion and creation of employment.\textsuperscript{150} On the other hand, the Framework Agreement paves the way to normalise this form of employment when it happens in a non-abusive way by stating that fixed-term employment contracts are a feature of employment in certain sectors, occupations, and activities and can suit both employers and workers.\textsuperscript{151} The Framework Agreement also emphasises the need to enhance the competitiveness of the Union economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.\textsuperscript{152} These opposed objectives reflect the EES guidelines from the mid-1990s, in which both the job creating rationales and the needs of undertakings to adapt their labour force rapidly to the fluctuation in demand and the protection of employees were

\textsuperscript{147} Kenner, Jeff: EU Employment law (2003) pg 288.
\textsuperscript{149} Framework Agreement on Fixed-Term Work, general considerations, para. 6.
\textsuperscript{150} Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pg 39.
\textsuperscript{151} Framework Agreement on Fixed-Term Work, general considerations, para. 6.
\textsuperscript{152} Framework Agreement on Fixed-Term Work, general considerations, para. 11.
emphasised as reasons to regulate fixed-term contracts. Furthermore, the objective of the Framework Agreement in regard to provisions stipulating the preconditions for use of fixed-term contracts reflects the 1999 “four pillar” Employment Guidelines, which stresses the role of fixed-term contracts as a tool of employability, creating entrepreneurship and encouraging the adaptability of businesses and employees.\textsuperscript{153}

The Directive, however, does not adopt the legal mechanism proposed by the Commission in its earlier attempts to regulate fixed-term work (proposals for Directives on 1982 and 1994), the conversion of temporary contracts into permanent status in the event of breach of restriction determined by the proposal for a Directive.\textsuperscript{154} It thus leaves plenty of scope for complementary interpretation by the CJEU, which has to prevent the potential to circumvent the protection laid down by the Framework Agreement.

The lack of protection of employees was also criticised by the European Parliament in its resolution on the Framework Agreement, which states that:

\textit{“The Member States and/or the social partners can choose from three options to prevent abuse arising from the use of successive fixed-term employment contracts (chain contracts), but at least one of them has already been fulfilled in most Member States, so that only two Member States would have to introduce completely new legal provisions; whereas no standards are being set for their quality because the agreement does not specify either objective reasons, a maximum duration or maximum number of extensions.”}\textsuperscript{155}

As most of the Member States have already adopted one of the measures of Clause 5, the implementation of the Directive does not represent the improvement in living and working conditions which is the primary objective of Article 151 of TFEU (ex 136 TEC). As this is also the objective of the implementation of the Framework Agreement in accordance with the preamble to Directive 99/70EC, it can be claimed that the Framework Agreement has not achieved the objectives laid down in Article 151.\textsuperscript{156}

The European Parliament criticised the fact that the agreement only establishes provisions for successive fixed-term employment relationships excluding the first ones. The Parliament also expressed its concern about the non-binding nature of

\begin{itemize}
  \item \textsuperscript{153} A reference is made in the preamble to the Directive to the conclusions of the Essen European Council, which stressed the need to take measures with a view to “increasing the employment-intensiveness of growth and the EES 1999 Employment Guidelines”. See paras 5-6 of preamble to the Directive 99/70/EC
  \item \textsuperscript{155} Report on the Commission proposal for a directive concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and the ETUC (COM(99)0203-C4-0220/99), para. N.
  \item \textsuperscript{156} Directive 99/70/EC, preamble, point 21.
\end{itemize}
the provisions that are supposed to prevent abuse arising from the use of successive fixed-term employment, because they do not impose any additional qualitative or quantitative standards for the use of fixed-term contracts. In other words, the agreement itself will not automatically ensure that the situation of fixed-term employees really does improve, thus leading to a need to transpose the agreement into national rules. In addition, the European Parliament criticised the facts that the agreement does not concern the use of temporary contracts in temporary agency work and that it does not set a uniform European standard for successive fixed-term employment contracts because the Member States have a choice between three options and, in addition, differing sectoral definitions of chain employment contracts are allowed.¹⁵⁷

The Parliament also expressed its concern over whether the differences in national provisions allowed by the Framework Agreement are causing distortion of competition in the internal market.¹⁵⁸ This possibility is against the objectives of the EES, according to which development of atypical employment terms which may cause problems of social dumping or even distortion of competition at Union level, and has to be avoided.¹⁵⁹ The restrictions on the use of successive fixed-term contracts are much more flexible than the previous attempts to regulate such contracts in the early of 1990s, as explained above.¹⁶⁰

The preamble to the Directive on Fixed-Term Work refers to the principles on Subsidiarity and Proportionality. As Barnard has concluded, Clause 5 reflects the point of departure of the principle of subsidiarity very well, according to which appropriate measures should leave as much scope for national solutions as possible in achieving the objectives of European Union law with regard to the nature and the extent of European Union action. In other words, while respecting the European Union law, care should be taken to respect well-established national arrangements and the organisation and functioning of the Member States’ legal systems. It is therefore justified that Union measures provide the Member States with alternative ways to achieve these objectives.¹⁶¹

In addition, the Treaty of Lisbon extends the scope and primacy of national measures even more, which has substantially extended the significance of the

¹⁶¹ Barnard, Catherine: Flexibility and Social Policy, in Constitutional Change in the EU, From Uniformity to Flexibility (2000), pgs 210-211.
principle of subsidiarity. According to Article 5 of the TEU, the European Union shall act in areas which do not fall within its exclusive competence, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can be better achieved at the EU level by reason of the scale or effects of the proposed action. The TFEU refers for the first time to the regional and local levels. Since this amendment, a more important role has been given to the national parliaments of the Member States to exercise control over compliance with the subsidiarity principle by the EU institutions. In respect of this, the power has been conferred on the CJEU to examine whether the secondary legislation infringes the principle of subsidiarity by an action of a Member State in the CJEU. Moreover, the Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. Correspondingly, the European Parliament must forward its draft legislative acts and its amended drafts to national Parliaments. After this, national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission stating why it considers that the draft in question does not comply with the principle of subsidiarity.

The role of this more flexible form of regulation, such as the Framework Agreement, was recognised in the Commission’s Green Paper on Partnership for a New Organisation of Work, which considered mainly how to develop the flexibility the employers need. This implied the development of labour law from rigid and compulsory systems of statutory regulations to more open and flexible legal frameworks. However, while this approach allows diversity in the national systems it also includes the potential dilution of individual rights and protection. As far as the development of fixed-term contracts is concerned, this has meant overemphasising flexibility at the expense of security.

The balance of the needs and interest between employer and employees concerning the use of fixed-term contracts rarely reflects the reality. The employee who performs work under temporary contracts is engaged in a form of employment that is discontinuous and of an insecure nature from the perspective of the employee’s on-going engagement in the labour market. This is a feature of all types of temporary work, not just abusive fixed-term work, the prevention of which is the objective of the Framework Agreement. Research

164 Articles 2 and 4 of the Protocol on the application of the principles of proportionality and subsidiarity
165 Barnard, Catherine: Flexibility and Social Policy in Constitutional Change in the EU: From Uniformity to Flexibility (2000), pg 211.
indicates that recourse to fixed-term contracts is more often a unilateral expression by an employer rather than an employee’s choice. In this respect, part-time work and fixed-term work differ considerably from each other. While part-time work may well represent the mutual interest of the parties to an employment relationship and may be a positive choice for many workers, those engaged under fixed-term contracts would usually accept an indefinite duration contract given the choice. To a limited extent, this is recognised in the directives as well. The Fixed-Term Work Directive does not contain any clause requiring Member States and the social partners to remove the obstacles to fixed-term work as is the case concerning the obligation of enhancing the part-time work laid down by the Part-Time Work Directive.

3.3 THE DEVELOPMENT OF EU LAW AFTER THE DIRECTIVE ON FIXED-TERM WORK

3.3.1 The Concept of Successive Fixed-Term Contracts and Prevention of Abuse Arising from Them

In accordance with the wording of Clause 5 of the Framework Agreement, it is applied only to successive fixed-term contracts. On the other hand, in Clause 5(2) determining the conditions under which fixed-term contracts shall be deemed as successive is left to the discretion of the Member States. This provision is crucial determining the scope of Clause 5 and, therefore, how far the abuse of fixed-term contracts can be prevented and how effectively circumventing of the protection provided by Clause 5 can be avoided.

The CJEU took a stance on this question in the Adeneler ruling. The question was whether the Greek legislation, according to which fixed-term employment contracts can be regarded as successive only in so far as they are not separated by a period of more than 20 working days compromised the objective and the practical effect of the Framework Agreement. The Court declared that:


167 Barnard, Catherine: EC Employment Law (2006), pgs 485-486. Directive 97/81/EC. According to the preamble to the Framework Agreement on Part-Time Work, parties to this agreement attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises. For these purposes, the intention of the parties to the Agreement is to facilitate the development of part-time work on a voluntary basis and contribute to the flexible organisation of working time in a manner that takes the needs of employers and workers into account.
“Clause 5 must be interpreted as precluding a national rule under which only fixed-term employment contracts or relationships that are not separated from one another by a period of time longer than 20 working days are to be regarded as ‘successive’ within the meaning of that Clause.”\textsuperscript{168}

The Court justified its opinion by stating that a national rule of that kind must be considered to compromise the object, aim and practical effect of the Framework Agreement because of the inflexible and restrictive definition of when a number of subsequent employment contracts become successive. This would allow insecure employment of a worker for years since, in practice, the worker would as often as not have no choice but to accept breaks of 20 working days in the course of a series of contracts with his employer. Furthermore, a national rule of this type could well not only exclude a large number of fixed-term employment relationships from the benefit of the protection of workers sought by Directive 1999/70 and the Framework Agreement, largely negating the objective pursued by them, but also permit the misuse of such relationships by employers.\textsuperscript{169}

In Adeneler, the CJEU found that the margin of discretion left for the Member States in defining the maximum total duration is not unlimited because it cannot compromise the objective or the practical effect of the Framework Agreement. In particular, this discretion must not be exercised by national authorities so as to lead to abuse and thus compromise the objective of the agreement.\textsuperscript{170} Thus, the court confirmed that discretion has to be exercised without circumventing the protection provided by Clause 5. It must also be noted that discretion of the Member States is restricted by the preamble to the Directive, which states that as to:

\textit{“the terms used in the Framework Agreement but not specifically defined therein, the Directive allows the Member States to define such terms in conformity with national law or practice as is the case for the other Directives on social matters using similar terms, provided that the definitions in question respect the content of the Framework Agreement.”}\textsuperscript{171}

The Court found the objective and effective enforcement of the Framework Agreement compromising where the employer was allowed to conclude a new fixed-term contract immediately after the 20 day period from the expiry of the

\textsuperscript{168} C- 212/04, Adeneler, para. 89.


\textsuperscript{170} C- 212/04, Adeneler, para. 82.

\textsuperscript{171} Preamble to the Directive 99/70 EC, para 17.
previous contract and thus prevent the conversion of successive contracts into a more stable employment relationship, irrespective of both the number of years for which the worker concerned had been taken on for the same job and the fact that those contracts cover needs which are not of limited duration but are ‘fixed and permanent’. In these circumstances, since the protection of workers against the abuse of fixed-term employment contracts or relationships, which constitutes the aim of Clause 5 of the Framework Agreement, is called into question, the Court of Justice thus specified the demarcation between permitted and prohibited use of fixed-term contracts by viewing as abusive the use of fixed-term contracts that were intended to cover the fixed and permanent needs of the employer.

It can be inferred from the reasoning of the judgment in Adeneler that optional measures are still subordinate to the main objective of preventing abuse of fixed-term contracts. The implication of the foregoing is that irrespective of the means by which measure a Member State has implemented Clause 5, the protective measure cannot be circumvented by the gaps between the fixed-term contracts or relationships. Consequently, all the contract periods shall be accounted together when the permissibility of such a measure is assessed, as is the case concerning maximum total duration. Furthermore, the objective factors relating to special features of particular sectors, occupational area or activity shall not be considered as legitimate reasons for concluding successive fixed-term contracts if the needs of employer are in fact fixed and permanent.

Advocate-General Julienne Kokott justified this reasoning by prohibition of circumvention, stating that especially where a number of fixed-term employment relationships have been concluded in succession, there is a danger that a contract of indefinite duration, a model defined by the social partners, will be circumvented, thus giving rise to the problem of abuse. This is why Clause 5(1) of the Framework Agreement expressly requires that measures to be introduced to prevent abuse arising from successive fixed-term employment relationships be sufficiently effective.

The prohibition of circumvention can also be understood as a practical application of the principle of efficient enforcement of the EU law, which requires national courts

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172 C-212/04, Adeneler, para. 88.
173 The Court continued the same line of reasoning in Vassilakis, taking the view that the number of successive fixed-term contracts concluded with the same person or for the purposes of performing the same work must be taken into account in ensuring that fixed-term relationships are not abused by employers, C-364/07 Vassilakis and Others, paragraphs 115 to 117.
175 Reasoning of this kind can also be seen in the opinion of Advocate General Niilo Jääskinen, delivered on the 15th of September 2011.
176 C-212/04, Adeneler, paras 68-69 and 88; see however C-586/10, Kücük, para. 56
177 Opinion of Advocate General Julienne Kokott in Adeneler, C-212/04, delivered on 25th of October 2005, para 64.
to interpret Clause 5, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the Directive. This means that the use of successive fixed-term contracts in tasks of a permanent nature by fixing the expiry and the beginning of contracts in the chain is not permissible. In this regard, restricting the scope of national law so that short breaks between the contract periods enable the contracts to be excluded from the scope of Clause 5 is also prohibited.\textsuperscript{178} The Court of Justice also specified the concept of abuse of fixed-term contracts, holding as abusive the use of fixed-term contracts in tasks the employee had performed for years and which serve a ‘fixed and permanent’ need.\textsuperscript{179}

As the optional measures are justifiably deemed subordinate to the objective of the Framework Agreement, the question of whether, in the light of the Adeneler case, the fixed and permanent needs of the employer exclude the possibility of concluding successive fixed-term contracts in cases where a Member State has adopted Clause 5 by introducing the measure of maximum total duration or by restricting the number of renewal of such contracts or if a Member state has equivalent measures in national legislation can also be raised. In Adeneler, the CJEU did not restrict the prohibition on concluding successive fixed-term contracts that were in fact intended to cover the fixed and permanent needs of the employer to the requirement of objective reasons.\textsuperscript{180} In other words, the use of successive fixed-term contracts is prohibited if an employee has been taken on for the same job in order to satisfy needs of the employer that are not of limited duration but are fixed and permanent irrespective of the measure introduced by the Member State. Therefore, the use of fixed-term contracts must always be related to some temporary need of employer and not a permanent one.\textsuperscript{181} The implication of this is that concluding successive fixed-term contracts in the case of ‘fixed and permanent’ needs is prohibited even if Member State has not opted for the measure of objective reasons to prevent abuse, but for limits on the maximum duration or the number of successive contracts renewals instead.\textsuperscript{182}

The foregoing interpretation is necessary to prevent the abuse arising from successive contracts effectively, which is the main objective of Clause 5 and to which the optional measures listed are subordinate.\textsuperscript{183} Thus, renewal of a fixed-term contract which is intended to cover the permanent needs of the employer constitutes

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178  C-212/04, Adeneler, paras. 88 and 95.
179  C-212/04, Adeneler, para. 88.
180  C-212/04, Adeneler, para.105.
183  In C-212/04, Adeneler, para. 92 emphasises the obligation of the Member States to adopt at least one optional measure listed in the Clause in order to pursue effectively to prevent the abuse. Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 88-93 and 118-119.
an abuse of such contracts and is not allowed even if those contracts were within
the limits of maximum duration or total number of renewals in accordance with
national law.

In the Adeneler ruling, the CJEU further developed the protection of fixed-
term work by specifying the concept of objective reasons and demarcation between
legitimate use and by prohibiting the abuse of successive fixed-term contracts. This
protection favours permanent employment contracts as the main rule over fixed-
term contracts because of the employment security included in the former. The
grounds for this can be derived from paragraph 6 of the general considerations
on the Framework Agreement, according to which the employment contracts of
indefinite duration are the general form of employment relationships contributing
to the quality of life of the workers concerned and improving their performance.
According to paragraph 7 of the general considerations, the use of fixed-term
employment contracts based on objective reasons is a way to prevent abuse. As
general considerations have the same legal status as preambles to the directives,
Clause 5 must be interpreted in accordance with these principles.\textsuperscript{184}

The objective reasons related to the temporary nature of the job must thus
be required for concluding fixed-term contracts. Because of these two principles
included in paragraphs 6 and 7 of the general considerations of the Framework
Agreement, objective reasons should be regarded as a minimum requirement for
concluding fixed-term contracts irrespective of other measures adopted by the
Member States to prevent abuse arising from successive fixed-term contracts. This
stance is also supported by Roger Blanpain, who argues that the requirement of
objective reasons in respect of all fixed-term employment contracts can be derived
from the main rule of the Framework Agreement, according to which fixed-term
employment contracts are an exceptional form of employment.\textsuperscript{185}

The CJEU indicated in Adeneler the desire to develop the protection of successive
fixed-term contracts further based on the general principles and the preamble to
the Framework Agreement by prohibiting the use of successive fixed-term contracts
in tasks where the need of the employer is permanent. In this regard, the CJEU
restricted the discretion of a Member State to limit the scope of implementation
of the Framework agreement in its national law. Furthermore, the CJEU required
that objective reasons must be related 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 contracts.\textsuperscript{186}

\textsuperscript{184} Bruun, Niklas – Bercusson, Brian: Fixed-Term Work in the EU (1999), pgs 61-63.
\textsuperscript{186} C-212/04, Adeneler, paras 68-69
Nevertheless, although the question of whether some of the national developments in legal conditions concerning recourse to fixed-term contracts have gone in the direction determined by the CJEU in Adeneler has been raised,¹⁸⁷ there are still significant differences.¹⁸⁸

For example, in the United Kingdom, where the Directive on Fixed-Term Work was implemented by the Fixed-Term Employment Regulations, according to which an employee who had four years of continuous employment after July 10th 2002 under successive fixed-term contracts, the contract is deemed as permanent if the employment under a fixed-term contract ‘was not justified on objective grounds’ at the time of the most recent renewal of the employment, or if the last of the contracts in question was not renewed at the time when that contract was entered into.¹⁸⁹

In Finland, the Directive on Fixed-Term Work was originally implemented by the requirement for objective reasons concerning successive contracts in the Employment Contracts Act (työopimuslaki). However, since the Supreme Court of Finland permitted the use of successive contracts in the same tasks for many years and in several contracts in its established case law, the Finnish legislator introduced new measures against abuse arising from successive fixed-term contracts in legislation where the objective reasons were complemented by more specific prohibition of the use successive fixed-term contracts in tasks where the need for a work force was permanent. In this evaluation, the number of renewals and total duration of employment have to be taken into account.¹⁹⁰ On the other hand, the interpretation adopted by the Finnish Supreme Court in judgment 1996:105, according to which the contracts do not convert into indefinite duration solely on grounds of their number of renewals or the time period they are intended to cover, provided that there is a justified reason for each contract, is against the criteria laid down by the CJEU in Adeneler.¹⁹¹ As explained above, the CJEU found in Adeneler that the margin of discretion left for the Member States in defining

¹⁸⁷ The concept of ‘objective reasons’ within the meaning of Clause 5(1)(a) of the Framework Agreement must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts. These 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.


¹⁹⁰ See, for example, KKO 2010:11 and KKO 1996:105.

¹⁹¹ See, however, C-586/10, Kücük, where even 13 successive contracts over 11 years was not deemed contrary to Clause 5 of the Framework Agreement. The CJEU considered that the existence of objective reason excludes per se the possibility of abuse. Accordingly, the CJEU stated that the Framework Agreement must be interpreted as meaning that a temporary need for replacement staff, provided by national legislation such as that at issue in the main proceedings, may in principle constitute an objective reason under that Clause, even if an employer may have to employ replacements on a 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); see paras 51 and 56.
the maximum total duration of successive fixed-term employment contracts is not unlimited, because it cannot compromise either the objective or the practical effect of the Framework Agreement.

In particular, this discretion must not be exercised by national authorities in a way that leads to a situation which causes abuse and thus compromises the objective of the Framework Agreement.\textsuperscript{192} Further, the CJEU found that the scope of possibility for employers to circumvent the rules introduced to prevent abuse must not be large, as this would call into question the protection of workers against the misuse of fixed-term employment contracts.\textsuperscript{193}

In Impact Ruling C-268/06, the question was whether the renewal of fixed-term contracts up to eight years by the Irish public sector employer after the expiry of the implementation period but before the national act came into force was abusive and therefore violated Clause 5. In Impact, the Commission had suggested that Clause 5(1) of the Framework Agreement also establishes such minimum material protection in that, in the absence of any other measures intended to combat abuse or at least any sufficiently effective, objective and transparent measure to that end, it requires objective reasons to justify the renewal of successive fixed-term employment contracts or relationships. However, the Court of Justice rejected the Commission’s proposal in its reasoning in Impact by stating that the construction advocated by the Commission effectively introduces a hierarchy between the various measures referred to in Clause 5(1) of the Framework Agreement, whereas the terms of that provision themselves unequivocally show that the various measures envisaged are intended to be ‘equivalent’.\textsuperscript{194}

The Court referred in Impact to Advocate General Kokott’s opinion, who stated that despite the fact that the Member States are required to make effective and binding provision in their domestic law for at least one of the measures to prevent the abuse referred to in Clause 5(1)(a) to (c), the Framework Agreement does not prescribe precisely which one(s). Instead, it leaves it to the discretion of the Member States to choose between the three types of measure, all of which are ranked equally and one or more of which the Member States must – at their complete discretion – implement in a manner that is effective and consistent with the purpose of the Directive. The situation in each Member State must thus be taken into account as well as the circumstances in particular sectors and occupations.

A Member State is, therefore, not necessarily required to introduce the first of the three possible measures. There is nothing to prevent it from simply defining the maximum total duration of successive employment relationships or the maximum

\textsuperscript{192} C- 212/04, Adeneler, para. 82.
\textsuperscript{193} C- 212/04, Adeneler, para. 88.
\textsuperscript{194} C-268/06, Impact, para. 76.
number of renewals of fixed-term employment relationships in order to prevent abuse, instead of providing objective reasons. This is because only the first of the three possible measures would, in being incorporated into national law, result in the requirement that the renewal of fixed-term employment contracts or relationships must be based on objective reasons. By contrast, the other two measures do not necessarily entail the need for such a justification since, provided that the maximum total duration or maximum number of renewals determined in accordance with the Directive is not exceeded, a fixed-term employment relationship may be renewed even if there is no objective reason for doing so without that renewal being contrary to the Framework Agreement.\(^{195}\)

Furthermore, Advocate General Kokott stated that the measures to be introduced by the Member States pursuant to Clause 5(1) of the Framework Agreement are also undoubtedly intended to result in the effective prevention of abuse in individual cases. However, Clause 5(1) of the Framework Agreement is not aimed at establishing an individual prohibition of abuse independently of the measures envisaged in Clause 5(1)(a) to (c), so that, in the absence of any other measure intended to combat abuse or at least of any sufficiently effective, objective and transparent measure to that end, it requires objective reasons to justify the renewal of successive fixed-term employment contracts or relationships. Accordingly, such a prohibition of abuse in individual cases cannot be inferred from the Framework Agreement by reference to the prohibition on frustrating the objective of a directive or the domestic authority’s obligation to cooperate (Article 10 EC in conjunction with the third paragraph of Article 288 TFEU) either.\(^{196}\)

This stance undoubtedly reflects the principle that the directives are binding with regard to the result but not as to their means. However, the conclusion that the prevention of abuse as an objective of the Framework Agreement on Fixed-Term Work does not have any independent significance is curious and contrary to what the CJEU has confirmed in Adeneler, where the Court held the use of fixed-term contracts abusive which in fact covered the fixed and permanent needs of the employer. The Court also disregarded the requirement of objective reasons as an ultimate means to prevent abuse in the way intended in the general considerations, which are an interpretative aid of the Clauses of the Framework Agreement.

The Court of Justice continued its demarcation between the permitted use and prohibited abuse of fixed-term contracts in its recent Küçük ruling by taking a stance


\(^{196}\) C-268/06 Impact, paras.75-79 and Opinion of Advocate General Kokott in Impact, delivered on 9 January 2008, para 130.
on the objective reasons.\textsuperscript{197} The question was about an employee who had been employed by the German public sector employer under 13 successive fixed-term contracts, the total duration of which was over 11 years, for the purpose of replacing several permanent employees who were on leave. The CJEU took the view that a temporary need for replacement staff may constitute an objective reason under Clause 5 of the Framework Agreement. The Court stated in its reasoning that each contract was concluded in order to cover the temporary individual replacement of an absent employee. Moreover, the tasks of fixed-term employee were defined specifically by the tasks of a particular absent employee whose intention was to return to resume work after the expiry of his leave. Therefore even though the fixed-term employee was performing work which was part of permanent activity of the employer, this fact did not preclude the individual temporary replacement need of the employer for this activity and his entitlement to fulfil this need by fixed-term contracts.\textsuperscript{198} Therefore the CJEU considered that the question was not about the same work performed by the employee under different contracts despite the long total duration of the contracts.\textsuperscript{199}

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 indefinite duration contracts 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 the Clause. However, in the assessment of the issue of 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 of renewals and total duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.\textsuperscript{200} The reasoning of the court resembles the interpretation adopted by the CJEU in Impact, in that it is sufficient for the Member State to introduce whatever measure listed in Clause 5 without further limits. The Court stated that the existence of an objective reason in principle precludes there being abuse, except where an overall assessment of the circumstances surrounding the renewal of the fixed-term employment contracts or relationships in question reveals that the work required of the employee does not merely meet a temporary

\textsuperscript{197} C-586/10, Küçük
\textsuperscript{198} C-586/10, Küçük, para 38.
\textsuperscript{199} Compare with C-212/04, Adeneler, para 88.
\textsuperscript{200} C-586/10, Küçük, para 56.
need. Furthermore, the Court justified its judgment by the fact that Framework Agreement does not lay down the absolute obligation to stipulate in national law that abuse of fixed-term contracts leads to a contract of indefinite duration.202

Thus the CJEU partly rejected the possibility of interpreting Clause 5 so that the measures listed are subordinate to the objective of the Framework Agreement in its Impact ruling and, recently, in the Kücük ruling.203

3.3.2 The Concept of Objective Reasons

A significant number of the Member States had already applied the requirement of objective reasons at the time Fixed-Term Work Directive had to be adopted. However, these reasons were specified technically in various ways, ranging from a more general requirement to be filled out by the courts to more or less detailed lists in the legislation indicating the range and types of permissible fixed-term contracts.204 Before being able to assess whether national legal development has followed the EU law, it is necessary to examine the concept of objective reasons determining the acceptable use of fixed-term contracts in the light of the wording and purpose of the Framework Agreement and the relevant CJEU case law.

In the preamble to the Framework Agreement, the parties to the Agreement illustrate their willingness to ensure that fixed-term employment contracts are being used on an acceptable basis for employers and workers.205 According to the general considerations on the Framework Agreement, the signatories have demonstrated their desire to establish a framework to prevent abuse arising from successive fixed-term employment contracts or relationships. The preamble states that use of fixed-term employment contracts based on objective reasons is a way to prevent abuse.206 Additional interpretative aid for the concept of objective reasons may be derived from the general considerations, according to which employment contracts of indefinite duration are the general form of employment relationship and contribute to the quality of life of the workers concerned and improve their performance.207 It can

201 C-586/10, Kücük, para 51. C-268/06, Impact, para 76.
202 C-586/10, Kücük, para 53: “Clause 5(2)(b) of the FTW Framework Agreement provides merely that the Member States may, ‘where appropriate’, determine under what conditions fixed-term employment contracts or relationships are to be ‘deemed to be contracts or relationships of indefinite duration’.”
203 C-586/10, Kücük, para 51. The CJEU stated that the existence of an objective reason excludes in principle there being abuse of fixed-term contracts. See next section.
205 Framework Agreement on Fixed-Term Work, preamble, para 3.
206 Framework Agreement on Fixed-Term Work, General Considerations, para.7.
207 Opinion of Advocate General Niilo Jääskinen, delivered on 15 September 2011, para 34.
be inferred from these principles that objective reasons must contain a qualitative constraint for these contracts that restricts their use to exceptional situations apart from contracts of indefinite duration one way or the other.

Further illumination of the concept of objective reasons may be derived from other clauses of the Framework Agreement, such as the principle of non-discrimination in Clause 4, in which equal treatment is required in respect of conditions of employment unless different treatment is justified by objective grounds. Correspondingly, Clause 4(4) requires similar periods of service qualifications to be applied for fixed-term workers and permanent workers except where a different length of service qualifications is justified on objective grounds. Filling permanent positions by fixed-term employees may violate Clause 4 of the Framework Agreement. Finally, Clause 3(1) contains a definition of fixed-term work in which the end of the contract is determined by objective conditions such as completion of a specific task, or the occurrence of a specific event (such as the return of a worker replaced when absent through illness). These provisions provide interpretative aid in what might constitute an objective reason for using a fixed-term contract.208

There is no further specification of the concept of objective reasons in Clause 5 of the Framework Agreement on Fixed-Term Work. It is agreed in the literature that EU Directive 99/70/EC contains a relatively broad definition of the ‘objective reasons’ regarded as sufficient to prevent abuse.209

However, the CJEU specified the concept of objective reasons in its Adeneler ruling, stating that this concept, within the meaning of Clause 5(1)(a) of the Framework Agreement, must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term contracts.210 Furthermore, according to the CJEU, such 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.211

The description developed by the CJEU seems to resemble the legal restrictions of certain national legal systems. According to Zappala, these may occur within the company at certain times such as employees on leave, vacancies, specified tasks such as increases in workload, which are not directly linked to the usual activity

208 Bruun, Niklas – Bercusson, Brian in Fixed-Term Work in the EU by Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas (1999), pgs 84-85.


210 C- 212/04, Adeneler, paras 68-69.

211 C- 212/04, Adeneler, para 70. See also Barnard, Catherine: EC Employment Law (2006), pgs 481-482.
of the company.\textsuperscript{212} These circumstances may also relate to the characteristics of a sector or the status of workers such as those on training programs or workers who belong to some disadvantaged category such as the long-term unemployed.\textsuperscript{213}

Furthermore, in accordance with the general considerations, since fixed-term employment contracts are a feature of employment in some sectors, occupations and activities, which may suit both employers and workers, such contracts based on mutual consent do not constitute an abuse. Additional illumination of the concept of objective reasons can be found in the opinion of the Advocate General, who inferred that the Framework Agreement and the Directive alike do not preclude the adoption of national rules permitting or even expressly prescribing the conclusion of fixed-term employment relationships for specific sectors, occupations or activities. \textsuperscript{214}

In such cases, the objective reason for concluding the fixed-term employment contract lies precisely in those special features that are considered characteristic of employment in that sector, occupational area or activity, as was the case in the Adeneler ruling, in which the Greek Presidential Act was the national law subject to interpretation. Furthermore, an objective reason may lie, for example, in efforts to reintegrate specific categories of people, such as the long-term unemployed or unemployed persons who have exceeded a specified age-limit, into working life.\textsuperscript{215} However, as the CJEU stated in the Mangold ruling, using successive fixed-term contracts as an employability tool must be proportionate to the outcome pursued.\textsuperscript{216}

On the other hand, the implication of the Adeneler ruling is that the objective reason cannot be based solely on the national legislation. The Court stated that a national provision that merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by statute or secondary legislation unrelated to what the activity in question specifically consists of, does not permit objective and transparent criteria to be identified, verifying whether the renewal of such contracts actually responds to a genuine need, is appropriate for achieving the objective pursued, and is necessary for that purpose.\textsuperscript{217}

Consequently, the requirement of objective reasons must be derived from the circumstances characterising an activity or from the specific nature of the tasks, for the performance of which such contracts have been concluded, or from the inherent characteristics of those tasks. Pursuing a legitimate social policy objective may also constitute an objective reason. However, in accordance with the opinion

\textsuperscript{212} See, for instance, French Labour Code, Articles 1242-1, 1242-2. See chapter 2 of France’s part of the research.


\textsuperscript{214} Opinion of the Advocate General Kokott in C-212/04, Adeneler, para 57.

\textsuperscript{215} Opinion of Advocate General Kokott in C-212/04, Adeneler, paras. 57 and 71.

\textsuperscript{216} C-144/04, Mangold.

\textsuperscript{217} C-212/04, Adeneler, para 74.
of Advocate General Kokott, the more general the provision defining an objective reason is, the less likely it is to fulfil the purpose of the Framework Agreement and the easier it will be to undermine the model of the contract of indefinite duration as the general form of employment relationship. 218

In the pending case C-313/10, the question is about preconditions for budget measures executed by a public authority constituting an objective reason and the interrelationship between the objective reason and other measures of Clause 5. The case concerns the termination of successive fixed-term employment relationships, of which the total duration was almost nine years and where the last contract was justified by budget funding. The Court of Justice was asked by the German regional court whether the assessment of the existence of objective reasons should be made merely by the circumstances prevailing at the moment of concluding the last contract or whether account must also be taken of the total duration and number of renewals of the contracts. Moreover, the CJEU was also asked whether the Framework Agreement imposed more stringent requirements for the objective reasons the more fixed-term contracts have preceded the fixed-term contract concerned and the longer their total duration was. Moreover, the Court of Justice was asked whether Clause 5 of the Framework Agreement (the objective reason requirement) must be interpreted as precluding the application of national law whereby only successive fixed-term contracts deemed to be acceptable in the public sector for the objective reason that the salary of the fixed-term employee is linked to the budget funds intended to cover the salary of the employee, the availability of which is restricted in time, whereas in the private sector economic reasons of this kind are not recognised as objective reasons. 219

With regard to the first and second question, the Advocate General stated that the Member States are bound to the content, objectives and effectiveness of the EU law while using their discretion in implementing it. Although the concept of objective reasons is not defined by Clause 5 of the Framework Agreement, and it does not preclude the renewal of the contracts between the parties, an obligation to introduce constraints on the use of successive contracts in order to prevent fixed-term employees being in a precarious situation for an excessive period of time is laid down by the Clause. This can undermine their viability and cause their exclusion from employment security guaranteed by the law to contracts of indefinite duration. In this regard, the Advocate General paid special attention to the stability

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218 Opinion of Advocate General Kokott in C-212/04, Adeneler, paras. 57 and 59. The same conclusion was repeated in the case C-378/07 Angelidakis and others, para 107, where the use of successive contracts was deemed to be against the Framework Agreement. The national legislation allowed the public-sector employer to renew the fixed-term contracts to meet temporary needs even in a situation where those needs were fixed and permanent.

of employment that is the objective pursued by the signatories to the Framework Agreement.\textsuperscript{220}

In this regard, the Advocate General agreed with the national court that the objective pursued by Clause 5 to prevent abuse arising from successive fixed-term contracts can only be achieved by laying down more stringent requirements for the objective reasons the more fixed-term contracts have already been concluded and the longer their total duration is. This means in practice that the longer the period of time a fixed-term employee has worked under renewed fixed-term contracts, the more likely the question is one of abuse. The Advocate General specified the more stringent objective reason requirement by stating that in this kind of situation it is important for an employer to show that need for work performance is really temporary and not permanent.\textsuperscript{221}

With regard to the second question of whether the chronologically restricted availability of budget funds constitute an objective reason only for a public sector employer, the Advocate General considered firstly that the legal position of the employer is not of relevance in interpreting Clause 5. Moreover, he considered that if a public authority may, by using the budgetary power, create a reason for using this kind of contract and therefore release itself from complying with the relevant employment law, this constitutes an abuse. Private and public sector functions must be treated equally considering the existence of objective reasons and a public sector budget cannot be deemed such a reason in accordance with Clause 5.\textsuperscript{222}

The Advocate General also referred to the objective reasons defined by the CJEU in Adeneler, specifying that objective reasons must be related to tasks of a temporary nature and stating that, with regard to the existence of budget funds for the purpose of employing fixed-term employees, he found it too general and abstract without some immediate connection with the circumstances characterising a given activity, so that it does not constitute an objective reason.\textsuperscript{223}

3.3.3 Concluding Remarks

The stance adopted by the Advocate General in Impact, according to which it is within the free discretion of a Member State to decide by what measure to tackle abuse, is open to criticism. First of all, this conclusion is not supported by the wording of Clause 5, as the measures are not subordinate to their equivalence but to their

\textsuperscript{220} Opinion of Advocate General Niilo Jääskinen, delivered on 15\textsuperscript{th} September 2011, paras 32-34.
\textsuperscript{221} Opinion of Advocate General Niilo Jääskinen, delivered on 15\textsuperscript{th} of September 2011, paras 34 and 37.
\textsuperscript{222} Opinion of Advocate General Niilo Jääskinen, delivered on 15\textsuperscript{th} of September 2011, paras 61 and 65.
\textsuperscript{223} Opinion of Advocate General Niilo Jääskinen, delivered on 15\textsuperscript{th} of September 2011, paras 69-71.
objective of preventing abuse, which the Court specified further in Adeneler. In that ruling, the Court held the use of fixed-term contracts in the same tasks performed by the employee for years and provided that those contracts cover needs which are not of limited duration but are ‘fixed and permanent’, as abusive independent of the requirement of objective reasons.

The Court also stated in the Adeneler ruling that the concept of ‘objective reasons’ must be related 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. The maximum total duration or maximum amount of renewal defined in the Framework Agreement as such do not necessarily entail such requirements as the CJEU confirmed in Impact ruling. The Advocate General nevertheless deemed those measures equivalent. It should be noted that despite discretion in respect of options to achieve the objective of the Directive, the use of this discretion cannot compromise this objective. The stance of the Court in Impact also calls into question the position of objective reasons as an ultimate way to prevent abuse that is included in the general considerations of the Framework Agreement.

Therefore, it is unclear after Impact and to some extent the CJEU’s Küçük ruling whether the demarcation between acceptable use and prohibited abuse of fixed-term contracts determined by the CJEU in Adeneler is still valid and whether it is permissible to have recourse to fixed-term contracts for an unlimited period of time or to renew them on unrestricted occasions provided that one of the three measures is introduced by a Member State. The CJEU did not take a stance on this question in Impact. However, in this regard in Küçük, the Court called into question the limit beyond which successive fixed-term contracts shall be deemed abusive.

The Court confirmed in the Küçük ruling that the replacement of employees might constitute an objective reason for the purposes of Clause 5 of the Framework Agreement, even if the need to replace employees is deemed to be permanent. By this judgment, the Court took a completely opposite stance on the permissibility of successive fixed-term contracts in which the need of the employer is in fact fixed and

224 See the Commission’s Explanatory Memorandum point 28 which explains that the expression one or more regulatory steps in Clause 5 refers to flexibility in implementing the measures to prevent abuse and could obviously be used in a way which takes into account the special needs of employers and workers in SMEs and also refers to the General Considerations para 10 in which the agreement refers back to the Member States and social partners to arrange the application of its general principles, minimum requirements and provisions in order to take account of the situation and the circumstances of particular sectors and occupations, including activities of a seasonal nature in each Member State. However, this optional nature of the provision does not justify undermining the need to arrange the protection effectively (MS).


226 C-212/04, Adeneler, paras 76-89.
permanent compared to Adeneler. By allowing 13 successive fixed-term contracts, the total duration of which was over 11 years, it seems to be almost impossible to show that the employer’s need is not temporary by using objective reasons.\footnote{227} This also means that total duration and number of renewals are not of much relevance in determining whether the need is permanent. The implication of the judgment is that fixed-term contracts are a form of employment almost equal to contracts of indefinite duration. This is, however, contrary to Framework Agreement on Fixed-term Work which requires that contracts of indefinite duration are the general form of employment and fixed-term contracts are an exception.\footnote{228} This objective will not be achieved, as the judgment of the CJEU in Kücük indicates, if there is no further requirement for objective reasons in national law. For example, according to the Fixed-Term Employment Regulations in the United Kingdom, successive contracts are not deemed as constituting a permanent relationship (or abuse of such contracts) if the total duration does not exceed four years.\footnote{229}

Thus, the stance adopted by the CJEU suggests to employees that protection against instability of employment is very dilute and furthermore that fixed-term contracts can be used almost the same as contracts of indefinite duration provided that the employer has an objective reason for each contract.\footnote{230} Furthermore, the view that it is permissible to use successive fixed-term contracts even if the need for workforce in replacing employees is deemed to be permanent and despite the fact that this need may also be covered by hiring employees under indefinite duration employment contracts may frustrate the significance of Clause 3 of the Framework Agreement, which requires that the end of a fixed-term contract be determined by objective conditions.\footnote{231} On these grounds, to consider that the Kücük ruling does not undermine the precedent value of the Adeneler ruling with regard to the restrictions of interpretation on the concept of successive fixed-term contracts in circumstances where the needs of employer are fixed and permanent is justified. Correspondingly, the characteristics of objective reasons perceived by the CJEU in Adeneler are valid irrespective of the Kücük ruling. This conclusion is also supported by the fact that the Adeneler ruling was given by the Grand Chamber of the Court whereas the Kücük ruling is not a Grand Chamber judgment.

\footnote{227}{C-586/10, Kücük , paras 43 and 51; compare with C- 212/04, Adeneler, para 88.}
\footnote{228}{General considerations of Framework Agreement, para 6.}
\footnote{230}{C-212/04, Adeneler paras 68-69 and 72 and C-586/10 Kücük, para 51 and 56. See also C-144/04, Mangold, para 64. Fredman, Sandra: Transformation or Dilution: Fundamental Rights in the EU Social Space in European Law Journal vol 12, January 2 (2006), pg 48. Fredman, Sandra: Discrimination law in the EU: Labour Market Regulation or Fundamental Rights, in Legal Regulation of the Employment Relation (2000), pg 195.}
\footnote{231}{C-586/10, Kücük, para 56. Clause 3 of the Framework Agreement on Fixed-Term Work.
Moreover, the practical implication of the Court’s stance in Impact is that an individual cannot rely upon the requirement of objective reasons solely on the grounds of the Framework Agreement in order to dispute the renewal of his fixed-term contract when that renewal does not violate the rules of maximum total duration or number of renewals adopted by the Member State in accordance with the options available under Clause 5(1) (b) and (c). This means that, if only option b of the maximum total duration of successive fixed-term employment contracts is introduced by a Member State, fixed-term contracts could be renewed for many years at least in principle without limiting the number of renewals or requiring objective reasons. Correspondingly, if a Member State has decided to adopt the Directive by introducing the number of renewals measure, fixed-term contracts could be concluded without objective reasons or a maximum total duration.

It thus seems legitimate in the light of Clause 5 of the Framework Agreement and Impact ruling to merely fix the number of renewals or the maximum total duration, leaving aside any further constraints. It thus seems that if a Member State has adopted any of the measures listed in Clause 5 to prevent abuse, the requirement of the Directive is deemed to be fulfilled and that this prevents an individual from relying upon the other measures listed in Clause 5 before the national court, even if the measure adopted has not been sufficient to prevent abuse of successive contracts. As Pascale Lorber has described it, by setting limits on duration or number of renewals of fixed-term contracts, employers can play a mathematical game to avoid employing people on permanent contracts. This means that the Directive has to some extent failed in achieving its goal of preventing the abuse of successive fixed-term contracts. It should thus be reviewed by extending its scope to the first use of such contracts and requiring that successive contracts must always be justified by objective reasons relating to the actual circumstances characterising a given activity which are capable in that context of justifying the use of successive fixed-term contracts or relating alternatively to the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks.

The precondition of objective reasons should be

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232 C-268/06, Impact, paras. 70 and 77. Compare the Commission’s view cited in paragraph 72, according to which the right of the Member States to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals to enforce before the national courts rights the substance of which can be determined in a sufficiently precise manner on the basis of the provisions of that directive alone.

233 The Advocate General took this view in his opinion on the CJEU ruling C-268/06, Impact, paras. 115-116.


required irrespective of other measures implemented by a Member State by which the abuse of fixed-term contracts is prevented.

As the CJEU has stated, Clause 5 of the Framework Agreement is too imprecise and conditional to be directly effective. These features of the provision also complicate the realisation of prevention of abuse arising from successive fixed-term contracts as the objective of the Framework Agreement. The scope of discretion left for the Member States in respect of the means by which abuse of successive fixed-term contracts is going to be tackled is too broad.\(^{236}\) Furthermore, as the content of the obligation laid down in Clause 5 is imprecise and does not emerge from the wording of the provision, effective protection against abuse of successive fixed-term contracts is diluted. As the Framework Agreement is intended to lay down minimum protection for the weaker party to the employment relationship, the protection against abuse of fixed-term contracts is unsatisfactory.

The case law of the CJEU indicates that the abuse of successive contracts cannot be prevented by any one measure listed in Clause 5.\(^{237}\) Instead, interpreting the optional measures as subordinate to this objective would be justified to achieve the main objective of Clause 5. This is confirmed by the CJEU in Adeneler and repeated in Angelidaki so that the use of fixed-term contracts, where the worker concerned has been taken on for the same job for years and the fact that those contracts cover needs which are not of limited duration, but are ‘fixed and permanent’, shall be regarded as abuse.\(^{238}\)

The Court continued the same line of reasoning in Vassilakis, suggesting that the number of successive fixed-term contracts concluded with the same person or for the purposes of performing the same work must be taken into account when ensuring that the question is not one of abuse. It is also submitted in the literature that measures listed in Clause 5 do not refer to the optional measures, but to their purpose, which is preventing the abuse of successive contracts. In accordance with this, one measure listed in the Clause might be sufficient, but more than one, three, or even more measures may be needed to prevent the abuse arising from successive fixed-term contracts, taking account of the needs of specific sectors and/or categories of workers as well.\(^{239}\)

Advocate General Jääskinen also adopted this interpretation in his statement on C-313/10 when he argued that in assessing whether the objective reasons for successive contracts exists, the number of renewals and total duration of the

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237 C-586/10, Küçük, para 56, C-268/06, Impact, para 76.
238 Case C-212/04 Adeneler, para. 88 and Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, para 107.
employment relationship must be taken into account. He stated that the measures listed in Clause 5 were not optional but complemented each other. Otherwise, for example, a national provision restricting the number of renewals may lose its effectiveness and relevance if not complemented by a provision confirming the maximum total duration of the renewed contract period. Accordingly, laying down a requirement that a fixed-term contract can only be renewed twice is not very useful if the total duration of the contract period is unrestricted and can be extended for years. Jääskinen suggests that optional measures can complement each other in ensuring that the objective of the Clause is achieved and further clarify the concept of objective reason.\textsuperscript{240} The CJEU, however, has not yet given a judgment in the case. Consequently, it can be said that the prevention of abuse must be understood as an independent principle and objective, which directs the interpretation of the measures of Clause 5 a-c and to which those measures should be regarded as subordinate, as against what Advocate General Kokott stated in her opinion in Impact. \textsuperscript{241}

On the other hand, the optional nature of Clause 5 reflects its intention, which is to set minimum standards instead of full or even partial harmonisation.\textsuperscript{242} As Bercusson has stated, the starting-point of harmonisation is the identification of a problem common to various European countries and the attempt to harmonise law and practice related to it. It has emerged, however, that the identification of common problems, when they are related to the varying labour laws of selected national systems, does not produce a harmonised view of law and practice.\textsuperscript{243} Therefore, variations in industrial relations and labour law systems and corresponding differences in the forms and substances of national labour laws represent overwhelming obstacles to full harmonisation. The implications of breaking down such differences are also both politically and socially undesirable. For these reasons, rigid harmonisation has been consistently rejected in favour of diversity built on common minimum standards. By adopting these standards in the form of directives

\textsuperscript{240} The Opinion of Advocate General Níló Jääskinen in C-313/10, delivered on 15.11.2011, para 44.

\textsuperscript{241} Opinion of Advocate General Kokott in Impact, delivered on 9.1.2008, para 130: “Clause 5(1) of the Framework Agreement is not aimed at establishing an individual prohibition of abuse, independently of the measures envisaged in Clause 5(1)(a) to (c). Accordingly, such a prohibition of abuse in individual cases cannot be inferred from the Framework Agreement by reference to the prohibition on frustrating the objective of a directive or the domestic authorities' obligation to cooperate (Article 10 EC in conjunction with the third paragraph of Article 249 EC) either.”

\textsuperscript{242} The CJEU has also confirmed this fact in the C-251/11 Huet case by saying that the agreement is not intended to harmonise all national rules relating to fixed-term employment contracts but simply aims, by determining general principles and minimum requirements, to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and preventing abuse arising from the use of successive fixed-term work agreements or contracts. C-251/11 Huet, para 41.

\textsuperscript{243} Bercusson, Brian: European Labour Law (1996), pg 52.
whose objectives can be achieved by optional measures, the Union is able to establish standards acceptable to all Member States.244

The purpose of the EU intervention in setting minimum standards has been only to guarantee that employees across Europe will benefit from a certain level of social protection but does not prevent those Member States who are willing and able to do so from maintaining or introducing higher standards. While the EU minimum standard setting may function so as to prevent low standard Member States from lowering their standards to undesirable levels, this kind of regulation does not prevent higher-standard States from lowering their standards provided that the minimum requirement is met.245 In this regard, as Phil Syrpis has concluded, the interpretation of non-regression clauses has a crucial role. They seek to prevent, at their best, downward-directed competition, higher-standard Member States from reducing levels of protection when implementing a minimum standard. However, as they do not prevent Member States from developing different legislation in changing circumstances, they are difficult to enforce, as is indicated with regard to Clause 5 of the Framework Agreement in the next section.246

However the Framework Agreement aims at achieving improvements in working conditions at national level by setting minimum standards for the use of fixed-term contracts.247 Clause 5 of the Agreement does not achieve this objective very satisfactorily, as at least one of the measures it lists has already been fulfilled in most of the Member States, so that only two Member States would have to introduce completely new legal provisions as the European Parliament stated in its resolution on the Framework Agreement on Fixed-Term Work.248

On the other hand, using minimum standards must not lead to compromising the objectives of the directives while leaving room for the Member States to choose the means by which the objectives are to be achieved. Therefore, the Member States must not only introduce concrete measures but these must also be sufficient to achieve the result sought by the directive and, consequently, comply with the third paragraph of Article 288 TFEU (ex. TEC 249).

In this sense, national courts should interpret national law governing the use of successive fixed-term contracts

244 Kenner, Jeff: EU Employment Law (2003), pgs 30-31.
248 Report on the Commission proposal for a directive concerning the Framework Agreement on Fixed-Term Work concluded by UNICE, CEEP and the ETUC (COM (99) 0203-C4-0220/99), para. N.
by requiring objective factors relating to the activity which justify the use of such contracts.  

As the CJEU has confirmed, while there is no minimum objective reason requirement for the use of fixed-term contracts, the measures listed in Clause 5 are deemed equivalent to each other so that the Member States can introduce a maximum total duration or a maximum number of renewals instead of some objective reason. Moreover, the existence of an objective reason for each contract precludes there being abuse, and in these circumstances it is possible to employ even on a permanent basis as the CJEU has confirmed. Thus, it can be said that the CJEU has not emphasised in its interpretation the objectives of the Framework Agreement that contracts of indefinite duration are the main form of employment and that objective reasons are a way to prevent abuse of fixed-term contracts. It can also be said that the threshold for successive fixed-term contracts turning into abuse is relatively high. The case law, however, has somewhat promoted the normalising of fixed-term contracts as an equivalent form of employment along with contracts of indefinite duration. On the other hand, this interpretation accurately reflects the contradictory objectives of Clause 5 of the Framework Agreement and the twofold attitude of the EU employment policy towards the use of fixed-term contracts.

3.3.4 The Enforceability of Protection Guaranteed to Private Persons by Clause 5

The provisions of directives can traditionally have a direct effect provided that they are unconditional, precise and the implementation period has expired. The CJEU has not interpreted these preconditions quite strictly in its earlier case law. For example, the general prohibition on discrimination on the grounds of gender is deemed to be sufficiently precise notwithstanding the broad scope of discretion left to Member States. This section will analyse how protection against unacceptable use of fixed-term contracts is feasible for private individuals.

The CJEU took a stance on the direct enforceability of preventive measures included in Clause 5 of the Framework Agreement in the Impact ruling. The question was whether the renewal of fixed-term contracts up to eight years by the Irish public sector employer after the expiry of the implementation

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250 C-212/04, Adeneler, paras. 68-69.
252 C-586/10, Küçük, paras. 51, 53 and 56.
253 Joutsamo, Kari - Aalto, Pekka - Kaila, Heidi - Maunu, Antti: Eurooppaolue (2000), pg 74 and, for example, C-51/76, Verbond der Nederlandse Onderemingen.
period but before the national act came into force was abusive and therefore violated Clause 5.

The Commission had suggested in the case that Clause 5(1) of the Framework Agreement established minimum material protection according to which the absence of any other measure intended to combat abuse or at least of any sufficiently effective, objective and transparent measure to that end requires objective reasons to justify the renewal of successive fixed-term employment contracts or relationships.\(^{254}\) The Court disagreed with the Commission's view, which it saw as creating a hierarchy between the various measures referred to in Clause 5(1) of the Framework Agreement, whereas the terms of the provision themselves unequivocally show that the various measures envisaged are intended to be 'equivalent'. The Court also referred to Advocate General Kokott, who stated in her opinion that while the Member States are required to make effective and binding provision in their domestic law for at least one of the measures to prevent abuse referred to in Clause 5(1)(a) to (c), the Framework Agreement does not prescribe precisely which one(s). As the three measures laid down under Clause 5(1)(a) to (c) of the Framework Agreement are not ranked \textit{inter se}, it cannot be inferred merely from the Member State's failure to transpose the Directive that Clause 5(1) or individual components of it are directly applicable.\(^{255}\)

Furthermore, the Advocate General stated that the interpretation proposed by the Commission would have the effect of rendering the choice of means allowed by Clause 5(1) of the Framework Agreement meaningless, since it would permit an individual to plead the absence of objective reasons in order to challenge the renewal of his fixed-term contract even where that renewal did not infringe the rules relating to maximum total duration or number of renewals adopted by the Member State concerned in accordance with the options available under Clause 5(1)(b) and (c). Mainly on these grounds, the court found it not possible to determine in a sufficiently precise and unconditional manner the minimum protection that should, on any view, be implemented pursuant to Clause 5(1) of the Framework Agreement. The Court considered that Clause 5(1) was not unconditional and sufficiently precise for individuals to be able to rely upon it before a national court.\(^{256}\) The Court specified this stance in the Angelidaki ruling so that, notwithstanding the vertical relationship between workers and their public sector employers, there is no question of Clauses 5 and 8(3) of the Framework Agreement having \textit{direct effect}.\(^{257}\)

\(^{254}\) C-268/06, Impact, para. 75.
\(^{256}\) Case C-268/06, Impact, paras. 76-77.
\(^{257}\) Opinion of Advocate General Kokott in Angelidaki, delivered on 9 December 2008, paras. 125.
The lack of direct effect of Clause 5, however, does not remove the obligation of the Member State to enforce the Framework Agreement in the light of its purpose effectively, which is to prevent the use of successive fixed-term contracts in tasks which are of a permanent nature. In the Impact ruling, the purpose of the fixed-term contracts concluded by the Irish public sector employer was to satisfy the temporary needs for labour and to resolve situations in which permanent funding could not be guaranteed. The general practice of the employer was to renew those contracts for periods of one to two years. However, in the period immediately before 2003, when national act that adopted Directive 99/70/EC entered into force, one of the respondents in the main proceedings renewed the contracts of a certain number of the complainants for a fixed term of up to eight years. The Court viewed the use of the fixed-term contract as abusive and referred to its reasoning to the third paragraph of Article 288 of the TFEU (ex. TEC 249), as well as to Directive 1999/70/EC, to take any appropriate measure to achieve the objective of the Directive and of the Framework Agreement of preventing the abuse of fixed-term contracts.258

Furthermore the Court of Justice stated that:

“However, that obligation would be rendered ineffective if an authority of a Member State, acting in its capacity as a public employer, were authorised to renew contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70/EC and the date on which the transposing legislation entered into force, thereby depriving the persons concerned for an unreasonable period of time of the benefit of the measures adopted by the national legislature for the purpose of transposing Clause 5 of the Framework Agreement. ( . . . ) In the light of the foregoing, Article 10 EC, the third paragraph of Article 249 EC (now. TFEU 288), and Directive 1999/70 must be interpreted as meaning that an authority of a Member State acting in its capacity as a public employer may not adopt measures contrary to the objective pursued by that Directive and the Framework Agreement as regards prevention of the abuse of fixed-term contracts, which consist in the renewal of such contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70 and the date on which the transposing legislation entered into force.”259

Instead, the CJEU continued the interpretation that it had adopted before in Adeneler, according to which in cases where a directive is transposed belatedly into a Member State’s domestic law and the relevant provisions of the directive do not

258  C-268/06, Impact, para 90.
259  C-268/06, Impact, paras 91-92
have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive. 260

The other important effect of the Impact ruling was that the Court confirmed the provision of non-discrimination in Clause 4 as sufficiently precise and unconditional to fulfil the vertical direct effect of the directives. The vertical direct effect is understood as a situation in which a private citizen appeals to directly to the secondary EU law against the authorities in a national Court. Because of the non-horizontal direct effect of the directives, private sector employees have not had the right to appeal directly to the directives as a basis for their rights against private employees, whereas employees in the public sector have enjoyed this right. This leads to the unsatisfactory situation in which public and private sector employees are in a different position in enforcing their rights when a Member State has neglected to transpose a directive correctly. 261

As explained above, Clause 5 of the Framework Agreement lacks the direct effect whereas, according to the Impact case, Clause 4 on the principle of non-discrimination fulfils the direct effect criterion. We cannot therefore exclude the possibility that recourse to fixed-term contracts in circumstances where the need of the employer is permanent can be prevented by the direct effective principle of non-discrimination included in Clause 4 of the Framework Agreement. This might apply where an employer uses fixed-term contracts in tasks of a permanent nature without an objective criterion 262 requiring that the contracts be concluded for a fixed term only, whereas other employees in the same or similar tasks are employed under a contract of indefinite duration. 263

Since the general principles of the EU law direct the interpretation of the EU secondary legislation, 264 the use of fixed-term contracts that violates the principle of non-discrimination on the grounds of age, for example, is also against the legitimate use allowed by the Framework Agreement on Fixed-Term Work. The use of successive fixed-term contracts can also be disputed by private individuals on the grounds of the general principles of Union law, as the CJEU decided in respect of the single use of such contracts. In Mangold, the CJEU viewed the conclusion

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260 C-212/04, Adeneler, para 124.
262 C-212/04, Adeneler, paras 69-70. The Opinion of Advocate General Niilo Jääskinen in C-313/10, delivered on 15.11.2011, para 44.
264 TEU Article 6.
of fixed-term contracts once the worker has reached the age of 52 as prohibited, partly on the general principle of non-discrimination on the grounds of age, which the court held as a general principle of Union law.\textsuperscript{265}

3.3.4.1 \textit{Enforceability and the Effects of Clause 5 on National Legal Order: Concluding Remarks}

The stance adopted by the CJEU that Clause 5 lacks direct effect is in line with the earlier case law on TEC, where the Court of Justice has maintained that the Articles of the Establishing Treaty should be clear and unconditional, containing no reservation on the part of the Member States. In other words, direct effect is precluded where further implementation measures are required at national level.\textsuperscript{266} However, the effective enforcement of directives faces difficulties if their provisions lack both direct effect and the minimum protection guaranteed to employees, as is the case with Clause 5 of the Framework Agreement according to the CJEU.\textsuperscript{267}

The problem in effective enforcement akin to Clause 5 explained above is related more generally to Framework Directives that the Community exercises with an increasing priority over more detailed measures as part of its process of regulatory renovation. This is written into the TFEU Article 5 and into the protocol on the application of the TFEU principles of subsidiarity and proportionality.  

As Vos has concluded, the risk is that, as agreed rules become less precise, conditional and ambiguous, the attached obligation of effective enforcement also becomes harder to track. For example, in connection with the European Union rules on health and safety regulation, it is understood that the broad discretion which is necessarily left for the Member States in order to permit detailed application in the light of local conditions is likely to compromise the evenness of the impact of the Union law and result in leeway for divergent and probably self-interested implementation. This may compromise the uniform realisation of the Union objectives. The same concern relates to the use of vague, ambiguous, and open-ended provisions in health and safety directives, generated by political compromises which also often result in divergent interpretation, implementation and intentional

\textsuperscript{265} C-144/04, Mangold, para 74.
\textsuperscript{266} C-26/62, Van Gend en Loos, Craig, Paul - De Burca, Gráinne: EU Law, Text, Cases and Materials. (2011), pg 187.
\textsuperscript{267} C-268/06, Impact, para.80. Raitio, Juha: Eurooppa- ja sisämarkkinat (2010), pg 234 and C-14/83, Von Colson, paras 26 and 115.
non-compliance at national level. These problems have also applied to the national impacts of Clause 5 of the Framework Agreement on Fixed-Term Work. In this regard, the British regulation implementing the Directive on Fixed-Term Work, the scope of which is restricted to employees, only excluding large categories of workers, is seen as an example of this kind of Union law implementation at national level.

The use of such vague and open-ended terms is similarly one of the factors that has caused enormous delays in the national implementation of the European Union law. As to EU legislation characterised by political compromises, some commentators have suggested that simply requesting the Member States to implement and apply the EU directives fully and precisely cannot solve the problems. Rather, it is seen as vital for the Union power that it should intervene more decisively in order to influence implementation of its acts.

The use of the subsidiarity principle to justify the elimination of details from implementing the directives may lead to the approach which Weatherill has called fictitious harmonisation. This may result in agreements which may compromise common objectives by allowing the Member States to pursue fundamentally divergent approaches under the camouflage of unambiguous framework measures. As Weatherill has stated, this tendency may compromise the viability and integrity of feasible legal order and the effective enforcement of individual rights of employees by preliminary rulings. Indeed, the purpose of such measures is that effective enforcement is defied and local choices preserved. Much the same criticism can be directed at national derogations, equivalent national measures and optional measures allowed to the Member States in implementing the Union measures. This is an increasingly common feature of the Union legislative activity, reflecting the inevitable pressure for legitimacy within the Union system, which is created by the geographical and functional expansion of the system in recent decades.

This criticism can also be addressed to Clause 5 of the Framework Agreement and may also provide an explanation of why the interpretation of Clause 5 is not submitted to the preliminary ruling of the CJEU by the Member States more than

has happened with, say, the consequences of the Equal Treatment Directive or the Working Time Directive.

However, as Weatherill claims, there are also advantages in the framework directives in adopting strategies which improve the chance of getting rules accepted and avoiding the inefficient rigidities of a broad framework which seems not to be a suitable legal solution locally. In this way, the framework directives permitting optional ways in implementation take the diversity of national legal cultures into account.

There are however negative consequences of such framework directives as well. Rules containing optional and ambiguous measures may have, as does Clause 5 of the Framework Agreement on Fixed-Term Work, a very different impact in the Member States, which will be difficult to track. In addition, this may compromise uniform application and the achievement of the objectives of regulation in the Member States. Furthermore, it may increase the risks of competitive under-implementation as the Member States may suspect that their firms are facing higher compliance costs than competitors based in less rigorous States. The British Government, for example, argued along these lines to justify its light regulation model in implementing the Directive on Fixed-Term Work.

The Commission also has very restricted competence in preventing the fragmentation and diversification because of the principles of subsidiarity and proportionality in EU law. The significance of the principle of subsidiarity has even increased since the inception of Lisbon Treaty, as the formalities for the control of compliance with this principle have been substantially amended in order to afford a more important role to the national parliaments. Moreover, the Treaty text refers for the first time directly to the regional and local levels before the power of the Union. The requirement laid down by Protocol 2 of the TFEU, according to which the Commission is obliged to forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator, also suggests

274 The Court of Justice has seen the equality principle included in Article 5 of Directive 76/207 as directly effective in its established case law. See, for instance, Judgments C 152/84, M. H. Marshall, paras. 46 and 49, C-187/00, Bauer-Kutz, para. 70, C-188/89, Foster, para. 21, C-167/97, Seymour-Smith and Perez, para. 40.

275 Weatherill, Stephen (2000), pgs 95-97, C-397/01, Pfeiffer, para. 104, where the CJEU viewed Article 6(2) of Working Time Directive limiting weekly working time as directly effective “since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time.” Correspondingly, the CJEU considered in C173/99 in respect of the provision guaranteeing paid annual leave that Article 7(1) of Directive 93/104 imposes a clear and precise obligation on Member States to achieve a specific result by virtue of which they are to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.


278 See Chapter 1.1 of the British part of this research.
the increased importance of the principle of subsidiarity. Accordingly, with regard to the nature and extent of Union action, Union measures should leave as much scope for national decisions as possible, in order to be consistent with securing the aim of the measure and observing the requirements of the TFEU. While respecting the EU law, care should be taken to respect well-established national arrangements and the organisation and functioning of the legal systems of the Member States. Where appropriate and subject to the need for proper enforcement, the Union measures should provide for the Member States with alternative ways to achieve the objectives of the measures.

Thus, as Stephen Weatherill puts it, the directives are not designed to achieve uniformity of national laws, but rather to go through transmission via tried and trusted but varying local structures. The Directives may be applied in different ways, especially where they confer broad discretion on the Member States in a field involving complex assessment. Naturally, administrative tradition varies among the Member States and this affects the practical patterns of application of the EU law across the European Union.

For these problems, which are related especially to the Framework regulation containing conditional and ambiguous provisions leaving much discretion to national level and aiming thus at the minimum standard setting only, there is not much to be expected of the CJEU’s role in promoting the rights of fixed-term employees, as the current CJEU case law indicates. In this regard, however, we can agree with some commentators’ suggestion that the EU Court of Justice needs to define more precisely the margin of discretion left to the Member States for the purposes of balancing the role performed by any given national requirement against its adverse impact upon full application of the Union law.

3.3.5 The First use

3.3.5.1 Predominant Interpretation

Despite the fact that both directives governing the use of atypical work, namely, the Part-Time and Fixed-Term Directives, are built around the principle of non-discrimination, the main objectives of these principles in terms of directives are quite

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280 TFEU 5 Article.


282 See, for example, C-586/10, Küçük and C-268/06, Impact. See chapters 2.3.2-2.3.4.

different. The Directive on Part-Time Work aims at identifying and removing the obstacles disrupting the expansion of part-time work and tries to eliminate them, whereas the Fixed-Term Work Directive introduces objective limits in the recourse to such contracts in order to avoid the abuse arising from successive fixed-term contracts. 284 This section introduces the problems that might occur in achieving this objective as restrictive measures of Clause 5 are applied only to successive fixed-term contracts, not to single uses or the first use of such contracts which is excluded from the scope of the Clause.

In accordance with the preamble to the Framework Directive, the Framework Agreement spells out the general principles and minimum requirements for fixed-term employment contracts and employment relationships. According to Clause 1 of the Framework Agreement, the purpose of the agreement underlying the Directive is 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 relationships. On those points, there are no exclusions of first or single fixed-term contracts.

On the other hand, the CJEU has confirmed that the requirement of objective reasons is not applied to the first or single use of a fixed-term employment contract, first in Mangold and then the Angelidaki ruling. 285 In the latter, which concerned the permissibility of fixed-term contracts in the Greek public sector, the Court of Justice considered that national legislation, according to which the renewal of successive fixed-term employment contracts is deemed to be justified by ‘objective reasons’ within the meaning of Clause 5 solely on the ground that those contracts are based on law allowing them to be renewed in order to meet certain temporary needs when, in fact, those needs are fixed and permanent, is against Clause 5. But since Clause 5(1)(a) is not applied to the first or single use of a fixed-term employment contract, it did not preclude the application of national law which permits the single use of fixed-term contracts on the basis of such a reason. 286 Thus, none of the individual measures listed in Clause 5 are applicable to single fixed-term contracts. In Mangold, the Court stated that Clause 8(3) of the Framework Agreement does not preclude the application of national law where it has lowered the age above which single fixed-term contracts of employment may be concluded without restriction in order to encourage the employment of older people. The implication of these cases is that the Framework Agreement does not have any effects on the national legislation concerning the first use of fixed-term employment contracts. 287

285 C-144/04, Mangold, paras. 40-43 and C-378/07 Kiriaki Angelidaki and Others. In the latter ruling, the Court stated that the scope of the Framework Agreement was not defined in Clause 5.
286 Joined Cases C-378/07 to C-380/07, Angelidaki and Others , para. 107.
287 C-144/04, Mangold, para. 54.
3.3.5.2 Critique on Predominant Interpretation

The criticism of this predominant interpretation excluding the first or single use of fixed-term contracts is twofold. Firstly, the criticism has concerned whether the purpose of the Framework Agreement (preventing abuse arising from successive fixed-term contracts) can be achieved without extending the restrictions to the first use of fixed-term contracts. The intention of the parties to the Framework Agreement spelled out in the preamble is that contracts of indefinite duration are and will continue to be the general form of employment relationship. Furthermore, in accordance with the preamble, the Framework Agreement illustrates the willingness of the social partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and by using fixed-term employment contracts on a basis acceptable to employers and workers. Moreover, it has been stated in the general considerations on the Framework Agreement that fixed-term employment – without the exclusion of the first contract – based on objective reasons is a means to prevent abuse. In this regard, Bercusson and Bruun have also adopted the interpretation that the use of fixed-term contracts must be justified by objective reasons from the first contract onwards. It must of course be taken into account that CJEU case law did not exist when Bruun and Bercusson took this view. However, as was explained, the CJEU has not accepted this view.

There are also several other interpretative policy purposes that can be derived from the general considerations and the preamble to the Framework Agreement. These provisions support the interpretation that the first use of fixed-term contract is, or at least should also be restricted by the Framework Agreement. For example, the exceptionality of fixed-term work and its negative consequences in terms of quality of life and fixed-term workers of weaker economic performance than permanent work support the inclusion of first fixed-term contracts in the scope of Clause 5. In recital 14 of the preamble to Directive 1999/70, which essentially replicates the third paragraph in the preamble to the Framework Agreement, the agreement sets out ‘the general principles and minimum requirements for fixed-term employment contracts and employment relationships’. The fifth paragraph in the preamble to the Framework Agreement also states that the agreement ‘relates to the employment conditions of fixed-term workers’. In these references, there is no exclusion of the first or single contract either.

288 Framework Agreement on Fixed-Term Work, Preamble paras. 2-3.
The wording in some provisions also confirms that the first or single contracts are included in its scope. According to the actual wording of Clause 2, the Framework Agreement applies to any fixed-term worker who has an employment contract or employment relationship as determined by law, collective agreements or practice in each Member State. Correspondingly, first or single contracts are not excluded from the concept of fixed-term worker in Clause 3, where he/she is deemed to be a person with an employment contract or relationship entered into directly between an employer and a worker in which the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.291

Furthermore, according to the general considerations determining the objectives of the agreement, the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse. The wording of this provision does not restrict this to successive fixed-term contracts.292 This principle is confirmed by the CJEU as one of the minimum requirements of the Framework Agreement. 293 The CJEU has also confirmed in its several rulings that in interpreting of the provisions of the Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part.294

These general objectives determined by the general considerations and the preamble to the Framework Agreement and the Directive must thus be taken into account in interpreting the scope of protective measures adopted by the Framework Agreement, as the Court of Justice in fact did in its Adeneler ruling by specifying the concept of objective reasons.295 In Angelidaki, the Court of Justice referred to recital 14 in the preamble to the Directive on fixed-term work and to paragraph 5 in the preamble to the Framework Agreement when the court justified extension of the scope of the non-regression Clause to single or first fixed-term contracts.296 It is also considered in the literature that the protection of the first use of fixed-term

292 General considerations of the agreement, paras 6-7. The CJEU stated in its ruling Adeneler C-212/04 that the protection of workers against instability of employment is a primary objective of the Framework Agreement. Therefore the national law which automatically and without further precision justifies successive fixed-term employment contracts would compromise the aim of the Framework Agreement. Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pg 40.
293 C-251/11, Huet, para 41.
294 Joined Cases C-397/01 to C-403/01, Pfeiffer, paras. 111-119. C 292/82, Merck, para. 12.
295 Adeneler, C- 212/04, paras 68-69, see also paras 61-62: The Framework Agreement is based on the premise that employment contracts of indefinite duration are the general form of employment relationship, while recognising that fixed-term employment contracts are a feature of employment in certain sectors or in certain occupations and activities and that the benefit of stable employment is viewed as a major element in the protection of workers.
296 Joined Cases C-378/07 to C-380/07, Angelidaki and Others, para 111.
contracts could be derived from those principles and the balance between flexibility and security pursued by the agreement.  

Secondly, it can be argued that objective reasons for renewal of fixed-term contracts are bound by the definition of such contracts in Clause 3(1). This would imply that renewal would be justified only if the initial conditions did not in fact determine the duration of the contract any longer. The specific date could have lost its relevance or have been postponed, the expected event that determined the duration did not take place or the specific task was not completed within the estimated time. In these situations the new date, another event or completion of the task would constitute an objective reason for renewal of the contract. On the other hand, the requirement of objective reasons for renewal is argued to derive from the wording of Clause 5(1) since it is inherent to the concept of renewal itself, which implies not only the renewal of the single contract but the objective reason as well.

Moreover, the purpose of the Agreement is to establish a framework to prevent abuse arising from successive fixed-term employment contracts. This objective might be compromised if the first use of fixed-term employment contracts is excluded from the scope of the Agreement. Excessive duration of the first contract could constitute an abuse of maximum total duration for successive fixed-term contracts determined in Clause 5(1)b; for example, when the duration of the first contract was multiple compared to the total duration of successive contracts. Correspondingly, when there is no objective reason requirement for the first use of a fixed-term agreement, there is no need to have recourse to successive fixed-term contracts and therefore the requirement of objective reasons and other restrictions opted for by the Member States in successive contracts can be circumvented. The requirement of a maximum number of renewals of such contracts could be rendered void when the first use is free from restrictions. This kind of approach was also adopted by Advocate General Niilo Jääskinen in his opinion in C-313/10, where he stated that protective measures can complement each other in ensuring that the objective of the Clause is to be achieved and may further clarify the objective reason concept.

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298 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pg 93.

299 Framework Agreement on Fixed-Term Work, Clause 1.

300 Framework Agreement on Fixed-Term Work, general considerations, para. 7.

301 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 51-131, see also C-212/04, Adener, para. 88.


303 The Opinion of Advocate General Niilo Jääskinen in C-313/10, delivered on 15.11.2011, para 4.4.
Consequently, it can be argued that excluding the first use of a fixed-term contract from the scope of the Framework Agreement may lead to the possibility of circumventing the requirement of objective reasons for renewal, maximum total duration, or maximum number of renewals or equivalent legal measures adopted at the national level to prevent abuse. Therefore, the prevention of abuse arising from successive fixed-term contracts as a result of the Directive cannot be achieved completely without extending the requirement of protective measures to single or first use of fixed-term contracts as well. These favour the broader interpretation of Clause 5(1) compared to its strict wording.\(^{304}\) This interpretation is also supported by the doctrines of fully effective enforcement of the EU law and the duty of Member States to interpret national law in conformity with EU law, which are based on the settled CJEU case law.\(^{305}\) In the Von Colson,\(^{306}\) Pfeiffer,\(^{307}\) and Marleasing\(^{308}\) rulings, the CJEU imposed a broad obligation on all state institutions, especially the national courts, arising from the purpose of the Directive, to interpret national law as far as possible in conformity with the requirements of the Union law subject to the general principles of the EU law, in order to achieve the result sought by the Directive and consequently to comply with the third paragraph of Article 288 (ex. 249) of the TFEU.\(^{309}\) In Pfeiffer, the CJEU also extended this obligation to cover not only the whole body of applicable national law including judge-made law but also private law agreements or whatever lies within its jurisdiction.\(^{310}\) The Pfeiffer doctrine has significant implications for social rights such as protection against the abuse of successive fixed-term contracts, by directing the interpretation of national law on fixed-term contracts and assuring that the objectives of the Directive are achieved. Employment contracts are the most important private measures in labour law. The Pfeiffer ruling indicates that employment contracts based on national law must be interpreted consistently with the purpose of the provisions of directives.\(^{311}\) The CJEU

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\(^{304}\) In case C-212/04, Adeneler (paras. 86-88) the Court deemed as prohibited the use of fixed-term contracts which leads to circumventing the protective measures on abusive use of successive fixed-term contracts.

\(^{305}\) Cf. Joined cases C-397/01 to C-403/01, Pfeiffer, para 111: “It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.” See also Prechal, Sacha: Enforcement of EC Labour Law: Some Less Felicitous Consequences in Social Responsibility in Labour Relations edited by Pennings, Frans- Konijn, Yvonne- Veldman, Albertine (2008) pg 16.

\(^{306}\) C-13/83, Von Colson.

\(^{307}\) Joined Cases C-397/01 to C-403/01, Pfeiffer, paras. 111-119.

\(^{308}\) C-106/89 Marleasing, para. 8.

\(^{309}\) Joined Cases C-397/01 to C-403/01, Pfeiffer, paras. 113 and 118. The CJEU has complied with this line since finding it in Von Colson ruling C-14/83.


has also accepted this stance in respect of Clause 5 in Adeneler and in Impact.\textsuperscript{312} Consequently the prevention of abuse arising from successive contracts cannot be achieved in accordance with the purpose of the agreement without extending the national law implementing the Directive on Fixed-Term Work to single fixed-term contracts simply because otherwise the protection guaranteed by the Directive can be circumvented by such contracts. As the CJEU stated in Adeneler:

\begin{quote}
“The national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive.”\textsuperscript{313}
\end{quote}

While doing this, national courts must favour the interpretation of the national rules which is the most consistent with that purpose in order to achieve an outcome compatible with the provisions of the directive.\textsuperscript{314}

The CJEU has also stated in Angelidaki that it is clear both from the objective of Directive 1999/70 and the Framework Agreement and from the wording of its relevant provisions that the scope of the Framework Agreement is not limited solely to workers who have entered into successive fixed-term employment contracts; on the contrary, the agreement is applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer, irrespective of the number of fixed-term contracts entered into.\textsuperscript{315} The prevention of abuse arising from successive contracts is recognised as one of the primary objectives of the Framework Agreement. In Adeneler, the CJEU has previously deemed the use of fixed-term contracts in tasks where the needs of employer are fixed and permanent as abusive. In the light of this, it contradicts this objective to exclude the first or single fixed-term contracts from the scope of measures which are intended to prevent abuse of such contracts.

In the literature, Roger Blanpain has also claimed that the requirement of objective reasons must be applied both to single and successive fixed-term contracts, pointing out that this stance can be derived directly from the Framework Agreement in which employment contracts of indefinite duration are the general rule and fixed-term contracts are the exception even if Clause 5 of the Framework Agreement seems

\textsuperscript{312} C-212/04, Adeneler, para. 124 and C-268/06, Impact, paras. 91-92.

\textsuperscript{313} C-212/04, Adeneler, para. 108.

\textsuperscript{314} C-212/04, Adeneler, para. 108.

\textsuperscript{315} Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, para 116. In respect of scope of the Framework Agreement the Court referred to C-307/05, Alonso, where it held Directive 1999/70 and the Framework Agreement applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer.
to derogate from this. He also considers that this is a general principle (nature of employment) of the EU law protected by TEU Article 6, which Member States shall respect in their national law.\footnote{316}{Blanpain, Roger: Fixed-Term Employment Contracts: The Exception (2007), pg 5.}

In sum, the prevention of abuse arising from successive fixed-term contracts spelled out in the Directive on Fixed-Term Work can be circumvented without extending the restrictions on the first fixed-term contracts which in fact serve the fixed and permanent needs of the employer and without laying down the requirement of temporary nature of the work for the first use of fixed-term contracts as determined by the CJEU in Adeneler for successive contracts.\footnote{317}{C 212/04, Adeneler, paras. 68-69.} Otherwise the protection against abuse arising from the successive fixed-term contracts can be circumvented by resorting to long-term single fixed-term contracts and the benefit of stable employment, which is viewed as a major element in the protection of workers, becomes an empty principle.\footnote{318}{Framework Agreement on Fixed-Term Work, paragraphs 6 and 8 of the general considerations. C-144/04, Mangold, para. 64. C-212/04, Adeneler, para. 62.}

Furthermore, since this would make it possible to circumvent protection against unjustified dismissal guaranteed by the European Union’s Charter of Fundamental Rights, it would render the principle that contracts of indefinite duration are the general form of employment relationship meaningless.\footnote{319}{C 212/04, Adeneler, para. 73.} Excluding the first or single contracts from the scope of Clause 5 is also against the purpose of the Framework Agreement, which is to protect workers against instability of employment and retain the principle that contracts of indefinite duration are the general form of employment relationship.\footnote{320}{C 212/04, Adeneler, para. 73.}

In Adeneler, the CJEU defined the concept of objective reasons so that it would be difficult to tackle the abuse arising from the successive contracts without extending the scope of preventive measures to first or single contracts. Otherwise it would also be significantly difficult to enhance the enforcement of permanent contracts as the main rule as intended in the Framework Agreement on Fixed-Term Work. Firstly, the CJEU specified the concept of objective reasons by determining that these must be referred to precise and concrete circumstances characterising a given activity and that these circumstances may also result from the specific nature or inherent characteristic of the tasks or may be related to social policy objectives of a Member State.

The Court deemed that the objective of the Framework Agreement could be compromised if the employer was allowed to conclude a new fixed-term contract after a 21-day period from the expiry of the previous contract, irrespective of both the

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\footnote{316}{Blanpain, Roger: Fixed-Term Employment Contracts: The Exception (2007), pg 5.}
\footnote{317}{C 212/04, Adeneler, paras. 68-69.}
\footnote{318}{Framework Agreement on Fixed-Term Work, paragraphs 6 and 8 of the general considerations. C-144/04, Mangold, para. 64. C-212/04, Adeneler, para. 62.}
\footnote{319}{C 212/04, Adeneler, para. 73.}
\footnote{320}{C 212/04, Adeneler, para. 73.}
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number of years for which the worker in question had been taken on for the same job and the fact that those contracts covered needs which were not of limited duration but, ‘fixed and permanent’. Under those circumstances, protecting workers against abuse of fixed-term employment contracts or relationships, which constitutes the aim of Clause 5 of the Framework Agreement, is called into question. Therefore, to achieve the objectives established by the Directive to prevent the abuse of successive contracts and to retain contracts of indefinite duration as the main rule, applying the requirement of objective reasons determined by the CJEU in Adeneler from the first fixed-term contract onwards would be justified.321

Furthermore, if the first use of fixed-term contract is free from restrictions or is loosely restricted, it is not possible to identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need, and it is therefore justified to extend the scope of the Framework Agreement to the first use of such contracts in order to achieve the objective pursued by the Framework Agreement.322 The CJEU has stated that the objective of the Framework Agreement is to prevent workers who have done the same tasks for years being excluded from the scope of the Agreement. This objective is compromised if the first use of fixed-term contract is deemed to be free from restrictions.323

Moreover, the concept of a “successive contract” is partly undefined and is within the power of the Member States to determine. For this reason, the need of protection is similar in both the single contracts and the successive contracts. On the other hand, not all the objectives of the Framework Agreement spelled out by the CJEU in Adeneler can be achieved without extending protection to single fixed-term contracts. Otherwise it is impossible to protect workers against instability of employment and this kind of solution also compromises the purpose of the Directive.324 Therefore, it could be argued that the first use of fixed-term contracts in circumstances intended to cover fixed and permanent needs of the employer is against the objective of the Framework Agreement on Fixed-Term Work.325

Nevertheless, we can agree with Zappala in that, as was previously stated in respect of Mangold, Angelidaki and Impact, that the Framework Directive on Fixed-Term Work is not applied to the first fixed-term contract and that since the EU law leaves the employer freedom to take on employees with this temporary form of


322 C 212/04, Adeneler, paras. 69-74.

323 C 212/04, Adeneler, para 88 and C-268/06, Impact, paras. 91-92.


325 C 212-04, Adeneler, para. 71.
work for any reason, it is justified to interpret the notion of successive fixed-term contracts strictly. Consequently, if the employer decides to continue the employment relationship by renewing it after the first contract period, the limitations of Clause 5 should be applied as well. Otherwise the general objective of the Framework Agreement would be compromised as explained above.\(^{326}\)

The CJEU also stated in case C-144/04 Mangold that it is against the principle of non-discrimination on the grounds of age, which the Court held as a general principle of Union law, to conclude even single fixed-term contracts with older employees who had exceeded a certain age on ground of age only for the purpose of employing those groups which it would otherwise be difficult to employ. Along with the general principle of non-discrimination, the Court also referred in its reasoning to “various international instruments and to the constitutional traditions common to the Member States as a source of law prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation”. \(^{327}\) Following the reasoning of the CJEU, the single use of a fixed-term contract, which is discriminatory on those grounds spelled out in primary and secondary legislation, constitutional traditions common to Member States and international human rights conventions such as the European Social Charter or ECHR which are binding sources of the Union law, shall be regarded as prohibited. \(^{328}\)

4 THE USE OF FIXED-TERM CONTRACTS AND THE PRINCIPLE OF NON-DISCRIMINATION IN CLAUSE 4 OF THE FRAMEWORK AGREEMENT

Since the provisions determining the scope of the Framework Agreement are in contradiction with each other, it is necessary to assess whether unacceptable use of fixed-term contracts can be circumvented by the principle of non-discrimination included in Clause 4 of the Framework Agreement.

In accordance with the provision determining the scope of the Framework Agreement on Fixed-Term Work, the agreement is applied to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in a Member State. A fixed-term employment contract is defined as that in which the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date,

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327 C-144/04, Mangold, para. 74
328 C-144/04, Mangold. paras. 74-75. See below for a more detailed analysis of this case.
completing a specific task, or the occurrence of a specific event. According to the principle of non-discrimination included in Clause 4 of the Framework Agreement on Fixed-Term Work, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers simply because they have a fixed-term contract or relationship unless objective grounds justify different treatment.\(^{329}\) This provision has been criticised for constituting a very narrow notion of equality. As the reason for unfavourable treatment in order to apply the provision must be duration of employment, only direct discrimination is prohibited.\(^{330}\) However, as Fredman has stated, a lot of inequality results not from less favourable treatment on grounds of duration but from the treatment which is formally equal but implies unfavourable treatment de facto. However, according to Clause 4, even direct discrimination in the form of differential treatment is permitted on objective grounds without further specification.\(^{331}\) Unlike equality and non-discrimination directives, there is no explicit provision in the Framework Agreement that such justification can be proportionate and necessary in order to achieve a legitimate objective, only including the requirement of objective grounds.\(^{332}\) However as can be seen in the Alonso ruling, the CJEU has applied the principle of proportionality in respect of Clause 4 as well.

However, the CJEU maintained, mainly on grounds of Clauses 2 and 3, that the scope of the Framework Agreement was not limited solely to workers who had entered into successive fixed-term employment contracts, but that the agreement was applicable to all workers providing remunerated services in the context of a fixed-term employment relationship with their employer irrespective of the number of fixed-term contracts entered into.\(^{333}\) Correspondingly, the Court of Justice stated that the scope of Clause 4 was not restricted to successive fixed-term employment contracts and that the concept of working conditions should not be interpreted restrictively.\(^{334}\) Furthermore, the Court of Justice ruled in Alonso that the same interpretation of the concept of objective grounds as it decided in Adeneler in the context of Clause 5, should be applied to Clause 4. In Alonso, the Court explained clearly how the objective grounds should be interpreted. It stated that:

\(^{329}\) Framework Agreement on Fixed-Term Work, Clause 4.

\(^{330}\) Compare Equality Directives 76/207 and Non-Discrimination directive 2000/78 in which, along with direct discrimination, indirect discrimination is prohibited as well.


\(^{333}\) Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, paras. 114-116 see also C-307/05, Del Cerro Alonso, para 28.

\(^{334}\) C-307/05, Alonso, paras 27-28 and Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, para. 116-117.
“that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.”335

Bruun and Bercusson consider that the principle of non-discrimination also concerns the choice of duration, which is an essential term of employment. In this approach, duration is the employment condition that distinguishes fixed-term workers from permanent ones. Thus, it can be argued that the objective condition that ends the fixed-term contract is an employment condition falling within Clause 4. This employment condition is one in respect of which the worker is treated in a less favourable manner, so that the worker will lose the job at the expiry of the contract, whereas a permanent worker will not. Clause 4, therefore, requires objective grounds to justify this employment condition.336 This stance is justified especially when the fixed-term contract reflects the unilateral need of the employer only rather than being a reflection of the employee’s own choice.337

If a fixed-term contract is not justified by objective reasons as determined by the CJEU in Adeneler, the fixed-term employee may be treated less favourably in respect of the duration of employment restricted by Clause 4 of the Framework Agreement on Fixed-Term Work. The CJEU has repeatedly emphasised the need to be specific and proportionate when allowing differential treatment, which shows the Court’s intention to make discrimination exceptional and justified on objective grounds. This also concerns the duration of employment relationship, which is an essential term of employment.338 Therefore, if a fixed-term contract (single or successive) is concluded with an employee on tasks where the need for labour is permanent without objective reasons requiring the contracts to be for a fixed-term, whereas the remaining employees performing the same tasks are in indefinite duration employment, it is possible that the fixed-term employee is being treated less favourably in respect of the duration of his employment contract than the

335 C-307/05, Alonso, para. 58.
337 Murray, Jill: Normalizing Temporary Work in Industrial Law Journal, vol 28, (1999), pg 274. On the other hand, fixed-term contracts cannot normally be terminated during the contract period unlike contracts of indefinite duration. The end of fixed-term employment contract or relationship is normally proscribed by objective conditions. This requirement is also included in Clause 3 of the Framework Agreement on Fixed- Term Work. However, nothing prevents agreeing on the possibility of termination during the contract period as in contracts of indefinite duration.
comparable permanent worker, which is against the principle of non-discrimination defined in Clause 4.  

In the light of the foregoing it can be claimed, as Silvana Sciarra has done, that equal treatment of comparable workers stipulated in Clause 4 of the Framework Agreement must include the evaluation of the objective criteria according to which fixed-term workers entered into their contracts. Therefore, if the use of successive fixed-term contracts appears to be in breach of Clause 4, it shall be deemed as abusive in the light of Clause 5 as well. This may be the situation if the condition determining the end of the employment relationship does not fulfil the objective criteria determined in Clause 3(1) of the Framework Agreement on Fixed-Term Work or the employer has no objective grounds on which require that the contracts be concluded for a fixed-term only. Therefore, sustainable use of fixed-term contracts requires that the work be known to be on offer for a fixed-term only.

The other term of employment in respect of which fixed-term employees might be treated in a discriminatory manner compared to permanent workers under circumstances in which a fixed-term contract is concluded despite the permanent need of the employer, is the notice period to which employees with contracts of indefinite duration are entitled before the end of employment. This is especially significant in fixed-term employment relationships the end of which is determined by the occurrence of an event or completing a specific task, where fixed-term workers cannot prepare themselves for the end of employment because of lack of a notice period compared with permanent employees or when the original reason justifying the duration has lost its relevance and another date, completing a specific task, or the occurrence of a specific event has taken place. The notice period is also protected by Article 4(4) of the European Social Charter, which implies recognition of the right to a reasonable notice period in employment relationships.

Clause 6 of the Framework Agreement also has to do with the adoption of the principle of non-discrimination, which requires that employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. This provision suffices to ensure the same opportunity only if fixed-term employees are entitled to terminate their contract during their contract period, which is not the case directly by virtue of the definition of the

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339 C-212/04, Adeneler, para.88. However, the Court of Appeal has deemed in the UK that less favourable treatment cannot be extended to the duration of employment. Department of Work and Pension v Webley (2005) IRLR (CA).


contract but requires at least that the possibility of termination during the contract period has been agreed in the employment contract. Bruun and Bercusson have even seen that this provision as implying that employees are entitled to terminate their fixed-term contracts if this is necessary to secure a permanent position.\footnote{ibid}

\section{4.1 The Effects of the Principle of Non-Discrimination and the EU's Secondary Legislation on Equal Treatment in the Use of Fixed-Term Contracts}

National law must be interpreted in conformity with the primary and secondary EU legislation on equal treatment and non-discrimination. Hence, the use of fixed-term contracts is bound to compliance with the principles on equal treatment and non-discrimination regardless of whether the question is of single or of successive fixed-term contracts. In other words, the use of fixed-term contracts contrary to the principle of non-discrimination or equality legislation shall be regarded as an abuse for the purposes of Clause 5 of the Framework Agreement on Fixed-Term Work. These points of departure have effects both on the interpretation of national law on fixed-term contracts and on the assessment of legislative measures adopted by the Member States. These questions are significant; for example, because fixed-term contracts are widely used as an employment measure throughout Europe. Correspondingly, the preamble to Directive 2000/78 refers to promoting the coordination of employment policies of the Member States, stating furthermore that a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce has been developed to this end.\footnote{Directive 2000/78/EC, preamble, para 7 and Article 6.} Accordingly, the Directive confers a lot of discretion on the Member States to derogate by means of positive special treatment in order to adopt specific legislative measures intended to promote the employability of particular groups.\footnote{Laulom, Sylvaine: The Law on Non-Discrimination in EU, edited by Malcom Sargeant (2007), pg 58.} This chapter explores how the principle of non-discrimination, especially included in the primary and secondary EU legislation, affects the permissible use of fixed-term contracts.

The CJEU examined these issues in detail in the controversial C-144/04 Mangold ruling.\footnote{C-144/04 Mangold} The controversial features of the judgment are partly related to the interrelationship between the EU labour law sources affected by the interpretation of national law, especially the impact of the general principles of EU law.
In Mangold, the private person concluded a fixed-term contract with Mr. Mangold, aged 56, on grounds of his age only. Mangold started legal proceedings in the German Labour Court, arguing that national legislation permitting such a reason solely as grounds for concluding fixed-term contracts was in breach of the EU law. Under scrutiny was the German legislation whereby the age limit above which it is permissible to conclude fixed-term contracts was lowered from 58 to 52 in order to keep workers over certain age, who would otherwise have been at risk of being expelled from the labour market, in employment.\textsuperscript{346} The CJEU was asked by the national court whether Article 6 of Directive 2000/78/EC was to be interpreted as precluding a provision of national law which authorised the conclusion of fixed-term employment contracts without any objective reasons with workers aged 52 and over contrary to the principle requiring the justification on objective grounds.\textsuperscript{347}

The court considered that an objective of the measure, which is to promote the vocational integration of unemployed older workers in so far as they encounter considerable difficulties in finding work must be regarded as justifying ‘objectively and reasonably’, as provided for by Article 6(1) of Directive 2000/78, a differential treatment on the grounds of age.\textsuperscript{348}

The Court of Justice also considered that the Member States indisputably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.\textsuperscript{349} However, the court took the view that the application of national legislation such as that at issue, led to a situation in which all the workers who had reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger of being excluded from the benefit of stable employment during a substantial part of their working life which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.\textsuperscript{350}

The Court of Justice also stated that;

\textit{“In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of}

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\item[\textsuperscript{346}] Sciarra, Silvana: Fixed-term Work in the Recent Case Law (2008), pg 300.
\item[\textsuperscript{347}] C-144/04, Mangold, para. 31 (2).
\item[\textsuperscript{348}] C-144/04, Mangold, para. 58
\item[\textsuperscript{349}] C-144/04, Mangold, para. 63
\item[\textsuperscript{350}] C-144/04, Mangold, para. 64.
\end{itemize}
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employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued. Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78. \(^{351}\)

Mainly on these grounds, the Court took the view that the German legislation on the use of fixed-term contracts contradicted the EU law and that it was the national court’s obligation to provide the legal protection which individuals derive from the rules of the Union law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with them.\(^ {352}\)

The Court of Justice assessed the permissibility of concluding fixed-term contracts from the perspective of Article 6(1) of Directive 2000/78 justifying differential treatment on the grounds of age regardless of the facts that, when the contract in question was concluded and that the period for transposition of said directive into domestic law had not yet expired.\(^ {353}\) In respect of this, the Court’s argument was that during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.\(^ {354}\)

The Court also justified its ruling by the principle of non-discrimination on the grounds of age, which the Court regarded as a general principle of the Union law rather than from the perspective of Clause 5 of the Framework Agreement.\(^ {355}\) The reasoning of the Court of Justice was that the principle of non-discrimination on the grounds of age is a general principle of community law that can be derived from

\(^{351}\) C-144/04, Mangold, para. 65.

\(^{352}\) C-144/04, Mangold, para. 77.

\(^{353}\) Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment ‘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’. According to sub-paragraph (a) of the second paragraph of Article 6(1), these differences may include inter alia ‘the setting of special conditions on access to employment and vocational training, employment and occupation ... for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection’ and, under sub-paragraphs (b) and (c), the fixing of conditions of age in certain special circumstances.

\(^{354}\) C-144/04, Mangold, para. 67.

\(^{355}\) C-144/04, Mangold, para. 74.
various international instruments and from the constitutional traditions common
to the Member States. The Court also referred to the guidelines supplied by
international treaties for the protection of human rights on which the Member States
have collaborated or to which they are signatories as a part of this tradition. The
ECHR, the Treaty of EC, The Charter of Fundamental rights of the European Union
and the ILO Convention of Discrimination in Labour Market no. 111 have special
significance in this respect. In this reasoning, the Court could also have relied upon
Article 21 of the EU Charter of Fundamental Rights, in which discrimination based
on any ground such as sex, race, colour, ethnic or social origin, genetic features,
language, religion or belief, political or any other opinion, membership of a national
minority, property, birth, disability, age or sexual orientation is prohibited.

The implication of the Mangold ruling is that the general principles of the EU
law that are sufficiently clear and precise with regard to its content, and accepted
by a Member State and the European Union, can have independent significance in
interpretation of national law even before the transposition period has expired and
the directive becomes valid. In Mangold, the principle of non-discrimination affected
the national law independently regardless of the valid secondary legislation. This
feature is considered to cause problems in the EU law, because relying on the general
principle of non-discrimination and equality can circumvent the non-horizontal
direct effect of the directives. The implications of Mangold for national law will not
necessarily be limited to non-discrimination on the grounds of age only. It has
been argued that the other forms of discrimination covered by Article 13 EU of the
Charter (thus concerning sex, racial or ethnic origin, religion or belief, disability
and sexual orientation) would receive similar treatment as age in the Mangold
ruling in future case law (as, in fact, Defrenne II has already shown regarding pay
equality). Age discrimination is equated in principle with a longer list of prohibited
discrimination in Article 21 of the EU Charter (including colour, genetic features,
language, political or any other opinion, membership of a national minority, property
and birth), which forms a further natural field where we may expect extensions of
Mangold.

Thus, national laws must be interpreted in the light of discrimination on grounds
determined by Article 21 of the EU Charter as well, especially now that the EU
Charter has become legally binding primary legislation and has the same status as
the Treaties of the Union. The Court seems to have followed the tendency adopted

357 C-144/04, Mangold, para 75. See also C-112/00, Schmidberger, para. 71 and C-274/99, Conolly, para. 37.
358 Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 39-42.
360 Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 39-40
in Mangold. In case C-04/227 Lindorfer, the Court considered that the use of factors that vary according to sex in order to calculate the number of additional years of pensionable service was not compatible with the principle of non-discrimination on the grounds of gender.\(^{361}\)

However, the independent role of the principle of non-discrimination as a source of law is not a novelty in the CJEU’s case law. In C-149/77 Defrenne II, the question was about the discriminatory nature of a female’s pay conditions compared with her male colleague carrying out the same work. The Court held that the right not to be discriminated against on grounds of sex in regard to employment and working conditions was a fundamental human right, which is also one of the general principles of the Union law, the observance of which must be ensured.\(^{362}\) Correspondingly, in the C-117/76 Ruckdeschel ruling the Court held that the principle of non-discrimination was a general principle of equality requiring similar situations and not be treated differently unless differentiation is objectively justified, and one of the fundamental principles of the Union law.\(^{363}\)

The EU Treaty was amended by the Treaty of Amsterdam. The competence of the Union to take appropriate action to combat discrimination based on sex, racial, ethnic origin, religion or belief, disability, sexual orientation or age was added to Article 13 (now TFEU Article 19). As a consequence of this amendment, the principle of non-discrimination became a fundamental right in the EU law.\(^{364}\) This provision has been a legislative background at least for Directives 2000/78/EC\(^{365}\) and 2000/43/EC.\(^{366}\) Currently this provision as such is included in Article 19 of TFEU.

However, the Court of Justice has developed further restrictions on the principle of non-discrimination in its case law since the Mangold ruling. In case C-13/05 Chacon Navas, the question was whether differential treatment based on the sickness of an employee could be regarded as a prohibited discrimination in addition to the grounds determined by Directive 2000/78.\(^{367}\) The Court of Justice referred in its reasoning to the EU Treaty by stating that no provision of the Treaty prohibited discrimination on the grounds of sickness as such. Article 19 TFEU

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\(^{365}\) Preamble to the Directive 2000/78/EC.

\(^{366}\) Preamble to the Directive 2000/43/EC.

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(ex Article 13 EC) and Article 153 TFEU (ex Article 137 EC), read in conjunction with Article 151 TFEU, contains only the rules governing the competencies of the Union. Article 19 TFEU does not refer to discrimination on the grounds of sickness as such or disability, and cannot therefore constitute a legal basis for Council measures to combat such discrimination. \(^{368}\) The Court took the view that sickness as such cannot be regarded as a ground of discrimination in addition to those listed in Directive 2000/78. \(^{369}\) The Court also pointed out that despite the fact that the fundamental rights which form an integral part of the general principles of the Union law include the general principle of non-discrimination, this principle is binding on Member States where the national situation at issue in the main proceedings falls within the scope of Union law. \(^{370}\) However, it does not mean that the scope of Directive 2000/78/EC should be extended by analogy beyond discrimination based on the grounds exhaustively listed in Article 1. \(^{371}\) In accordance with this, the general principles of the EU law affect national law only via interpretation of secondary legislation and are binding on Member states when they implement Union law.

In respect of the independent role of general principles of the EU law, Advocate General Geelhoed stated the following in his opinion on C-13/05 Chacon Navas:

> “So broad an interpretation of Article 19 TFEU (ex. Article 13 TEC) and of the rules adopted by the Community legislature on the implementation of that Article results, as it were, in the creation of an Archimedean position, from which the prohibitions of discrimination defined in Article 19 TFEU (ex. Article 13 TEC) can be used as a lever to correct, without the intervention of the authors of the Treaty or the Community legislature, the decisions made by of the Member States in the exercise of the powers which they – still – retain. Given that, according to the EU Treaty, the core of those powers continues to rest with the Member States, even if the Union competence in that respect is activated by the

\(^{368}\) C-13/05, Chacon Navas, para. 55.

\(^{369}\) C-13/05, Chacon Navas, para. 57. See also C-411/05, Palacios de la Villa where the Court followed the wording of the Directive 2000/78 closely in interpreting the conformity of national legislation with the Directive. According to the national law, the compulsory retirement clauses contained in collective agreements are lawful where such clauses provide the sole requirement that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime provided that the following preconditions are fulfilled. Firstly, according to the CJEU, the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and, secondly, the principle of proportionality is complied with.

\(^{370}\) Jari Hellsten: From Internal Market Regulation to Ordre Communautaire Social (2007), pg 36.

In case C-442/00 Rodriguez Caballero, the question was about interpretation of national law and its conformity with Directive 80/987/EC in circumstances in which all the workers who were unfairly dismissed were in the same situation in the sense that they were entitled to a certain payment from national wage security in lieu of their salaries. However, in the event of the employer’s insolvency, the national provision of the Workers’ Statute treated dismissed workers differently to the extent that the right to payment was acknowledged only in respect of those determined by judicial decision but not confirmed in a conciliation procedure. The Court of Justice stated in its reasoning firstly that fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, secondly, that the requirements flowing from the protection of fundamental rights in the Union legal order are also binding on Member States when they implement Union rules. Consequently, the Member States must, as far as possible, apply those rules in accordance with those requirements. Moreover, the Court stated that fundamental rights include the general principle of equality and non-discrimination. These principles preclude comparable situations from being treated in a different manner unless the difference is objectively justified.

In the ruling on C-427/06 Bartsch, the Court of Justice took a contrary view to the independent validity of general principles in national law. The question was whether the primary Union legislation Article 19 TFEU (ex Article 13 TEC) or Directive 2000/78, even before the time limit for transposition had expired, contained a prohibition on discrimination on the ground of age which had to be taken into account in evaluating the legality of an occupational pension scheme excluding the right to a pension of a spouse more than 15 years younger than the deceased former employee. The Court considered that:

“Now Article 13 TEC (now Article 19 TFEU), which permits the Council of the European Union, within the limits of the powers conferred upon it by the EC Treaty, to take appropriate action to combat discrimination based on age, cannot, as such, bring within the scope of Community law, for the purposes of prohibiting discrimination based on age, situations which do not fall within the framework of measures adopted on the basis of that Article, specifically Directive 2000/78, before the time-limit provided therein for its transposition has expired.”

372 Opinion of Advocate General Geelhoed in Chacon Navas delivered on 16th March 2006, para. 54
373 C-442/00, Rodriguez Caballero, para. 30 and 32. The same conclusion was drawn by the Court in Case C-112/00, Schmidberger, para. 75.
375 C-427/06, Bartsch, paras. 18 and 25 and operational.
The court took therefore the view that Union law does not contain such prohibition of discrimination on the grounds of age, that should be applied at national level, when different treatment contains no link with Union law.

No such link arises either from Article 19 TFEU, (ex. Article 13 TEC) or Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, before the time-limit allowed to the Member State concerned for its transposition has expired.\(^{376}\)

Correspondingly, the criticism of Advocate General Mazak in his opinion in case C-411/05 Palacios de la Villa relates to the imprecision of the general principles. He stated that the main problem of the general principle of non-discrimination is that, unlike a specific prohibition of a particular type of discrimination which identifies the kind of differentiation prohibited, the general prohibition leaves open the question of grounds on which the differentiation is acceptable. This kind of principle of equality potentially implies a prohibition of discrimination on any ground. Mazak found that such an approach raised serious concerns in relation to legal certainty.\(^{377}\) Moreover, according to Mazak neither Article 19 TFEU (ex Article 13 TEC) nor Directive 2000/78 necessarily reflect an already existing prohibition on all the forms of discrimination to which they refer. Mainly on these grounds, Mazak found that the conclusion drawn in Mangold with regard to the existence of a general principle of non-discrimination on the grounds of age was not in conformity with the valid Union law.\(^{378}\)

In C-555/07 Kücükdeveci, the Court strengthened the justification models and independent role of general principles in the EU law, which interpretation the Court adopted in Mangold. In this case, the question also concerned the application of the principle of age discrimination to the national rule so that in calculating length of employment in order to ascertain the length of notice period, age prior to 25 was not counted. Apart from Mangold, where the time period for the implementation of the Directive had not expired, the employment contract of Kücükdeveci was terminated after the expiry of the implementation period in a situation where the Member State (Germany) had already enforced Directive 2000/78/EC. The Court referred in its reasoning to Defrenne II, which Advocate General Bot scrutinised by stating that the purpose of Directive 75/117 is only to provide further details concerning certain aspects of the material scope of Article 157 TFEU (ex. TEC 141) and also therefore to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by that Article.\(^{379}\) By following

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\(^{376}\) C-427/06, Bartsch, para. 25.


\(^{378}\) Opinion of the Advocate General Mazak, in case C-411/05 Palacios de la Villa, delivered on 15th February 2007 paras. 89, 94, 95, 97 and 138.

\(^{379}\) C-555/07, Kücükdeveci, para. 21. C- 43/75, Defrenne, paras. 63 and 54.
this model of justification, the Court considered that the principle of prohibition of discrimination on the grounds of age was only enforced and given expression by Directive 2000/78EC and that this conclusion was coherent with the case law created by the CJEU on the general principles of equality and non-discrimination. By doing so, the CJEU placed greater emphasis on the general principle of equal treatment rather than the Directive. Moreover, the Court underlined the significance of the general principle of equal treatment in the legal order by linking it to the right to non-discrimination in the Charter of Fundamental Rights. Consequently, the national court was obliged to decline the application of national legislation that was incompatible with the principle of equal treatment.

The general principles of the EU law are situated between the primary and secondary legislation in the hierarchy of norms of the EU law, with the exception that principles included in international treaties of human rights and the EU fundamental rights are regarded as primary norms. One of the main functions that the principles have in the EU law is to aid in the interpretation of primary and secondary norms. The CJEU shall interpret secondary legislation in conformity with primary legislation and the fundamental rights included therein as an expression of general principles in community law. The ECHR, the Treaty of EC, the Charter of Fundamental rights and the ILO Convention of Discrimination in the Labour Market no. 111 are of special significance in this respect. The Court of Justice has indicated its readiness to justify its decisions even solely by the general principle of non-discrimination; for example, in C-144/04 Mangold and C-117/76 Ruckdeschel, and the principle of equal treatment in C-149/77 Defrenne III and also partly in C-555/07 Kükükdeveci. In the latter ruling, by deciding disputes in favour of general principles of Union law, the CJEU also recognises their higher status in the norm hierarchy, as for the directives. Kükükdeveci and Mangold also provide a good indication of the way in which the Court has constitutionalized anti-discrimination legislation by embedding it in higher legal norms and then drawing upon these as a justification for an extensive interpretation of the legislation.

380 Hellsten, Jari: From Internal Market Regulation to Orde Communautaire Social (2007), pgs 78-82.
384 C-112/00, Schmidberger, para. 71, see also C-274/99, Conolly, para 37.
Furthermore, mainly as a result of Mangold the Court of Justice has taken the view that when the Member States are acting within the sphere of the Union law by implementing the secondary legislation and when they are derogating from the Union law, their actions must also be compatible with fundamental rights and generally recognised principles of law as an expression of those rights. Some commentators have therefore claimed that the validity of national acts can also be challenged by those principles.\textsuperscript{387}

Consequently, the interpretation of what is deemed to be acceptable use of fixed-term contracts in the light of Clause 5 of the Framework Agreement is affected by equal treatment defined in the secondary EU legislation,\textsuperscript{388} the principle of non-discrimination subject to the EU treaty, and the principle of equal treatment determined in fundamental human rights and fundamental social rights valid in the EU.\textsuperscript{389} Hence, renewal of a fixed-term contract, neglecting to renew it or restricting the duration of such a contract on a discriminatory basis prohibited by Union law shall be deemed as against Clause 5 of the Framework Agreement on Fixed-Term Work as well. In this sense, the general principles included in the Union legal order are also of relevance. As these sources of Union law enjoy primacy in the interpretation of all national law, the use of fixed-term contracts is restricted by those sources of Union law as well. Whenever fixed-term contracts are used in the way explained above, these contracts shall be deemed as contracts of indefinite duration and other equivalent sanctions adopted by a Member State shall be applicable regardless of whether the successive contract fulfils the requirement of the Clause 5(1) a-c or equivalent measures.\textsuperscript{390}

The equality directives must also be taken into account in assessing acceptable use of fixed-term contracts.\textsuperscript{391} The objective of Directive 76/207/EC is to put into effect the principle of equal treatment between men and women in respect of access to employment, including the promotion of employment and vocational training as well as working conditions in the Member States. Article 3 of the Directive states that application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of gender in the conditions, including selection criteria for access to all jobs or posts, whatever the sector or branch of activity and to all levels of the occupational hierarchy.

\textsuperscript{387} Barnard, Catherine: EC Employment Law (2006), pgs 319-320 and Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire, The Fourth Article, pg 42.

\textsuperscript{388} For example, Directives 2000/78/EC, 2000/43 /EC, 76/207/EC and 92/85/EC.

\textsuperscript{389} In this respect, the protection against unjustified dismissal included in the EU Charter of Fundamental Social Rights is of special relevance that will be reviewed in the forthcoming sections.

\textsuperscript{390} Framework Agreement Clause 5(1).

\textsuperscript{391} According to the general considerations of the Framework Agreement on Fixed-term work, more than half of fixed-term workers in the European Union are women and this agreement can therefore contribute to improving equality of opportunity between women and men.
Correspondingly, according to Article 5 of the Directive, the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on the grounds of gender. Moreover, the purpose of Directive 92/85/EC\textsuperscript{392} is to protect the workers who have recently given birth or who are breastfeeding against dismissal for reasons associated with their condition. According to Article 10 of the Directive, the Member States shall take the necessary measures to prohibit the dismissal of workers within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of their maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.

The CJEU has already prohibited the use of fixed-term contracts contrary to the principle of equality on the grounds of Directive 76/207/EC prior to validity of the Framework Directive on Fixed-Term Work. In ruling C-438/99 Melgar, the non-renewal of the contract of the pregnant worker who had been employed under successive fixed-term contracts and was capable of performing the work concerned despite her pregnancy, was deemed direct discrimination on the grounds prohibited in Article 2 of Directive 76/207/EC.\textsuperscript{393} In this case, the Court deemed the Article directly effective. It also made clear that the prohibition of dismissal laid down by Article 10 of the Directive applied both to fixed-term employment contracts and to those concluded for an indefinite duration.\textsuperscript{394} Thus, where an employer unilaterally terminates a contract on discriminatory grounds, irrespective of its duration, it contravenes Article 10 of Directive 76/207EC.

Where, however, a fixed-term contract has expired as a result of reaching the end of its agreed term and is not renewed, this could not be regarded as a dismissal and therefore its non-renewal does not contravene Article 10 of Directive 92/85/EC.\textsuperscript{395} However, the Court specified that since the non-renewal of a fixed-term contract could be deemed as refusal of employment, the Court’s case law on the equal treatment is applied. Consequently, if the non-renewal of a fixed-term contract is

\textsuperscript{392} Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

\textsuperscript{393} C-438/99, Melgar: “In certain circumstances, non-renewal of a fixed-term contract could be viewed as a refusal of employment. It is settled case-law that a refusal to employ a female worker, who is otherwise judged capable of performing the work concerned, based on her state of pregnancy constitutes direct discrimination on grounds of sex

\textsuperscript{394} C-438/99, Melgar, para. 44.

\textsuperscript{395} C-438/99, Melgar, para. 47.
motivated by the pregnancy of an employee, this constitutes direct discrimination contrary to Articles 2 and 3 of Directive 76/207/EC.\footnote{ibid.}

The Court’s case law on pregnancy-related dismissals is currently based on Directive 92/85, whereas other forms of discrimination during pregnancy are mainly based on Directive 76/207/EC which is also applied, as the CJEU has stated, to the use of fixed-term contracts.

Correspondingly, in case C-109/00, Tele Danmark A/S, the Court of Justice took a stance on the interpretation of Directives 76/207EC and 92/85/EC when the contract of a fixed-term employee was terminated because of pregnancy after the employee had failed to inform her employer of this despite the fact that she knew about it at a time the contract was concluded and was unable to work for a considerable part of the duration of employment. The Court considered that the termination was contrary to the Directives. In its reasoning, the Court stated that an employee is not obliged to inform her employer of her condition, since an employer is not entitled to take it into account in recruitment. The Court also referred to the established case law according to which a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave, and that the same conclusion must be drawn as regards the financial loss caused by the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy.\footnote{C-109/00, Tele Danmark, paras.24 and 28 Case C-177/88, Dekker, para. 12 and Case C-207/98, Mahlburg, para. 29.} Moreover, the Court also held that, while the availability of an employee is necessarily a precondition for the proper performance of the employment contract for the employer, the protection afforded by the Union law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave is essential to the proper functioning of the undertaking in which she is employed. A contrary interpretation would render the provisions of Directive 76/207 ineffective.\footnote{C-109/00, Tele Danmark, para. 29.}

The Court made it clear both in Melgar and Tele Danmark that if the Union legislator had intended to exclude fixed-term contracts, which represent a significant proportion of employment relationships, from the scope of that directive it would have made express provision to that effect.\footnote{C-438/99, Melgar, para 43. C-109/00, Tele Danmark , para. 33. Barnard, Catherine: EC Employment Law (2006).}
4.2 THE ACCEPTABLE USE OF FIXED-TERM CONTRACTS IN THE EU EMPLOYMENT POLICY AND THE EU EMPLOYMENT LAW

4.2.1 Age Discrimination

The previous section concluded that use of fixed-term contracts (successive or single) as an employment measure must fulfil the requirements of equal treatment set out in the secondary EU legislation. Derogation from that principle requires that the principle of proportionality be complied with. In the following sections, the CJEU’s case law on the requirement of equal treatment of national employment measures, how the proportionality test is carried out and finally its implications for the permissible use of successive fixed-term employment contracts are examined.

The Court in Mangold considered that the German national legislative employment measure was in conflict with the principle of proportionality mainly because it had not been shown that fixing an age threshold as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, was objectively necessary to the attainment of the objective, that is, the vocational integration of unemployed older workers. Since the principle of proportionality requires that derogations from an individual right to be reconciled, so far as possible, with the principle of equal treatment, the German employment measure must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.\footnote{\textit{C-144/04, Mangold, para. 65. Veldman, Albertine: The Coherency of European Social Policy (2008), pgs 98-99.}}

Despite the broad discretion accorded to the Member States concerning the choices of employment policy objectives and the means of achieving them, the ruling applies a strict proportionality test in interpreting the non-discrimination principle on grounds of age compared to well-established case law on gender equality. Because the employment measure in the German law differentiating on age was deemed as derogation from an individual right (the principle of non-discrimination), the requirements of the measure had to be reconciled with the equal treatment requirement. Therefore the personal situation of the older employee and the structure of the labour market in question shall be taken into account as a precondition for this kind of derogation.\footnote{Veldman, Albertine: The Coherency of European Social Policy (2008), pgs 98-102.}

Accordingly, the problem of the German employment measure was that it did not consider whether the older worker was unemployed before the fixed-term contract was concluded, nor the duration of of such an unemployment period. Regardless of the other circumstances than age which might affect the employability of older
people, it permitted these employment contracts to be renewed an indefinite number of times regardless of the duration of their tasks.\textsuperscript{402}

Setting an age threshold above which it is permissible to conclude fixed-term contracts without limits, as the German legislature did, involves the questionable generalisation that the only complicating employability factor is age. However, as the CJEU stated, it has not been shown that fixing an age threshold as such is objectively necessary to enhance the employability of older people regardless of other influential factors.\textsuperscript{403} However, the age of a worker is certainly relevant in assessing employability. The Advocate General stated in his opinion in Mangold by referring to the report by a national commission which found that “an unemployed person over the age of 55 has about a one-in-four chance of re-employment”,\textsuperscript{404} in the light of which, measures enhancing employability would have been justifiable.

On the other hand, age as a ground for discrimination is not deemed to be as unconditional as gender, which is a binary natural criterion, whereas age is a point on a scale. Apart from age discrimination, discrimination on the grounds of gender based on actuarial tables is thus an extremely crude form of discrimination involving very sweeping generalisations, whereas age discrimination may be graduated and may rely on more subtle generalisations. Moreover, in law and society in general, equality of treatment irrespective of gender is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential.\textsuperscript{405}

The Court had already taken a somewhat different position on the different treatment on grounds of age in the name of social policy measure in its later C 411/05 Palacios de la Villa ruling, in which the Spanish employment policy measure on compulsory retirement was under evaluation. From the 1980s onwards, the government applied a policy of compulsory retirement. The relevant labour legislation provided that the capacity to work and thus the automatic termination of employment contracts was subject to a maximum age limit set by the government without prejudice to the right to complete qualifying periods for retirement benefits. However, the radical change in the labour market situation at the beginning of the new century changed the priorities. In view of the demographic challenges and their

\textsuperscript{402} Veldman, Albertine: The Coherency of European Social Policy (2008), pg 99, C-144/04, Mangold, para 65.
\textsuperscript{403} C-144/04, Mangold, para. 65.
\textsuperscript{404} Opinion of Advocate General Tizzano in C-144/04, Mangold, delivered on 20.6.2005, para. 77.
consequent burden on the social security system, the exit from the labour market was delayed, which is in conformity with the contemporary policy objectives of the EES on prolonging working life and increasing the employment of older employees. The law repealed the provision on compulsory retirement in 2001 on emergency measures to reform the labour market in order to increase employment.

It was uncertain, however, whether the withdrawal of statutory compulsory retirement also implied that collective agreement based arrangements on compulsory retirement were deemed to be unlawful. When the Spanish Supreme Court regarded this as being so, the government was pressured by social partners to reinstate compulsory retirement. This led to an amendment of the act to allow the collective agreement to contain clauses on compulsory retirement, provided that such a measure was linked to objectives consistent with employment policy, and the worker whose contract of employment was terminated had completed a minimum contribution period in respect of retirement benefits. However, it was for the CJEU to decide whether it was contrary to the principle of equal treatment laid down by Directive 2000/78 that the national measure pursuant to compulsory retirement clauses contained in collective agreements was unlawful.\textsuperscript{406}

First of all, the Court stated that the legitimacy of such a measure could not be reasonably called into question, since employment policy and labour market trends were among the objectives expressly laid down in Article 6 (1) of Directive 2000/78, and the Court also referred to the intention of Article 2 of the EU, according to which the promotion of a high level of employment was an objective pursued both by the European Union and the European Community.\textsuperscript{407} The Court also referred to its previous case law, in which it had stated that encouragement of recruitment undoubtedly constituted a legitimate social policy objective and that assessment must obviously apply to instruments of national employment policy designed to improve the opportunities of particular categories of workers to enter the labour market.\textsuperscript{408}

In respect of the proportionality test concerning the objective pursued and the legitimacy of the measures, the Court emphasised the role of country-specific circumstances and the discretion of Member States to determine the best measures by stating that:

\textit{“It should be recalled in this context that, as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to}

\textsuperscript{407} C-411/05, Palacios de la Villa, para. 66.
\textsuperscript{408} C-411/05, Palacios de la Villa, para. 64 and C-208/05, para. 39.
pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.”\(^{409}\)

“As is already clear from the wording, ‘specific provisions which may vary in accordance with the situation in Member States’, in recital 25 in the preamble to Directive 2000/78, such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people’s working life or, conversely, to provide for early retirement.”\(^{410}\)

“Furthermore, the competent authorities at national, regional or sectoral level must have the opportunity available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned.”\(^{411}\)

The Court did not consider it unreasonable for the authorities of a Member State to take the view that a measure may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting of the promotion of full employment by facilitating access to the labour market.\(^{412}\)

Mainly in the light of all the foregoing arguments, the Court took the view that the prohibition on any discrimination on the grounds of age, as implemented by Directive 2000/78, must be interpreted as not precluding national legislation according to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide the sole requirement that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution provided that certain preconditions are fulfilled. Firstly, the measure, although based on age, must be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market. Secondly, the means put in place to achieve that aim of public interest must not be inappropriate and unnecessary for the purpose.\(^{413}\)

\(^{409}\) C-411/05, Palacios de la Villa, para. 68. Compare to Case C-144/04 Mangold, para. 63. For the discretion of the Member States to enforce the objectives of the social policy, see also C-167/97, para 74. Veldman, Albertine: The Coherency of European Social Policy (2008) pgs 104.

\(^{410}\) C-411/05, Palacios de la Villa, para 69.

\(^{411}\) C-411/05, Palacios de la Villa, paras 70-71.

\(^{412}\) C-411/05, Palacios de la Villa, para. 72.

\(^{413}\) C-411/05, Palacios de la Villa, para. 68-73 and operational.
The Court continued the same line of reasoning in Georgiev, which concerned the employers’ right to conclude fixed-term contracts with university professors after the age of 65, the social policy aim of which was to encourage recruitment to higher education by offering professorships for younger candidates. The Court considered that Directive 2000/78, in particular Article 6(1), must be interpreted so as not to preclude national legislation, according to which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that legislation pursues a legitimate aim linked inter alia to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations. Moreover, the Court required compliance with the principle of proportionality, i.e., that it must be possible to achieve that aim by appropriate and necessary means. The Court justified its ruling by saying that, unlike in Mangold, that decisive factor is that the professor had acquired the right to a retirement pension, in addition to the fact that he had reached a specified age, which moreover was higher than in the Mangold case.\(^\text{414}\)

### 4.2.2 Conclusions of the Case Law

Comparison between Mangold, Palacios de la Villa and Georgiev indicates some coherence in the grounds for the measures of employment policy, the aim of which is to promote employment of older groups which are acceptable under the EU employment law. In Mangold, the Court deemed an employment measure intended to increase job opportunities for the older unemployed discrimination on the grounds of age because the measure (concluding the fixed-term contract) was based on the age of an employee only, whereas in Palacios de la Villa and Georgiev, the Court approved the employment measure on compulsory retirement despite the differential treatment on the grounds of age because it was not based on reaching a *specific age only*, but also took into account the fact that the people concerned were entitled to financial compensation by way of a retirement pension at the end of their working lives. \(^\text{415}\)

Nevertheless, the indication of these rulings in the Mangold, Palacios de la Villa and Georgiev cases is that when the Member States adopt employment policy tools the aim of which is to further the employment opportunities of older people by

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\(^{415}\) Joined cases C-250/09 and 268/09, Georgiev paras 54, 63 and operational and C 411/05, Palacios de la Villa, paras. 68-73 and operational.
lowering the protection level of fixed-term workers, the levers must be proportionate
to the objective pursued. In Mangold, removing the requirement of objective reasons
for renewal of the fixed-term contracts because of age only would have been an
exclusion from large categories of workers benefiting from stable employment for
an indefinite period of time and was not deemed to be a legitimate employment
policy measure and not justifiable in the light of Directive 2000/78.416

Consequently, the Mangold, Palacios de la Villa and Georgiev cases suggest that
derogation from protection of fixed-term contracts requires an acceptable social
policy objective and compliance with the principle of proportionality.417

In the Mangold ruling, however, the Court of Justice also took a stance on
the tension between the job security of fixed-term workers and using fixed-
term contracts as a flexicurity tool by means of enhancing job creation for older
unemployed people in the labour market. The latter was in accordance with the
objectives of the European Employment Strategy. According to the Lisbon agenda,
action is needed to enhance employability and to prevent structural unemployment
and high dropout rates for older workers who still start exiting the labour market
in very large numbers by the time they reach 55 years of age. Furthermore, the
Lisbon Agenda articulates the objective of moving people from unemployment or
inactivity back to employment and offers incentives to stay in the workforce longer.418
In the European Employment Pact, attention is also focused on measures that
decrease long-term unemployment and introduce more flexible arrangements for
older employees to work.419

Mangold is therefore a practical example of tension between the application of
soft law and hard law instruments. As far as fundamental labour law principles are
concerned, their protective nature requires that some measures derived from the
European or national policy agenda cannot be realised as such. As explained above,
a national policy can correspond to the objectives of the European Employment
Strategy perfectly but still be against the general principles of Union law such as
that of equal treatment on the grounds of age.420

The judgment in Mangold indicates that national applications of flexicurity will
have to comply with the fundamental principle of non-discrimination as adopted

416 C144/04, Mangold, para. 64, Veldman, Albertine: The Coherency of European Social Policy (2008), pgs 98-
99.
417 C144/04, Mangold, para. 65, Joined cases C-250/09 and 268/09, Georgiev paras 54 and 63 and C 411/05,
Palacios de la Villa, paras. 68-73.
418 Commission Communication to the Spring European Council, Working Together for Growth and Jobs: A
419 Resolution of the European Council on the European Employment Pact in International Journal of Comparative
in secondary legislation and ultimately with the Union concept of flexibility and security deriving from the EU employment law which gives a privileged position to permanent contracts.421 This is also an indication of tension between the EU employment law and EU employment policy, which need to be reconciled without forgetting the need to preserve a space for national diversity.422

To conclude, it seems justifiable to lower the threshold to conclude successive fixed-term contracts in order to enhance the employability of older workers in circumstances where the prospect of their re-employment is estimated to be bad given the labour market situation and the situation of the person concerned. Correspondingly, it seems to be acceptable to promote the best possible allocation of posts for employees between the generations provided that the principle of proportionality is complied with. This can be considered as acceptable in terms of the Georgiev, Palacios de la Villa and Mangold cases.423 This conclusion is also supported by the CJEU in the Adeneler ruling, where the Court stated that the circumstances which constitute objective reasons for successive fixed-term contracts might result from pursuit of the legitimate social policy objective of a Member State, for example, employing the long-term unemployed.424 Furthermore, encouraging the recruitment of older people has been regarded at least to some extent as a legitimate aim of social policy both in the European Employment Policy and in EU labour law.425

Perhaps one of the main differences between the Mangold, Palacios de la Villa and Georgiev cases is that in Mangold age was the only crucial factor which was the reason for deviation from the individual right, whereas in Palacios de la Villa and Georgiev the decisive factor was not based merely on a specific age, but also took into account the fact that the people concerned were entitled to financial compensation by way of a retirement pension at the end of their working lives, the level of which could not be regarded as unreasonable.426

However, the Court of Justice extended the scope of the discretion of the Member States regarding the means of achieving their social policy objectives significantly in Palacios de la Villa compared to Mangold. As Albertine Veldman has concluded, in Mangold, a derogation from the individual right to non-discrimination implies a narrow fit between objective and measures; whereas, in Palacios de la Villa, the CJEU left discretion for a Member State in respect of choice of objectives and appropriate

421 C 144/04, Mangold, para 64.
423 C-144/04, Mangold, para. 64, Joined cases C-250/09 and 268/09, Georgiev para 54 and 68.
424 C 212-04, Adeneler, para.69-70.
425 C-144/04, Mangold, paras.59-60 and C-411/05, Palacios de la Villa, para. 65.
426 C-144/04, Mangold, para. 64. C-411/05, Palacios de la Villa, para. 73, Joined cases C-250/09 and 268/09, Georgiev, para. 54.
means in social and employment policy almost unrestricted.\textsuperscript{427} The implication of this is that a national social policy solution is deemed to be acceptable even if it leads to different treatment on the grounds of age if the objective of the Member State`s measure is legitimate and the means of achieving the objective are appropriate and necessary. Therefore, in the light of the Palacios de la Villa, Mangold and Georgiev cases, the age threshold as a reason to deviate from compulsory labour legislation, for example, in concluding fixed-term contracts in order to enhance the employability of older or younger people and transition between the generations in the labour market as part of legitimate social policy objective is permitted.\textsuperscript{428} The question is about favouring certain groups in the employing process who are disadvantaged in getting employed in order to attain actual equality for those groups or promote transition in the labour market. Naturally, the principle of proportionality must be complied with.

For the sake of comparison, the Court of Justice has also indicated in its previous settled case law in the area of gender discrimination that if a Member State is able to show that the measures chosen reflect a necessary aim of its social policy and are appropriate and necessary for achieving that aim, the mere fact that the legislative provision affects far more women than men at work cannot be regarded as a breach of Article 157 of the TFEU (ex.141).\textsuperscript{429}

The broad discretion conferred on Member States in Mangold, Georgiev and Palacios de la Villa was somewhat qualified in the recent Age Concern England case, in which a British charitable organisation challenged a provision of the UK law permitting an employer to dismiss workers under the age of 65 when they reached the retirement age fixed by the employer if such a measure constituted a proportionate means of achieving a legitimate aim. In this case, the CJEU emphasised that legitimate policy objectives listed in Article 6(1) were simply illustrative rather than exhaustive, and ruled that a legitimate aim of a national measure could be inferred from its context even if the legislation lacked specificity or precision. However, the CJEU distinguished the legitimate employment or social policy objectives of a public nature from purely individual reasons particular to the

\textsuperscript{427} Veldman, Albertine: The Coherency of European Social Policy (2008), pg 104.
\textsuperscript{428} C-144/04, Mangold. paras. 64-65 and C-411/05, Palacios de la Villa, paras. 68-70, Joined cases C-250/09 and 268/09, Georgiev, paras. 54 and 68.
\textsuperscript{429} Case C-444/93, Megner and Scheffel, para. 24, and Freers and Speckmann, cited above, para. 28.
employer’s situation such as cost reduction or improving competitiveness, even while acknowledging that there could be a close relationship between these at times.\footnote{Craig, Paul - De Burca, Gráinne : EU Law, Text, Cases and Materials. (2011), pgs 905-906. C-388/07, Age Concern England, paras. 43-46. See also C-315/09, Rosenbladt, where a scheme permitting automatic termination of employment contracts on reaching retirement age, which served the legitimate policy aim of promoting better distribution of work between the generations, was found to be proportionate as the scheme was flexible enough for individual or collective agreements to be made between employers and employees permitting work beyond the retirement age. In C-341/08, the question was about German legislation which provided that admission to practice as a dentist in the statutory health insurance scheme expired on reaching the age of 68, which was deemed to be a proportionate means of achieving the legitimate aim of improving opportunities for young people entering this particular labour market category.}

Correspondingly, it can be argued that when a Member State has a legitimate social policy objective that relates to promoting the employment of certain groups and the principle of proportionality is adhered to, the deviation from job security in the preconditions for the use of successive fixed-term contracts does not violate non-discrimination as determined in Directive 2000/78/EC.

This stance is also supported by the CJEU in Adeneler, in which the Court stated that objective reasons justifying fixed-term contracts may result from pursuing the legitimate social policy objective of a Member State and in Age Concern, where the legitimate objective must be interpreted to reflect the broad discretion of Member States in the social policy area.\footnote{Craig, Paul - De Burca, Gráinne : EU Law, Text, Cases and Materials. (2011), pgs 905-906.} In Adeneler, the Advocate General stated in her opinion that an objective reason may lie in efforts to reintegrate specific categories of persons – such as long-term unemployed or unemployed persons who have exceeded a particular age limit – into working life.\footnote{Opinion of Advocate General Kokott, delivered on 27th October 2005 in C-212/05, Adeneler, para. 70.} However, in accordance with Mangold, this must not lead to a situation in which the groups whose position is favoured by the employment measure on discriminatory grounds provided by Directive 2000/78/EC without distinction, whether or not they were unemployed before the contract was concluded or whatever the duration of any period of unemployment and regardless of other factors related to employability may lawfully be offered fixed-term contracts which may be renewed an indefinite number of times. In other words, when fixed-term contracts are being used as a measure for employing certain groups, age cannot be the only differentiating factor in deviating from the protection guaranteed by the directive.\footnote{C-144/04, Mangold, paras. 64-65, Joined Cases C-250/09 and 268/07, Georgiev, paras. 54, 68 and C 411/05, Palacios de la Villa, paras. 68-73.}

There is, however, another point of view which must be taken into account when legislative measures are used to favour the employability of particular groups, for instance, because of age. While Directive 2000/78 states that a national measure that contains different treatment is not deemed as discrimination, if, within the context of national law, it is objectively justified by a legitimate aim including a legitimate
employment policy, labour market and vocational training objectives, and, if the
means of achieving that aim are appropriate and necessary, Article 21 of the EU
Charter of Fundamental Rights does not necessarily entitle such a justification for
difference in treatment. As Sminsmans has stated, while Article 21 of the Charter
clearly prohibits discrimination (for example) on the grounds of age, the Charter
does not contain a clear entitlement to different treatment as Article 6 of Directive
2000/78 does.\footnote{Article 6(1) of Directive 2000/78 includes a provision according to which the Member States may provide
that such differences of treatment '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'. According to sub-paragraph (a) of the second paragraph of Article 6(1), these differences
may include inter alia 'the setting of special conditions on access to employment and vocational training,
employment and occupation ... for young people, older workers and persons with caring responsibilities in
order to promote their vocational integration or ensure their protection' and, under sub-paragraphs (b) and
(c), the fixing of conditions of age in certain special circumstances. Smiensmans, Sjijn: How to Be Fundamental
with Soft Procedures? The Open Method of Coordination and Fundamental Social Rights (2005), pgs 229-
230.} However, this does not undermine the broad discretion given
to the Member States in social policy and the primary role of the Member States
in developing employment policy measures in accordance with the principles of
subsidiarity and proportionality included in the Treaty of Lisbon.\footnote{Articles 2 and 4 of the Protocol (no 2 of TFEU) on the Application of the Principles of Proportionality and
Subsidiarity. TEU Article 5.}

4.2.3 Tensions between the EU Employment Policy and the EU Employment
Law

The previous section examined the requirements laid down by the principle of
non-discrimination in lowering the threshold for concluding fixed-term contracts
as an employment measure. This section analyses other possible tensions
between the EU employment policy and the EU employment law concerning
the use of fixed-term employment contracts in various periods of time, taking
the case law of the CJEU on successive fixed-term contracts and the debate
on the consequences of excessive use of successive fixed-term contracts into
account. The question is important, as Freedland has pointed out, beacuse the
evolution of the EU employment law has always depended on the possibility of
legitimating employment law in the EU economic policy terms and the EU social
and employment policy terms.\footnote{Freedland, Mark: Employment Policy in European Community Labour Law: Principles and Perspectives
edited by Davies, Paul - Lyon-Caen, Antoine - Sciarra, Silvana - Simitis, Spiros(1996), pg 287.} For example, in its White Paper on Social Policy,
which in fact concerns only labour law, the Commission considered that regulating
for higher labour standards and employee rights has been an important part of
the Union’s achievements in the social field. The key objectives have been firstly to ensure that the creation of the common market did not lead to reduction of labour standards or distort competition, and secondly to guarantee that working people also share the new well-being. The main areas of focus have been equal treatment of men and women, free movement of workers, health and safety, and to a limited extent labour law as well.  

According to Loredana Zappala, the choices made by the CJEU in the Adeneler ruling reflect too unilaterally the protective side of the flexicurity adopted in the Directive on Fixed-Term Work. This criticism suggests that by giving high priority to stable employment, the CJEU refuses to recognise employment policy used in the various guidelines adopted within the framework of the European Employment Strategy. The Court is said to be reluctant to interpret the Fixed-Term Work Directive in the light of the employment objectives of adaptability and flexicurity, which is likely to increase the incompatibility between the EU labour law and the European Employment Policy objectives. Furthermore, it is criticised for neglecting to take the political strategy into account, which tries to promote flexibility in the labour market, the organisation of labour and employment relationships and to increase not job security but employment security and social security for workers in the labour market. If the Court was to extend its ruling to national systems that did not opt for the measure of objective reasons, this is estimated to increase incompatibility with the European employment policy objectives where the intention is to enhance the adaptability of companies and workers in order to respond swiftly to fluctuations in demand and supply as a result of stiffer economic competition.

Moreover, prohibiting the conclusion of successive fixed-term contracts under circumstances of fixed and permanent employer needs is argued to disrupt the

437 ibid, COM (94) 533. See also COM (93) 551, where the Commission states that commitment to high social standards and promotion of the social progress form an integral part of the Treaties.
438 The definition of objective reasons must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts. Furthermore, according to the CJEU, 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 the legitimate social-policy objective of a Member State.
439 Point 5 of the Preamble of the Directive.
441 The preamble to the Directive stresses the need to take measures with a view to “increasing the employment-intensiveness of growth, in particular by a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition and the social partners are invited at all appropriate levels to negotiate agreements to modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security” Veldman, Albertine: The Coherency of European Social Policy (2008) pgs 96-97
employment objectives set out in the Lisbon Agenda.\textsuperscript{443} Loredana Zappala’s criticism seems unconvincing taking into account that in the Adeneler ruling the line adopted by the background of the EES aspirations at the end of the 1990s, where the right balance between flexibility and security and especially the protective nature of the use of fixed-term contracts were emphasised, is followed. Correspondingly, according to the Green Paper of 1997, which was the initial background for the Framework Directive on Fixed-Term Work, the need to take the interests of both workers and employers into account was specifically emphasised.\textsuperscript{444} In other words, flexibility needed to be developed without forgetting the aim of creating more and better jobs, not only for employers but for the employees as well. The commitment of employees is clearly introduced as a positive feature of protection by the TaskForce. This has to be taken into account in developing country specific flexicurity measures. Moreover, long-term successive use of fixed-term contracts seemed to be abusive according to the EES from the mid-2000s onwards.\textsuperscript{445}

Furthermore, as Murray has pointed out, there is evidence that long-term temporary work undermines the quality of employment and is against the high standard, high productivity labour market the European Union sometimes seems to support. As the Commission’s White Paper on social policy states: “the pursuit of high social standards should not be seen as a cost but also as a key element in the competitive formula”.\textsuperscript{446} The Commission’s own experts concluded in 1994 that “when contractual relationships are more durable, firms are willing to invest in their personnel and when employment relationships are more precarious, employee’s motivation, loyalty and willingness to cooperate are likely to be lower, with negative consequences for firms productivity”.\textsuperscript{447}

Furthermore, fixed-term workers are subject to higher turnover, earn lower wages on average and receive less training. This can lead to a situation in which companies resorting systematically to fixed-term contracts under-invest in their human resources and therefore impair their competitiveness and productivity in the long-term. Moreover, excessive career instability, especially in the early careers of young adults, can be associated at the macro level with the lowering of the propensity to consume and the fertility rate. Available statistical evidence shows that only one-

\textsuperscript{443} Zappala, Loredana: Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ’s Jurisprudence, pgs 440-441.
third of those in temporary employment find a stable job after a year. However, even after six years, the longest time horizon allowed by available data, around 16 per cent were still in the same situation and, more worryingly, 20 per cent had moved out of employment.\textsuperscript{448} Consequently, in the light of the EES aspirations in the 1990s, it seems that there are more disadvantages than benefits in enhancing the use of fixed-term contracts in order to create more jobs at the expense of security.

It is essential to note that strict dismissal laws seem to result in somewhat lower use of employment contracts of indefinite duration. If employment laws make it easy to have work done under temporary contracts, some groups in the labour market will not readily accept an employment contract of indefinite duration. This is against the current flexicurity strategy adopted by the Commission.\textsuperscript{449} On the other hand, there is also research which seems to indicate that non-permanent contracts serve as stepping-stones to permanent contractual relationships or as a new form of segmentation depending on the institutional context, in particular the degree to which existing permanent jobs are subject to strong job protection. Such protection reduces possible flows into and out of such jobs and hence puts limits on the degree to which non-permanent jobs can serve as stepping-stones, although activating policy interventions meant to move workers from temporary to permanent jobs seem to have positive effects.\textsuperscript{450}

Research has also shown that attempts to create more and better jobs by reducing the level of protection against dismissal, of which the relevant part is protection against the use of successive fixed-term employment contracts, are not going to succeed. Although reducing the level of using a temporary workforce might temporarily increase the number of jobs, this is to be attributed to a decrease in labour productivity rather than to an increase in employment in the long run. Labour productivity falls because employees are less willing to invest in a specific job. Therefore, the harm of reducing the preconditions of temporary work seem to be greater than the benefits related to the increase in temporary employability. These facts raise the question of whether a relaxation of dismissal laws including the threshold for concluding fixed-term contracts is to be preferred because it does not lead permanently to more or better jobs and thus does not promote these


\textsuperscript{449} For example, the European Expert Group on Flexicurity report recommends reducing asymmetries between non-standard and standard employment by fully integrating non-standard contracts into employment law. See European Expert Group on Flexicurity, pgs 23-34.

Commission objectives.\textsuperscript{451} Furthermore, as will be indicated in the “The Use of Fixed-Term Contracts and Fundamental Rights” chapter, the main rules on contracts of indefinite duration and fixed-term contracts based on objective reason are binding principles of EU law, which should not be reduced simply for because of economic reasons.

From the perspective of economic sciences, permanent employment is another crucial factor in developing competitive advantage. Instead of an atypical workforce and dismissals, corporations should avoid dismissals and concentrate on policies for permanent employment relationships and skills development by training, education and transfers to new jobs.\textsuperscript{452}

Therefore, taking into account the criticism of the results of Wim Kok’s TaskForce explained above and other research covered in this chapter, there are good reasons to develop more stringent regulation on the use of fixed-term contracts, which resemble the earlier attempts of the Commission in the early 1980s.\textsuperscript{453}

The severest criticism of the EU employment policy guidelines is that the advantages of atypical work for competition and productivity are often based on the fact that atypical workers have traditionally been excluded from high levels of employment protection. As Ashiagbor has stated, the very purpose of atypical work is to provide a way of circumventing legislative and collective regulations and the costs associated with them.\textsuperscript{454} This is clearly unacceptable, as well as supporting more stringent regulation on the use of fixed-term contracts than provided by the Framework Agreement.\textsuperscript{455}

On the other hand, the policy objectives of the EES, which are in the background of regulation in the Framework Agreement, are somewhat the reverse. The preamble, on the one hand, emphasised the willingness to improve social policy and to enhance competitiveness of the Community economy and to avoid burdens that might


\textsuperscript{452} Porter, Michael (2006), pg 657 and Lamponen, Helena (2008), pg 40.

\textsuperscript{453} Murray, Jill: Normalizing Temporary Work, Industrial Law Journal, vol 28, pgs 271-275. The Commission’s Proposals on Atypical Work (1995) Industrial Law Journal, vol 24, pgs. 269-299. See Proposal for a Council Directive concerning temporary work, 19 May 1982. In this proposal, the Commission specified the grounds upon which the use of temporary work could be used: fixed-term employees were only to be hired to meet five specific business needs - temporary reduction in the work force, a temporary or exceptional increase in activity, to carry out a clearly defined “occasional task of a temporary nature”, where the work was of a “special nature”, or in connection with a ‘new activity of uncertain duration.


\textsuperscript{455} C- 586/10, Küciük, para. 56, C-268/06, Impact, para. 76.
impede the development of small- and medium-sized businesses.\textsuperscript{456} It reflects the so-called third way followed by the EU very well, by which individual choices are supported by the regulation. As Sandra Fredman has described it, the third way also stands for civic responsibility, according to which individual rights carry social responsibilities with them. It also stresses equal opportunities rather than equal outcomes. The third way also relies on the fact that the social rights are a positive business asset, which promotes the efficiency of the enterprise and the society as an entirety. In order to contribute to the modernised European social model, the aim is a synthesis between economic and social policy, market and state. Social policy is regarded as a productive factor, a substantial contribution to the economy, while economic policy should promote social objectives. The focus on job creation is seen as important in improving the quality of jobs, and competitiveness goes hand in hand with the need for a high level of social protection. Well-focused social protection is important in adapting an economy to change and providing an efficient and well trained labour force. At the same time, the development of fundamental social rights is deemed an outcome in itself, a key element of an equitable society and respect for human dignity rather than simply a means to a more competitive economy.\textsuperscript{457}

It is, on the other hand, difficult to combine rights of employees and market rationales as CJEU’s case law on Clause 5 of the Framework Agreement on Fixed-Term Work indicates. For employers, flexibility usually requires adjustment of the duration of employment appropriate to business needs which does not necessarily coincide with the employees’ demands for continuity of employment. The result is that Clause 5 does not provide substantive rights for fixed-term employees.\textsuperscript{458}

The CJEU has promoted the flexible use of fixed-term contracts even more, which illustrates this tension. When looking at the recent case law of the CJEU after Adeneler, we see that it does not correspond to the balance between flexibility and security sought by the EU employment guidelines. As the CJEU ranked the measures of maximum total duration and total number of renewals as equivalent without further restriction, so that there is neither a minimum requirement of objective reasons to prevent the abuse nor minimum protection for individuals provided by Clause 5 of the Framework Agreement whatsoever, the CJEU in fact permitted long sequences of consecutive fixed-term contracts. The CJEU did not emphasise the principle of contracts of indefinite duration as the main rule in the Kücük ruling, in which it stated that a temporary need for replacement staff may, in principle, constitute an objective reason for concluding 13 successive fixed-term contracts.

\textsuperscript{457} Fredman, Sandra: Transformation or Dilution: Fundamental Rights in the EU Social Space in European Law Journal, vol 12 (2006), pg 44.
contracts within over 11 years for an employer who may have to employ temporary replacements even on a permanent basis, irrespective of whether the employees could have been employed by contracts of indefinite duration and that the existence of objective reason excludes there being any abuse of fixed-term contracts. This judgment clearly indicates that measures included in Clause 5 of the Framework Agreement must not be interpreted in subordination to the purpose. This kind of interpretation is also somewhat contrary to the notions of fixed-term contracts adopted by the EU employment policy guidelines in 1998 and 1999, where fixed-term contracts were intended to create pathways to employment and to reduce unemployment but not to permit their use on a permanent basis instead of contracts of indefinite duration.\(^\text{459}\) Correspondingly, the stance adopted by the CJEU regarding the use of successive fixed-term contracts does not reflect the assumptions of the European Expert Group on Flexicurity, which suggested in its report that successive use of fixed-term contracts should be limited and labour market segmentation should be reduced.\(^\text{460}\) Preventing labour market segmentation is still one of the primary goals of the Employment Policy Guidelines, which can hardly be enhanced by liberal interpretation on the grounds that fixed-term contracts can be concluded.\(^\text{461}\) However, the CJEU’s line means a relatively low threshold for using fixed-term contracts. On the one hand, this threshold enables extensive use of fixed-term contracts in order to promote employability and business adaptability (in the short run). This is in line with the European Employment Policy Guidelines.\(^\text{462}\) On the other hand, permitting long sequences of successive fixed-term contracts does not promote job quality, which has been an established criterion of the European Employment Policy Guidelines in the 2000s.\(^\text{463}\)

Thus, the nature of the EES can be seen, as Vos has done, as more political than regulatory, merely translating a broad win-win stance on labour market regulation, suggesting the possibility of labour market reform beyond the traditional ideological divide.\(^\text{464}\) Given the fact that it has affected many national legislative solutions\(^\text{465}\) and that Clause 5 of the Framework Agreement on Fixed-Term Work has led to unilateral

\(^\text{462}\) C-586/10, Kicici, paras. 51- 56.
\(^\text{465}\) French CNE, see Chapter 7 of the French part of the research.
emphasising of flexibility at the expense of security, it is certainly questionable whether the EES can be used as the sole inspiration in creating legislation.

4.2.4 The Horizontal Direct Effect of the Directives and the Mangold Ruling

The question of how the general principles of Union law overall and the principle of non-discrimination in particular affect the interpretation of national law is also related to their independent position as a source of law in the national legal order and whether they can be relied upon before the court by individuals. These questions were considered by the CJEU in the Mangold case, which concerned the fixed-term employment relationship between two individuals. The Mangold ruling has been criticised from the perspective of narrowing the principle of lacking horizontal direct effect of directives between individuals in the interpretation of national law. Some of the commentators have even stated that through Mangold, the Court recognised the horizontal direct effect of directives in a situation where the implementation period for the directive was still running.

In its reasoning, the Court derives the content of the principle of non-discrimination in respect of age from the rules of the EU law, which must be observed regardless of the expiry of the period allowed the Member States for the transposition of a directive. Therefore, the Court required that the national courts must ensure that those rules are fully effective, setting aside any provision of national law which may conflict with the rules. However, as pointed out in the literature, the authors of the Treaty did not mean to impose a directly effective prohibition on age discrimination or any other matters the Article 19 of TFEU (ex. Article 13 TEC)

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466 Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pgs 246-256.
469 C-144/04, Mangold, para. 77.
refers to, but to leave this for the further secondary legislation to determine.\footnote{This can also be observed in the wording of Article 13 EC (now TFEU 19) in which the power to take appropriate action to combat discrimination based on gender, racial, or ethnic origin, religion or belief, disability, age or sexual orientation is given to the Council. Editorial Comments, Horizontal direct effect, A law of Diminishing Coherence, Common Market Law Review, vol. 43 (2006), pgs 7-8, and Prechal, Sacha: Enforcement of EC labour law: Some Less Felicitous Consequences (2008), pg 19.} Thus, the direct effect of the Article leads to contra legem interpretation of the Article.\footnote{Editorial Comments, Horizontal direct effect, A law of Diminishing Coherence, Common Market Law Review, vol. 43 (2006), pgs 7-8, and Prechal, Sacha: Enforcement of EC Labour Law: Some Less Felicitous Consequences (2008), pg 19. On this criticism, see Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 41-42.}

However, there are plenty of arguments that support the independent significance of the principle of non-discrimination as a source of law in the EU legal order even if it is not determined in the secondary legislation. According to Article 6 of the TEU, the Union is bound to respect fundamental rights guaranteed in the ECHR (European Convention on Human Rights) and the protection of human rights and fundamental freedoms included in the Rome Convention as general principles of the Union law since they result from constitutional traditions common to the Member States. This principle is protected by these conventions. It also has to be taken into account in interpretation of national law irrespective of whether those principles can be independently relied upon as a subject of rights or obligations.\footnote{Compare with C-144/04, Mangold, paras. 76-77. The differences between horizontal and vertical direct effects of the directives mean that private sector employees have more restricted opportunities to appeal to the directives on the grounds of their rights than public sector employees. See Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 233. Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 41-42.}

On the other hand, the horizontal direct effect (apart from the direct effect) of general principles in national law has been criticised from the perspective of legal certainty, which appears normally, for example, as a protection of legitimate expectations and non-retroactivity. The main purpose of the principle of legal certainty is to protect the trust of EU citizens who are acting under its subordination. The concept of legal certainty requires unambiguousness from legislation, predictability from jurisdiction and that authorities and courts are bound to the settled practices.\footnote{Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 290 and pgs 299-300.} In accordance with the principle of non-retroactivity, the EU regulation shall not have legal effects on facts which arose before the validity of the regulation.\footnote{Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 290 and pgs 301-302.} The CJEU has coherently complied with this principle by rejecting the impact of retroactivity from secondary legislation.\footnote{See, for example, C-212/04, Adeneler, para.110, C-105/03, Pupino, paras. 44 and 47 and Joutsamo, Kari - Aalto, Pekka - Kaila, Heidi - Maunu, Antti: Eurooppaoikeus, (2000), pg 30.} With regard to the common constitutional tradition of the Member States, the CJEU has not undertaken any
study of the constitutional provisions of the Member States either in Mangold or prior to it. Therefore, it might be problematic from the perspective of legal certainty.\textsuperscript{476}

Advocate General Mazak also found such a horizontal direct effect of general Union law principles raising serious concerns from the perspective of legal certainty. According to Mazak, neither Article 19 TFEU (ex. Article 13 TEC) nor Directive 2000/\textsuperscript{78} necessarily reflects an already existing prohibition on all the forms of discrimination to which they refer.\textsuperscript{477} For example, the scope of prohibited discrimination is wider in Article 21 of the EU charter of Fundamental rights than the corresponding definition in Article 19 TFEU (ex. Article 13 TEC). The EU Charter, however, has a direct effect on national law only insofar as it concerns the areas in which the Community has power.\textsuperscript{478}

In the Mangold ruling, the Court ended with the reverse position by regarding national law, which authorises the conclusion of fixed-term contracts of employment once the worker has reached the age of 52 without restriction and in certain circumstances, contrary to Article 6(1) of Directive 2000/\textsuperscript{78}, even before the period prescribed for transposition of that directive had expired. In its reasoning, the Court referred to the previous C-129/\textsuperscript{96} Inter-Environment Wallonie case, stating that during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.\textsuperscript{479}

This relates to the widespread criticism of the Mangold ruling, in which the Court of Justice ignored the settled principle that directives lack horizontal direct effect. According to the settled case law of the CJEU since C-\textsuperscript{152}/\textsuperscript{84} Marshall,\textsuperscript{480} which is developed further in case C 397-01 Pfeiffer, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (horizontal direct effect).\textsuperscript{481} This point of view is a coherent consequence of

\begin{itemize}
\item \textsuperscript{476} C-\textsuperscript{44}/\textsuperscript{79}, Hauer, paras. 20 and 22 and Leanerts, Koen - De Smijter, Eddy: A Bill of Rights for the European Union, Common Market Law Review (2001) vol 38, pg 299.
\item \textsuperscript{477} Opinion of Advocate General Mazak, in the C-411/\textsuperscript{05} Palacios de la Villa case, paras. 89, 94, 95, 97 and 138.
\item \textsuperscript{479} C-\textsuperscript{144}/\textsuperscript{04} Mangold. para 78. C129/\textsuperscript{96} Inter- Environnement Wallonie para 45, editorial comments, Common Market Law Review, vol 43, (2006), pg 6.
\item \textsuperscript{480} The binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.
\end{itemize}
the fact that obligations in directives are addressed to the Member States rather than private individuals.\textsuperscript{482}

Advocate General Mazak also criticised the Court’s approach in Mangold as “ascripting direct effect to the corresponding general principle of law” in his opinion in C-411/05 Palacios de la Villa, going on to say that “in adopting that approach the Court set foot on a very slippery slope not only with regard to the question of whether such a general principle of law on the non-discrimination on grounds of age exists, but also with regard to the way it applied that principle.”\textsuperscript{483} Mazak also criticised the horizontal direct effect of directives, which are deemed to be expressions of general principles of the Union law from the perspective of legal certainty.\textsuperscript{484}

The most recent decision by the CJEU that touched on the horizontal direct effect is C-555/07 Küçükdeveci, in which the Court stated that the principle of non-discrimination on the grounds of age as given expression by Directive 2000/78 must be interpreted as precluding national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.\textsuperscript{485}

Advocate General Bot specified the opinion on lack of horizontal direct:

\textit{“The Court continues to oppose recognition of a horizontal direct effect of directives and seems to consider that the two principal palliatives represented by the obligation to interpret national legislation in conformity with Community law and the liability of the Member States for infringements of Community law are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States.”}\textsuperscript{486}

However, Advocate General Bot remarked in his opinion that by virtue of the fact that Union law is increasingly directly applicable, the Court of Justice will inevitably be confronted by other situations that raise the question of the right to rely in proceedings between private persons on directives that contribute to ensuring the observance of fundamental rights. In these situations, evaluating whether the directives by which the guaranteeing of fundamental rights are enhanced, can be relied upon in legal disputes between private parties is


\textsuperscript{483} Opinion of Advocate General Mazak, in C-411/05, Palacios de la Villa delivered on 15\textsuperscript{th} February 2007. paras. 132-133.

\textsuperscript{484} Opinion of Advocate General Mazak in C-411/05, Palacios de la Villa delivered on 15\textsuperscript{th} February 2007. para. 138

\textsuperscript{485} C-555/07, Küçükdeveci, para. 43.

\textsuperscript{486} Opinion of Advocate General Bot in C-555/07, Küçükdeveci delivered on 7\textsuperscript{th} July 2009. para. 65, Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 233.
inevitable. Those situations will probably be likely to increase now that the Charter of Fundamental Rights of the European Union has become legally binding, since numerous fundamental rights contained in that Charter are already part of the existing body of the Union law in the form of directives. From that perspective, the Court must think now about whether the designation of rights guaranteed by directives as fundamental does or does not strengthen the right to rely on them in proceedings between private parties.\(^\text{487}\)

Despite the foregoing case law, the denial of horizontal direct effect of the directives causes problems from the perspective of effective enforcement of the EU labour law in the private sector compared to the public sector. For example, it is deemed possible for a worker employed in the public sector to rely upon the Directive on Equal Pay 75/117 EC by interpreting the concept of State extensively, whereas this has been prohibited in employment relationships between private parties. The problem may arise especially where a Member State has not implemented a directive adequately.\(^\text{488}\)

### 5 THE USE OF FIXED-TERM CONTRACTS AND FUNDAMENTAL RIGHTS

The use of fixed-term contracts that is against fundamental social rights must also be regarded as an abuse in the context of Clause 5 of the Framework Agreement on Fixed-Term Work. The following chapter analyses how fundamental social rights affect the acceptable use of such contracts.

In accordance with Article 6(3) of TEU, the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States and the general principles of Union law. As Roger Blanpain has stated, the provisions determining the nature of the employment contract are clearly part of these general principles protected by TEU Article 6.\(^\text{489}\) The CJEU has already clearly confirmed that they constitute an essential element of the protection of employees.\(^\text{490}\)

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\(^\text{487}\) Opinion of Advocate General Bot in C-555/07, Küçükdeveci delivered on 7th July 2009, para. 90.
\(^\text{488}\) Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 233.
\(^\text{489}\) Such provisions are included in point 6 (employment contracts of indefinite contracts are the main rule) and point 7 (objective reasons is a way to prevent abuse) of the Preamble to the Framework Agreement and Clauses 1 (b), 3(1) and 5 are provisions determining the nature of a fixed-term employment contract. Blanpain, Roger: Fixed-Term Employment Contract. The Exception to the Rule? in International Journal of Comparative Labour Law and Industrial relations (2008), pg 131.
\(^\text{490}\) C-212/04, Adeneler, paras. 68-69 and 88.
As we saw above, Article 6(1) of the TEU also has had a direct effect on secondary legislation, which is referred to, for example, in the preambles to Directives 2000/43/EC and 2000/78. In respect of the principle of equality, both Directives also refer to the general principle of non-discrimination, the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and to the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all the Member States are signatories. In addition, Directive 2000/78/EC refers to convention No. 111 of the International Labour Organisation (ILO), which prohibits discrimination in employment and occupation.

Fundamental social rights at the Union level were first determined in the European Social Charter in 1961 and then in the Community Charter of Fundamental Social Rights of Workers in 1989, to which the preamble to the Directive on Fixed-Term Work refers. The latter charter was of a judicially non-binding nature and its enforcement was left to the responsibility of the Commission action plan. By signing this Charter, the social dimension of the internal market took a more practical form. Although the European Parliament was anxious that the Charter be incorporated into the Union law by means of a binding instrument, it was only adopted as, in the words of the Preamble, “a solemn proclamation of fundamental social rights”. As Barnard points out, the Charter reflects the old philosophies in many ways. For example, the preamble to the Charter states that the completion of the internal market is the most effective means of creating employment and ensuring maximum well-being in the Union. However, the Member States had to guarantee the rights of the Charter at national level by notifying the fact, as Barnard says, that the social and economic aspects of the European Union must be developed in a balanced manner.

The rights contained in the Social Charter 1989 were to be implemented through the Social Charter Action Programme and any measures adopted were to be based on the EU Treaty. The Action programme was based on four fundamental premises:

(i) subsidiarity, i.e., taking the specific nature of social policy and its objectives into account and ensuring that the type of action (harmonisation, coordination, convergence, cooperation etc.) matches the subject matter; also that due consideration is given to known needs and to the potential added value of Community action;
(ii) the diversity of national systems, cultures and practices, where this is a positive element in terms of the completion of the internal market;

(iii) the preservation of the competitiveness of firms, taking economic and social issues into consideration; (iv) reducing disparities between Member States without interfering with the competitive advantage of the less developed regions.\textsuperscript{494}

The Commission Action Programme led to 17 directives adopted in the 1990s, the preambles of which are referred to the Charter. This has led many commentators to conclude that the 1989 Charter was a genuine impetus for the innovative EU social policy.\textsuperscript{495} The Directive on Proof of the Employment Contract, the Posted Workers Directive and the Working Time Directive can be mentioned as examples.

Since then, however, the principle of subsidiarity has changed significantly, especially along with the Treaty of Lisbon, as far as separation of powers between the Union and the Member States is concerned. Article 5 of TEU, which states that in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. Since this amendment, a more important role has been given to the national parliaments of the Member States to exercise control over compliance with the subsidiarity principle by the Commission’s legislative drafting procedures and statement procedures of national parliaments.\textsuperscript{496} In respect of this, the power has also been conferred on the CJEU to examine whether the secondary legislation infringes the principle of subsidiarity by an action of a Member State in the Court.\textsuperscript{497} Thus, the Union measures should leave as much scope for national decisions as possible in order to be consistent with securing the aim of the measure and observing the requirements of the TFEU. While respecting the Union law, measures of the Member States have become more primary compared with Union measures in this area of divided power. Therefore, it must be taken into account that well-established national arrangements are to be respected and the organisation and functioning of the legal orders of Member States have a more

\textsuperscript{494} Action Programme 1990/91 adopted by the Commission, COM (93) 551, pg 10.


\textsuperscript{496} Piris, Jean-Claude: The Lisbon Treaty: A Legal and Political Analysis (2010), pg 84. Articles 2 and 4 of the Protocol (no 2 of TFEU) on the application of the principles of proportionality and subsidiarity. TEU Article 5.

\textsuperscript{497} Piris, Jean-Claude: The Lisbon Treaty: A Legal and Political Analysis (2010), pg 130.
significant role in an area of divided power such as employment policy. For this purpose, where appropriate and subject to the need for proper enforcement, the Union measures should provide the Member States even broader discretion than before with alternative ways to achieve the objectives of the measures.\textsuperscript{498}

According to the preamble to the Directive on Fixed-Term Work, the completion of the internal market must lead to an improvement in the living and working conditions of European Union workers. This process must result from an approximation of these conditions, while the improvement is being maintained, with regard in particular to forms of employment other than open-ended contracts, such as fixed-term contracts, part-time work, temporary work and seasonal work.\textsuperscript{499} Originally this provision was based on the 1989 Social Charter, but the provision is Treaty based, being currently included in Article 151 of TFEU, along with the Treaty of Lisbon coming into force.\textsuperscript{500} The details of how the improvement is going to be carried out in respect of the precariousness of fixed-term employment contracts were left open in the Charter and in the Treaty. The problem is that the substance of the ‘fundamental rights’ of a fixed-term worker is determined in such a general manner compared, for example, to freedom of association, workers’ rights to information, consultation and participation and other fundamental rights protected by the Charter such as working time protection, which is, along with the 1989 Charter, also carried out in the European Social Charter to both of which the preamble to Working Time Directive refers.\textsuperscript{501}

As we saw, these social rights are currently included in Article 151 of the TFEU (ex. Article 136 TEC). This Article states that the Union and the Member States shall pursue the social policy objectives listed in the Article, \textit{having in mind} fundamental social rights such as those set out in the European Social Charter signed at Turin on 18th October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers as well as having the objectives of the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, including proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end, the Union and the Member States shall take measures that take the diverse forms of national practices into account, in particular in contractual relations, and the need to maintain the competitiveness of the Union economy. They believe

\textsuperscript{498} Piris, Jean-Claude: The Lisbon Treaty: A Legal and Political Analysis (2010), pgs 84 and 130.
\textsuperscript{499} Directive on Fixed-Term Work 99/70/EC, preamble, para 3.
\textsuperscript{500} 1 December 2009.
\textsuperscript{501} Opinion of Advocate General Bot in C-555/07, delivered on 7 July 2009, para. 65, Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 233.
that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaty and the provisions laid down by law, regulation or administrative action. 502 In accordance with the preamble to the Framework Directive, the annexed Framework Agreement is intended to contribute to achieving the objectives in Article 151 of the TFEU (ex. 136 TEC). 503

According to Article 153 of TFEU (ex. Article 137 TEC), in order to achieve the objectives set out in Article 151 of TFEU (ex. Article 136 TEC), the Union shall support and complement the activities of the Member States in, for example, areas such as improvement of the working environment in order to protect workers’ health and safety, working conditions, social security, social protection of workers, the protection of workers when their employment contract is terminated and informing and consulting workers.

Since the 1950s, when the Treaty of Rome was concluded, the notion prevailed in the Community that there was no need for the EEC to have a social policy of its own. Even if there was a clear awareness of social dumping between the Member States, there was a stronger belief that the merger of the economies into a single European market would lead automatically to gradual harmonisation of social policy throughout the Union. 504 The implication of this was also that improvements would arise not through specific positive laws at the Union level in the social field but as a result of removal of barriers and improvement in productivity, allowing the Member States to enhance the social conditions at a national level, leading to a general upward harmonisation of social standards. The main purpose of the Treaty was deemed to be promoting the interests of internal markets, the economic objectives of which are of primary importance. Thus, in the field of EU labour law, legislative intervention has originally been characterised by the idea of improvement in economic conditions automatically and gradually leading to improved social conditions. The EU level labour law was thought necessary only in a situation of competition distortion, where the market alone had failed to create the framework for improvement. 505

The minimalist legal philosophy at the EU level was greatly affected by strong national traditions in the Member States’ labour and social laws and different attitudes to the welfare state ideology. Member States tended to build the labour law and social standards required according to domestic models. As Lamponen has

502 TFEU 151.
pointed out, the minimalist EU labour law philosophy originally lacked the notion that employees as a weaker party to employment relationships needed protection, which was the case in many Member States. 506

The European labour law’s original emphasis on improvement in economic conditions automatically leading to improvement in social conditions had its reflections in the EES-backed notions of flexibility and security from the 1990s. 507 As explained in the first section, one of the primary objectives of regulating fixed-term contracts was the job creating rationale and the aspects relating to increasing productivity and competitiveness and the employer’s need to respond to fluctuations in demand. As explained above, these objectives took on a significant role as a result of the Lisbon Strategy. 508

By virtue of the wording of Article 151 of TFEU (ex. Article 136), ‘having in mind’ the fundamental social rights included in those documents is hardly directly enforceable as a matter of the EU law. Accordingly, Article 153 of TFEU (ex. Article 137) does not allow an individual to rely upon any of the fundamental social rights listed in a directly effective sense, even after the adoption of the EU Charter of Fundamental Rights. Both of these charters are considered to be part of the EU law and offer scope for the Court, in interpreting the Union law, to prohibit any measure deemed to violate clearly understood and accepted social rights or which is against the objectives of the Union. 509 The CJEU has already referred to the Charter as an interpretative aid in justifying worker protection in several judgments. The United Kingdom v BECTU, Jaeger, Pfeiffer, Dellas and Kiiski cases are just a few examples. 510

In Chacon Navas, which concerned the interpretation of Directive 2000/78, the CJEU referred in its reasoning to the 1989 Charter via Article 151 of TFEU (ex. Article 136 TEC). 511 One practical expression of upward harmonisation explained above is the principle of non-regression that is also included in the Framework Agreement on Fixed-Term Work.


508 See Chapter 1.5


511 Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pg 36.
The CJEU referred to Article 151 of TFEU (ex. Article 136 TEC), and the 1989 Social Charter by taking a stance on the applicability of the non-regression clause of the Framework Agreement on Fixed-Term Work to single or first fixed-term contracts in the Angelidaki ruling. According to Clause 8(3) of the Framework Agreement, implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers within the ambit of the agreement. The question addressed to the Court related to the extension to which the Non-Regression Clause must be applied in national law. The Court referred in its reasoning to the fundamental objective of upwards harmonisation enshrined in the first paragraph of Article 151 of TFEU (ex. Article 136 TEC), and in the 1989 Social Charter Articles 7 and 10, which are associated with the improvement in living and working conditions, so as to facilitate their harmonisation while the improvement is being maintained, and with the existence of proper social protection for workers; in the present case, fixed-term workers.

The Court held Clause 8(3) akin to the Treaty provision and the 1989 Social Charter. In the light of these objectives, the Court considered that Clause 8(3) of the Framework Agreement could be interpreted as not affecting national law on single or the first contracts but that Clause 8(3) of the Framework Agreement on Fixed-Term Work must be interpreted as meaning that the ‘reduction’ which the Clause concerned must be seen in relation to the general level of protection applicable in the Member State concerned, both to workers who have entered into successive fixed-term employment contracts and to those who have entered into their first or a single fixed-term employment contract.\(^{512}\) The Court also deemed that for reduction to be caught by the prohibition laid down by Clause 8(3) of the agreement, it must, firstly, be connected to the ‘implementation’ of the Framework Agreement and, secondly, relate to the ‘general level of protection’ afforded to fixed-term workers.\(^{513}\) This constitutes an important exception to the principle of the non-regression clause, as it does not restrict lowering the existing standards included in the other national measures.

The Court considered that Clause 8(3) of the Framework Agreement must be interpreted firstly as not precluding national legislation which no longer provides for fixed-term employment contracts to be recognised as contracts of indefinite duration where abuse arises from their use in the public sector, or which makes such recognition subject to additional requirements. Secondly, the Court argued that Clause 8 (3) does not preclude national law excluding the protective measures provided for workers under the first or single fixed-term contract, where that law relates to a limited category of workers who have entered into a fixed-term contract

\(^{512}\) Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, paras. 120-121.

\(^{513}\) Joined Cases C-378/07 and 380/07, Angelidaki and Others, paras. 125-126.
or are compensated by the adoption of measures to prevent the abuse of fixed-term employment contracts within the meaning of Clause 5(1) of the Framework Agreement.\textsuperscript{514}

In the Mangold ruling, the CJEU implied that the Non-Regression Clause of the Framework Agreement on Fixed-Term Work could not be interpreted as a limit on the adoption of the legislation justifying fixed-term contracts as a means to promote employment when the legislation is not related to the implementation of the Framework Agreement.\textsuperscript{515} The implication of the stance adopted by the CJEU in Mangold and Angelidaki is that a Member State is free to pursue an objective that will have the practical effect of reducing rights under the Agreement provided that these actions are related to some other legitimate social policy objective instead, not with the implementation of the directive. A Member State may undermine the effectiveness of the body of rights granted by the Directive in this way.\textsuperscript{516}

The Court of Justice has also referred directly to Article 151 of TFEU (ex. Article 136 TEC), by assessing the aim of the Framework Agreement on Fixed-Term Work in interpreting its provisions. In the Impact ruling, the Court assessed whether ‘employment conditions’ within the meaning of Clause 4 of the Framework Agreement include conditions of an employment contract relating to remuneration and pensions. Since the question of interpretation raised could not be resolved by the wording of Clause 4, the Court considered it necessary, in accordance with its settled case law,\textsuperscript{517} to take into consideration the context and objectives pursued by the rules related to the Clause. The Court stated that it was apparent from the wording of Clause 1(a) of the Framework Agreement that one of its objectives was to ‘improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination’. Similarly, the third paragraph of the preamble to the Framework Agreement states that this agreement ‘illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination’.

Recital (14) in the preamble to Directive 1999/70 states that the aim of the Framework Agreement is, in particular, to improve the quality of fixed-term

\textsuperscript{514} Joined Cases C-378/07 to C-380/07, Kiriaki Angelidaki and Others, paras. 146 and 177.

\textsuperscript{515} C-144/04, Mangold, paras 52 and 54. Sciarra, Silvana: National and European Public Policy in Boundaries and Frontiers of Labour Law. Edited by Davidov, Guy- Langille, Brian (2006), pgs 256-257. The Court found, however, that the right not to be discriminated against because of age was violated by the German law and that it should be the task of national courts not to enforce legislation infringing such a fundamental right.

\textsuperscript{516} Watson, Philippa: EU Social and Employment Law: Policy and Practice in an Enlarged Europe (2009), pg 291.

\textsuperscript{517} In that regard, the Court referred to following cases: C-292/82 Merck , para. 12; C-337/82, St. Nikolaus Brennerei und Likölfabrik, para. 10, C-223/98, Adidas, para. 23, C-76/06 P Britannia Alloys & Chemicals, para. 21.
work by setting out the minimum requirements in order to ensure application of the principle of non-discrimination. The Court continued by saying that the Framework Agreement, in particular Clause 4, thus follows an aim which is akin to the fundamental objectives enshrined in the first paragraph of Article 151 of TFEU (ex. Article 136 TEC), as well as in the third paragraph of the preamble to the EU Treaty and Article 7 and the first paragraph of Article 10 of the Community Charter of the Fundamental Social Rights of Workers, to which Article 151 of TFEU (ex. Article 136 TEC) refers, and which is associated with the improvement of living and working conditions and the existence of proper social protection for workers; in the present case, for fixed-term workers.518

A similar justification to that of the CJEU applied to Clause 4 and its purpose defined in Article 151 of TFEU (ex. Article 136 TEC) and Article 7 and Article 10 of Community Charter can be used with regard to Clause 5 as well, irrespective of the fact that the wording of Clause 5 concerns only successive contracts. Clause 1 also declares the objective, along with ensuring the principle of non-discrimination, of establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. Furthermore, the preamble (the recital 14) to Directive 1999/70 also mentions that the aim of the Framework Agreement is to improve the quality of fixed-term work by setting out the minimum requirements preventing abuse arising from the use of successive fixed-term employment contracts or relationships as well as to ensure the application of the principle of non-discrimination, and that fixed-term contracts based on objective reasons are a way to prevent abuse. Furthermore, the preamble to the Framework Agreement also affirms the principle that contracts of indefinite duration are the main form of employment. It can thus be argued that Clauses 4 and 5 have overlapping objectives and that Clause 5 must be interpreted as articulating the principle of Union social law also protected by Article 6 of the TEU and Article 151 of TFEU (ex 136 TEC), which cannot be interpreted restrictively, as the CJEU confirmed in respect of Clause 4 in Impact and in Alonso.519

Consequently, point 7 of the Community Charter of the Fundamental Social Rights of Workers and points 6 and 7 of the preamble to the Framework Agreement520 can be used as aids in interpreting Clause 5 much as they are used by the CJEU in interpreting Clause 4. Therefore, the CJEU could well have extended the scope of Clause 5 of the Framework Agreement to the first or single fixed-term contract in

518 C-268/06, Impact, paras.109-116. See also C-307/05, Alonso, para. 38.
519 C-307/05, Alonso, para. 39 and C-268/06, Impact, para. 114.
520 General considerations para 6: employment contracts of an indefinite duration are the general form of employment relationship and contribute to the quality of life of the workers concerned and improve performance. Para 7: the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse.
the Angelidaki and Mangold cases since abuse of successive contracts cannot be avoided without extending the measures laid down by the provision to single or the first contracts as well. Correspondingly, the CJEU could have interpreted Kücük as meaning that, despite the existence of objective reasons for each contract, the use of successive contracts can still be abusive when it is done on a permanent basis. In the latter case especially, the CJEU deliberately overlooked the main rule of contracts of indefinite duration by taking the view that because the employer had objective reasons for each contract, there was no abuse of fixed-term contracts even though the hirings could also have been covered under employment contracts of indefinite duration.\textsuperscript{521} Correspondingly, the Court of Justice could have seen the measures included in Clause 5 as subordinate to the purpose of the Framework Agreement. This interpretation could have guaranteed minimum protection for fixed-term employees against abuse of such contracts more efficiently than by deeming it sufficient for the Member State to introduce any measure listed in the Clause without further restrictions.\textsuperscript{522} Requiring objective reasons related to the temporary nature of the job irrespective of the measures introduced by the Member States to implement the Framework Agreement on Fixed-Term Work via the fundamental objectives of Clauses 4 and 5 of the Framework Agreement is thus justified.

The Court of Justice did not follow the teleological interpretation method in Angelidaki, Mangold and Kücük which it has consistently followed in its case law since the 1960s.\textsuperscript{523} This method has meant that the CJEU has not invoked the wording of the provision subject to interpretation or to the legislative background either but has rather chosen an interpretation that promotes the best way to achieve the EU objectives.\textsuperscript{524} It can be said that the CJEU overlooked the idea of upwards harmonisation and Article 151 of the TFEU, which reflects the central objectives of the Union, in interpreting Clause 8 (3) of the Framework Agreement in the Mangold and the Angelidaki restrictively, so that when national law is not related to the implementation of the Framework Agreement the practical effect of the law may reduce the rights provided for by the Agreement.\textsuperscript{525} This outcome is contrary to the objective of Article 151 TFEU and, as Philippa Watson has noted, undermines

\textsuperscript{521} C-586/10, Kücük, paras. 56 and 51. In the case, the CJEU judged that 13 successive contracts within 11 years did not constitute an abuse.


\textsuperscript{523} C-26/62, Van Gend en Loos.

\textsuperscript{524} Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 186.

the effectiveness of the body of rights guaranteed by the Directive on Fixed-Term Work.\textsuperscript{526} Similarly, the CJEU overlooked the main rule of contracts of indefinite duration in Küciük, and invoked only the strict wording of Clause 5, interpreting it separately from the main rule. By doing so, the CJEU did not invoke the fundamental objectives enshrined in Article 151 TFEU (ex. TEC Article 136) in declaring that an employer has the right to use successive fixed-term contracts provided that there is an objective reason for each contract and irrespective of whether the employer could have hired the employees on contracts of indefinite duration.\textsuperscript{527}

Thus, in order to achieve the objectives laid down by the 1989 Community Charter of Fundamental Social Rights, which has a treaty basis by virtue of Article 151 of TFEU (ex. Article 136 TEC), and to which the preamble to the Directive also refers, the general principles and minimum requirements for the use of fixed-term contracts have been laid down by the Framework Agreement on Fixed-Term Work. These are the application of the principle of non-discrimination and the prevention of abuse arising from successive fixed-term employment contracts or relationships. In this respect, point 7 of the general considerations of the Framework Agreement refers to objective reasons as a means to prevent abuse of fixed-term contracts. In a narrow sense, these references can be said to form a framework for protecting the rights of fixed-term workers. These legal sources must be taken into consideration when assessing whether a Member State has introduced sufficiently effective measures against abuse arising from successive fixed-term contracts.\textsuperscript{528}

In addition to improving the living and working conditions of fixed-term employees, another purpose of harmonisation of the Member States regulation governing fixed-term work, preventing the distortions of competition concerning fixed-term work, appears in point 4 of the preamble to the Directive on Fixed-Term Work. The basic provision on repairing the distortions of competition is currently included in Article 116 TFEU (ex. 96 of TEC), the purpose of which is to improve the functioning of the common market by removing sources of distortion of competition linked to the application of different standards or, in other words, ‘social dumping’. Harmonisation is laid down as an objective in Article 153 TFEU (ex Article 137 TEC), which specifies that the use of directives, and therefore recognising the necessity for Union legislative standardisation, requires that directives must contain minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each Member State. It is widely

\textsuperscript{526} Watson, Philippa: EU Social and Employment Law: Policy and Practice in an Enlarged Europe (2009), pg 291.

\textsuperscript{527} C-586/10, Küciük, paras. 53 and 56.

recognised, as Phil Syrpis has commented, that the EU institutions should intervene in a way that prevents competitive deregulation by both high- and low-standard Member States.\(^{529}\)

Therefore, in order to prevent minimum standards leading to a reduction in domestic protection, Article 153 TFEU (ex Article 137 TEC) lays down the entitlement for Member States to maintain and to introduce more stringent protective measures compatible with the Treaty. These objectives have been (and still are) a partial source of upwards harmonisation of working conditions as reflected by Article 151 TFEU (ex. Article 136 TEC) since the 1970s.\(^{530}\)

Consequently, Articles 116 (ex. 97 TEC), 151 and 153 TFEU (ex.136-137 TEC) can be seen as a judicial basis of the Directive on Fixed-Term Work as well.\(^{531}\)

These objectives have been the background of several labour law directives, such as those on the European Works Councils, Parental Leave, Part-time Work and the Burden of Proof in Sex Discrimination Directive as well as the Directive on Fixed-Term Work.\(^{532}\)

As the preconditions for long-term use of fixed-term contracts vary considerably from one Member State to another, this may constitute distortion in conditions of competition and abuse of such contracts, which are against the purpose of the Directive on Fixed-Term Work. In this sense, the outcome of Clause 5 does not reflect the idea of the EU regulation enshrined by the Commission in the 1993 Green Paper very well, the aim of which was to create uniform minimum standards against distortion and to prevent states benefitting from unacceptably low labour standards.\(^{533}\)

In the light of the foregoing, we see that protection against abuse of fixed-term contracts has not succeeded completely through minimum standard setting, as Clause 5 is too imprecise, conditional and addressed to Member States, leaving them too much discretion in crucial issues such as determining the final content and scope of the measures, the concept and scope of successive fixed-term contracts, the sanctions and, finally, excluding the first use of fixed-term contracts. For these reasons, it is for the CJEU to decide whether a national measure adopting the Fixed-Term Work Directive is contrary to the objectives of the Directive. In this regard, the application of the fundamental social rights can be helpful in determining the limits of sustainable recourse to fixed-term contracts as the CJEU indicated in Impact by assessing the interpretation and ‘roots’ of Clause 4 through Article 151 of

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\(^{529}\) Syrpis, Phil: EU Intervention in Domestic Labour Law (2006), pg 145.


\(^{531}\) Barnard, Catherine: EU Employment Law (2006), pgs 470-471.


\(^{533}\) COM (93) 551, pgs 59-60. See Chapter 1.3.
TFEU (ex 136 TEC). In this assessment, the CJEU must also consider whether the diversities in national legal cultures can be preserved without being guilty of social dumping and therefore causing considerable harm to the terms of completion of the internal market and how far the competitiveness of companies can be preserved at the expense of job security. 534

As the CJEU indicated in the settled case law explained above and especially in Mangold,535 the use of fixed-term contracts must occur within the framework of the general principles of Union law and the fundamental rights which form an integral part of the EU legal order.536 Hence, the general principles of the Union law also direct the use of optional measures in order to prevent the abuse mentioned in Clause 5 of the Framework Agreement on Fixed-Term Work.537 In this regard, the CJEU case law has overlooked the fact that contracts of indefinite duration are a main rule, which is the binding principle of the Union law protected by Article 6 of TEU.538

The contradiction between this principle and case law of the CJEU is discernible in Küçük, where the CJEU permitted 13 successive fixed-term contracts, the total duration of which was over 11 years for the purpose of replacing several permanent employees who were on leave. As the CJEU stated that even if the employer has 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, this does not mean that there is no objective reason for each contract539 under Clause 5(1) (a) of the Framework Agreement or that there is abuse within the meaning of that clause. It can be said that

534 C-268/06, Impact, para 112. De Witte, Bruno: The Trajectory of Fundamental Social Rights in the European Union, in Social rights in Europe, edited by, De Búrca, Gráinne - De Witte, Bruno (2005), pgs 155-158. However, otherwise the Directive on Fixed-Term Work is less rooted in the protection of fundamental rights than the anti-discrimination directives, as the Directive aims at improving the quality of fixed-term work. This is qualitatively different to the anti-discrimination directives, which draw a connection between their aims and those of international human rights. See, for example, Recitals 2 and 3 of Directive 2000/47. Recital 1 and 4 of Directive 2000/78. Bell, Mark: The Principle of Equal Treatment: Widening and Deepening in The Evolution of EU Law (2011), edited by Craig, Paul - De Burca, Gráinne pg 625.

535 C-144/04, Mangold, para. 74. In Mangold, the question was whether a single fixed-term contract concluded in accordance with the German law on grounds of age of an employee conformed with the general principle of non-discrimination on the grounds of age. Therefore the question was not about the interpretation of Clause 5 of the Framework Agreement.

536 On the significance of fundamental freedoms for the case law of the CJEU, see also C-540/03, Parliament vs. Council and the opinion of the Advocate General, in C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH para. 49 and especially case C-303/05, in which the Court stated that by virtue of Article 6 TEU, the Union is founded on the principle of the rule of law and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

537 See also Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 39-46.


539 C-586/10, Küçük, paras. 38 and 56.
the CJEU overlooked the principle provided by the Framework Agreement according to which contracts of indefinite duration are the primary form of employment.\footnote{C-586/10, Küçük, para. 56.} Correspondingly, the CJEU adopted an interpretation in Impact that the measures listed in Clause 5 are equivalent to each other and no objective reason whatsoever is required if a Member State has introduced any other measure listed in the clause without further restrictions.\footnote{C-268/06, Impact, paras. 75-77.} Here, the Court overlooked the principle included in the Framework Agreement that fixed-term contracts based on objective reasons are a way to prevent abuse. This is a second example of how the CJEU overlooked the binding principles governing the use of fixed-term contracts in the Framework Agreement.

On the other hand, preconditions for the use of fixed-term contracts play a central role in guaranteeing protection against unjustified dismissal, which is determined both in Article 153 TFEU (ex. 137 TEC) with regard to the power of the Union and in the EU Charter of Fundamental Rights which has a treaty base as a result of the Treaty of Lisbon coming into force. Protection against unjustified dismissal as laid down in the EU Charter is compromised without preventing the abuse arising from successive fixed-term contracts properly. It is therefore justified to require objective reasons for concluding fixed-term contracts, as determined by the CJEU in Adeneler, from the first fixed-term contract onwards. Otherwise, the prevention of abuse of successive fixed-term contracts can be circumvented by recourse to long-term, single fixed-term contracts or extending the total duration of successive fixed-term contracts excessively. This would permit circumvention of the protection of unjustified dismissal guaranteed by the European Union’s Charter of Fundamental Rights, which also renders the principle that contracts of indefinite duration are the general form of employment relationship meaningless.\footnote{C-212/04, Adeneler, para. 73 and Article 288 TFEU.}

5.1 THE UNION CHARTER OF SOCIAL RIGHTS

The Presidents of the Commission, the European Parliament, and the Council approved the European Union’s Charter of Fundamental Rights on December 12th 2007, culminating in the signing of the Treaty of Lisbon the following day. Article 6 (1) of TEU recognises the rights, freedoms and principles set out in the Charter, stating that these shall have the same legal force as the Treaties, in other words binding primary legislation regardless of not being included in the text of
The Treaty of Lisbon and the Treaty-based Charter came into force in December 2009. However, the United Kingdom excluded by a specific protocol the power of the CJEU and national courts to inspect the consistency of its laws, regulations and administrative provisions with the fundamental rights, freedoms and principles of the Charter. In particular, this concerns the justifiable rights of the solidarity Chapter applicable to the United Kingdom, except in so far as the United Kingdom has provided such rights in its own law.

The EU Charter has been described as a significant step in promoting the rights of employment and industrial relations in the EU for a number of reasons. It is an independent source of rights, the application of which is not restricted to national practices in the Member States. The Charter breaks new ground by including a single list of fundamental social and economic rights, proving that these are recognised as having the same status as civil and political rights. Finally, the Charter may imply a new impetus for the EU institutions to promote the European social model.

The inclusion of fundamental rights concerning employment and industrial relations in the EU Charter may well confer on them a constitutional status within national legal orders. Since the Charter, even prior to its legally binding effect, has been deemed a manifestation of the common constitutional traditions of the Member States, it can be considered as expressing the EU’s common values. As Barnard has says, perhaps the Charter’s greatest importance will prove to be that, in the social field at least, it will help to provide some counterweight to the neo-liberal orientation of the Treaty, providing the Court with a firmer foundation to reconcile social and economic rights. Furthermore, as Barnard has pointed out, for the other Union institutions and the Member States, the Charter will provide a stark reminder of the EU’s social rights agenda at a time when the EES has deregulatory aspirations and the Member States, deprived of the traditional tools for managing their economies, might look to removing social rights as a way of gaining a competitive advantage. These aspirations and developments are obviously incompatible with the objectives provided by the Charter such as job security and working conditions.

Because of the significance of the Charter for further advancement in EU law, it is appropriate to scrutinise its general scope for rights. According to its preamble, the Articles are divided into freedoms, rights, and principles. The difference between the

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543 However, there are special provisions in respect of the application of Charter to the United Kingdom, Poland, Ireland and the Czech Republic.
545 Articles 1 and 2 of Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.
latter two is that the rights constitute subjective rights which may be directly relied upon as such by individuals in court, whereas the principles determine objectives to be respected by the EU legislature and which can be invoked once they have been implemented through legislation. The Charter is addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing and interpreting EU law. 

The Charter does not establish any new power or task for the Union or modify the powers or tasks defined by the Treaties. Taking this into account, certain doubts apply to the scope of the rights the Charter includes. This restriction on the scope of the Charter is even thought to undermine its practical relevance, as the Union has just marginal or no power at all concerning several rights it protects. According to the established case law of the CJEU, the requirement to respect fundamental rights determined in the context of the Union is only binding on the Member States when they act (implement or interpret) within the scope of the EU law that still remains to be identified in respect of labour law. Therefore, the application of the Charter in a practical situation is strongly affected by the aspects of power. This may have an impact in the field of prohibited discrimination, for example, as there are less prohibited forms of discrimination in Article 19 of TFEU (ex Article 13 of TEC) than in Article 21 of Union Charter.

On the one hand, although it does not provide a mandate for the Union institutions to implement these rights outside their own competence, or to oblige the Member States to recognise the principle differently from how they currently do under national law, the Union shall not violate the principle by sleight of hand in some other legislation within its competence. On the other hand, the Member States must respect the rights, observe the principles and promote their application in accordance with their respective powers. Therefore, the purpose of the Charter is to promote the legitimacy of the EU by ensuring that it complies with internationally recognised standards of fundamental rights in all of its activities, without granting the Union a specific competence to accede to the ECHR or the ESC.

549 Case C-292/97, Karlsson and Others, para. 37.
550 This was because some of the Member States feared that the Charter could influence their internal legal order to the extent that a purely internal action, independent of the implementation of the EU law, would nevertheless fall within the scope of the Charter. Piris, Jean-Claude: The Lisbon Treaty, A Legal and Political Analysis (2010), pg 158.
The coverage of the Charter includes the opportunity to take the human rights and fundamental rights protected by the international human rights conventions into account in the interpretation of Union law, a fact emphasised by the EU Network of Independent Experts on Fundamental Rights as well. The Network noted the importance of the fact that the provisions of the Charter are based on the rights guaranteed in instruments adopted in the area of human rights in the framework of the United Nations, the International Labour Organisation and the Council of Europe in its Commentary on the Charter. Where this is the case, these provisions of the Charter are interpreted by taking those instruments and the interpretation granted to them in the international legal order into account. For example, Article 52(3) of the Charter is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to those the ECHR guarantees, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. 555

These are important factors as many Member States have not signed up to such things as the Revised European Social Charter or all the relevant ILO conventions. The adoption of the Charter, however, as a high level inter-institutional declaration, and the unique manner of its drafting, reinforced its legitimacy and created an assumption of compliance with individual rights by the Member States without strict legal obligation even prior to the Treaty of Lisbon coming into force. 556 These external impacts on Union law would also imply a new feature of development and a challenge to the CJEU as it has refused to consider that the European Social Charter (or Revised Charter) should influence the Union judicature in its development of the general principles of law, the observance of which it should ensure in applying and interpreting the Union law to some extent in the 2000s. This involves the risk of conflicts of interpretation between the European Court of Justice and the European Committee of Social Rights. 557

The power of the Union over protection against unjustified dismissal can be derived from Article 153 TFEU (ex.137 (1) TEC), point d, according to which in order to achieve the objectives of Article 151 TFEU (ex. Article 136 of TEC) the Union shall complement and support the activities of the Member States in the protection of workers where their employment contract is terminated. Although there is no general secondary legislation on termination of employment in the Union with the exception of situations covered by Directive 2001/23/EC on the

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556 Kenner, Jeff: EU Employment Law (2003), pgs 528-530.
557 De Schutter, Olivier: Anchoring the EU to the ESC: The Case for Accession in Social Rights in Europe edited by De Burca, Grainne - De Witte, Bruno (2005), pgs 123-124.
safeguarding of employees’ rights in the event of transfers of undertakings and equality directives 76/207/EC and 92/85/EC and Directive 96/34/EC on Parental Leave, employment security of fixed-term employees determined in Clause 5 of the Framework Agreement Fixed-Term Work should not be interpreted as undermining the right to the protection of national law against unfair dismissal.558

In the Union legal order, all legislation must be interpreted in conformity with fundamental rights. However the rights of the Charter may have important direct consequences for national law as well, especially where there is secondary legislation stipulating the rights defined by the Charter. Firstly, as with equal pay for women and men included in Article 157 TFEU (ex. Article 141 TEC), the European Court of Justice (CJEU) could confirm the binding ‘direct effect’, vertical and horizontal, to the provisions of the Charter, which were considered sufficiently clear, precise and unconditional. It is very likely that, just like granting individuals the right to invoke the Treaties before national courts by virtue of the principle of direct effect, the Charter may be subject not just to a preliminary ruling arising from individual actions under Article 267 TFEU (ex. 234 of TEC), but also to the interpretation of national acts by domestic courts in conformity with the Union law or indirect effect as part of the general obligation of a Member State to comply with its Union obligations under Article 10 TFEU.559 Moreover, by combining direct effect with the principle of supremacy, the Charter could be a basis for Union-initiated action against a Member State that is deemed to have failed its Charter obligations under Article 258 of TFEU (ex. 226 of TEC).560

Secondly, the doctrine of ‘indirect effect’, which requires national courts to interpret national laws consistent with the EU law (Primacy of Union law), is applied to the rights guaranteed by the Charter. Furthermore, according to this doctrine, as the CJEU has deemed in the Pfeiffer case, national courts are also obliged to interpret private law measures (such as employment contracts) consistently with directly effective provisions of a Directive, not simply when they invoke claims against Member States.561 Third, the infringement by the EU or a Member State of a fundamental right included in the Charter could constitute a breach of the EU law, giving rise to liability under the Francovich principle of state liability.562 However, the Charter’s provisions do not extend the competences of the Union as defined by the Treaties in any way.

560 Kenner, Jeff: EU Employment Law (2003), pgs 43-44.
561 Opinion of the Advocate General Ruiz-Jarabo Colomber in joined cases C-397/01 to C-403/01, Pfeiffer, para. 58. and Bercusson, Brian: Social and Labour Rights under the EU Constitution in Social Rights in Europe (2005), pg 177.
5.2 THE FUNDAMENTAL RIGHTS IN THE CJEU'S CASE LAW

The CJEU stated for the first time as early as 1969 that the fundamental human rights are enshrined in the general principles of the Union law and protected by the Court. The Court has since continued to strengthen this protection so that respect for human rights is a condition of the lawfulness of the Union Acts.

The fundamental rights currently form an integral part of the general principles of Union law, the observance of which the Court of Justice ensures. In regard to the Charter, the legitimate and challenging role of the CJEU continues to interpret and clarify the vague notions of the Charter, thereby acting as a sort of constitutional Court. For this purpose, the CJEU draws inspiration from the primary norms of the Union law and the constitutional traditions common to the Member States and from guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. As to the EU Charter and its predecessors, it has had a practical effect on the case law of the CJEU for decades.

The most recent example of this is case C-555/07 Kükükdeveci, in which the court referred in its reasoning to Article 21 of the Charter, in which discrimination on any grounds such as age is prohibited. The court also referred to Article 6 TEU which states that the Charter has the same legal status as the treaties. This indicates that the Charter has independent and practical value as a legal source in judicial decision-making where its role is not restricted simply to an expression of the general values of the Union.

In the Laval case, the European Court of Justice recognised that as a consequence of the Charter, the right to take collective action must be recognised as fundamental. The Charter was also referred to in the Viking case. Thus the dynamism shown by the Court over the past 30 years as far as the recognition of fundamental rights as general principles of the Union law is concerned suggests

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563 See C-29/69, Stauder, para. 7.
565 See opinion 2/94, Accession of the EC to the ECHR, paras. 33 and 34. See also Piris, Jean-Claude: The Lisbon Treaty (2010), pg 146.
567 C-555/07, Kücükdeveci, para. 22.
569 C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union, para. 43.
that the Charter may eventually be applied to promote the fundamental rights of employment and industrial relations in the EU Charter in the future.\textsuperscript{570}

Before Viking and Laval, several Advocates General referred to the EU Charter as a supportive argument as well as the Court of First Instance.\textsuperscript{571} An example can be taken from the BECTU case, where the question was whether the UK legislation concerning the entitlement to paid annual leave was in conformity with the Working Time Directive in so far it laid down a qualification period of thirteen weeks of employment. Advocate General Tizzano handed down his opinion on February 8\textsuperscript{th} 2001, in which he looked at the right to paid annual leave in the wider context of fundamental social rights, pointing out that:

\begin{quote}
"Even more significant, it seems to me, is the fact that this right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States."
\end{quote}

While admitting the non-binding nature of the Charter, he states that:

\begin{quote}
"I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right."\textsuperscript{573}
\end{quote}

The Court agreed with the argument of the Charter and relied expressly (paragraph 39) on the 1989 Charter referred to by the Preamble to the Working Time Directive.\textsuperscript{574} The CJEU resorted to the EU Charter as an argument for the first time in case C-540/03, Parliament v Council, which concerned the interpretation of

\textsuperscript{570} Bercusson, Brian-Clauwert, Stefan- Schömann, Isabelle: Legal Prospects and Legal Effects of the EU Charter (2002), pg 13.

\textsuperscript{571} Opinion of Advocate General Alber in C-340/99 delivered on 1\textsuperscript{st} February 2001.

\textsuperscript{572} Opinion of Advocate General Tizzano in C-173/99 delivered on 8\textsuperscript{th} January 2001, para. 26.

\textsuperscript{573} Opinion of Advocate General Tizzano in C-173/99 delivered on 8\textsuperscript{th} January 2001, para. 28.

The court emphasised the status of the EU Charter by stating that:

“The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child’s best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.”

The European Court of Justice may still incorporate core international labour standards that do not receive protection through the adoption of the EU directives into the fundamental rights jurisprudence being developed. These rights recognised by the court have been applied to limit the scope of the EU law, circumscribe the activities of the EU institutions and restrict the actions of the Member States in implementing and interpreting EU law.\footnote{Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 45-46.} The court has, for a significant period of time, considered international labour standards as fundamental rights. The CJEU has made reference to the prohibition of discrimination on the grounds of gender as set out in ILO Convention No.111 in cases C-149/77 Defrenne II,\footnote{C-540/03, Parliament v. Council. para. 58.} C-43/76 Defrenne I\footnote{Novitz, Tonya: The Dialogue between the EU and ILO in Labour Rights as Human Rights. Edited by Alston, Philip (2005), pgs 226-229.} and C-61/81, Commission v. UK.\footnote{C-149/77, Defrenne, paras. 23-26.}

More recently, in the Bosman case, the CJEU noted that the principle of freedom of association was one of the fundamental rights that, as the court has consistently held, are protected by the Union legal order.\footnote{C-43/75, Defrenne, paras. 26-28.} Furthermore, the Court found in the Albany International case that the social policy objectives pursued by the collective agreements would be seriously undermined if management and labour were to be subject to the EU competition law provisions when adopting measures to improve conditions of work and employment, even if there was no explicit recognition by the CJEU that this was required by protection of freedom of association as a fundamental right.\footnote{C-61/81, Commission v. UK. Hellsten, Jari: From Internal Market Regulation to Ordre Communautaire Social (2007), pgs 36 and 50.} In Viking, the CJEU also referred to Convention No 87 concerning Freedom of Association and Protection of the Right to Organize, adopted in 1948 by the
International Labour Organisation as a basis for the right to take collective action.\textsuperscript{583} The references made by the CJEU to rights protected by the ILO conventions have mainly concerned the international core labour standards which are freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective elimination of child labour and the elimination of discrimination in respect of employment and occupation.\textsuperscript{584} However, as ILO Convention No 158 and Recommendation No 166 are not among these core labour standards, they cannot have an effect on the interpretation of the EU law similar to that of the core labour standards.\textsuperscript{585} Therefore, the CJEU could not have used the ILO Termination of Employment Convention and Recommendation as an interpretative aid in its case law on Clause 5 of the Framework Agreement.

5.3 THE EU CHARTER OF FUNDAMENTAL RIGHTS, ILO CONVENTION 158, RECOMMENDATION 166 AND ABUSE OF FIXED-TERM CONTRACTS

This section gives special attention to Article 30 of the Charter of Fundamental rights, which deals with protection from unjustified dismissal. This is done because of the article’s potential aid in restricting the abuse of fixed-term contracts. To be more precise, Article 30 of the Charter and its normative background examines the principle of the prevention of abuse arising from successive fixed-term contracts as a fundamental right. The Charter of Fundamental Rights grants every worker the right to protection against unjustified dismissal, in accordance with the Union law as well as national laws and practices. Although there is no generally applicable Union secondary legislation providing grounds for termination of an employment relationship, there are several areas of the Union law laying down substantive and procedural requirements for termination of employment. In Article 4 of Directive 2001/23EC on Transfers of Undertakings, which is also referred to in the Explanations relating to the Charter of Fundamental Rights, it is prohibited to terminate employment on grounds of transfer of the undertaking, business or part of the undertaking or business itself by the transferor or the transferee. Furthermore, the Union law provides that the employer is responsible for terminating the employment relationship where the contract or employment


\textsuperscript{584} Novitz, Tonya: The Dialogue between the EU and ILO (2005), pgs 214-215.

\textsuperscript{585} Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), pg 10, European Social Charter, Explanatory Report, ETS no 163, para 86.
relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee. The Collective Redundancies Directive obliges an employer to consult with the worker’s representatives in good time before collective redundancies take place. The Framework Directive on Parental Leave stipulates protection against dismissal on the grounds of an application for, or the taking of, parental leave. The whole body of law protecting employees against discrimination on various grounds clearly also protects against dismissal on these discriminatory grounds. The body of the Union law on discrimination is therefore also part of the Union law providing protection against unjustified dismissal. The examples may be taken from Article 2 of the Equality Directive 76/207 and Article 2 of Directive 2000/78. Finally, since the insolvency directive protects the economic interests of the employee in a situation where the contract of employment ends as a consequence of the insolvency of the employer, it can be concluded that the Union law, to which Article 30 of the EU Charter refers, contains both material restrictions excluding certain grounds as justifiable reasons for termination and procedural rights according to which justifiable termination cannot take place unless an information and consultation procedure has occurred. Hence, there are good reasons to understand Article 30 as a whole, including the grounds which render dismissal unjustified, as of both a substantive and procedural nature.

In accordance with the explanations relating to the Charter, the normative basis and inspiration on Article 30 is drawn from Article 24 of the revised Social Charter, which protects workers against termination of employment without a valid reason connected to their capacity, conduct, or based on the operational requirements of the undertaking, establishment or service. On the other hand, the right of an employee whose employment is terminated without a valid reason to adequate compensation or other appropriate relief shall be ensured. To this end, the right to appeal to an impartial body of a worker who considers that his employment has been terminated without a valid reason shall be ensured.

Since the Council of Europe drafted the Revised Social Charter with the ILO Convention 158 on Termination of Employment as a model, we may justifiably interpret Clause 5 of the Framework Agreement on Fixed-Term Work in accordance with ILO Convention 158 and its complementary Recommendation 166 on

589 European Social Charter, Explanatory Report, ETS no 163, para. 86.
protection against unjustified dismissal, albeit there is no clear judicial obligation to do so.590 Otherwise, abuse of fixed-term contracts cannot be avoided.

According to the Termination of Employment Convention, adequate safeguards must be provided against recourse to contracts of employment for a specified period of time (i.e., fixed-term contracts) the aim of which is to circumvent protection from unjustified termination provided by the Convention.591 According to Termination of Employment Recommendation No 166 ILO (1), similar safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid protection resulting from the Termination of Employment Convention 1982 and the Recommendation. To this end, provision may be made for one or more of the following: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or the circumstances under which it is to be effected or the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in Clause (a) of this sub-paragraph, to be contracts of employment of indeterminate duration; (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than the cases mentioned in Clause (a) of this sub-paragraph, to be indeterminate duration employment contracts.592

When comparing the scope of ILO Convention 158 Article 2(3) and Article 3 of ILO Recommendation 166 with Clause 5 of the Framework Agreement on Fixed-Term Work, one significant distinction can be made. While the scope of Clause 5 is restricted to the successive fixed-term contracts, the ILO Convention and Recommendation do not contain such a restriction. On the contrary, the convention and the recommendation concern all kinds of recourse to fixed-term contracts, the aim of which is to avoid the protection resulting from the Termination of Employment Convention. Thus the Framework Agreement does not cover all the protection the EU Charter, the ILO Convention and the Recommendation are intended to cover. Because the legislative background of the EU Charter is the Revised Social Charter, which has been prepared taking into account ILO Convention 158 and Recommendation 166, which also concern single or first use fixed-term employment contracts, it would be justified to amend the Directive on Fixed-Term Work to include single fixed-term contracts within the scope of Clause 5 of the Framework Agreement.

592 Article 3, Termination of Employment Recommendation ILO, no 166.
Because ILO Convention 158 (and Recommendation 166) is not a core ILO labour standard,\textsuperscript{593} it is understandable that the CJEU has not referred to these legal sources in its case law concerning the interpretation of the Directive on Fixed-Term Work. However, the Court’s interpretation of objective reasons in fact resembles the basis for the use of fixed-term contracts included in ILO Recommendation No 166. In Adeneler, the Court stated that use of successive contracts must be justified by the presence of objective factors relating to the particular features of the activity concerned and to the conditions under which it is carried out.\textsuperscript{594}

The same line of reasoning represents the definition of the concept of objective reasons adopted by the CJEU, which refers to precise and practical circumstances characterising a given activity, and which are therefore capable in that particular context of justifying successive fixed-term employment contracts.\textsuperscript{595} According to the CJEU, these circumstances may result in particular from the specific nature of the tasks for which such contracts have been concluded and from the inherent characteristics of those tasks.\textsuperscript{596} Correspondingly, the determination of prohibited abuse arising from successive fixed-term contracts specified by the CJEU in Adeneler, where the Court deemed this practice abusive irrespective of both the number of years for which the worker concerned has been taken on for the same job and if those contracts cover needs which are not of limited duration but ‘fixed and permanent’, is similar to ILO Recommendation 166 with regard to avoiding the circumvention of employment protection related to permanent contracts and confining the use of fixed-term contracts to situations in which the nature of the work requires the employment contract to be concluded for a fixed-term only. Therefore, the interpretation of the CJEU in the Adeneler,\textsuperscript{597} Vassilakis and Angelidaki cases in respect of the requirement of objective reasons and prohibition on successive fixed-term contracts where the need of the employer is fixed and permanent is very similar to the requirements in Article 2 of the ILO Convention on Termination of Employment and Article 3 of the Termination of Employment Recommendation.

Correspondingly, in order to achieve consistency between the ILO Convention and Recommendation and the Framework Agreement and to achieve its objectives for the use of successive fixed-term contracts effectively, the latter should be

\textsuperscript{593} Novitz, Tonya: The Dialogue between the EU and ILO (2005), pgs 214-215.
\textsuperscript{594} C-212/04, Adeneler, para. 68.
\textsuperscript{595} C-212/04, Adeneler, para. 69.
\textsuperscript{596} C-212/04, Adeneler, para. 70. This interpretation continued in Joined cases C-378/07 and 380/07, Angelidaki and Others, paras. 96, 103 and 107. See also Barnard, Catherine: EC Employment Law (2006), pgs 481-482.
\textsuperscript{597} C-212/04, Adeneler, paras. 69-70 and especially para 74, where the CJEU stated that for successive fixed-term contracts there must be objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need, is appropriate for achieving the objective pursued, and is necessary for that purpose. See also Joined cases C-378/07 and 380/07, Angelidaki and others, para. 107.
amended, requiring objective reasons related to the temporary nature of work for concluding a fixed-term contract from the first contract onwards. The fact that it has been considered possible for the EU to create more stringent and extensive regulations when they are based on the ILO standards (albeit not core), the legal sources of the Council of Europe, the EU Charter of Fundamental Rights and particularly the social policy objectives of the European Union also supports this. The abuse of successive fixed-term contracts is clearly condemned by the European Employment Strategy. However, as contradictory case law of the CJEU indicates, the Framework Agreement has not been able to prevent the abuse. This supports amending Clause 5 of the Framework Agreement to make it consistent with the ILO regulation.

When considering the effect of the EU Charter Article 30 on the interpretation of the Framework Agreement, one should bear in mind that the European Union does not have general competence in the grounds for termination of employment, which comes under the power of the Member States with the exclusions governed by the Directives mentioned above. The argument is, however, that because the abuse of successive fixed-term employment contracts falls within the legislative competence of the EU by the Directive on Fixed-Term Work, Clause 5 of the Framework Agreement should be interpreted in accordance with the guidelines adopted by the Termination of Employment Convention No 158 and Recommendation No 166. This prohibition on circumvention was also referred to by Advocate General Kokott in Adeneler (albeit with no reference to the Charter) when she justified why a Member State cannot interpret the concept of successiveness so narrowly that gaps between the contracts can be 20 days without the contracts being regarded as successive.

Thus the protective measures against abuse of successive fixed-term contracts introduced by the Member States are justifiably interpreted in accordance with ILO Convention 158 and Recommendation 166 on Termination of employment. In other words, although the Union does not have direct competence over protection against unlawful dismissal with the exceptions of situations related to equality, non-discrimination, parental leave and transfer of undertakings, the Union

600 C-268/06, Impact, para. 76, C-586/10, Kücük, paras. 51, 53 and 56.
602 Directives 76/207/EC and 92/85/EC.
603 Directive 2000/78/EC.
604 Directive 96/34/EC.
605 Directive 2001/23/EC.
does have competence over the abuse of fixed-term contracts, which is the case when the aim of recourse to such contracts is to circumvent the protection against unlawful dismissals related to contracts of indefinite duration. In this sense, the ILO Convention 158 and Recommendation could strengthen the protection laid down in Clause 5 of the Framework Agreement on Fixed-Term Work.

The right to protection against unjustified dismissal has links to several other fundamental social rights guaranteed by the EU Charter. One such close link is between protection against discrimination and unjustified dismissal on discriminatory grounds, which, as specified in Article 21 of the Charter violates both Articles 21 and 30 of the Charter. Article 33 on the reconciliation of family and professional life explicitly provides that everyone shall have the right to protection against dismissal for reasons connected with maternity, thus including not only mothers, but also dismissal for family related grounds in general. Accordingly, not to renew, to restrict the duration or to end fixed-term contract prematurely on those grounds is prohibited.

Although the expiry of a fixed-term contract at the end of an agreed period of work may fall outside the scope of the concept of ‘dismissal’ within the context of Article 30, the Article may have practical significance in preventing the abuse arising from successive fixed-term contracts through the prohibition on circumventing protection against unjustified dismissal. As mentioned above, the Charter gives protection against unjustified dismissal in accordance with the Union law and national laws and practices, whereas Clause 5 of the Framework Agreement requires prevention of abuse arising from successive fixed-term contracts. If the threshold for concluding or renewing fixed-term contracts is low in domestic law, the maximum total duration is long or concluding the first fixed-term contract is free from further restrictions, this can lead to circumvention of the protection against unjustified dismissal provided by Article 30 by resorting to fixed-term contracts. This may compromise the purpose of the Fixed-Term Work Directive, enabling the abuse arising from successive fixed-term contracts and rendering the principle adopted by the Directive that contracts of indefinite duration are the main rule meaningless.

The abuse in Clause 5 of the Framework Agreement must thus be understood in conformity with Termination of Employment Convention 158, the aim of which is to provide a safeguard against recourse to employment contracts for specific periods of time, the intention of which is to avoid the protection provided by the Termination of Employment Convention, and with Recommendation 166, which restricts the use of fixed-term contracts to situations where the work is of a temporary nature.

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606 Directive 1999/70/EC.
607 However it must be noted that the interpretation of Chapter IV of the Charter is restricted by the annexed protocol no 30 as regards the application of the Charter to Poland and the UK and in respect of the national courts of those countries.
In other words, Clause 5 of the Framework Agreement cannot be interpreted so that the employees’ right to protection against unjustified dismissal, in accordance with the Union law and national laws and practices, can be circumvented.

In this regard, Article 54 of the Charter, which stipulates that nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in the Charter is also worth mentioning. Permitting the use of the first or successive fixed-term contracts in circumstances in which the need of the employer is permanent undermines the protection against unjustified dismissal included in Article 30 of the Charter or renders it meaningless.

The interpretation of Clause 5, which stipulates that it is sufficient to prevent the abuse solely by restricting the number of renewals or limiting the total duration of employment relationships without further limits, can lead to long-term use of successive contracts. This may in fact serve the fixed and permanent needs of an employer. It is also prohibited by the CJEU in the Adeneler ruling and can also be deemed as circumventing the protection against unjustified dismissal related to permanent contracts. However, it may be impossible to evaluate and to supervise whether the reason for using fixed-term contracts serves the ‘fixed and permanent needs’ of an employer without requiring from the first contract onwards that those reasons must be related to circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts as determined by the CJEU in the Adeneler ruling.608 The more freely it is permitted in national law to renew fixed-term contracts or to extend their duration, the easier it is to circumvent the protection offered by the Framework Agreement. Therefore, in order to prevent the circumvention of protection against unjustified dismissal and the Framework Agreement, it is justified to amend Clause 5 by requiring objective reasons for concluding fixed-term employment contracts as determined by the CJEU in the Adeneler ruling.

Not all the CJEU’s case law on the use of fixed-term contracts corresponds to the points of departure adopted by ILO Convention 158 and Recommendation 166. Firstly, in the Angelidaki case the CJEU deemed that Clause 5 of the Framework Agreement is not applied to the first or single use of a fixed-term employment contract or relationship even if it serves the fixed and permanent needs of the employer.609 Secondly, the CJEU considered in the Impact ruling that there is no requirement for an objective reason for concluding successive fixed-term contracts and deemed the other measures without further restrictions sufficient to

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608  C-212/04, Adeneler, para. 69.
609  Joined cases C-378/07 and 380/07, Angelidaki and Others, para. 107.
prevent the abuse. 610 Thirdly, the CJEU deemed in Kücük that an employer may employ temporary replacements on a recurring, or even permanent basis despite those replacements possibly also being covered by the hiring of employees under employment contracts of indefinite duration, and this 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. 611

These points of departure for the use of fixed-term contracts are not consistent with the objective of tackling the use of fixed-term contracts the aim of which is to circumvent protection against unjustified dismissal, or with the fact that the use of fixed-term contracts shall be limited to situations in which they are required by the nature of the work or their circumstances. Therefore, the CJEU could have interpreted the objective reasons of Clause 5 of the Framework Agreement in Kücük by noting, as it in fact did in the Adeneler ruling, that such reasons are restricted to situations in which the nature of the work requires the employment contract to fixed-term only instead of arguing that a temporary need for replacement staff may constitute an objective reason under Clause 5, even if the employer may have to employ temporary replacements on a permanent basis and despite those replacements possibly being covered by the hiring of employees under employment contracts of indefinite duration. 612 Correspondingly, the CJEU could have considered that the use of successive fixed-term contracts was restricted to situations in which the nature of the employment requires the contract to be fixed-term only irrespective of the measure through which a Member State has adopted the Directive.

By contrast, as the Union has competence with regard to unjustified dismissals due to parental leave or to dismissal that violates non-discrimination or equality between men and women, the EU Charter clearly has more relevance in assessing the acceptable use of fixed-term contracts in these areas. 613

5.4 CONCLUDING REMARKS

In the light of the foregoing, Articles 151 and 153 TFEU (ex. 136-137 of TEC), the Directives prohibiting discrimination, 614 the equality directives, the relevant Articles of the Charter of the Fundamental Rights of the European Union as the

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610 C-268/06, Impact, paras. 75-79.
611 C-586/10, Kücük, para. 56.
612 C-586/10, Kücük, para. 56.
614 2000/43/EC, 2000/78/EC, 76/207/EC, 92/85/EC.
expression of the general principles of Union law, the international conventions such as the Revised European Social Charter, the ILO Convention on prohibition of Discrimination, the leading principles included in the preambles and general considerations to the Framework Directive and Framework Agreement, especially fixed-term contracts based on objective reasons and the main rule of contracts of indefinite duration, form a protective normative framework for the use of fixed-term contracts in the context of Clause 5 of the Framework Agreement on Fixed-Term Work.

Scholars consider that compliance with the fundamental rights in the EU law requires a degree of uniformity of protection across the Member States. This follows from the view that national differences bring a risk of inequality and unfairness in the protection of individual rights conferred by the Union law, and inevitably have a disintegrating effect. This approach implies that the degree of protection of fundamental rights recognised at European level differs from one Member State to another. However, in order to achieve the objective of the Framework Agreement and therefore to guarantee the objectives of the Directive, the Member States are required to interpret the Directive relatively uniformly throughout the Union. This imposes an obligation to introduce restrictions on the use fixed-term contracts, keeping this form of employment exceptional, and retaining contracts of indefinite duration as the main form of employment irrespective of the measure chosen by a Member State to prevent abuse.

Therefore, although it is understandable that, in interpreting the minimum requirements for concluding successive fixed-term contracts laid down by the Framework Agreement, the realities of specific national, sectoral and seasonal situations, the circumstances of particular sectors and occupations including activities of a seasonal nature and the diverse forms of national practices in accordance with Article 151 TFEU (ex. 136 TEC) will be taken into account, this does not entitle a State to relieve any sector or occupation of the restrictions applying to fixed-term contracts guaranteed by the Framework Agreement. This can lead to violation of the legal sources mentioned above and to recourse to fixed-term contracts intended to circumvent protection from unjustified dismissal.

As it has been shown that, in respect of EU Charter Article 30, albeit its normative background can to some extent be derived via the Revised Social Charter from ILO Convention 158 and Recommendation 166, there is still no legal obligation within the

615 Especially Articles 21, 30 and 33.
617 C-307/05, Alonso. para. 29 and joined cases C-397/01 to 403/07 Pfeiffer and Others, para. 99.
618 See Framework Agreement on Fixed-Term Work, general considerations, para. 10 and preamble to the Framework Agreement on Fixed-Term Work para. 3.
EU law to interpret Clause 5 of the Framework Agreement in accordance with these legal sources. However, Clause 5 does not demand minimum material protection for fixed-term employees considering that no further quantitative or qualitative restrictions on its use are required, except those expressly listed in Clause 5. On the contrary, it has been deemed as sufficient for a Member State to introduce any measures listed in Clause 5 without further constraint. Furthermore, no objective reasons are required if other measures are introduced by a Member State, and the first use of a fixed-term contract is excluded from the scope of the Framework Agreement. Finally, considering that the existence of objective reasons precludes in principle there being abuse irrespective of total duration or number of renewals, fundamental rights in protection of fixed-term employees’ should be strengthened in respect of concluding or renewing their contracts.

6 SANCTIONS ON ABUSE OF FIXED-TERM CONTRACTS

6.1 INTRODUCTION

The enforcement of the EU law is of great importance because a claim to judicial enforcement without an effective sanction makes it impossible to exercise the right conferred by the EU law. Article 10 of TEC stipulates that the Member States shall take all appropriate measures to ensure fulfilment of the Treaty obligations. It is an established principle of Union law that under the duty of co-operation laid down in Article 4 (3) of TEU (ex.10 TEC), Member States must ensure the legal protection which individuals derive from the direct effect of Union law.

Mainly on the basis of this Article, the CJEU has developed three principles on how the Union rules should be protected by the Member States. Firstly, the Union rules are not to be discriminated against by maintaining less favourable conditions for enforcement compared with domestic rules of a similar nature (the principle of equivalence). Secondly, the principle of sufficient effectiveness has to do with the effectiveness of the enforcement methods of EU law. As an expression of this the CJEU has stated that national rules may not render the exercise of the rights conferred by the Union law virtually impossible or excessively difficult. Thirdly,

619 C-268/06, Impact, para. 76.
620 C-144/04, Mangold, para. 42, 43.
621 C-586/10, Kücük, para. 43. Except where an overall assessment of the circumstances surrounding the renewal of the relevant fixed-term employment contracts or relationships reveals that the work required of the employee does not merely meet a temporary need. In the case, however, the CJEU considered that 13 successive fixed-term contracts within 11 years in circumstances of structural need of workforce was not abuse.
there is the principle of proportionality, whose position as regards the remedies is slightly different from the previous two. 623

Currently the obligation of sanctions is also included in Article 47.1 of the Charter of Fundamental Rights of the European Union according to which everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down by this Article. 624

According to the explanatory memorandum of the Charter, the protection is more extensive in the Union law than its model included in Article 13 of the ECHR, since it guarantees the right to an effective remedy before a court. The Court of Justice has enshrined this principle in its Johnston, Heylens and Borelli judgments. 625

To facilitate the analysis of effective enforcement of labour law, Malmberg has distinguished between requirements for the full effectiveness of rights deriving from the Union law and remedies for breaches of it. Firstly, the requirement for full effectiveness of rights reviews the question of what rules, procedures and sanctions a Member State must adopt in order to ensure that they are effectively enforceable or applied in practice by either private entities or the Member States acting in capacities other than legislator. The second requirement, the Member State liability, concentrates on the remedies that are available if the Member States do not correctly fulfil their obligations to implement directives. 626 The effectiveness of rights is discussed in chapter 6 of this research and the Member State liability in chapter 7 of the EU part of the research. The CJEU has specified in its case law the requirement for deterrent sanction. The case C-14/83 von Colson concerned sanctions in the case of the violation of the equal treatment Directive in job application procedures. The court confirmed that even if the substantive part of the Directive had been implemented in the German legal order, this was not sufficient to ensure that the Directive was fully effective in accordance with the objective that it pursues in the absence of adequate remedies for discrimination. 627 Although the full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that sanction be such that it guarantees real and effective judicial protection. Moreover, the deterrent effect of the sanction means that where a Member State chooses to penalise the breach of the prohibition of discrimination by awarding compensation, that compensation must in any event be adequate in relation to the

624 Charter of Fundamental Rights of the European Union, para 47.1.
625 Explanations of the Charter Related to the Charter of Fundamental Rights of the European Union, pg 41. C-222/84, Johnston, C-222/86, Heylens, C-97/91, Borelli
627 C-14/83, Colson/Kamann, para. 14, Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pg 33.
damage caused. As a consequence of this, it appears that national provisions limiting the right to compensation for people who have been discriminated against in access to employment to a purely nominal amount, such as the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.\textsuperscript{628} At the second development phase, the CJEU extended the scope of its jurisprudence by requiring that adequate national remedies be available for the violation of rights conferred by the EU law, even in the absence of any specific remedy provisions in the Directive concerned. In the Johnston case, the Court of Justice held that the principle of judicial control was part of the constitutional traditions common to the Member States, which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which must be taken into consideration in the Union law. By virtue of Article 6 of Directive 76/207, interpreted in the light of the general principle stated above, all people have the right to obtain an effective remedy in a competent court against measures that they consider to be contrary to the principle of equal treatment for men and women laid down in the Directive.\textsuperscript{629}

A further conclusion drawn by the CJEU case law concerning adequate sanctions for violation of the EU law is that a Member State which chooses compensation as a form of sanction must ensure that, in accordance with national rules, the compensation covers the damage suffered as a whole. Given this requirement, it is impossible to provide an unconditional upper limit for compensation. Such a limit could fix the amount of compensation at a level that would not accord with the requirement of full compensation. The CJEU has taken a stance on upper limits in its Draehmpaehl ruling, considering an upper limit of compensation of three months earnings as invalid for an applicant who would have got the position had he not been discriminated against. Correspondingly, the CJEU found maximum compensation of three months pay valid for the applicant if the employer could prove that, because the applicant engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position even if there had been no discrimination in the selection process.\textsuperscript{630} It was also considered as prohibited to set an upper limit of six sets of monthly earnings for all the applicants discriminated against together.\textsuperscript{631} The implication of these cases is that financial loss has to be compensated for as an entirety. This includes compensation for material and immaterial loss.\textsuperscript{632}

\textsuperscript{628} C-14/83, Colson/Kamann, paras. 23-24, Gotthardt, Michael: Effective Sanctions, in Effective Enforcement of EC Labour Law (2003), pg 226.
\textsuperscript{629} Johnston, Case C-222/84, paras. 18-19 and Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pgs 33-34.
\textsuperscript{630} C-180/95, Draehmpaehl, para. 37.
\textsuperscript{631} C-180/95, Draehmpaehl, para 30.
\textsuperscript{632} Gotthardt, Michael: Effective Sanctions (2003), pgs 226-228.
The question as to whether the Member States can put an upper limit on compensation was also at stake in the C-271/91 Marshall case. A woman’s employment was terminated solely because she had attained or passed the qualifying age for a State pension in circumstances in which the age limit was different for men and for women under the national legislation.\textsuperscript{633} An upper limit to the amount of compensation equivalent to the limit to the compensatory award for unfair dismissal was applied according to the UK law. This implied a maximum amount of compensation and meant that compensation would not have corresponded with the full amount of the loss.\textsuperscript{634} The court took the view that the damage for a loss suffered by a person in the context of a dismissal which is discriminatory on the grounds of gender must not be restricted to a maximum amount determined a priori, and that interest must be awarded as compensation for a justified loss in respect of the time elapsed until the sum awarded is actually paid.\textsuperscript{635}

According to the settled case law of sanctions concerning breach of Directive 76/207/EEC, compensation is unsuitable and forms an obstacle to effective sanctioning if it is limited to less than the real damage. Accordingly, the nominal compensation or an upper limit determined for it must be regarded as contrary to the EU law if it does not cover the damages as an entirety.\textsuperscript{636}

These minimum requirements for sanctions (effective, proportionate-dissuasive) developed by the CJEU are codified in the recent labour law directives adopted in the 2000s.\textsuperscript{637} The following chapters analyse the content of sanctions included in the Framework Agreement on Fixed-Term Work and how they fulfil the requirements developed by European Union law.

6.2 SANCTIONS AND THE ABUSE OF FIXED-TERM CONTRACTS IN DIRECTIVE 99/70EC

The original proposal for a Council Directive concerning the Framework Agreement on Fixed-term Work included a separate the Article regarding sanctions according to which:

\textit{“Member States shall determine the range of penalties applicable for infringements of national provisions made in implementation of}
this directive and shall take all necessary steps to ensure that they are enforced. The penalties must be effective, commensurate with the infringement, and must constitute a sufficient deterrent. Member States shall notify these provisions to the Commission by the date mentioned in Article 4 at the latest, and any subsequent amendment thereto in good time."

However, this provision was deleted in the version of the Fixed-term Work Directive adopted.

According to Clause 5(2b), the Member States, after consultation with the social partners, shall, where appropriate, determine the conditions under which fixed-term employment contracts or relationships shall be deemed to be contracts of indefinite duration. As transpires from the wording, Clause 5(2b) appears to be very a flexible provision, seemingly conferring very broad discretion on the Member States and/or social partners to determine the scope of the Clause. It does not impose a general obligation on the Member States to provide the conversion of fixed-term contracts into contracts of indefinite duration as a sanction of abuse of successive fixed-term contracts. In this regard, as Advocate General Kokott stated in her opinion in Angelidaki, and as the Court found concerning Clause 5(1) in Adeneler, the same considerations can be applied to Clause 5(2), which is phrased with even less precision and grants the Member States even greater discretion in their implementation than Clause 5(1). The mere wording of the provision, with its introductory phrase ‘where appropriate’, indicates that the Member States are under no obligation whatsoever to introduce any of the measures mentioned in Clause 5(2) (a) and (b).

Furthermore, there is no mention of judicial control in the Framework Agreement on Fixed-Term Work, as Clause 8 (5) refers only to national law, collective agreements and practice as to the prevention and settlement of disputes and grievances arising

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638 According to the Commission’s explanatory memorandum, the Commission provides that the Member States adopt penalties which are effective, commensurate with the infringement and constitute a sufficient deterrent. The Commission pointed out further that in applying Community law it is necessary, as in every legal system, both that those with obligations resulting from this law are dissuaded from infringing it and that those who do not respect Community law are duly penalized. See Commission’s Explanatory Memorandum on Proposal for a Council Directive concerning the Framework Agreement on Fixed-Term Work, COM/99/0203 final, para 47.

639 COM/99/0203.


641 Framework agreement on fixed-term work, Clause 5(2b).


from the application of this agreement.  

Hence, the Framework Directive does not unconditionally impose sanctions but instead leaves the issue of sanctions to the discretion of the Member States and social partners.

For the sake of comparison, the Framework Employment Directive of Equality and the Race and Ethnic Origin directive require that the Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to these Directives and shall take all the measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.  

Correspondingly, the Equal Treatment Directive requires that the Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process. A similar provision, allowing redress after recourse to other competent authorities, is included in the Directive of Transfers of Undertakings, Article 9. The Directive on Collective Redundancies contains a similar provision.

The Equal Pay Directive also contains detailed and effective provisions on sanctions. In Article 4 it is stipulated that the Member States shall see that effective means are available to ensure that the principle of equal pay is observed. Article 6 contains the more specific obligation that the Member States must take the necessary steps to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be or may be declared null and void or may be amended. A similar provision is found in Article 3.2 of the Equal Treatment Directive.

In this context, the sanctions laid down by the Framework Agreement as a consequence of abuse of successive fixed-term contracts appear to be weaker. First of all, the compensation for damage as a form of sanction is not determined in the Framework Agreement unlike in the Directives mentioned above. Secondly, it does not contain the requirement of sanctions as being effective, proportionate and dissuasive as is the case in those Directives. Thirdly, it leaves the circumstances under which successive contracts shall be regarded as contracts of indefinite duration

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entirely to the discretion of the Member State. Thus, it appears to be left to the discretion of the Member States whether they implement nullity as a sanction in respect of duration of fixed-term contracts. A sanction that is determined in such an imprecise and conditional manner decreases the effective enforcement of the Union norms at national level. Furthermore, there are no other optional sanctions to prevent abuse of successive fixed-term contracts. The consequence of this is that unless the Member States and their national courts as part of their jurisdiction approve ensuring the effectiveness of the Union law provided for by the Directive on Fixed-Term Work as far as abuse of fixed-term contracts is concerned, the judicial protection of the individual will remain incomplete. 651

On the other hand, in this regard we can agree with Gotthardt who states that because the assumptions are so different in the Member States with regard to the sanctions, it is deemed that the European legislator itself should not prescribe judicial sanctions for the violation of the European labour law norms in a detailed way. In every such case there is a danger of interfering with homegrown national structures and providing judicial sanctions that are not consistent with the fundamentals of the national system. 652

Even if this is inherent in the European law, the prescription of a certain judicial sanctions should not be undertaken without weighty reasons, and an in-depth look at the current sanctions and the legal structures in the Member States. This is also supported by the principle of subsidiarity under which the Union shall respect the structure and function of different legal systems provided, naturally, that the objectives of the EU law are achieved. This implies that too far-reaching and detailed regulation of sanctions is not recommended. 653 As a result of the Treaty of Lisbon, the importance of the principle of subsidiarity has even increased in the assessment of whether the Union legislative measures are deemed to be more justified than the national ones. In this regard, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. Moreover, as the Member States have been given more responsibility in following

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the principle of subsidiarity, it seems to be very hard to justify why the objective of a directive cannot be achieved by different national solutions on sanctions.  

Thus, as Michael Gotthart has concluded, the Union should give convincing reasons why only one concrete sanction is the right one to attain the aim of the directive. This kind of reason must require that the Member States cannot attain aim of the directive otherwise. According to Gotthart, the Union should act only if even the possibility of the Member States making a choice between different sanctions may affect the achievability of the purpose of the directive. This is also in line with the intended nature of directives, which are compulsory concerning their aims, but not with regard to the ways and methods by which they should be achieved.

6.3 CASE LAW OF THE CJEU AND SANCTIONS FOR THE BREACH OF DIRECTIVE 99/70/EC

The CJEU argued in its recent Küçük case similarly to Adeneler, that the Framework Agreement neither lays down a general obligation for the Member States to introduce the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used. In the Küçük case, the CJEU also justified this outcome by stating that the Framework Agreement provides merely that the Member States may, where appropriate, determine the conditions under which fixed-term employment contracts or relationships are deemed to be contracts or relationships of indefinite duration.

However, the CJEU has applied the general requirements of the sanctions adopted in its previous case law to the abuse of fixed-term contracts as well.

In Adeneler, the CJEU considered that it was the obligation of the Member States to choose the most appropriate forms and methods to ensure that the prevention of abuse of successive fixed-term contracts was attained. Related to this requirement, the CJEU referred in Adeneler to the previous case law, claiming that where, as in the present case, the Union law does not lay down any specific sanctions and abuse nevertheless appears, it is the obligation of the

657 C-212/04, Adeneler, para. 91, C-586/10, Küçük, paras. 52-53.
658 Article 288 of TFEU (ex.249 TEC).
national authorities to adopt appropriate measures to deal with such a situation. These measures must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.659

In Adeneler, the Greek legislation provided that where private sector employers were deemed to be guilty of abuse of fixed-term contracts, they were converted into indefinite duration contracts. However, such a remedy did not operate in the public sector because the access to positions as public servants was regulated by a specific procedure. In this context, the referring court asked the CJEU whether the Framework Agreement was to be interpreted as precluding the application of national legislation which, in the public sector, prohibits a succession of fixed-term employment contracts that have, in fact, been intended to cover the fixed and permanent needs of the employer from being converted into indefinite duration contracts.660 The CJEU answered that the Framework Agreement must be interpreted so that, in so far as the national law does not include any other effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts in the sector under consideration, the Framework Agreement precludes the application of national law. In the public sector, this prohibits successive fixed-term contracts being converted into indefinite duration that have in fact been intended to cover the ‘fixed and permanent needs’ of the employer and must therefore be regarded as constituting an abuse.661

Thus, Clause 5(1) in conjunction with Clause 5(2) does not preclude a prohibition in the public sector against converting a fixed-term contract into one of indefinite duration, even in cases where the statutory requirements governing the use of such fixed-term employment might have been circumvented in an abusive manner.662 There were special considerations applying to employment in the public sector in the Member State in question (Greece). Access to public service employment was regulated by specific legal procedures and there were strict limits imposed by law on recourse to employment relationships governed by private law for fixed-term contracts, and the conversion of those relationships into public sector employment of indefinite duration was prohibited.663 However, if a Member State has not opted

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659  C-212/04, Adeneler, para. 94 and Joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95


661  C-212/04, Adeneler, para.105.

662  C-212/04, Adeneler, para. 91.

for any other sanction on abuse of successive fixed-term contracts, the contract is
deemed to be converted into a contract of indefinite duration.
In Adeneler, the court did not specify what might constitute another effective
measure to prevent abuse of fixed-term contracts. However, the court emphasised
the key role of the principle of effectiveness, according to which sanctions for breach
of the EU law must not be less favourable than those governing similar domestic
situations (the principle of equivalence) or render the exercise of rights conferred
by the Union law impossible in practice or excessively difficult (the principle of
effectiveness). 664
The CJEU has also laid down a further requirement for transformation of
contracts to indefinite duration. The Court deemed in its recent Huet ruling that,
when a Member State chooses the transformation of contract into indefinite duration
as a sanction, it must ensure that terms of employment are not substantially
weakened while the contract is transformed into a permanent one, provided that
person’s tasks and the nature of his functions remain unchanged, in order not to
undermine the practical effect or the objectives of Directive 1999/70. 665

6.4 LEGITIMATE SECTORAL DIVERGENCES BETWEEN SANCTIONS

The Court took a somewhat different and also a more detailed stance in its
subsequent Marruso and Sardino ruling compared with Adeneler with regard
to legitimate divergence between the sanctions. 666 Case C-53/04, Marruso and
Sardino, discussed the Italian national legislation governing the duration and
renewal of fixed-term contracts and the right to compensation for damage suffered
by a worker as a result of the abuse by public authorities of successive fixed-term
employment contracts or relationships. Those sanctions were different from those
applied in the private sector wherein the consequence of abuse of successive
contracts was conversion into a contract of indefinite duration. The question
was accordingly whether the sanction of abuse arising from successive contracts
can differ from sector to sector and whether the compensation for damage can
be regarded as an equivalent sanction as to conversion of the employment
relationship into a permanent one. 667

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664 C-212/04, Adeneler, para.95, see also C-312/93 Peterbroeck, para. 12, and the case-law cited.
665 C-251/11, Huet, para. 46.
666 C-53/04, Marrosu & Sardino, para. 57. See also, Vigneau, Christophe: Le Régime des Contrats à Durée
Determined en Droit Communautaire, Droit Social, (2007), pg 97.
667 C-53/04, Marruso & Sardino, para 57. Zappala, Loredana: Abuse of Fixed-Term Employment Contracts and
In its reasoning, the Court of Justice referred to Clause 5(2), according to which it is a matter for a Member State to determine the conditions under which fixed-term employment contracts or relationships shall be deemed to be transformed into contracts or relationships of indefinite duration. Advocate General Maduro stated in this assessment that a Member State is entitled to take into account the specific features of certain sectors in accordance with Clause 5 in order to lay down conditions that lead to precluding the possibility to convert fixed-term employment contracts into contracts of indefinite duration.\textsuperscript{668} It is sufficient for the sectors in question to be governed, with regard to employment relationships, by their own particular needs or by specific rules. By following the opinion of Mr. Maduro, the Court of Justice stated that since the Framework Agreement neither lays down a general obligation for the Member States to adopt the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used, it allows a margin of discretion in the matter for the Member States.\textsuperscript{669}

Consequently, despite the fact that the abuse of fixed-term contracts shall be prevented according to Clause 5 of the Framework Agreement, the Member States retain the discretion to exclude specific sectors from the obligation of having fixed-term contracts transformed into permanent ones. Relating to this, the CJEU stated in Marrosu and Sardino that the Framework Agreement does not preclude national legislation, which prevents abuse arising from successive fixed-term employment contracts or relationships in the public sector by other remedies than fixed-term contracts being converted to indeterminate duration, even though such conversion is provided for in the private sector, requiring that legislation includes another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public sector employer.\textsuperscript{670}

However, ‘other effective measures’ used as a sanction must not be less favourable than those governing similar domestic situations. Furthermore, the Court stated that when the EU law does not specify particular sanctions, should abuse occur nevertheless, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation that must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure

\textsuperscript{668} Opinion of Advocate General Poiares Maduro in C-53/04 Marrosu &Sardino delivered on 20th September 2005, para. 35
\textsuperscript{670} C-53/04, Marrosu and Sardino, para. 57 and C-180/04 Vassallo para. 42.
that the provisions adopted to implement the Framework Agreement are fully effective.\textsuperscript{671}

Thus, the Member States are under an obligation to comply with the general principles of the Union law with regard to sanctions. Secondly, the implementation of the provision of the Directive is required without compromising its integrity. If a selected sanction differs from one sector to another, the question can easily be raised whether it is as effective as conversion of the contract into indefinite duration. This kind of derogation requires that any difference in treatment must be justified by objective legitimate reason and must occur within the limits of the principle of proportionality.\textsuperscript{672} In this case, the hindrance to transforming successive fixed-term contracts into indefinite duration was justified by the existence of a requirement specific to that sector. The need to safeguard the constitutional principle of access to employment in the public service through competition was deemed such a reason, provided that provision is made in that sector for effective measures to prevent and to penalize abuse arising from the use of fixed-term employment contracts in that sector.\textsuperscript{673}

The Advocate General indeed pointed out that a possibility like this has to be used within the restriction of equal treatment, which the Court of Justice has consistently held as the obligation of Member States when they implement the Union rules. Such a requirement implies that comparable situations must not be treated differently and that different situations must not be treated in the same way unless this treatment is objectively justified. It is required that the Member State in question apply the directive concerned under conditions that do not infringe that principle as far as possible in such cases.\textsuperscript{674} The implication is that, as a main rule, the Member States have a general obligation to lay down equal sanctions applied to comparable fixed-term employee groups. Derogation from this main rule requires objective reasons and must be done in compliance with the principle of proportionality.\textsuperscript{675}

In accordance with the opinion of Advocate General Maduro, the access to public employment relationship through the employment competition procedure stipulated by the Italian Constitution aiming to guarantee impartiality and efficiency of the public service was deemed an objective reason which justified the different sanction of public sector fixed-term employees compared to private sector


\textsuperscript{672} C-212/04, Adeneler, paras. 70, 74 and 82.

\textsuperscript{673} The Advocate General took this view in his opinion on the CJEU ruling C-53/04 Marrosu and Sardino, para 50.

\textsuperscript{674} Opinion of Advocate General Poiares Maduro in C-53/04 Marrosu & Sardino and C-180/04 Vassallo delivered on 20th September 2005, para. 37.

\textsuperscript{675} Ibid
employees. Thus the need to retain access by competition as the special means of access to employment by the public authorities was deemed to be a legitimate objective that justified the exclusion of conversion of fixed-term contracts into contracts of indefinite duration in that sector. 676

The CJEU deemed Italian compensation for damage sufficiently effective, proportionate, deterrent and furthermore equivalent to the measure of conversion into a contract of indefinite duration in order to guarantee for the protection of workers to duly to punish the abuse and nullify the consequences of the breach of the Union law. 677 The derogation made by the CJEU in Marruso and Sardino corresponds with the earlier case law of the CJEU according to which a derogation from the right conferred by the Union law can be made on the grounds of public interest. 678

The CJEU drew a similar conclusion in the Angelidaki case. The Framework Agreement was interpreted as meaning that, where the domestic law of the Member State concerned includes in the public sector under consideration other effective measures to prevent and, where relevant, to punish the abuse of successive fixed-term employment contracts within the meaning of Clause 5(1) of that agreement, it does not preclude the application of national law which prohibits absolutely conversion of a succession of fixed-term employment contracts into a contract of indefinite duration. Even when the fixed-term contracts have been intended to cover fixed and permanent needs of the employer, this kind of use of labour must therefore be regarded as constituting an abuse. In the case, the payment of wages and severance pay in addition to criminal and disciplinary penalties for the person responsible for the infringement when appropriate were deemed as an equivalent measure compared with conversion of a fixed-term contract into a contract of indefinite duration. Furthermore, the legislation also provided that certain fixed-term employment contracts, which were still in effect when the legislation entered into force or which had expired shortly before that date may, subject to compliance with certain conditions, be converted to contracts of indefinite duration. 679

678 See, for example C-411/05 Palacios de la Villa.
679 Joined Cases C-378/07 to C-380/07, Angelidaki and Others, paras. 187 and 189.
6.5 CONCLUDING REMARKS

The judgments of the CJEU, where compensation for damage suffered by a fixed-term worker has been regarded as effective, proportionate and dissuasive a sanction as conversion of contract into indefinite duration, has been criticised in the literature. According to the criticism by Zappala, providing protection purely in the form of compensation for damage and disregarding the problems related to the burden of proof of the damage suffered by an employee, which he or she has to bear, cannot always in practice obtain similar protection compared with the re-employment of the employee in the post he or she previously held. According to Bruun, the monetary compensation for damage based purely on the economic loss caused may not be sufficiently effective, proportionate and deterrent even in cases where the worker finds a new job.

This criticism appears to be justifiable. It is very questionable overall whether the monetary compensation for damages arising from successive fixed-term contracts can be deemed an equivalent sanction to converting the contract to indefinite duration. In the latter situation, the sanction is that the condition determining the duration of the employment contract is null, whereas premature expiry of a fixed-term contract is rarely compensated as well by money as by unjustified dismissal from a permanent contract. The ground for compensation in many national legal orders is limited to the salary equivalent for the remaining contract period. The employee, however, loses his or her beneficial position as an employee to get the employment contract renewed which is often a valuable benefit in successive fixed-term contracts.

Although comparing sanctions between different groups of workers may be difficult, the rules of sanctions relating to violation of the EU law in the national legal orders must not be less favourable than those governing similar domestic situations. Transforming a contract into indefinite duration may prevent the employer ending the contract as the non-renewal of fixed-term contracts is commonly used as a primary way to reduce workforce in collective redundancies. Furthermore, it is questionable overall whether compensation for damage is equivalent to the continuity of employment. This justifies compensating the abuse of fixed-term contracts by a larger amount of compensation than equivalent to damage suffered, as is the case in the French indemnity system, where employees

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683 C-212/04, Adeneler, para. 95.
are paid an extra indemnity allowance in addition to compensation for damage by means of compensating the precariousness of fixed-term employment.\textsuperscript{685}

It is also worth mentioning that divergence between sanctions among the Member States is limited by the requirement of effective sanctions laid down by Article 47.1 of the EU Charter of Fundamental Rights.

Equal treatment of sanctions applied to fixed-term contracts can also be approached from the perspective of the non-discrimination principle stipulated in Clause 4 of the Framework Agreement on Fixed-Term Work. This requires that the sanctions on unjustified non-renewal of fixed-term employment contract shall not be less favourable than those applied to a comparable permanent worker in a situation in which the employment contract has been terminated on some unjustified ground.

The CJEU justified different treatment between the fixed-term workers and permanent workers regarding the term of employment provided for by the law or collective agreement in the Alonso ruling. The court decided the issue by applying the principle of proportionality. As the Court of Justice considered in the ruling, Clause 4 requires that the difference in treatment between fixed-term and permanent workers must be justified by objective grounds and it is not allowed solely on the basis that it is provided by a statute or the secondary legislation of a Member State (or by a collective agreement concluded between the staff union representatives and the relevant employer). The concept of the ‘objective grounds’ within the meaning of the Clause requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates and in the specific context in which it occurs. The existence of objective grounds is also required by objective and transparent criteria in order to ensure that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.\textsuperscript{686}

Even if the derogation from equal treatment concerning the sanctions can be justified by objective reasons, the sanctions adopted, as the CJEU has stated in its settled case law, must be sufficiently effective, proportionate and deterrent. To be effective, the provision determining sanctions must not render the exercise of rights conferred by the EU law "in practice impossible or excessively difficult".\textsuperscript{687} Furthermore, the Member States must ensure that infringements of the EU law are penalised under conditions, both procedural and substantive, that are analogous to those applicable to infringements of national law of a similar nature.\textsuperscript{688} With regard to the abuse of fixed-term contracts, the CJEU stated that where abuse of successive

\textsuperscript{685} See Chapter 5.1 of the French part of the research.
\textsuperscript{686} C-307/05, Alonso, paras. 58-59.
\textsuperscript{687} C-212/04, Adeneler, para. 95.
\textsuperscript{688} C-14/83, Colson/Kamann, para. 12, C-68/88, Commission v Greece para. 24 and C-212/04, Adeneler, para. 95.
fixed-term contracts has taken place, a measure offering an effective and equivalent guarantee for the protection of workers must be capable of being applied in order to duly punish the abuse and nullify the consequences of the breach of the EU law.\textsuperscript{689} To be legitimate, divergences in sanctions must fulfil this requirement. If the compensation is restricted by an upper limit or an economic loss of a nominal amount, this does not satisfy the general requirements laid down by the CJEU.\textsuperscript{690}

The CJEU has also indicated its willingness to apply the general requirements of sanctions to the regulation on fixed-term work, first in the Adeneler, Vassallo, Marruso and Sardino cases and then in Angelidaki.\textsuperscript{691} In these cases, the CJEU accepted indemnity as a sanction when it fulfilled the general requirements of sanctions.\textsuperscript{692} Therefore, if a chosen sanction for abuse is monetary compensation, it must cover the damage as an entirety in order to adequately punish the abuse and to nullify the consequences of the breach of the EU law.

Furthermore, to guarantee the achievement of the objective laid down by the Directive, which is to prevent unjustified resort to successive fixed-term contracts, the compensation for a fixed-term worker must not be less than compensation for unlawful dismissal for a comparable permanent worker in a comparable situation, taking account the duration of employment. This is required by the principle of equivalence and the principle of non-discrimination stipulated in Clause 4 of the Framework Agreement on Fixed-Term Work.\textsuperscript{693} Moreover, with regard to the proportionality test applied by the CJEU in Marruso and Sardino, the outcome of the court is based on the assumption that monetary compensation is sufficiently effective to prevent abuse of fixed-term contracts. The Court did not indicate the grounds on which those remedies were deemed to be as effective as conversion of contracts into indefinite duration. However, if the compensation for abuse arising from fixed-term contracts is less than for a permanent employee in a similar situation or it is difficult to obtain due to burden of proof or for other reasons, this interpretation is based on incorrect assumptions.\textsuperscript{694}

In its case law, the CJEU has not pursued remedial harmonisation to offset the abuse of successive fixed-term contracts. This is a justified line, taking into account that the CJEU’s contributions in other areas, such as in competition law

\textsuperscript{689} C-53/04, Marrosu & Sardino, para. 53.

\textsuperscript{690} C-14/83, Colson/Kamann, paras. 23-24, Gotthardt, Michael: Effective Sanctions, (2003), pgs 226-227, C-180/95, Dreihmaehl, paras. 30 and 37. C-271/91 Marshall, paras. 31 and 34.

\textsuperscript{691} C-378/07, Angelidaki, paras. 159-176, C-212/04, Adeneler, paras. 90-105, C-180/04, Vassallo, paras. 37-42, C-53/04, Marruso and Sardino, para. 57.

\textsuperscript{692} Malmberg, Jonas: The Complementary Functions of Different Kinds of Enforcement Processes in Effective Enforcement of EC Labour Law (2003), pg 312.

\textsuperscript{693} C-212/04, Adeneler, para 95.

\textsuperscript{694} Opinion of Advocate General Poiares Maduro in C-53/04 Marrosu and Sardino delivered on 20\textsuperscript{th} September 2005, paras. 51-53 and 55, C-180/04 Vassallo paras. 36-38 and 40.
and state aid, where it has striven to harmonise the sanctions, such aspirations have led rather to negative harmonisation setting limits, boundaries and minimum requirements rather than prescribing harmonised solutions.\textsuperscript{695} Because, however, the requirement of sanctions is left open in Clause 5 (2), the role of the CJEU and national courts in considering whether the sanctions adopted by the Member States are deemed to fulfil the requirements of the EU law remains overemphasized. However, in order to ensure that minimum requirements laid down by the Directive are complied with and therefore to ensure that the effective enforcement of the Framework Agreement on Fixed-Term Work is properly accomplished, it appears to be justifiable to amend the Agreement by determining the applicable sanctions unconditionally and exhaustively. Roger Blainpain has even suggested that conversion of contracts into indefinite duration, which can only be terminated by notice, should be the only sanction in case of abuse of fixed-term contracts. Furthermore, according to Blainpain, if a contract is terminated without notice, this should give rise to compensation based on the salary that would have accrued during the period of notice, or alternatively, a provision should be made for some other adequate compensation.\textsuperscript{696} Nevertheless, the discussion between the Member States on the issue of sanctions indicates conflict between the autonomy of the Member States and the necessary role of the European Union in setting standards for sanctions when the European labour law is violated. The Member States are to some extent inherently resistant to EU interference with their systems of private law, to which the sanctions in question undoubtedly belong. This reflects implicit but fundamental social and cultural choices. \textsuperscript{697} Consequently, as Paul Dougan has concluded the underlying challenge which remains in this area of the EU law is the need to strike a balance between the legitimate Union concerns about its own legal effectiveness and uniformity and equally legitimate and legitimately different national conceptions about the organisation and governance of the administration of justice.\textsuperscript{698}

\textsuperscript{695} Dougan, Michael: National Remedies before The Court of Justice, pg 212. Craig, Paul - De Burca, Gráinne: EU Law, Text, Cases and Materials. (2011), pg 254. C-120/78, Cassis de Dijon, C-178/84 Commission v Germany, C-302/86, Commission v Denmark, C-2/90 Commission vs. Belgium, C- 456/02, Trojani, C- 413/99, Baumbast

\textsuperscript{696} Blanpain, Roger: Fixed-Term Employment Contracts: The Exception to the Rule in International Journal of Comparative Labour Law and Industrial Relations (2008), pg 131.

\textsuperscript{697} Craig, Paul - De Burca, Gráinne: EU Law, Text, Cases and Materials (2011), pg 254.

6.6 REQUIREMENT OF SANCTIONS WITH REGARD TO THE FIRST OR SINGLE USE OF FIXED-TERM CONTRACTS

The foregoing sections emphasise the importance of extending the restrictions of successive fixed-term contracts to their first use in order to prevent circumvention of protection as laid down by Clause 5(1). This section illustrates the problems in effective enforcement of successive fixed-term contracts related to the fact that Clause 5 does not restrict the use of single or the first fixed-term contract or establish any obligation for sanctioning the abuse of such contracts either.

In the Angelidaki case, the Court of Justice stated that since Clause 5(1) of the Framework Agreement is not applicable to workers who have entered into the first or single fixed-term employment contract, the provision does not require the Member States to adopt penalties even where such a contract does in fact cover the fixed and permanent needs of the employer. Thus, the implication is that there is no obligation for the Member State to interfere with the first or single use of fixed-term contracts either by prohibition or by sanctions irrespective of both the number of years for which the worker concerned has been taken on for the same job and the fact that those contracts cover needs which are not of limited duration but are indeed ‘fixed and permanent’. The solution complies coherently with the line adopted by the CJEU, according to which Clause 5 is not applied with single or the first fixed-term contracts. The solution can be criticised from several perspectives. Firstly, the CJEU overlooked the requirement of objective reasons included in the preamble to the Framework Agreement, the application of which is not restricted to successive fixed-term contracts, but stated that fixed-term contracts based on objective reasons is a way to prevent abuse without the exclusion of the first contract. Secondly, the CJEU’s interpretation enables employers to have recourse to single contracts in circumstances of a fixed and permanent need for labour without restrictions laid down by the Union law and to avoid applicable sanctions related to the illegal use of successive contracts in national law. For this reason, it might be excessively difficult to exercise the rights and remedies against abuse of successive fixed-term contracts in a Member State (the United Kingdom being one example) which has not introduced restrictions and sanctions for abuse of the first use of such contracts. Therefore the exclusion of the first or single use of fixed-term contracts may compromise the effective enforcement of the objective of the Framework Agreement in accordance with Article 288 TFEU (ex.249 TEC).

It can be stated on the grounds of the Marruso & Sardino and Vassallo cases that the CJEU has been reluctant to promote positive harmonisation of sanctions. The Court has, by excluding the first or single fixed-term contract systematically from Clause 5 of the Framework Agreement and therefore from the applicable

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699 C-378/07, Angelidaki and others paras 189-190, Adeneler C-212/04, para 88.
sanctions, retreated somewhat from its settled case law since the mid 1970s on how it has perceived the principle of effectiveness in that national rules cannot render the exercise of the Union rights virtually impossible or excessively difficult;\(^\text{700}\) and national courts must provide sufficient protection for employees seeking to assert the rights derived from the Union law.\(^\text{701}\)

Rather, this line reflects the contemporary notion adopted by the CJEU on the principle of effectiveness, by which the Court has approached decentralized enforcement merely by establishing certain minimum standards of effective judicial protection, but otherwise leaving much to the discretion of each Member State to create and develop its own national sanctions and procedural rules.\(^\text{702}\) Some commentators have, however, expressed their concerns about whether the Court’s case law is sufficient to guarantee the effectiveness of the EU law against the restrictions and dilutions that result from the dependence of the EU law upon national sanctions.\(^\text{703}\) In particular, it has been suggested that the Court needs to determine more precisely the margin of discretion left to the Member States for the purposes of balancing the legitimate role performed by any given national requirement against its adverse impact upon the full application of the Union law.\(^\text{704}\)

7 MEMBER STATE LIABILITY

The question in Member State liability is about failure to fulfil the duty to transpose directives into national law in accordance with Article 288 TFEU (ex. 249 TEC). This duty includes introducing into national law substantive rules meeting the demands of the directive in question and complementing the substantive rules with rules on procedures and remedies that satisfy the principles of equivalence and sufficient effectiveness.\(^\text{705}\) The question is therefore about non-implementation or incorrect implementation of directives. The Member States are obliged to compensate injury caused to individuals due to breaches of the

\(^{700}\) C-33/76 and 45/76, Rewe-Zentral AG v Landwirtschaftskammer fur das Saarland and Comet BV v Produktspaar voor Siergewassen.


\(^{702}\) C-19/08 Petrosian, Dougan, Michael: The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts (2011), pg 419.


\(^{704}\) Dougan, Michael: The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts (2011), pg 420

\(^{705}\) Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pg 35.
Union law. This chapter examines the potential for compensation for injury caused to citizens as a consequence of an imprecise or insufficient transposition of the Directive on Fixed-Term Work in accordance with the CJEU’s case law.

The idea that infringement of the Union law by a Member State should be actionable under national regimes of public non-contractual liability is not new. Although the principle of State Liability in its current form was developed by the CJEU in its case law in the 1990s, the CJEU suggested as early as 1975 that persons affected by the failure of a Member State to fulfil an obligation under the Union law should obtain redress before national courts.\footnote{Bull EC Supp 9/75, t8 and Prechal, Sacha: Directives in EC Law (2003), pgs 271-272.} Moreover, as regards infringement of Article 267 TFEU (ex. 234 TEC), the Court suggested as one of the remedies an action for damages against the Member State concerned by the suit of the party adversely affected. During the preparation of the Treaty on the European Union, and still prior to the Francovich ruling, the Commission proposed to include a provision stipulating that the Member States should be obliged to compensate the consequences of infringements of the Union law in the Treaty. Furthermore, according to the proposal the institutions should enact harmonising or coordinating measures for that purpose if necessary. Such provisions were not finally included in the EU Treaty, however.\footnote{Bull EC 2/91, pgs 152-153 and Prechal, Sacha: Directives in EC Law (2003), pg 271.} Before the CJEU gave its fundamental Francovich ruling, which recognised the principle of Member State liability, national courts decided numerous cases involving breaches of the EU law under relevant national rules of non-contractual liability.\footnote{Prechal, Sacha: Directives in EC Law (2003), pgs 271-272}

The Francovich rulings C-6/90 and C-9/90 considered Directive 80/987 relating to protection of employees in the event of the insolvency of the employer. The CJEU took the view that the right of a Member State to which a Directive is addressed to choose among several possible means of achieving the objective the directive required, does not preclude the right of individuals to direct enforceability before the national court, provided that the content of the right can be determined sufficiently precisely solely on the basis of the provision of the directive. The insolvency provisions are sufficiently precise and unconditional with regard to identifying persons entitled to the guarantee. The persons concerned cannot enforce those rights before the national courts where no implementing measures are adopted by the Member State, since the provisions of the directive do not identify the person liable to provide the guarantee and the state cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.\footnote{C-6/90 and C-9/90, Francovich and Others, paras. 25-26.}
The Court laid down the general requirements of Member State liability in Francovich. Where a Member State fails to fulfil its obligation under the third paragraph of Article TFEU 288 (ex. 249 TEC) to take all the measures necessary to achieve the result a directive prescribes, the full effectiveness of the rules of Union law requires that there should be a right to reparation provided that three conditions are fulfilled.\(^\text{710}\) Firstly, the purpose of the Directive in question must be to grant rights to individuals. Secondly, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State’s obligation and the damage suffered.\(^\text{711}\)

Furthermore, the precondition for the Member State liability is that the infringement must be sufficiently obvious. In relation to this precondition, the Court of Justice has stated that the decisive test for finding that a breach of the EU law is sufficiently serious is whether the Member State or the EU institution concerned manifestly and gravely disregarded the limits of its discretion.\(^\text{712}\)

If a Member State makes choices related to legislation subject to implementation and the margin of discretion of the Member State has been other than narrow, \(^\text{713}\) the preconditions for whether it has exceeded the limits of discretion can be summarised as follows:

- the clarity and precision of the rule breached
- the measure of discretion left by that rule to the national or the Union authorities
- whether the infringement and the damage caused was intentional or involuntary
- whether any error in law was excusable or inexcusable
- whether the position taken by a Union institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Union law.\(^\text{714}\)

Infringement of EU law is always deemed to be as obvious as required for Member State liability if it has continued regardless of (1) judgment of the failure to comply with the Member State obligations; (2) the act or failure is contrary to

\(^{710}\) C-6/90 and C-9/90, Francovich and Others, para. 39.

\(^{711}\) See also C-91/92, Faccini Dori, para 27.


EU law, which can be stated in the preliminary ruling; (3) the failure to comply with the EU law can clearly be demonstrated from the settled case law of the CJEU; and (4) a decision of the court whereby the authorities of the Member States are obliged to enforce the interim order.\footnote{715 C-48/93, Brasserie du Pêcheur SA, para. 57 and Ojanen, Tuomas (1999), Lecture Material on Työoikeus ja EY- Oikeuden Yleiset Opit, pg 4.}

In the CJEU case law, the clarity and precision of the rule breached has been deemed to be the most important precondition of Member State liability since the Francovich ruling. The CJEU has deemed it justified to require precise content from the directive so that rights thus created for private persons shall be recognizable from the provisions of the directive.\footnote{716 C-48/93, Brasserie du Pêcheur SA, para. 56, Raitio, Juha: Eurooppaoikeus ja Sisämarkkinat (2010), pg 244. Joutsamo, Kari - Aalto, Pekka - Kaila, Heidi - Maunu, Antti: Eurooppaoikeus (2000), pg 327.}

The Court took a stance on fulfilling the criteria of the Member State liability of Clause 5 in the C-268/06 Impact case. The court considered in accordance with the Francovich case that, irrespective of the right of the Member States to choose among several possible means of achieving the result required by the directive, this did not preclude the opportunity for individuals to enforce rights before the national courts, the content of which could be determined sufficiently precisely on the basis of the provisions of that directive alone. Therefore, the rights shall be identifiable in an unconditional and sufficiently precise manner to comprise minimum protection in favour of individuals, as was the case in the Francovich ruling, which concerned a minimum guarantee for the payment of wage claims in the event of the employer’s insolvency. In respect of the requirement of identification of rights, the Court also referred to the Pfeiffer and Simap cases. In the former, the court confirmed that individuals may rely upon Article 6(2) of Directive 93/104 before the national courts against the Member State, since it imposes in an unequivocal manner a precise obligation for the result to be achieved for the Member State. The result was the same in the C-303/98 Simap case, which concerned the provision of a maximum reference period in the working time directive.\footnote{717 Joined Cases C-397/01 and C-403/01 Pfeiffer, para 105, C-303/98 Simap, para 68. Case C-268/06, Impact, para. 74.}

Contrary to what was accepted in the Francovich, Pfeiffer and Simap cases, the CJEU found in Impact that Clause 5(1) of the Framework Agreement does not contain any unconditional and sufficiently precise obligation capable of being relied upon in the absence of transposing measures taken within the requisite period by an individual before a national court.\footnote{718 C 212-04, Adeneler, para 88 and Case C-268/06, Impact, para.73} Therefore the Court of Justice rejected the Commission’s suggestion that Clause 5(1) of the Framework
Agreement also establishes such minimum material protection as to require objective reasons to justify the renewal of successive fixed-term employment contracts or relationships in the absence of any other measures intended to combat the abuse or at least of any sufficiently effective, objective and transparent measure to that end. 719

The Court disagreed with the Commission’s view, which it saw as creating a hierarchy between the various measures referred to in Clause 5(1) of the Framework Agreement, whereas the terms of that provision themselves unequivocally show that the various measures envisaged are intended to be ‘equivalent’. The court also referred to opinion of Advocate General Kokott who stated that while the Member States are required to make effective and binding provision in their domestic law for at least one of the measures to prevent abuse referred to in Clause 5(1)(a) to (c), the Framework Agreement does not prescribe precisely which one(s). As the three measures laid down under Clause 5(1) (a) to (c) of the Framework Agreement are not ranked inter se, the Member States cannot be deemed to have failed to implement the clause merely because of not adopting individual components of Clause 5 into its national law. 720

Furthermore, the Advocate General stated that the interpretation proposed by the Commission would have the effect of rendering meaningless the choice of means allowed by Clause 5(1) of the Framework Agreement, since it would permit an individual to invoke the absence of objective reasons in order to challenge the renewal of his/her fixed-term contract, even where the renewal did not infringe the rules relating to maximum total duration or number of renewals adopted by the Member State concerned. 721 Mainly on these grounds, the court found it not possible to determine in a sufficiently precise and unconditional manner the minimum protection that should, on any view, be implemented according to Clause 5(1) of the Framework Agreement. Correspondingly on those grounds, Advocate General Kokott claimed that Clause 5 does not resemble Francovich, in which the minimum scope of protection could at least be established based on the directive. On the other hand, the CJEU found in the same judgment that Clause 4 was unconditional and sufficiently precise for individuals to be able to rely upon it before a national court. 722

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719 Case C-268/06, Impact, para. 75.
721 Case C-268/06, Impact, paras. 76-77.
7.1  CONCLUDING REMARKS

Some commentators have argued that changing the methods of the European law-making process in labour law in respect of the ways to govern a particular problem or phenomenon will decrease the value of the measures for private enforcement established by the CJEU. The tendency is that the Union resorts to less precise rules which allow derogations from the Framework Directives instead of provisions containing unconditional and unequivocal rights. It is obvious that such rules will not often be considered to have direct effect or constitute Member State liability.  

The lack of sufficient precision in the wording of Clause 5 of the Framework Agreement with regard to the direct effect precludes the fulfilment of the criterion of the Member State liability as the CJEU has confirmed. As the Advocate General argued, while the Member States are required to make effective and binding provision in their domestic law for at least one of the measures to prevent abuse referred to in Clause 5(1) (a) to (c), depending on the needs of specific sectors or categories of workers, the Framework Agreement does not prescribe precisely or unconditionally what measures shall be adopted.  

It is left for the Member States instead to choose between the three types of measure, all of which are ranked equally and one or more of which the Member States must – at their complete discretion – implement in a manner that is effective and consistent with the purpose of the Directive.  

Although there is considerable discretion left for the Member States in implementing the Directive, this does not necessarily preclude Member State liability. The CJEU has coherently followed the principle that the content of the rights conferred by the directive have to be recognizable from the wording of the directive. This is not the case with regard to Clause 5.  

As explained above, what constitutes an abuse of fixed-term contracts does not emerge from the wording of the provision. Moreover, it is sufficient for the Member State to adopt any measure listed in Clause 5 without further restrictions to implement the directive correctly. By doing so a Member State avoids the Member State liability in practice. 

As the CJEU has stated, because the rights and obligations are not defined in Clause 5 of the Framework Agreement sufficiently precisely and unconditionally

724 For example, the CJEU ruled in C-180/04 Vasallo that it was permissible in the light of the Framework Agreement Clause 5 to have different measures against abuse of fixed-term in the public sector as against private sector measures. C-180/04 Vasallo, para. 42.  
726 C-6/90 and C-9/90, Francovich and Others, paras. 25- 26.  
to be identified from the provision itself, Clause 5 lacks minimum protection guaranteed for individuals. Therefore Clause 5 is not directly applicable and consequently cannot be relied upon before the court in the Member States. According to the CJEU, the problem of lacking precision and unconditional content of the provision is related to the choice of measure. Because the obligation laid down in Clause 5 is determined in an optional manner, the right of an employee was not identifiable in the wording of the provision and therefore it is deemed not possible to require objective reasons for renewal of fixed-term contracts. In addition to the ‘optional nature’ of the measures intended to prevent abuse, the questions of what measures can be regarded as equivalent to those in the provision and what the total maximum number of renewal or maximum total duration to prevent abuse is can be raised.

As Clause 5 is too imprecise and conditional, it does not meet the preconditions of the Member State liability either. In the literature, Prechal has pointed out that there is a link between direct effect and the creation of rights, in the sense that the content and beneficiaries of the rights must be determinable with sufficient precision, although the identifiability and direct effect of rights cannot be equated. Directives may intend to create rights for individuals but further substantiation of the rights and the determination of their scope is left to the Member States. It is impossible to determine the loss and damage incurred by the individual. A directive must provide sufficient guidance in this regard. 728

As Prechal has concluded from the case law, there are at least three sets of circumstances in which the directive confers or intends to confer rights upon individuals which can be taken into account in assessment of fulfilling the requirement of the Member State liability. Firstly, there is the question of whether an individual can be party to a relationship to which the Directive in question relates. Secondly, one or more provisions of a directive interpreted in the light of its purposes must be such that it protects individual interests along with other things, like the general interest. Thirdly, there is a requirement for the practical nature of provision. In this context, the directive may be intended to confer rights even though it is not a direct source of the right in question but the actual creation will take place at a later implementing stage. In these cases, some discretion with regard to the exact scope and modalities of the content of the measures to be enacted at national level in accordance with the Directive may be left to the Member States. However, this may not lead to the conclusion that a Directive is not intended to create rights in favour of individuals. In such a situation, the actual rights may result from the national measures, which must, for this very reason, be sufficiently precise and enforceable

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728 Prechal, Sacha: Directives in EC Law (2003), pgs 118-130 and 283-284
positions. In other words, the rights conferred by the Directive can be identified in a sufficiently precise manner only after being implemented in national law.

On the other hand, as the CJEU has stated, a breach of the Union law will clearly be sufficiently serious if it has continued despite the settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement. The Court of Justice has taken a stance on acceptable use of fixed-term contracts in the Adeneler and Angelidaki cases. These judgments have features in common. In both, the CJEU specified the prohibited abuse by stating that it is not permitted to use successive fixed-term contracts in tasks which the employee has performed for years and which serve the needs of the employer that are ‘fixed and permanent’. A common feature of those judgments is that the court stated that the objective of the Framework Agreement would have been compromised or rendered meaningless had it been possible for employers to exclude fixed-term workers from the scope of the Framework Directive for an undetermined period of time. On the other hand, the Impact and Küküç rulings mean that it is sufficient for the Member State to introduce any measure listed in the provision without further restrictions to prevent abuse in accordance with Clause 5 of the Framework Agreement. Thus, it seems that the case law on acceptable use of fixed-term contracts is not settled in establishing Member State liability.

As Malmberg has concluded, the most usual manner of enforcing the EU labour law and enabling private parties to benefit from the Union law even when the Member States have failed to fulfil their duties properly according to the Treaty and secondary legislation is to apply for preliminary rulings. This concerns also situation in which a Member State’s legislation implementing the Framework Agreement on Fixed-Term Work permits the use of successive contracts in circumstances of a fixed and permanent need for labour.

In this approach, as it is declared in CJEU’s settled case law, national courts shall in cases in their jurisdiction misapply national law that may conflict with provisions of the Treaty and directly applicable secondary legislation of the Union. This model, often also called the private enforcement model of the Union law, represents the prevailing method of enforcing the EU labour law, as European citizens have obtained substantive rights deriving from the Union law more through national courts acting on the preliminary references of Article 267 TFEU (ex. 234 of TEC) than in accordance with the Article 258 of TFEU (ex. 226 TEC) infringement.

729 Prechal, Sacha: Directives in EC Law (2003), pgs 118-130 and 283-284
730 C-48/93, Brasserie du Pêcheur SA, para. 57.
731 C-212/04, Adeneler, para. 88, C-378/07, Angelidaki, para. 103.
732 C-212/04, Adeneler, para. 88, C-268/06, Impact, para. 76, C-586/10, Kücük, para. 56.
733 Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pgs 35-37
procedures. However, as the rights in Clause 5 of the Framework Agreement are not defined in a directly identifiable manner and as the CJEU’s case law shows, especially in the Kiciik and Impact cases, that it is sufficient for the Member States to introduce any measure to implement the Directive correctly, this constitutes a problem in the enforcement of Clause 5 irrespective of whether the question is the procedure of preliminary rulings or the Member State liability.

734 Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pgs 35-37
III FINNISH LAW ON FIXED-TERM CONTRACTS

1 THE PREVALENCE AND DIVIDING OF FIXED-TERM CONTRACTS IN THE LIGHT OF STATISTICS IN FINLAND

In Finland, fixed-term employment contracts increased steadily from the beginning of the 1980s until the end of the 1990s. The proportion of fixed-term employees in the entire workforce increased between 1984 and 1997 from 11 per cent to 17 per cent. In the 2000s, the proportion of fixed-term employees of the entire workforce has been steady between 15 and 18 per cent. On the European scale, Finland has also appeared to be a country where fixed-term employment relationships are being used widely. Between 2007 and 2009, fixed-term employment contracts were more numerous only in Spain, Poland, Portugal, and Slovenia. Furthermore, in Finland fixed-term work focuses on very a different part of the population compared with the other Member States on average. Especially comparing women fixed-term workers and their education in the EU-15 or the EU-25 countries, it can be seen that in Finland one-third of fixed-term workers are highly educated whereas only 16 per cent of fixed-term workers have only a basic education level. Elsewhere in Europe, fixed-term work is heavily concentrated among young people (close to 40 per cent for individuals aged 15–24). It also appears that the prevalence of fixed-term work is highest for those with the lowest education level and that it is more prevalent in the primary and construction sectors than in manufacturing. In terms of education, only 27 per cent of fixed-term workers have graduated at a high level and 33 per cent at the basic level in the EU-15 countries.

An inherent feature of fixed-term work across the entire European Union labour market is the greater proportion of women than men in almost all Member States and their significant position in every generation. Because of this, prevention of abuse arising from fixed-term contracts and equal treatment between fixed-term workers and other forms of labour promote equal opportunities between men and women.

Fixed-term contracts are commonly concluded on other than an employee’s own initiative. In 2005, almost one third of employees in the EU labour market aged below 30 had a fixed-term employment relationship, of whom 40 per cent were fixed-term duration based on other than the workers’ own initiative.\textsuperscript{741} According to the survey, covering all the Member States, the reason for limited duration of the employment was failing to find permanent work in almost 50 per cent of fixed-term employment relationships.\textsuperscript{742}

This also reflects on the duration of employment. Almost half of these fixed-term contracts lasted less than 6 months on average and in 35 per cent the duration of employment was between 6 and 12 months.\textsuperscript{743} There are also plenty of sector and reason specific divergences in the duration of the fixed-term contracts.\textsuperscript{744} This is also the situation in Finland, where the duration of employment varies on average from a month to four years. Long-term employment relationships are especially prevalent in project work, where the majority of employment relationships are concluded for at least a year. The shortest employment relationships were most typical in seasonal work, where the duration of employment is six months on average. In cases of substitution, the duration of employment varies from 6 to 12 months, these being most typical in the public sector where the fixed-term contracts are more numerous overall than in the private sector. It is worth noting that successive contracts to replace an absent employee are most numerous.\textsuperscript{745}

According to the Finnish Quality of Work Life Survey, fixed-term employees encounter unemployment, economic insecurity and an unfavourable labour market position significantly more often than permanent workers.\textsuperscript{746} This insecurity has been suggested to cause sickness and sick-leave and increasing use of medical services.\textsuperscript{747} The fixed-term worker’s access to training and other opportunities for career development also seems to be more difficult than for permanent workers.\textsuperscript{748}

\begin{footnotesize}\begin{enumerate}
\item This was more prevalent in Finland, than in the EU Member States (80 per cent). Men and women employed on fixed-term contracts involuntarily, Eurostat 2007, pg 1.
\item Also in this group, the proportion of women was greater than men. See Men and women employed on fixed-term contracts involuntarily, Eurostat (2007), pgs 1-2. In Spain and Portugal involuntary fixed-term contracts are the most prevalent in the EU (Weiler (2005). The impact of training on people’s employability. European Foundation for the improvement of living and working conditions, pg 7. Pysyvän Työn Toivossa. Työpoliittinen Tutkimus (2005), pg 16.
\item However, there are great country-specific divergences. For example, the corresponding number in Spain in 2005 was 64 per cent. Men and women were employed on fixed-term contracts involuntarily, Eurostat 2007, pg 3.
\item Eurostat, European Labour Force Survey (2009).
\item Pysyvän Työn Toivossa. Työpoliittinen Tutkimus 2005, pgs 127-135.
\item Pysyvän Työn Toivossa. Työpoliittinen Tutkimus 2005, pg 133.
\end{enumerate}\end{footnotesize}
In Finland, however, fixed-term employment relationships operate as a pathway to contracts of indefinite duration as well. This can be inferred from the fact that the proportion of fixed-term contracts of new employment relationships has been approximately 50 per cent and that the proportion of fixed-term contracts has remained approximately at the same level. Thus, some fixed-term employment relationships have been converted into indefinite duration contracts.\footnote{Määräaikaisten Työsuhteita Selvittäneen Työryhmän Raportti. Työhallinnon Julkaisu (2007), pg 27.}

Fixed-term contracts are concentrated in the public sector. In the municipal and state sectors, the proportion of fixed-term employees is approximately 23 per cent, whereas in the private sector the corresponding proportion is approximately 10 per cent.\footnote{Labour Force Survey (2005).} Both in the state and the municipal sector, the most general reason for fixed-term contracts is replacement of an absent employee with the exception of universities, where the reasons for fixed-term contracts relate to the temporary nature of research funding, which has generally led to a situation in which fixed-term contracts are restricted to one year’s duration only irrespective of the duration of the research project. The trade union representing university staff questions this.\footnote{Määräaikaisten Työsuhteita Selvittäneen Työryhmän Raportti. Työhallinnon Julkaisu (2007), pg 27.}

In the municipal sector, replacements as a reason for women’s fixed-term contracts are explained by women’s dominance in the sector and the increased rights of employees to various categories of leave determined by national employment laws. The other factor explaining the predominance of fixed-term contracts in the public sector is lack of competent personnel for the permanent positions required by the law, according to which the positions can be filled by untrained personnel only under fixed-term contracts.\footnote{Määräaikaisten Työsuhteita Selvittäneen Työryhmän Raportti. Työhallinnon Julkaisu (2007), pg 27.}

In the state administration sector, the social partners have committed themselves to reduce the use of fixed-term contracts, to ensure in future that the main form of employment is contracts of indefinite duration and that fixed-term contracts are used only when there is a job-related reason for doing so.\footnote{Määräaikaisten Työsuhteita Selvittäneen Työryhmän Raportti. Työhallinnon Julkaisu (2007), pg 29-37.} In the municipal sector, the social partners have also usually instructed the municipalities to ensure that fixed-term contracts are being used on bases determined by the law and that the reason is specified in the contract.\footnote{Fixed-term Appointments in State Administration Sector. Final Report of the Working Group for Studying the Use of Fixed-Term Appointments in State Administration 15/2003, pgs 46-50.}

The private sector is characterised by daily, weekly and yearly fluctuations in demand that are aligned with replacing absent employees, which explains the

use of fixed-term contracts as well as temporary agency work.\textsuperscript{755} According to the
trade unions representing employees in the private sector, the biggest problems
in using fixed-term contracts are related to the temporary agency work where
successive fixed-term contracts are often used without justifiable reasons.

2 FIXED-TERM WORK IN FINNISH LAW PRIOR TO
IMPLEMENTATION OF DIRECTIVE 99/70/EC

2.1 INTRODUCTION

Since restrictions on the unlimited use of fixed-term contracts become actual only
after restrictions on the use of indefinite duration contracts, protection against use of
successive fixed-term employment contracts must be seen vis-à-vis development of
employment security for indefinite duration contracts. Thus, in order to understand
the need to establish protection against successive fixed-term contracts, it is useful
to examine the development of protection against unjustified dismissal.

In Finland, there was no legislative protection against unilateral termination
of employment contracts prior to the 1970 Act on Employment Contracts
(työsopimuslaki). According to the 1922 Act on Employment Contracts, both parties
to an employment relationship were free to terminate the contract of employment
without any reason.\textsuperscript{756} However, the introduction of protection against
unjustified dismissals was inspired by the ILO Termination of Employment
Recommendation, 1963, in which the leading principle was that an employment
contract of indefinite duration must not be terminated without a legitimate
reason relating to the operational demands of the enterprise or the ability of
the employee or his/her behaviour. The Finnish labour market confederations
adopted this Recommendation by concluding the General Agreement on
Protection against Dismissal in 1966. However, the National Committee on the
Employment Contracts Act examined protection against unjustified dismissal as
well. The Committee considered that protection against unjustified dismissals
should be extended to the employment relationships of unorganized employers

\textsuperscript{755} Määräaikaisen Työn Yleisyys, Kiitotön Lainmukaisuus ja Lainsääädännön Kehittämistarpeet. Työhallinnon
Julkaisu (2007), pg 29-38. In 2005 33.8 per cent of temporary agency workers were employed in the service
sector, 24 per cent in the industrial sector, 12.9 per cent in administration, office and tourism and IT sector
jobs, 12.5 in the commercial sector and 6.9 per cent in the social and healthcare sector.

\textsuperscript{756} Sipilä, Arvo: Suomen Työoikeus I (1947), pg 80 and Kallio, Teuvo: Työsopimuksen Irtisanomisperusteista
(1978), pg 32. The only exception was a prohibition on terminating the employment contract of an employee
who is giving birth. Valkonen, Mika (2001), pg 36.
where the collective agreements were not applied.\textsuperscript{757} Mainly on these grounds, the Finnish Parliament thought it justified to limit an employer’s unrestricted right to give notice in the Employment Contract Act which came into force at the beginning of 1971.

As a consequence of this legislative employment security, the desire of employers to avoid concluding permanent contracts by recourse to successive fixed-term contracts have somewhat increased.\textsuperscript{758} On the other hand, in Finland it is traditionally deemed possible to agree on the term of notice in the fixed-term contract so that it expires at the end of term unless it is terminated by either party before the expiry on grounds determined by the Employment Contracts Act (economic or individual reasons) and by the notice period.\textsuperscript{759} An employment contract concluded for longer than five years may, when five years have elapsed from the beginning of the contract, be terminated on the same grounds and using the same procedure as an employment contract concluded for an indefinite period, irrespective of whether or not the parties have agreed on that.\textsuperscript{760}

\subsection*{2.2 TOWARDS RESTRICTIONS ON THE USE OF FIXED-TERM CONTRACTS}

There were no restrictions on concluding fixed-term contracts in the original 1970 Act on Employment Contracts. The legislator took no stance on whether the emphasis in interpretation should be imputed to the practical needs of working life or to the protection of the employee. The parties to the employment contract were


\textsuperscript{758} Tiitinen, Kari-Pekka: Määräaikainen Irtisanomisehtoinen Työsopimus (2006), pg 368 and Committee Report on the Employment Contracts Act 1969:A25. This was allowed by the Employment Contract Act of 1970, according to which a fixed-term employment contract expires at the end of the contract period without notice unless the parties have agreed that the employment is to be continued for another fixed-term or for an indefinite period of time unless not terminated by the employee or employer for a certain period before the end of contract period. This stance was justified by the freedom of contract and the intention of the Committee to leave the determination of employment security to the social partners.

\textsuperscript{759} The Finnish Supreme Court has accepted the term of notice in fixed-term contracts in its judgment KKO 2006:4, which, however, does not constitute the right for the employer to lay off workers. In the judgment, the Court found the condition of notice not violating the principle of the employee’s protection as the termination requires legal grounds to be satisfied. In this regard, however, the case law is contradictory as the Supreme Court prohibited the Clause in KKO 1996:127 on fixed-term contracts which entitled the employer to lay-off the fixed-term employee on the same grounds as a permanent employee. The Court found this to be inconsistent with the intention of the fixed-term contract, which was to ensure work performance for the employer and wages for the employee for a period, the duration of which is determined by the employer’s risk. Government proposal 157/2000 for paragraph 6:1 § of the Employment Contract Act (HE 157/2000 vp pg 87 and pgs 90-91). Otherwise, a fixed-term contract is not terminable during its term without some extremely serious cause committed by the employee or negligence of duties when the employer is entitled to cancel an employment contract with immediate effect.

\textsuperscript{760} Employment Contracts Act para 6:1.2 §.
therefore free to choose the duration of employment. Correspondingly, the renewal of the employment contract was in principle free from restrictions.\footnote{761}{KM 1969:A 25, Sosiaalivaliokunnan Mietintö no 33/1969, pg 2. Jalanko, Risto: Määriäikainen Työsopimus (1990): pgs 46-47.}

The later case law of the Supreme Court in Finland paid increasing attention to the situations in which choosing the duration of employment was aimed at circumventing protection against unjustified dismissal. In respect of this, the Supreme Court of Finland established a precedent in 1978 stating that several fixed-term contracts were valid for an indefinite period of time, irrespective of the period defined in the contract, in circumstances where the employees had been employed for several months before concluding the written contract, the purpose of which was to achieve employment contracts of indefinite duration valid for one month at a time.\footnote{762}{KKO 1978 II 45, KKO 1980 II 84 Kallio, Teuvo: Työsopimuksen irtisanomisperusteista (1978), pg 70.}

The labour market confederations referred to the above mentioned precedent in their General Agreement on Protection against Dismissal. Their interpretative instructions stated that the assessment of whether the employment contract was valid for a fixed-term or an indefinite period of time shall be made on a case-by-case basis. In respect of this, the most crucial factor is the contract. However it was emphasised that as far as successive fixed-term contracts were being concluded with the intention to circumvent the provisions of protection against unjustified dismissal, they might constitute a contract of indefinite duration.\footnote{763}{General Agreement on Protection against Dismissal concluded by labour market confederations SAK and STK in 1978.}

The original freedom to conclude fixed-term contracts was restricted by the legislator at the beginning of the 1980s on the same grounds as the social partners did before. The preconditions for the use of fixed-term contracts were laid down by the amendment to the Act on Employment Contracts in 1984. According to paragraph 2 of the Act, a fixed-term contract could be concluded only if it could be justified by the nature of the work, substitution, training or some comparable reason or if the employer had other reasons related to the activity of the enterprise or to work performed which required the contract to be fixed-term. These reasons were not defined exhaustively, but other reasons, which were deemed as comparable to reasons mentioned in the provision, also came into question. These restrictions were applied both to single and successive fixed-term contracts.\footnote{764}{Government Proposal for Employment Contracts Act, 205/1983, pgs 26-27.}

The nature of the work was a justified reason for a fixed-term employment contract; for instance, when the question was about an accurately determined job entirety or short-term work that the employer did not carry out on a regular, ongoing basis. Furthermore, the seasonal nature of the work may constitute a justified reason
for concluding a fixed-term contract if the work is carried out in a particular part of the year only or the amount of work varies considerably from one season to another. According to the previous Act on Employment Contracts of 1984, being of seasonal nature also entitled fixed-term contracts under circumstances of temporary peaks in sales or in production or when the volume of orders varied temporarily. However, the employer must have sufficient grounds to presume that the rise in volumes is only temporary. Fixed-term employment contracts cannot be used when the demand for labour is permanent or stable.

Replacement of employees also constitutes a justified reason for concluding a fixed-term contract. In this respect, replacement is understood as an arrangement where the absent worker is replaced by a substitute or filling the deficit in the workforce caused by the absence of a worker. In these situations, the duration of the employment contract of the substitute may be related to the return of the permanent employee, or the tasks of a substitute may be defined on the grounds of the absence of one or several employees and the personnel arrangement derived therefrom. This means that the length of contract period may vary from days to several years. Training may also constitute a justified reason for a fixed-term contract. Training in this respect means practical training prescribed in the statutes concerning official training and learning programs or student programs.

The regulation laid down two requirements for the use of fixed-term contracts. The initial contracts were required to have a justified reason as explained above. In addition to this, successive fixed-term contracts were required to have a valid reason.

A fixed-term contract which was concluded without justified reason was regarded as a contract of indefinite duration right from the beginning of the contract period. Correspondingly, successive contracts without valid reason were deemed to be converted into contracts of indefinite duration from the expiry of the justified reason. There is no upper limit to the number of successive fixed-term contracts, but every contract must have a justified reason.

A valid reason as a precondition for successive fixed-term contract was deemed to come into effect from the third successive fixed-term contract onwards. The wording ‘repeatedly’ was deemed to require at least two contracts, whereas ‘repeatedly successive’ required three. The preparatory works of the Act of 1984 also take a view on the concept of ‘successive’. In accordance with this, contracts do not

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768 Kairinen, Martti: Työoikeus Perusteineen (2004), pg 179.
necessarily need to repeat each other without interruption, but the period of time between the contracts can be several weeks.\textsuperscript{769}

In earlier literature and case law, the position has been on prohibition of chaining of fixed-term contracts that the more successive contracts have been concluded the more stringently valid reasons must be interpreted.\textsuperscript{770} It is thus of significance to assess whether an employee can be employed by a contract of indefinite duration and whether the need of the employer can be deemed as permanent. In demarcation between prohibited and permitted use of successive contract attention was paid to the assessment of whether the parties to the employment aimed at a contract of indefinite duration and therefore circumvented the protection against unjustified dismissal.\textsuperscript{771} The latter criterion was already included in the Employment Contract’s Act of 1984, whose preparatory works included a prohibition on circumventing compulsory provisions by choosing the duration of employment. This same stance, adopted by the Supreme Court of Finland in 1978, was taken as the cornerstone in tackling abuse of successive fixed-term contracts. On the other hand, there was no intention otherwise to restrict the right to use fixed-term contracts within the limits of the Act whenever the practical needs of working life required them. As the restrictions laid down in the Act are of a protective nature, they are not applied when the fixed-term contract is concluded on the employee’s initiative.\textsuperscript{772}

\subsection*{2.3 Case Law in the 1990s on the Use of Successive Fixed-term Contracts}

In the 1990s, the Supreme Court of Finland paid attention to the number of contracts and their maximum total duration, the continuation of employment without interruption, the similarity of the tasks performed and their frequency in the assessment of the legitimate use of successive fixed-term contracts. However, no unambiguous interpretation line on how many successive contracts could be concluded or in respect of maximum total duration was established.

In the case KKO 1989:100, the city had concluded six repeatedly successive contracts almost without interruption within two years. The Court did not consider the nature of the task as constituting a valid reason to conclude successive contracts because the tasks typical of different seasons were repeated regularly during the two-year employment. In KKO 1993:70, the Supreme Court deemed the budget limit

\textsuperscript{769} Government Proposal 205/1983, pg 27.
\textsuperscript{770} For example, KKO 1995:13 and KKO 1995:14
on employing funds as not a valid reason to conclude nine repeatedly successive fixed-term contracts within one year.

In assessing valid reasons for concluding successive fixed-term contracts, the Supreme Court has also to some extent taken prevailing sectoral custom into account, especially in the construction and restaurant sectors, temporary agency work and certain occupations such as sportsmen, actors and musicians. In the KKO 1995:70 case, the court viewed the specific characteristics of road construction work and its prevailing custom in the sector as a valid reason to conclude five almost successive fixed-term contracts within 1.5 years. However, the number of renewals and total duration of the agreements also affect the legitimacy of this reason as the Supreme Court determined in the case KKO 1995:14. In this judgment, the Court took the view that the Road Administration of Finland did not have valid reasons for almost 50 successive contracts within seven years despite the specifics of the sector. Therefore, the court indicated that the contracts had to be transformed into contracts of indefinite duration. The Supreme Court has also permitted repeatedly successive of fixed-term contracts for a restaurant which operated on an irregular basis and had therefore decreased opportunities to employ waiters otherwise than under fixed-term contracts.

Consequently, if the employment contracts are concluded mainly for a fixed-term in a particular sector or occupation to because of its regular custom, this has been of significance is assessing the validity of reasons for successive contracts. Although a regular custom is not treated as a separate justified reason for concluding a fixed-term contract in the Employment Contracts Act, these reasons fall into the category of the nature of the work and some other reasons related to the activity of the enterprise. Under these circumstances, the burden of proof of why derogation should be made from established custom is transferred to the employee.\footnote{773} To conclude, consideration has been given in the Finnish case law on the preconditions for successive fixed-term contracts prior to 1996 to the number of fixed-term contracts and their total duration, as well as the similarity and repetitiveness of the tasks performed during the contract periods.\footnote{774}

However, the Supreme Court considerably lowered the threshold of a valid reason for concluding fixed-term contracts in its judgment concerning the public sector in 1996. The Court found that the city as an employer had valid reasons to conclude over 90 repeatedly successive fixed-term contracts with an employee within six years on the grounds of replacement of employees provided, firstly, that each contract had a justified reason; secondly, the aim of the employment


relationship was not a contract of indefinite duration and, thirdly, that the employer did not attempt to circumvent protection against unjustified dismissal.\textsuperscript{775} The Supreme Court argued in its judicial assessment that replacement of employees may constitute a valid reason to conclude successive contracts irrespective of the total duration or number of renewals. The Court also reasoned that, irrespective of the long duration of employment, the contracts do not convert into of indefinite duration contracts solely on the grounds of their number or the time they covered. In this precedent, the Supreme Court clearly altered its previous justification, according to which a large number of contracts and long total duration are strong indications that valid reasons to conclude successive fixed-term contracts are lacking and there is an attempt to circumvent protection against unjustified dismissal. This legal position adopted by the Supreme Court enables the use of successive contracts for an undetermined period of time, which in fact implies circumventing the protection against unjustified dismissal. This can also be deemed as abuse of successive fixed-term contracts that contradicts the objective of Clause 5 of the Framework Agreement on Fixed-Term Work. On the other hand, this strongly resembles the point of departure of the CJEU’s Küçük ruling, in which the Court deemed that successive fixed-term contracts concluded for the long term, even over 11 years, intended to cover tasks of employees who were on leave which were a permanent and normal activity of the employer on grounds of replacements constituted objective reasons in accordance with Clause 5, irrespective of whether the question was of a temporary or permanent need or whether the employee could have been employed on a contract of indefinite duration.\textsuperscript{776}

The Labour Court of Finland considered the total duration of the contracts and the number of renewals as preconditions for objective reason in its case law earlier than the Supreme Court and even prior to the implementation of Directive 99/70/EC. In its judgment in 1999, the Labour Court considered that the employer did not have valid reasons for concluding successive fixed-term contracts whose total duration varied between 16 months and 2 years 9 months and which consisted of 2-5 successive contracts.\textsuperscript{777} The case concerned successive contracts justified by replacement derived from temporary sick leaves without justifying each contract by the absence of a particular employee. Under these circumstances, the Court deemed that the repeated need and the great number of replacements indicated that at least some replacements could have been employed on contracts of indefinite duration.

\textsuperscript{775} KKO 1996:105. In accordance with this line of justification, the Supreme Administrative Court argued in 2000 that a municipality as an employer had valid reasons for over 150 repeatedly successive fixed-term contracts within seven years. KHO 16.11.2000 T 2941.

\textsuperscript{776} C-586/10, Küçük. Paras 38 and 56.

\textsuperscript{777} TT:1999-11.
At the end of the 1990s, the Finnish legislature enacted two different acts with temporary validity that, by lessening the requirements for concluding fixed-term employment contracts, were intended to promote employability and decrease long-term unemployability. The first Act, according to which the a single fixed-term contract could be concluded without justifiable reason for a minimum period of six months with an unemployed person whose unemployment had lasted continuously for a year, was stipulated to be in force during the years 1995 – 1996. The second temporary valid act was aimed at enhancing employability during the difficult labour market situation between 1997 and 1999. Firstly, it allowed single fixed-term contracts on the new ground of “instability of demand for services” in order to increase employability, especially in the new service sector enterprises and, secondly, the use of repeatedly successive fixed-term contracts without justified reason. After the expiry of these temporary acts, the use of fixed-term contracts was again regulated by the provisions of the Act of 1984, until the Act of Employment Contracts implementing Directive 1999/70 EC came into force in 2001.

3 IMPLEMENTATION OF THE FRAMEWORK DIRECTIVE ON FIXED-TERM WORK IN FINLAND WITH RESPECT TO THE USE OF FIXED-TERM CONTRACTS

In Finland, fixed-term contracts are defined as those the expiry of which is defined by justified reasons such as reaching a date, completing a task or the occurrence of some event. Thus, the concept used in Finland corresponds with the definition of fixed-term contracts in Clause 3.1 of the Framework Agreement on Fixed Term Work. As is required by the Act, that justified reason must be related to the temporary need for labour, which justifies concluding the employment contract for a fixed-term, and the concept of justified reason can also be deemed as corresponding with the concept of objective reasons required by the CJEU in its case law.

As the justified reason requirement already existed in Finland at the time the Directive on Fixed-Term Work was implemented, the Finnish legal position did not change very much as a result of implementation of the Directive in the Employment Contracts Act of 2001. However, some amendments were made. One of the main principles in the amendment was that preconditions for the use of fixed-term contracts were not tightened but the position of fixed-term and permanent...
employees was approximated by adopting the provision of non-discrimination based on Clause 4 of the Framework Agreement and guaranteeing fixed-term employees access to information on available vacancies based on Article 6.782

As far as the use of fixed-term contracts is concerned, the legislator abolished the detailed list of situations in which objective reasons exist and stipulated a general clause according to which an employment contract is valid indefinitely unless it has, for justified reasons, been made for a specific fixed term. Furthermore, contracts for a fixed term on the employer’s initiative without justified reason, and successive fixed-term contracts concluded without justified reasons were to be considered valid until further notice.

Despite the slight change in wording (valid reason was changed to justified reason) the legislator did not intend to change the legal position in the Employment Contracts Act in this regard and these criteria explained in the chapter concerning the legal position prior to implementation of the Directive as well as case law must be taken into account in assessing the permissibility of successive fixed-term contracts.783 If the need for labour is permanent, the employment contracts shall be valid until further notice.784 Thus, concluding successive fixed-term contracts is permissible provided that, firstly, there is a justified reason for each contract; secondly, the needs of the employer are not estimated permanent and, thirdly, protection against unjustified dismissal is not circumvented. With regard to the permanent need for labour as a criterion included in the preparatory works, the legal position was changed from the previous situation. When employment contracts have been concluded repeatedly on the same grounds, these grounds lose gradually their validity as a justified reason for a new fixed-term contract. The total duration of fixed-term contracts and the number of renewals must therefore be taken into account in assessing whether successive contracts concluded on the same grounds constitute a contract of indefinite duration. As the duration of need for labour is significant in assessing whether successive contracts have been converted to indefinite duration, the Supreme Court’s judgment 1996:105 can no longer be used as an interpretative aid in valid law.785

783 See Government proposal 157/2000 for paragraph 1:3.2 § which states that the previous legal position must be taken into account when the existence of objective reasons is assessed. On the other hand, in a valid act it is specified, as against the previous one, that the use of fixed-term contracts is not permitted when the need for labour is permanent. The Supreme Court seems to have followed this principle in its KKO 2012:2 precentent. See chapters 2.1-2.2 of Finnish part of the research.
785 Note TT:2006-64, TT:2006-65, TT:2009-34 where the Labour Court paid attention to the criterion of whether the employer could have taken on the employee in the jobs under consideration using a contract of indefinite duration.
It is noteworthy that, along with the Employment Contracts Act amendment, the threshold for using successive fixed-term contracts has somewhat increased. The more successive fixed-term contracts have been concluded and the longer the period they cover, the more requirements can be imposed on the justified reasons. On the other hand, simply the number of fixed-term contracts is not significant when permanence of need for labour is assessed. In addition, the likelihood of additional work after the expiry of the contract period must be taken into account.

In the Act implementing the Directive, the Finnish legislator also shortened the notice period of the indefinite duration contracts, the duration of which has been at most a year, in order to increase flexibility in the labour market. The aim of shortening the notice period in short employment relationships was to reduce the threshold for employing personnel under permanent relationships and to increase the attractiveness of contracts of indefinite duration compared with fixed-term contracts. This amendment was made in 1995 and was adopted in the valid Employment contracts Act as well.

The principle of non-discrimination laid down in Clause 4 of the Framework Agreement on Fixed-Term Work affects the use of fixed-term work as well. The Finnish legislator implemented this principle by incorporating in the Employment Contracts Act a provision according to which compared to terms in other employment relationships, less favourable terms of employment must not be applied to fixed-term and part-time employment relationships merely because of the duration of the contracts without justified reason.

Before this amendment inspired by the Directive, there was no legislation in Finland protecting fixed-term employees against discrimination in respect of terms of employment solely on the grounds of duration. The previous Employment Contracts Act contained only a general prohibition on unjustified different treatment on the grounds of origin, religion, sex, age, political or trade union activity or any other comparable reason. Although the duration of employment does not necessarily seem a legitimate reason for unfavourable treatment, the previous Act did not directly prohibit discrimination against fixed-term employees with regard to the terms of employment.

As the duration of employment is an essential term of employment, objective grounds related to the temporary nature of the work are required to justify this term of employment. As it is required by the Employment Contracts Act that objective reasons must exist from the first contract onwards, the Finnish Employment

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786 Preparatory works of paragraph 6:3 of the Employment Contracts Act.

787 See, for example, Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed- Term Work in the EU (1999), pgs 94-95.
Contracts Act is consistent with the principle of non-discrimination and is also more stringent than is required by Clause 5 of the Framework Agreement.

As a prohibition on concluding successive fixed-term contracts without a valid and justified reason is an essential part of the protection of fixed-term contracts, the term of notice may be problematic in realising this protection in some situations. For example, if the parties to a fixed-term contract have agreed that the employment is to be continued for another fixed-term or until further notice unless not terminated by the employee or the employer for a specified period prior to the expiry of the contract period, this may lead to long-term use of fixed-term employment and complicate identification of objective and transparent reasons for the contract, but offer flexibility in situations where the expiry of work is not known beforehand.\textsuperscript{788}

\section*{3.1 SUCCESSIVE CONTRACTS AND CONTINUITY OF EMPLOYMENT}

Despite the improvements carried out by the Finnish legislator at the end of the 1990s, which concerned grievances in such matters as pension accrual, pay for sick leave and the right to leave of absence for studies in short-term employment relationships, general improvement in these issues came about only through the amendment of the Employment Contracts Act in 2001. The act was complemented by the provision that, in respect of employment benefits calculated in relation to the length of employment, successive fixed-term contracts – including short interruptions between the contracts – are to be considered as continuous employment.\textsuperscript{789} This provision must be applied irrespective of the existence of objective reasons for successive employment contracts.\textsuperscript{790} In accordance with the Act, annual holidays and other benefits related to the duration of the contract are determined in the same way for fixed-term employees and employees on open-ended contracts. These provisions implied that fixed-term workers became entitled to the same benefits accorded to permanent employees in relation to their duration of employment.\textsuperscript{791}

According to Clause 1 (b) of the Framework Agreement, the purpose is to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. In the Employment Contracts Act,\textsuperscript{791}

\begin{itemize}
\item \textsuperscript{788} Tiitinen, Kari-Pekka-Kröger, Tarja: Työsopimusoikeus (2008), pg 385.
\item \textsuperscript{789} Government proposal 78/1996.
\item \textsuperscript{790} Government Proposal for Employment Contracts Act, 157/2000, pg 65. This principle was not a novelty in Finland and was originally based on an interpretation in the literature half a century ago according to which employment relationship can be deemed to be uniform even if the obligations between the parties of employment were based on separate consecutive employment contracts. Vuorio, Jorma: Työsuhteen Ehtojen Määramaaminen (1955). This principle has been established practice complied with by Finnish courts. See, for example: Labour Council 1255-90. Kairinen, Martti: Työoikeus Perusteineen (1995), pg 10.
\item \textsuperscript{791} Employment Contracts Act, para. 2:2.2 §.
\end{itemize}
there is no provision determining the circumstances in which fixed-term contracts should be deemed successive. However, in order to describe the preconditions of application of the provision concerning a continuous employment relationship and finally paragraph 1:3.2 of the Employment Contracts Act, it is necessary to review how those concepts are traditionally understood in Finnish jurisprudence.

The concept of ‘successive contracts’ relates to the number of contracts in the chain and the maximum period between the contracts notwithstanding which they can be deemed successive. In the Employment Contracts Act, the maximum allowed duration of interruption between the employment contracts designed to prevent circumvention of the provision has not been defined. It must be assessed in each individual case instead, taking the maximum total duration of the employment contract and its interrelationship to the individual benefit concerned into account. In the case of long total duration of employment where the work is being performed for years in several continuous fixed-term employment contracts and where the question is about earning annual leave, even a week’s interruption is deemed to be possible. However, the shorter the duration of employment is the shorter the maximum interruption allowed is. The concept of continuous employment cannot be equated to the concept of successive fixed-term employment, although the former must be taken into account when successive contracts are defined in order to prevent abuse of successive fixed-term contracts in accordance with Clause 1(b) of the Framework Agreement on Fixed-Term Work. Thus, it is not justified to interpret the period of maximum total interruption more narrowly than the concept of successive contracts as perceived in the jurisprudence. According to the literature, fixed-term employment contracts can be deemed successive even despite several weeks’ interruption between them.

In Finnish case law, fixed-term contracts are also deemed to be successive notwithstanding even a month’s interruption. Thus, continuous employment cannot be required in order to deem fixed-term contracts successive, unlike in the United Kingdom. This stance is justified by the fact that by fixing the duration of interruption between the contracts, the circumvention of protection against abuse arising from successive contracts cannot be prevented. The CJEU in the Adeneler case, as explained in chapter 3.3.1 of the EU part of this thesis, supports this stance. As the employment relationship is deemed to be valid until further notice immediately when objective reasons are lacking irrespective of the number of contracts in the

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chain, the term ‘successive’ is understood appropriately in the Finnish legal order with regard to the prevention of abuse arising from fixed-term contracts.

3.2 SANCTIONS ON UNJUSTIFIED USE OF FIXED-TERM CONTRACTS

As the main purpose of restrictions on the use of fixed-term contracts laid down by the Employment Contracts Act is to prevent the use of such contracts to circumvent the protection of employment security related to contracts of indefinite duration, it is appropriate to establish sanctions on recourse to fixed-term contracts for other purposes than those determined in the law.

According to the Employment Contracts Act, a contract made for a fixed-term on the employer’s initiative without justified reason, and consecutive fixed-term contracts concluded without justified reasons, shall be converted to indefinite duration. Thus the term of fixed duration in employment contract concluded without justified reason on employer’s initiative is ineffective and the employment contract is valid for an indefinite duration rather being deemed to be void as a whole. The consequence is the same if the employer permits the work to be continued after the expiry of the contract period. The provisions on employment security, notice periods and compensation in the case of unjustified dismissal apply.

In these situations, the employee is entitled at the expiry of the fixed-term contract to compensation to be determined in accordance with the same criteria as for unjustified termination of a contract of indefinite duration. The following criteria are to be taken into account in determining the amount of compensation: estimated time without employment and estimated loss of earnings, the remaining period of a fixed-term employment contract, the duration of the employment relationship, the employee’s age and chances of finding employment corresponding to his or her vocation or education and training, the employer’s procedure in terminating the contract, any motive for termination originating with the employee, the general circumstances of the employee and the employer, and other comparable matters.

The employer must provide an employee whose employment relationship is valid either indefinitely or for a term exceeding one month with the principal terms of work in writing by the end of the first pay period at the latest, unless the terms are stated in a written employment contract. If an employee repeatedly concludes fixed-term employment relationships of less than one month with the same employer on the same terms and conditions, the employer must provide information on the

797 Kairinen, Martti: Työoikeus Perusteineen (2004), pg 178.
principal terms of work within a maximum of one month from the beginning of the first employment relationship. The necessary information comprises among other things the expiry or estimated expiry of a fixed-term employment contract and the justification for specifying a fixed term. Neglecting this duty has been penalised as a violation of the Employment Contracts Act and sanctioned by fines. This provision is ultimately based on Directive 91/533/EU on an employer's duty to inform the employees on the applicable terms of employment.

3.3 FINNISH JUDICIAL CONDITIONS SINCE THE EVOLUTION OF EU LAW IN THE 2000S – CONCLUDING REMARKS ON THE FINNISH LEGAL POSITION

In various sectors in Finland, the preconditions for the use of fixed-term contracts are governed by collective agreements, the terms of which equate to the requirements included in the Act on Employment Contracts explained above. When the sector is governed by a collective agreement including the preconditions for the use of fixed-term contracts, the cases are resolved in the labour court, which specialises in disputes on the interpretation of collective agreements. Otherwise the Act on Employment Contracts is applied and the general court, ultimately the Supreme Court, is competent.

The Finnish Labour Court has taken a stance on the permissibility of successive fixed-term contracts in several cases during the validity of the current Employment Contracts Act. Since it has emphasised the total duration of employment and the number of renewals as the preconditions of successive fixed-term contracts more than the requirement of a justified reason for each contract, the Court has viewed those criteria as an indication of a permanent need for labour. In the TT: 2006-64 and TT: 2006-65 cases, the employer had terminated the contract of a permanent employee on economic and production grounds and hired fixed-term employees in the former case, consisting of six successive contracts within two years and in the latter nine successive contracts within two years. The Court deemed in both cases that the employment contracts were valid until further notice from the first contract onwards. The Court reasoned that the question was not about a particular job or job entirety but about the normal activity of the factory, and that the need for labour in the production was continuous. Correspondingly, the question in case TT: 2004-42 concerned whether the employer had a justified reason for concluding

802 Act on Labour Court, para. 1.
ten almost successive fixed-term contracts within two years. The Court concluded that the need of the employer was permanent despite a few short interruptions between the contracts and small variations in the tasks.

The Supreme Court interpreted the concept of ‘permanent need for labour’ in parallel with the Labour Court in its 2008:29 judgment which concerned the permissibility of concluding single fixed-term contracts in circumstances in which employees were hired for similar tasks during the previous ten years regularly and where the question was not about completing a specific task or job entirety. The Court considered that the expiry of the task was not predictable at the outset of the employment relationship and the work was not being performed on a casual basis. Mainly on those grounds, the Court determined that the employer did not have a temporary need for labour in tasks the duration of which was not known beforehand and the expected need was long-term.

However, the Finnish Supreme Court took a completely different stance on the permissibility of successive fixed-term contracts in its judgment in 2010. The case concerned the permissibility of successive fixed-term contracts in circumstances where the employer’s activity was based solely on a sub-contract agreement between a city as a subscriber and the employer company for one year at a time. The employer company had operated since 1997, its purpose being to continue activities as long as it had preconditions. The Supreme Court held the activity of the company relatively established and thus the need for personnel was of a permanent nature. According to the Supreme Court, the activity of the company rested on the arrangement by which the city as a sole service buyer concluded a sub-contract with the employer company. In this contractual arrangement, the city could have imposed the duration and the price of the services. The Court considered that the company could not under these circumstances prepare itself for the changes on an economic basis in the normal way but could arrange its activities for one year at a time. On those grounds, the company had the right to conclude successive fixed-term contracts with an employee one year at a time for over five years.

This decision is in obvious contradiction to the judgment of the CJEU in Adeneler, where the court considered that the justification for the use of fixed-term contracts which do not refer 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, as abusive. Thus, fixed-term contracts cannot be justified by precise and concrete circumstances characterising a given activity if it is of established nature and the need for labour for the activity is permanent as was the case in Supreme Court’s case. In circumstances where the employer’s normal and regular activities consist of providing services as a sub-

803 KKO 2010:11.
contractor, where the risk of continuity is normally borne by the employer, no objective and transparent criteria related to the activity in question can be found as provided by the CJEU in Adeneler. By contrast, the use of fixed-term contracts in these circumstances can lead to a situation in which a worker is kept in the same job for years by contracts covering needs which are not of limited duration but ‘fixed and permanent’, which is abuse as the Adeneler judgement stated. 804 Furthermore, permitting the use of fixed-term contracts, as the judgment of the Supreme Court did in this regard, when the need for labour is of permanent nature means abolishing the protection of stable employment provided by the Framework Agreement and confirmed by the CJEU in Adeneler and Mangold. 805 The Supreme Court should have submitted the case to the CJEU for a preliminary ruling instead of deciding against the established case law in the CJEU.

For the sake of comparison, the Finnish Labour Court has also considered that preparing for changes in activity constitutes a justified reason for concluding fixed-term contracts. However, the Court required changes to be made in the permanent nature of the work so that preconditions for concluding successive contracts were satisfied. 806 The Labour Court applied the same reasoning to project work as a justified reason for successive contracts. The question concerned whether an employer had the right to conclude seven successive fixed-term contracts within 3.5 years in circumstances where all the work in the company was arranged in projects, the contracts of employment being linked to their duration. The employee had performed work that related to the core area of the business, did not relate to the fluctuation of production peaks and was not short-term. Despite the variation in the order book and the need for labour, work had been available continuously and the employer had also taken on people in employment relationships until further notice doing the same tasks during the contract period of the fixed-term employees. Therefore, the court determined that the employer did not have a justified reason to assume an inability to offer work after each project and deemed the employment relationship valid until further notice from the sixth contract onwards. The judgment reflects the traditional interpretation, according to which concluding a fixed-term contract on ground of duration of a particular project requires that employer must

804 C-212/04, Adeneler, paras. 68-74 and 88. See also C-144/04, Mangold, para. 64.
805 See however the CJEU’s judgment C- 586/10, where the Court ruled that employer had an objective reason for use of successive fixed-term contracts over 11 years irrespective of whether the question was of a temporary or permanent need or whether the employee could have been employed on a contract of indefinite duration, provided that the employer had an objective reason for each contract in the chain. C-586/10, Kücük, paras. 53 and 56.
have justified reasons to assume an inability to offer work after the order (or project) has been delivered.  

To summarize the development in the Finnish case law since the Directive on Fixed-Term Work was implemented, there are some divergences in interpretation between the Supreme Court and the Labour Court concerning the use of successive fixed-term contracts. The former appears to have emphasised the existence of a justified reason for each fixed-term contract, whereas the Labour Court seems to have been more concerned with the total duration of the employment relationship and the number of renewals, indicating a permanent need for labour. A shared feature of the case law is that the courts have made no reference either to Clause 5 of the Framework Agreement or to the case law of the CJEU. Furthermore, we note that there are no signs of deeming the use of successive fixed-term contracts illegal on the principle of non-discrimination, despite its being possible in some of the cases. Nevertheless, in the Finnish case law the total duration and number of renewals as far as the legality of successive fixed-term contracts are concerned has been noted, and the case law is characterised by the attempts to prevent recourse to fixed-term contracts the aim of which is to circumvent the protection employment security related to contracts of indefinite duration.

However, there have been indications of more general change in use of workforce in the Finnish labour market over recent years. Companies are increasingly concentrating on their core businesses and outsourcing support from external service providers. As a result of this, cooperative contractual relationships between the companies have increased and new ‘chains’ of sub-contractors have emerged. Public sector actors are bound to arrange tendering before acquiring external services. In all these situations, the duration of the purchase agreement between companies may have implications for the duration of the employment relationships of the service provider’s employees. Organising work based on assignment agreements and sub-contracting implies in practice that some of tasks carried out by the public sector which are permanent are transferred to private actors. The shorter the contract periods are and the more often the service provider is changed the more short-term employment contracts may be. On the other hand, where repeated tendering leads to successive supply agreements between the same parties, this may result in successive fixed-term employment contracts. This increase in outsourcing has

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807 TT:2006-64, TT:2006-65, TT:2009-34. In this regard the Supreme Court has also paid attention in its judgment 2011:73 to the criterion of whether there are realistic risks with regard to continuity of tasks under evaluation, i.e., whether the need for labour is considered to be permanent.

808 See, for example, the justification of KKO 2010:11, in which the Court considered that the employer had justified reasons for successive contracts although its activity was deemed to be established and it had a continuous need for labour. Compare, for example, judgments TT:2003-13 and TT:2009-34.

resulted in a greater need for fixed-term contracts. It has also challenged the role of contracts of indefinite duration as a main rule.

Employers may choose their labour in accordance with their needs and restrictions imposed by the legislation. The point of departure in the Employment Contracts Act is that an employment contract can be concluded for a fixed-term on the employer’s initiative only where the question is of work restricted in time or a defined job entirety, and it is assessed at the point of conclusion of a contract that the work is not on offer after the expiry of the contract period. Thus, a fixed-term assignment contract or sub-contract may constitute a justified reason for a fixed-term contract only provided that the work on offer is restricted by the duration of the assignment. However, insecurity over whether the work will continue after the assignment does not of itself constitute a justified reason to use fixed-term contracts. \(^{810}\)

However, the implication of judgment 2010:11 of the Finnish Supreme Court is that insecurity about the continuity of an employer’s activity constitutes a justified reason for successive fixed-term contracts. The consequence is that the risk of entrepreneurship can partly be transferred from employer to employee. The Court stated that restricting the duration of fixed-term contracts on the ground of assignment contracts solely is also an abuse of successive fixed-term contracts as it enables an employee to be hired for the same job to satisfy needs of the employer which are not of limited duration but are fixed and permanent. \(^{811}\) The interpretation adopted by the Finnish Supreme Court is also contrary to the CJEU’s case law as it enables the use of successive fixed-term contracts in circumstances where the activity of the employer is established. In this situation, there are not very precise and concrete circumstances characterising a given activity which would be of justifying the use of successive fixed-term employment contracts. \(^{812}\) The permissibility of successive fixed-term contracts in assignment work solely on grounds of the insecurity of an employer’s activities confirmed by the Finnish Supreme Court leads to a situation in which employers have an opportunity to circumvent the rules introduced to prevent abuse, calling into question the protection of workers against the abuse of fixed-term employment contracts. \(^{813}\)

In order to remedy this, the legal position was deemed to be contrary to the Directive, and the legislator amended the Finnish legislation on use of successive fixed-term contracts \(^{814}\) by specifying when the need for labour is deemed to be

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810 Government Proposal for Employment Contracts Act, 239/2010, pgs 3-4
811 Adeneler C-212/04, para 88.
812 Adeneler C-212/04, paras 68-69.
813 Adeneler C-212/04, paras 68, 82, 88.
permanent. The new provision prohibits the repeated use of fixed-term contracts where their number or the total duration or their entirety indicates that the need of labour is permanent. According to the preparatory works, the permissibility of repeated fixed-term contracts must be assessed in the same tasks or task entirety that is performed by fixed-term workers. The amendment legalised the earlier situation adopted by the Supreme Court and the Labour Court according to which the number or renewals and total duration of employment is relevant in assessing whether the need for labour is deemed to be permanent and the more successive contracts have been concluded the more stringently the justified reasons must be interpreted.\textsuperscript{815} The maximum total duration and number of renewals has not been defined specifically but a permanent need for labour shall be assessed using these criteria, taking into account that the activity of employer or its relevant part based on fixed-term contracts is an indication of stable activity. Moreover, concluding fixed-term employment contracts with several employees in the same long-term jobs is normally an indication of established activity and permanent need for labour. The extent of the employer’s activities, clientele, and the number of assignments can also be taken into account. Although the history of the use of the workforce shall be taken into account in assessing whether the activity is stable and thus the need for labour is permanent, the preconditions for continuation of activities in the future must also be notified. Thus, as a consequence of this amendment, the activity of an employer based on fixed-term assignments or insecurity about the continuation of the activity or whether the work will suffice do not constitute automatically justified reasons for successive contracts, as distinct from the Supreme Court ruling in its 2010:11 judgment, considering especially that the use of fixed-term contracts in situations of permanent need for labour had already been prohibited by the act implementing the Directive.\textsuperscript{816}

Furthermore, this amendment reflects the determination adopted by the CJEU that it is prohibited to use successive fixed-term contracts where the worker concerned has been taken on for the same job and the contracts cover needs which are ‘fixed and permanent’, not of limited duration.\textsuperscript{817} By requiring restricted work the expiry of which is known beforehand, the amended Employment Contracts Act corresponds with the assumptions of objective reasons adopted by the CJEU in Adeneler,\textsuperscript{818} according to which an objective reason must have justification based


\textsuperscript{817} C-212/04,Adeneler, para. 88.

\textsuperscript{818} C-212/04, Adeneler, paras. 68-74.
on the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out. Furthermore, the amended act takes into account the criterion laid down by the CJEU, according to which the number of successive contracts concluded with the same person or for the purposes of performing the same work is relevant in assessing whether fixed-term relationships are abused by employers.\textsuperscript{819}

The point of departure in the Employment Contracts Act now specifies more clearly that the contract of employment can be concluded for a fixed-term only provided that it is judged when concluding the contract that the work will not be on offer after the contract period determined by objective conditions. Thus, the question must be about the work entirety of time-restricted tasks, after which the work is no longer on offer. This also corresponds more clearly with the definition and the purpose of fixed-term contracts spelled out in the Framework Agreement on Fixed-Term Work. In accordance with this definition a ‘fixed-term worker’ means a person having an employment contract or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event. Insecurity about the continuity of business cannot be deemed as an objective condition determined in Clause 3 of the Framework Agreement on Fixed-Term Work.

In future case law, what kinds of requirement are to be ascribed to the stability of the employer’s activities, as regards to the duration of assignments, the number of contracts or total duration of employment remains to be seen. However, the Finnish legislator took a justified step where the case law had shown that the abuse of successive fixed-term contracts could not be tackled solely by objective reasons as a requirement for concluding those contracts, and introduced a model in which the number of renewals and the total duration of employment were also of significance in assessing whether successive fixed-term contracts are deemed to be abusive. This solution is also in line with the notion that prevention of such abuse is the primary objective of the Framework Agreement and when it cannot be achieved by one measure, other appropriate measures must be introduced.\textsuperscript{820} It is against this objective to permit renewals of fixed-term contracts for justified reasons for indefinite times or for some unlimited period of time because this enables circumvention of the protection against unjustified dismissals prohibited by Directive 99/70/EC.

\textsuperscript{819} C-364/07, Vassilakis and Others, paras.115-117 and C-378/07, Angelidaki para.157.
\textsuperscript{820} Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 118-119. However, C-268/06, Impact, paras. 70-77.
Therefore, the interpretation of national law according to which it is sufficient to require the same justified reason for successive contracts as for each single contract does not necessarily fulfil the requirement of preventing the abuse arising from successive fixed-term contracts provided in the Framework Agreement on Fixed-Term Work. On the other hand, the CJEU has taken another direction in its recent judgment by determining that a temporary need for replacement staff may constitute an objective reason even if an employer may have to employ temporary replacements on a permanent basis, and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration or that it would constitute an abuse within the meaning of Clause 5. In this sense, the Finnish legal position on the permissibility of concluding successive fixed-term contracts on replacement grounds appears to be more stringent than that adopted by the CJEU as the previous stance adopted by Supreme Court in this respect has been gradually abolished as a result of the law implementing the Directive on Fixed-Term Work which entered into force in 2001 and by the succeeding case law of the Labour Court.

Correspondingly, an established custom alone cannot constitute an objective reason for concluding successive fixed-term contracts without justification related to the presence of specific factors relating to the activity in question and the conditions under which it is carried out. Despite it being recognised in the Framework Agreement that fixed-term contracts are a feature of employment in certain sectors, occupations and activities that may suit both employers and workers, no sector can automatically be privileged to conclude successive fixed-term contracts on the grounds of its historical tradition irrespective of the duration of the need for labour. The assessment must be made on the grounds of duration of labour needs known beforehand. In other words, the directive does not allow the exclusion of certain sectors from the scope of application of Clause 5. The Supreme Court has confirmed in several precedents that the number of renewals and the total duration of employment are crucial criteria in determining justified reasons for successive fixed-term contracts, while the court has ascribed partial relevance to the established custom in the sector as well. In this regard, however, The Supreme Court of Finland restricted the use of fixed-term contracts in temporary agency work in its recent judgment by relying on this argument on prohibition to circumvent the employment

822 C-586/10, para. 56.
protection of permanent contracts.825 A company, acting in the temporary agency sector, had concluded a fixed-term contract with an employee, the expiry of which was determined by the end of the assignment agreement between the client company and temporary work agency. The employee, however, was performing the tasks included in the normal activities of the user-company, the expiry of which was not connected to the expiry of the assignment agreement. The Court deemed that established custom alone did not constitute a ground for concluding a fixed-term contract and that a justified reason was needed in addition. The Supreme Court declared that justified reasons in temporary agency work exist only when the job is on offer for a restricted period. When such a reason was lacking, the Supreme Court deemed the contract to be open-ended.826 The Court deemed in accordance with the Framework Agreement on Fixed-Term Work that even in a sector where it is established custom to conclude employment contracts for a fixed-term only, contracts of indefinite duration are still the main rule, and objective justification is needed for restricting the term of employment.

This has also clearly been the point of departure in the last amended provision in the Employment Contracts Act, according to which it is prohibited to use fixed-term contracts if the need for labour is assessed to be permanent, and the assessment must be made on the total duration of employment and the number of fixed-term contract renewals.827 Consequently, it can be said that Finland has adopted Clause 5 of the Framework Agreement not only by introducing the requirement of objective reason but also through the maximum total duration and the number of renewals. By thus preventing abusive recourse to fixed-term contracts the aim of which is to circumvent the employment security related to contracts of indefinite duration, and requiring that fixed-term contracts must relate to the temporary nature of the job, the Finnish legal position also accurately reflects the provisions of ILO Convention No 158 and Recommendation No 166.

Thus, the interpretation of national law according to which established sectoral custom constitutes a justified reason for renewal of fixed-term contracts without requiring that the need for labour be clearly temporary enables circumvention of protection against unjustified dismissals prohibited in the Framework Agreement on Fixed-Term Work.828 Another interpretation would lead to a situation that gives rise to abuse and thus compromises the objective of the Framework Agreement on Fixed-Term Work.

825 In Finland, the use of fixed-term contracts is governed by the same rules (Employment Contracts Act, 1:3:2 §) as in a normal employment relationship.
826 KKO 2012:12.
827 Preparatory works of the Employment Contracts Act 239/2010, pgs 4-5.
The situation is the same in terms of the use of successive fixed-term contracts on the grounds of replacement. When replacement as a ground for fixed-term contract is not associated with the absence of an employee but more generally with the need for replacement caused by the absence of permanent workers in general, this may constitute a justified reason for successive contracts only if the expiry of the need for additional workers can be defined and specified beforehand. Otherwise renewal can lead to renewal of fixed-term contracts for indefinite periods or to the use of fixed-term employment contracts for unlimited periods of time or, in other words, using fixed-term contracts in tasks where the need of the employer is fixed and permanent and thus prohibited by the CJEU in Adeneler. This also constitutes circumventing protection against unjustified dismissal prohibited by the Employment Contracts Act and thus abuse arising from successive fixed-term contracts. As stated above, in this regard, the Finnish law is more stringent than the interpretation of Clause 5 adopted by the CJEU. 829

The recent ruling of the Finnish Supreme Court has taken a stance on the employer’s right to conclude successive fixed-term contracts on the grounds of fixed-term budget funds intended to cover the salary costs of a fixed-term employee. In the case, the employee had been employed by the authority under the subordination of the Ministry of Labour in eight successive fixed-term contracts almost without interruption over five years. This public sector employer had received budget funds for the employment from the European Social Fund. Because the tasks of the employee were related to the ordinary and normal activities of the employer which the employer as a public authority had to carry out and which the employee had already performed before the fixed-term contracts concerned regardless of the salary cost funding source and which continued after the expiry of the employment, the Supreme Court found that the employer did not have objective reasons for concluding those fixed-term contracts. 830 The significant point from a comparative perspective was the reference made by the Supreme Court to the objective reasons required for renewal of fixed-term contracts in the Framework Agreement on Fixed-Term Work, in the background of which the Supreme Court also assessed the permissibility of concluding fixed-term contracts in these circumstances. 831 This is also an indication that the Supreme Court perceived the requirement of an objective reason for successive contracts differently from the 1996:105 case.

The stance adopted by the Supreme Court corresponds with the line adopted by the Advocate General in pending case C-313/10, where he deemed that objective...

829 See, however, C-586/10, Kücük, para. 56.
830 KKO 2012:2. This is in line with the Supreme Court’s earlier judgment KKO 1993:70, which deemed that a public sector employer who received funds for salaries for a limited period of time only did not have an objective reason for concluding nine successive fixed-term contracts within two years.
831 KKO 2012:12.
reasons must relate to tasks carried out by the fixed-term worker which must be of a temporary nature. In addition, the Advocate General found the existence of budget funds to employ fixed-term employees too general and abstract without a practical connection with the circumstances characterising a given activity and therefore not constituting an objective reason. 832

The court continued its strict line of reasoning in its case law concerning whether a job of a project nature and its external funding constituted objective reasons for seven successive contracts within seven years in circumstances where the continuity of the funding was ensured for one year at a time. The Supreme Court stated that a job of a project nature can be deemed as an objective reason when it is known to be finished during a short foreseeable period of time. The Supreme Court referred to the criteria of permanent need for labour and the prohibition on circumventing the job security of permanent contracts. It also stated that as the foreseeable duration of research can exceed 20 years, the economic risk caused by the notice period is similar to what it is in general. According to the Court, no extraordinary threats applied to the continuity of the employer’s needs. Mainly on those grounds, the Supreme Court deemed the need of the employer permanent and the contract as valid for an indefinite duration. 833

As far as the ‘successive fixed-term contracts’ concept is concerned, a few remarks about the positions at national level and notions adopted by the CJEU are worth mentioning. As stated above, the CJEU held the national rule, according to which only fixed-term employment contracts that are not separated from one another by a period longer than 20 working days, are to be regarded as ‘successive’ within the meaning of Clause 5, contrary to the Clause. In Finland, an established notion has been that contracts can be deemed successive irrespective of the brevity (days or up to several weeks but not several months) of the interruptions between the contract periods. 834 This stance is in line with the interpretation adopted by the CJEU in the Adeneler case. The notion adopted by jurisprudence prior to the current Employment Contracts Act according to which a valid reason as a precondition for successive fixed-term contract was deemed to come into question from the third successive fixed-term contract onwards, however, is open to criticism in the

833 KKO 2001:73.
light of the Framework Agreement on Fixed-Term Work. First of all, according to the wording of Clause 5(1) a, which Finland has adopted, objective reasons shall be introduced for justifying the renewal of such contracts or relationships. Thus, there is no exclusion of the first renewal, and objective reasons shall be introduced from the first renewal onwards. Defining the concept of succession so restrictively that it cannot even be applied to a substantial proportion of successive fixed-term employment relationships is also seen as prohibited by the CJEU in the Adeneler case, where Advocate General Kokott stated in her opinion that such an interpretation is contrary to the objective of the Framework Agreement. The notion that the protection of successive fixed-term contracts is applied only from the third employment contract onwards restricts the scope of regulation inappropriately.

The Finnish legislator has also used fixed-term contracts as an employment policy tool. With regard to the ageing of the population, the main objectives of the recent amendment to the Finnish retirement legislation were postponing the retirement age and prolonging working careers.

The background to this was that the Commission had recommended that Finland should strengthen its efforts to sustain the availability of labour in the long run in accordance with the Employment Guidelines of 2003. In particular, the Commission suggested that Finland should continue action to increase the effective exit age in line with the national strategy for active ageing. The targets laid down in the Government Programme were inter alia to increase the average number of years people spend at work by 2 to 3 years by 2010.

This objective was pursued by the flexible retirement age between 63 and 68 years. In respect of this, the Employment Contracts Act was complemented by the provision according to which an employee’s employment relationship is terminated without giving notice and without a notice period at the end of the calendar month during which the employee turns 68, unless employer and employee agree to continue the relationship. The employer and the employee may agree on a fixed-term continuation of an employment relationship regardless of restrictions concerning successive fixed-term contracts laid down by the Employment Contracts Act.

The amendments were justified by Article 6 of Directive 2000/78/EC, which enables differences in treatment on the grounds of age without constituting discrimination if they are objectively and reasonably justified by a legitimate aim.

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835 See, for example, Kairinen, Martti: Työoikeus Perusteineen (2004), pg 179, where he argues that the word ‘repeatedly’ was deemed to require at least two contracts whereas ‘repeatedly successive’ requires three contracts.
including legitimate employment policy, labour market and vocational training objectives, or when the difference in treatment is related to the age limits of social security schemes, entitlement to retirement or invalidity benefits and if the means of achieving that aim are appropriate and necessary. Furthermore, the Finnish legislator determined that derogation from the provision restricting the conclusion of successive fixed-term contracts in order to pursue postponing retirement was not in breach of the principle of proportionality. 839 This kind of solution is in fact approved by the CJEU in the Palacios de la Villa case, where the Court found that national legislation according to which compulsory retirement clauses included in collective agreements are lawful and not contrary to Directive 2000/78/EC. It is lawful in a collective agreement to require that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out by the social security legislation for entitlement to a retirement pension under their regime provided that the following preconditions are satisfied. Firstly, the measure, although based on age, must be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market. Secondly, the means put in place to achieve that public interest aim must not be inappropriate and unnecessary for the purpose. 840

To sum up the Finnish legal position, it can be said that security perspectives have been emphasised more than aspirations for flexibility in the regulation. There have not been efforts to deregulate the existing labour legislation in order to facilitate the use of fixed-term contracts, as in Austria, Greece, Sweden or France, for example. As stated above, the Finnish legislator has instead tried to tighten the preconditions for use of successive fixed-term contracts after the Supreme Court judgment concerning assignment work, which was deemed abusive in the light of the Fixed-Term Work Directive. 841 After this amendment, the line of the Supreme Court has become somewhat more stringent, so that it seems to favour the prohibition on concluding successive fixed-term contracts the intention of which is to circumvent the job security of permanent contracts 842 as well as the prohibition on the use of fixed-term contracts in normal and permanent work in jobs of a permanent nature, temporary agency work, 843 and on the grounds of the temporary nature of funding intended to cover the salaries of an employee. 844

840 C-411/05, Palacios de la Villa, paras. 53-57, 62, 64, 68, 71-73, 77.
842 KKO 2011:73.
843 KKO 2012:2.
Furthermore, it seems that in Finland the enforcement of the EU Employment Guidelines has not caused waiving from the main principles governing the use of fixed-term contracts such as the prohibition on circumventing the employment security provided for contracts of indefinite duration or inserting the grounds on which fixed-term contracts can be concluded. Related to this, it is clearly stated in the National Action Plan that employment contracts valid until further notice are the main type of employment relationship, but entering into fixed-term contracts is permitted when there is a justified reason referred to in law and arising from the nature of the task or from the employer’s operations. Legislative reforms in recent years have been aimed at preventing unhealthy competition through terms of employment and putting employers in an equivalent position. Moreover, as part of measures aiming at improvement of working life in the public sector in 2003, actions were taken to convert successive fixed-term contracts into permanent ones, a tendency which has continued in the succeeding years. This tendency is fully in line with the objective of the EU Employment Policy Guidelines that suggest that labour market segmentation should be decreased and the quality of jobs improved.

The legislator has even adopted further measures to prevent abuse of successive fixed-term contracts in its most recent amendment that is in fact consistent with the Employment Policy Guidelines where Member States are urged to prevent labour market segmentation through precarious employment. The most recent amendment is also a step towards strengthening labour market protection in atypical employment relationships and represents an aspiration to limit successive use of fixed-term contracts. Recent developments in the field of fixed-term contracts thus reflect the trend in individual labour law, so that the individual rights of employees have gained importance. As the Directive on Fixed-Term Work has affected, although not crucially, national law governing the use of fixed-term contracts, it is an example of beneficial mutual interaction in law-making between the national and supranational levels, as Sciarra has suggested.

IV    BRITISH LAW ON FIXED-TERM CONTRACTS

1 THE PREVALENCE AND DIVIDING OF FIXED-TERM CONTRACTS IN THE LIGHT OF STATISTICS

The Labour Force Survey or LFS is the main source of data on the prevalence of non-standard or temporary work in the United Kingdom. The definition of temporary worker covers people on fixed-term contracts, temporary agency workers, casual workers and seasonal workers. The number of employees with temporary work increased during the early 1990s. From May-July 1996 until January-March 1999, the proportion of temporary employees stood at around 7.3 per cent of all employees. The increase in temporary work was in fixed period contracts, which consisted of half of all temporary employment, and of temporary agency work.852 Since 1997, the number of temporary workers has fallen to around 6 per cent, where it has remained since 2003, indicating that temporary work is less prevalent. However, a significant reduction occurred in the percentage of fixed-term employees, from 50.1 per cent of all temporary employees in 1997 to 44.1 per cent in the first quarter of 2007. During the same period, the proportion of temporary agency work increased from 13.5 per cent to 18.7 per cent of all temporary workers.853

According to the LFS data, the proportion of men working under a fixed-term contract was less, that is, 41.6 per cent of all temporary employees compared with women at 46.1 per cent in 2007.854 In accordance with the early survey, men were more likely to work in craft jobs,855 whereas women were more likely to work in clerical and secretarial jobs.856 There were also significant differences across industrial sectors. Just under half of the women respondents worked in the public administration, education and health sectors, whereas men were more likely than women to work in the construction857 and manufacturing sectors.858 Temporary work has been also more prevalent among the young (25-49) and ethnic minority workers. According to the LFS data in 2007, the highest proportion of all temporary

852 Barnard, Catherine - Deakin, Simon (2007), pg 113.
855 One in five men compared with one in twenty women, Koukiadaki, Aristea (2010), pg 28.
857 One in five men compared with one in a hundred women, Koukiadaki (2010), pg 28.
858 One in five men compared with one in ten women, Koukiadaki, Aristea (2010), pg 28.
employees was in the professional occupations category (21 per cent). The biggest proportion of temporary employees under a fixed-term contract was in the lower managerial and professional occupations (25.1), the semi-routine occupations (20.1 per cent) and the intermediate occupations (18 per cent of all temporary workers). It is also worth noting that fixed-term contracts are not only used among the peripheral workforce but also among the core, especially when a particular occupation forms the major group within the workplace.\footnote{859} The increase in temporary employment in the 1990s reflected a radical shift in the way of using labour in particular sectors as shown by the LFS data. The most striking was the increase in short, fixed-term contracts in the public service, particularly in health and education, which began in the early 1980s and comprised over two-fifths of all temporary work at the end of the 1990s. Budgetary difficulties, as well as the need to replace absent personnel provided the main reasons for this increase. In the private sector, temporary work increased in most sectors after the early 1980s, although often from a low base, and for the first time infiltrated sectors such as banking and finance, which were previously characterised by stable employment. However, between 1997 and 2007, the manufacturing sector faced a decrease in the proportion of temporary employees, from 12.1 per cent in 1997 to 9.5 per cent in 2007. In the construction sector, a decrease was over a corresponding time from 4.5 per cent to 3.4 per cent and in the banking, finance and insurance sector from 14.7 per cent to 13.3 per cent. In contrast, the proportion of temporary employees in the public administration, education, and health sectors increased further from 37 per cent in 1997 to 41.8 per cent in 2007. The percentage of temporary employees also increased in the distribution, hotels and restaurants sectors from 16.3 per cent in 1997 to 17.7 per cent in 2007.\footnote{860} The 1999 Temporary Employment Survey indicated a correlation between the prevalence of temporary work and the level of education among those doing temporary work. Those without qualifications were more likely to work in seasonal jobs than those with qualifications. People with a university qualification were more likely to be employed on a fixed-term contract (just under 60 per cent) than those with no qualifications (just under 40 per cent). The most common groups among fixed-term workers seemed to be the professional, managerial, associate and technical professions (just under 60 per cent).\footnote{861} As far as the reasons for temporary work are concerned, the LFS indicated an increase in the proportion of all employees working on a temporary basis because


\footnote{860} Koukiadaki, Aristea (2010), pg 29. 

\footnote{861} Koukiadaki, Aristea (2010), pg 29.
of not being able to find a permanent job – in other words, from 25.7 per cent in 2007 to 37.9 per cent in 2009. The ratio of employees under fixed-term contracts who did not want a contract of indefinite duration decreased slightly in these years from 28.6 per cent in 2007 to 25.4 per cent in 2009. The proportion of employees who had a contract with a period of training also diminished from 6.5 per cent in 2007 to 5.5 per cent in 2009. As far as employers’ motives for using fixed-term contracts, the most usual reason was to respond to a temporary increase in demand and workforce. More than one-third (36 per cent) of workplaces with some fixed-term employees used this reason to justify themselves. Almost a quarter (24 per cent) of workplaces used fixed-term contracts to replace employees on maternity leave or long-term absence. Fixed-term contracts were used to achieve and utilise specialist skills in 17 per cent of workplaces with such contracts, and 16 per cent of workplaces employing fixed-term employees used them in order to decide whether an employee should be employed on a permanent contract. Less than 10 per cent of workplaces used fixed-term contracts as a tool to maintain the number of permanent staff, achieving enhanced performance of employees, because of time-limited funding, budget restrictions, or financial constraints. It also seems that fixed-term employees face unemployment periods considerably more frequently than permanent employees.

2 FIXED-TERM WORK IN BRITISH LAW PRIOR TO IMPLEMENTATION OF THE DIRECTIVE 99/70/EC

Unlike the situation in most of the Western European countries in the 1970–1980s, the British labour law was traditionally characterised by a complete policy of non-interference of the state with regard to statutory law in industrial relations and a reliance on collective bargaining as the primary form of labour market regulation. This is called the collective laissez-faire approach. As Koukiadaki has stated, by virtue of reliance on this collective laissez-faire, non-unionised workers and therefore the majority of non-standard workers were marginalised in terms of a regulatory model and the normative conception of the labour law.

Fixed-term contracts were subject to little regulation prior to the introduction of the Fixed-Term Employees Regulations by which the Directive on Fixed-Term

865 Koukiadaki, Aristea (2010), pg 32.
Work was implemented. The basic attitude of the common law towards temporary work in general, and to fixed-term work in particular, was a highly permissive one for a long time. There is still no common law rule in the English law imposing a limit on the form in which work relations are established. The parties are free to conclude a contract for either an indefinite duration or for a fixed-term one. No minimum or maximum limit on the duration of a fixed-term contract is laid down by common law and such a contract can be renewed any number of times without being regarded as permanent. Furthermore, in common law, the contract terminates automatically at the expiry of the period. The liberal attitude towards the use of fixed-term contracts in the common law means that the concepts of renewal and extension of employment contract have not been recognised.

In case law, a fixed-term contract is traditionally determined as a contract of employment for a stipulated period of time. Instead, prior to the implementation of the Directive on Fixed-Term Work, task or purpose contracts were excluded by the dismissal legislation. In other words, fixed-term contract the expiry of which was defined by the occurrence of particular event or by the completion of a particular task was not counted as a fixed-term contract.

As a general rule, such a contract could be terminated before its expiry date except for gross misconduct or by mutual agreement. However, it was possible to include a provision in a contract enabling either side to terminate it by giving notice before the term expired.

As Freedland has pointed out, the statutory law has gradually increased in the individual employment relationships area albeit the core of the regulation governing employment relationships has remained in the common law. As Freedland has stated, a significant part of the statute law regulating the employment relationship was consolidated first into the Employment Protection (Consolidation) Act 1978 and later into the Employment Rights Act 1996. Many subsequent amendments have been integrated into this Act. Protection for employees against unfair dismissal was laid down in the Industrial Relations Act 1971. This unfair dismissal right was reintroduced with minor amendments by the Trade Union and and Labour Relations

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866 Koukiadaki, Aristae (2010), pg 32.
868 Smith, Ian - Thomas, Gareth: Smith & Wood`s Employment Law, pg 421.
869 Wiltshire County Council v National Association of Teachers in Further and Higher Education and Guy (1978) 77 LGR 272.
870 Koukiadaki, Aristae (2010), pg 32. Wiltshire County Council v NATFHE (1980) ICR 455. This also meant that these kinds of contracts were excluded from the definition of what was counted as a dismissal in the UK law, thereby closing the door on dismissal protection for those hired on this kind of contract.
872 Freedland, Mark in Chitty on Contracts (2008), pg 1008
Act 1974. The Employment Protection Act 1975 made additional amendments to the unfair dismissal provisions and especially added a more extensive set of provisions concerning remedies. Those provisions were consolidated into Employment Protection (Consolidation) Act 1978 which was amended by the Employment Acts 1980, 1982, 1988 and 1990. Some of the essential provisions were transformed into the Trade Union and Labour Relations (Consolidation) Act 1992. Furthermore the provisions concerning unfair dismissal were amended by the Trade Union Reform and Employment and Employment Rights Act 1993. The current law on unfair dismissal is mainly included in part X of the Employment Rights Act 1996.  

As Simon Deakin and Catherine Barnard have commented, the concept of fixed-term work was not part of legal and policy discussion until the 1970s, when the unfair dismissal legislation was introduced. This legislation made it necessary to determine the expiry and non-renewal of a fixed-term contract as a ‘dismissal’ in order not to reduce the effectiveness of unfair dismissal legislation, which resulted in a debate about the necessity and desirability of fixed-term employment. Handling the expiry of fixed-term employment contracts without renewal as a dismissal by the employer in employment security legislation was also deemed to be necessary because in the common law of individual work or employment contracts, the expiry of a fixed-term contract without renewal would not be regarded in that way.  

If the employment security legislation had simply defined dismissal as the termination of the contract of employment by the employer, it is unlikely that the expiry of a fixed-term contract in cases of non-renewal would have been regarded as dismissal by the courts. Instead, they would very likely have taken the view that expiry of the contract without renewal was not so regarded, because it was not an act of termination by the employer but simply an automatic ending of the contract in accordance with its own self-executing provision. As Freedland has stated, from the point of departure of the classical theory of the law on employment contracts, it is deemed positively counter-intuitive to regard the expiry of a fixed-term contract of employment as a dismissal by the employer.

The immediate consequence of deeming non-renewal of fixed-term contract as dismissal was that an employee working under such a contract could claim unfair dismissal or a redundancy payment in cases of non-renewal of the fixed-term contract.

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873 Freedland, Mark in Chitty on Contracts (2008), pg 1152
874 Barnard, Catherine - Deakin, Simon (2007), pg 121.
875 Mark Freedland: The Personal Employment Contract (2003), pg 316; see also Selwyn, Norman: Selwyn’s Law of Employment (2011), pg 77.
876 Freedland, Mark: The Personal Employment Contract (2003), pg 316.
877 Koukiadaki, Aristea (2010), pg 32.
However in order to balance the equilibrium between the contractual parties after determining the non-renewal of a fixed-term contract as a dismissal, qualifying periods were inserted into the unfair dismissal and redundancy payment rights. As Kilpatrick has stated, the Conservative Government introduced a qualifying period for unfair dismissal rights in 1971 and excluded those employers employing four or less employees from its application. However, the legislation was amended by the Employment Protection Act in 1979 when the legislator made a compromise according to which the failure to renew a fixed-term contract on the same terms as before was treated as a dismissal, but the employee could waive his or her right to claim unfair dismissal rights effectively, provided that the contract specified a fixed-term of at least a year and in regard to the right to redundancy compensation, as long as the fixed-term was for a duration of at least two years (qualifying period). In accordance with these provisions of the Employment Protection Act of 1979, the employer did not need to have additional substantive reasons for choosing to offer employment in this form. The Employment Protection Act section 142 laid down instead only procedural constraints on the parties’ right to derogate and did not impose any limit on the number of times a fixed-term contract may be renewed. The principal precondition of the derogation was that the contract of which non-renewal constitutes the dismissal had to be for a fixed-term of at least one year. According to the case law on the Act, it was also possible to include a clause in a fixed-term contract enabling termination by notice before the expiry of the contract period.

Where fixed-term employment for a year or more was renewed at the time of its expiry for a period of less than a year, even this did not necessarily prevent the employer from relying on a waiver which was previously signed by the employee because it was possible to regard the renewal as a variation of the existing contract extending its length, rather than an agreement for a new contract. The minimum waiver provision contained the idea of a trade-off between protection and job security so that rights could be waived in exchange for a guaranteed period of work, the rights in question being considered inappropriate to genuine fixed-term contracts, where both parties recognised there was no understanding that the contract will necessarily be renewed on expiry. See McCann, Deirdre: Regulating Flexible Work (2008), pg 113.

878 Koukiadaki, Aristea (2010), pg 33.
880 Barnard, Catherine - Deakin, Simon (2007), pg 121. Employment Protection Act, Sections 55 (2) and 142 (1). This waiver provision contained the idea of a trade-off between protection and job security so that rights could be waived in exchange for a guaranteed period of work, the rights in question being considered inappropriate to genuine fixed-term contracts, where both parties recognised there was no understanding that the contract will necessarily be renewed on expiry. See McCann, Deirdre: Regulating Flexible Work (2008), pg 113.
882 Lorber, Pascale (1999), pg 131, Deakin, Simon - Morris, Gillian, S: Labour Law, (1995), pgs 402-404. Court of Appeal, Dixon v BBC [1979]. This stance is also accepted by EAT later in its Allen v National Australia Group Europe Ltd [2004] IRLR 847 case. The opposite view was taken by the Court of Appeal in BBC v Ioannou (1975) ICR 267. In this case, the contract was concluded for a fixed-term, but with a provision for termination by three months’ notice and this was not held to be a fixed-term contract so that the purported written waiver clause of redundancy and unfair dismissal rights was deemed ineffective.
qualification period of one year was regarded as fulfilled even if the initial contract was less than a year but was extended by a variation of the contract after which the total contract duration was at least a year. As Deakin and Morris have stated, the cases interpreting waiver provisions highlighted the inability of labour laws to cover work performed under successive fixed-term contracts.

The other conditions for the application of section 142 of the Employment Protection Act were mostly formal. Firstly, the waiver had to be in writing. It was legal to include it in the employment contract or in another agreement and it had to be related to the contract of which non-renewal was being considered. However, it was not necessary to agree on a separate written waiver every time a new contract was agreed, as long as the waiver could be construed as relating to the new contract. A different precondition was applied to a waiver of the right to a statutory redundancy payment. It was expressly laid down in the legislation that there had to be a new written waiver on the occasion of each new contract, and that the contract had to be stated for a fixed-term of two years despite the fact that the contract could include a notice clause.

These rights reflected a difficult compromise between two conflicting policy objectives: on the one hand, the need to prevent widespread and uncontrolled use of fixed-term contracts in order to avoid circumvention of the Act and on the other hand a perceived need to preserve the option of fixed-term employment free from the possibility of unfair dismissal in cases where, on the grounds of flexibility or otherwise, the use of a fixed-term was thought to be legitimate. The purpose of the waiver rule was also to reduce the burden on the employers when terminating a fixed-term contract. On the worker's side, the possible reason could be that the attraction for an employee to agree to such a clause was the promise of a one or two year contract.
The courts` attitude towards the application of the waiver rule in 1970s was at first straightforward, attempting to ensure that the rights to redundancy payments or to compensation for unfair dismissal could not easily be waived by the employee and the courts used to interpret the concept of fixed-term contract in defining the contracts in relation to such waivers narrowly as possible. However, despite this, the law (or the case law) did not stop the use of waivers becoming widespread as a way of insulating employers from legal liabilities in respect of fixed-term work.

According to Barnard and Deakin, the law on fixed-term employment remained almost unchanged during the 1980s despite the deregulatory stance taken by the Thatcher governments at this time. No major amendments were regarded as necessary and the employers had the flexibility they desired by virtue of the waiver rule. However, the length of the qualifying period for unfair dismissal was changed from six months to one year between 1974 and 1979 and then to two years with effect from 1985 and eventually to one year in 1999. The waiver rules were amended with effect from the 1980s so that the employer was obliged to offer a fixed-term contract for one year in order for the employee`s opt-out from unfair dismissal to be valid. However, a two-year waiver was still required for purposes of redundancy compensation.

As Barnard and Deakin have described, the legal position of fixed-term employees was worsened by the amendments of the Conservative government in the mid 1980s, since a fixed-term employee could be given a contract for only one year, but could be required to work two years before achieving an entitlement to basic unfair dismissal protection.

As Kilpatrick has stated, these same rights were based on the notion of continuous work both in regard to qualification for the statutory right and the amount of compensation received in the case of a successful claim. Therefore, employees who were working under successive fixed-term contracts for the same employer were vulnerable to non-qualification interruption between employment relationships could exclude them from the continuous employment needed. Even

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892 Barnard, Catherine - Deakin, Simon (2007), pg 122.

in the event of qualifying to make a claim, interruptions in continuity would reduce their compensation.\textsuperscript{894}

In addition, as Lorber puts it, the legislation did not restrict the use of fixed-term contracts, as in many continental systems which provide that if there was a justified reason for the use of a fixed-term contract, or if the contract was renewed more than the maximum number of times permitted by legislation, the employee was treated as if he or she was employed on a contract of indefinite duration with the full protection of dismissal law.\textsuperscript{895} Prior to the implementation of the Directive on Fixed-Term Work, the UK law contained no restrictions on how these contracts were to be used by employers, permitting the unrestricted use of successive fixed-term contracts for unlimited periods of time.\textsuperscript{896} However, the lack of regulation did not mean that abuse was non-existent. Research was provided for the Government showing that employers used fixed-term contracts to fill permanent posts widely and avoided employment protection.\textsuperscript{897}

As Kilpatrick has concluded, workers on fixed-term contracts have also been excluded from other forms of employment protection which would otherwise have applied. For example, employees under contracts of three months or less were excluded from a minimum notice period, guarantee pay, statutory sick pay and payments on medical suspension as these require a qualifying period of continuous employment.\textsuperscript{898}

As a consequence of the legislation introduced in the 1970s and explained above operated to marginalise non-standard workers as the standard model was transplanted to the legislative form. In order to put it another way, 22 per cent of male and 29 per cent of female workers were excluded from legislative coverage. Also the legislation excludes a large number of fixed-term workers employed by the same employer across the qualifying period because of the continuous employment requirement.\textsuperscript{899}

\textsuperscript{894} Kilpatrick, Claire: Has New Labour Reconfigured Employment Legislation in ILJ, vol .32(2003), pg 142-143.
\textsuperscript{895} Lorber, Pascale (2008): Achieving the Fixed-Term Work Directive’s Aims. United Kingdom Implementation and Comparative Perspectives, pg 323.
\textsuperscript{896} Kilpatrick,Claire: Has New Labour Reconfigured Employment Legislation in ILJ, vol .32(2003), pg 143.
\textsuperscript{897} Department of Trade and Industry (2002), Fixed-Term Employees Regulations 2002.
\textsuperscript{898} Kilpatrick, Claire: Has New Labour Reconfigured Employment Legislation in ILJ, vol .32(2003), pg 142.
\textsuperscript{899} Koukiadaki, Aristea (2010), pg 33.
2.1 THE DEVELOPMENT OF BRITISH LABOUR LAW IN THE 1990S AND THE INFLUENCE OF THE EU EMPLOYMENT POLICY

This section examines how the development of the position of fixed-term contracts has deviated from the development of other employment rights in the United Kingdom. The intention now is to explain the deviant development through the flexibility and security discussed by the British Government and the European Union.

As Barnard and Deakin have indicated, generally speaking the Labour governments after 1997 extended the scope of labour law from the ‘employee’ concept to cover other categories of ‘workers’ who were economically dependent on their employer and did not contract to supply services in the context of a professional or customer-supplier relationship. These various categories of workers came under the coverage of basic labour standards legislation on such matters as the minimum wage and working time control, as well human rights legislation and protection of individual rights in relation to trade union membership and non-membership. Workers also came within the scope of anti-discrimination legislation laws as a consequence of the extended definition of ‘employment’. Correspondingly, temporary agency workers, who were covered by aspects of anti-discrimination law and health and safety law prior to 1997, have also been included in the minimum wage and working time laws approved by the Labour government. Therefore, as Davies and Freedland have concluded, the restriction of personal scope to employees in the Fixed-Term Employment Regulation in 2002 seems to represent a turn away from the tendency to extend the personal scope of employment legislation which the Labour administration had undertaken in its first term of government.900

On the one hand, the development of the British labour law during the term of Labour administrations has been characterised by the ideas of enhancing competitiveness, flexibility, modern working companies and an efficient labour market and economy. As Davies and Freedland have stated, this kind of rhetoric was very similar to that of the Green Paper, Partnership for a New Organisation of Work, which had been published by the European Commission in 1997 and which was a continuation of the Commission’s White Paper of 1993 on growth, competitiveness and employment, as far as the microeconomic regulation of work relations within employing enterprises was concerned.901 The objectives were to secure efficiency and fairness by ensuring employability and flexibility. Employability aimed at ensuring that people were well prepared, trained and supported before starting work and throughout their working lives. Flexibility was to ensure that businesses were able

901 Davies, Paul - Freedland, Mark: Towards a Flexible Labour Market (2009), pg 45.
to adapt quickly to changing demand, technology, and competition. 902 Therefore, as Ashiagbor has stated, it is not surprising that the UK has strongly emphasised employability in its National Action Plans. Its objectives are defined as, among other things, maintaining stable public finances and a low inflation level in order to obtain a high level of growth and employment, increasing investment in education, training and life-long learning, active labour market policies to assist job-seekers to take up employment and, finally, creating a fair and flexible labour market. 903 In sum, the UK has tried to increase employability through measures such as education, training and mobility in order to create jobs. 904 Similarly, the Employment Guidelines were intended to promote the use of fixed-term contracts as well.

The programme of the Labour administration however included a new body of minimum standards for some basic terms and conditions of employment and moved back into the mainstream of European Union social and employment policy formation by implementing the relevant labour law directives. 905 The way in which these policy objectives were combined and changed to regulatory form was called light regulation. As Freedland and Davies have put it, the typical features of this regulation are that it responds to some particular demand, such as one generated by a specific political event or the need to comply with an EU obligation rather than as the result of a general policy programme and, secondly, that the response to such demands is, as far as possible, cast in terms of process regulation rather than hard substantive rights. 906

The Fixed-Term Employment Regulation also represents some kind of light regulation, the intention of which was, along with implementing the Directive on Part-Time Work, to make the law on personal relations more adaptable to non-standard employment. 907 The Labour government considered that fixed-term employment should not be discouraged, as it represented an important source of flexibility in the labour market. The presumption of the Government was that overly rigid regulation of fixed-term employment contracts could impede employers from using such contracts. A report by the House of Lords European Union Committee on the Green Paper also concluded that the UK law did not need to be changed, as it had achieved the right balance on the issue of labour market flexibility by

902 Davies, Paul-Freedland, Mark (2009), pg 9.
905 Davies, Paul-Freedland, Mark (2009), pgs 45-46.
906 Davies, Paul-Freedland, Mark (2009), pgs 67 and 87.
907 Davies, Paul-Freedland, Mark (2009), pg 56 and 88.
permitting employers and workers to retain significant autonomy over the form of the employment contract.\textsuperscript{908}

Nevertheless, the Fixed-Term Employment Regulation, along with the implementation of the Directives on Part-Time Work and Parental Leaves, represents a turn from a tendency that was dominant in 1980-1990 under which mandatory labour standards were incompatible with labour market flexibility and efficiency because they impeded the creation of jobs and created burdens on business. Mainly on those grounds, the United Kingdom government was not ready to adopt the Directives proposed by the Commission purporting to improve the legal position of atypical forms of work, also arguing that they would disrupt the national industrial relations system.\textsuperscript{909}

However, the government has acknowledged the disadvantages of fixed-term work and lack of labour standards. The economic argument for re-regulation of basic standards was fully acknowledged in the government’s Regulatory Impact Assessment of the Employment Relations Bill 1999. This stated that employers have indicated that establishing decent labour standards can contribute to competitive business and that there should also be economic benefits for the economy and individual employers through reduced staff turnover and improved employee commitment, which lead to improved labour productivity.\textsuperscript{910} As Murray has stated, the extensive use of fixed-term contracts is incompatible with this objective, since many surveys have indicated that in precarious employment relationships, the employee’s motivation, loyalty and willingness to cooperate are lower, with negative consequences for company productivity. Fixed-term workers are subject to higher turnover as well.\textsuperscript{911} However, despite this awareness, no legislative measure was taken by the government to improve the protection of employees in fixed-term contracts.

Since the late 1970s, commentators in Britain have debated the over-rigid labour market laws and the impact of excessive social security provisions on slowing down processes of labour market adjustment. However, as the experiences of deregulation in the 1980s indicate, enhancing labour market efficiency cannot be achieved most effectively by means of deregulation, and an unregulated labour


\textsuperscript{909} Proposal for a Council Directive Concerning Temporary Work. Lorber, Pascal (1999), pg 122. Only one Directive, 91/383/EC, was accepted concerning the measures to encourage improvements in the safety and health at work of workers with fixed-duration employment or a temporary employment relationship.


market is likely to increase the abuse of the workforce and other kinds of ‘market failure’. According to the European Commission, however, seeking to strike a better balance between economic and social policy goals should improve efficiency. As the Commission found in the White Paper in 1994 and as referred to by Deakin and Morris, long-run competitiveness is to be sought not through a dilution of the European model of social protection but through the adaptation, rationalisation and simplification of regulations, so as to establish a better balance between social protection, competitiveness and employment creation. Furthermore, the White Paper suggests that the pursuit of high social standards should not be seen simply as a cost but also as a key element in the competitive formula.912

These suggestions of the White Paper show, as Deakin and Morris have stated, that there is no necessary conflict between protective labour law and economic objectives in contrast to the way the situation has been perceived in the UK deregulation or light regulation aspirations. Labour standards may have positive impacts on the economy as well.913 As Deakin has argued, labour standards are one aspect of the business environment needed to facilitate long-term aspirations of enterprises, encouraging them to invest in labour quality and to support a high-wage, high productivity strategy to achieve competitiveness. It is doubtful that innovativeness, flexibility and responsiveness, which are key elements in increasing competitiveness and productivity, can be achieved by the low wage strategy or a policy that encourages employers not to engage their labour on permanent contracts. Eventually, innovation and dynamism are not derived from making labour resources cheaper but from making labour more effective, productive and innovative.914 These conclusions also concern the use of fixed-term contracts that affect competitiveness, long-term efficiency and productivity as the low-wage strategy in the same way.915

The Labour government was criticised for neglecting to take these positive economic effects of labour standards into account.

Analysis by the UK Employment Department also shows, as Deakin and Morris mention, that different countries achieve flexibility in different ways. Consequently, highly regulated systems such as in Germany or the Scandinavian countries have succeeded in keeping up a high rate of productivity growth despite their continuing commitment to a higher level of social protection and respect for employment rights than the UK. On the other hand, the United Kingdom continues to have lower productivity growth than similar developed economies despite its lower level of social protection. In this regard, there is very little evidence that an efficient

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915 In this regard, see for instance, Murray, Jill: Normalising Temporary Work. Industrial Law Journal, vol, 28 (1999), pgs 273-274.

3 IMPLEMENTATION OF THE DIRECTIVE ON FIXED-TERM WORK AND RELATED DEVELOPMENT

3.1 BACKGROUND

In June 1997, the United Kingdom agreed to ‘opt into’ the Social Chapter of the TEC, a decision reflected in the revised social policy provisions of the Treaty of Amsterdam. The consequence was an effective transfer of the substance of the Agreement on Social Policy into the body of the new Treaty\footnote{Now Articles 151 and 153-155 of TFEU.} that formally took effect when the United Kingdom ratified the new Treaty on the 1st of May 1999. When the Council accepted the new Directive on Fixed-Term Work, the United Kingdom was bound to incorporate it into its national law as a full social policy member of the Union.\footnote{Pascale, Lorber (1999), pgs 122-124.}

The Labour Government, returned to power in 1997, assessed the issue of fixed-term work in its \textit{Fairness at Work} White Paper of 1998. This took the view that while some control of the waiver option was desirable, complete prohibition of waivers was deemed unjustified since this would ‘remove a useful flexibility for genuine employers’. The Employment Relations Act 1999 accordingly achieved a new compromise under which the waiver was abolished for unfair dismissal claims but maintained for redundancy compensation.\footnote{McCann, Deirdre: Regulating Flexible Work (2008), pg 127. Barnard, Catherine - Deakin, Simon (2007) pg 122. The argument for retaining the waiver possibility in respect of the redundancy payment was that since the purpose of a redundancy payment is to compensate employees for unexpectedly losing their jobs, they are unsuited to workers on fixed-term contracts who expect their engagements to terminate at the end of their contract. DTT, Fixed-Term Work Public Consultation, n 10.}

The latter was repealed from the 1st of October 2002 as a result of the Fixed-Term Employees (Prevention of Less Equal Treatment) Regulations 2002 (‘FTER’) being enacted. This Regulation implemented the Fixed Term Work Directive.\footnote{Barnard, Catherine - Deakin, Simon (2007) pg 122. Prior to 25 October 1999, section 197 of ERA 1996 provided that, if the employment was in the form of a fixed-term of at least one year and the dismissal took the form of the non-renewal of the contract under section 95 (1) (b), the employee lost the right to claim unfair dismissal if he or she agreed in writing before the expiry of the term to exclude this right. This provision was repealed by the Employment Relations Act and only valid waivers agreed before 25 October 1999 remain effective.}
The negative attitude of the United Kingdom to adopting the development of the rights of the Union in the Charter of Fundamental Rights has continued. The United Kingdom used a specific protocol to exclude the power of the CJEU and national courts to oversee the consistency of its laws, regulations and administrative provisions with the fundamental rights, freedoms and principles of the Charter. This concerns justifiable rights of the solidarity chapter applicable to the United Kingdom in particular, except in so far as the United Kingdom has provided for such rights in its national law. This is of significance in respect of protection against unjustified dismissal rights guaranteed by the Charter.

3.2 FIXED-TERM WORK REGULATIONS (FTER) AND THEIR IMPACT ON THE POSITION OF THE FIXED-TERM EMPLOYEE IN THE LIGHT OF CASE LAW

The implementation process itself was challenging. As some commentators have concluded, this is quite understandable in the light of the history explained above. As was explained in the previous section, no specific rules governing fixed-term contracts existed. The traditional approach of the government had been to avoid interference with the individual employment contract and, indeed, most of the statutory interventions in this field took the opposite direction towards deregulation during the period of conservative governments in 1979-1997. The government took full benefit of the Directive’s option according to which a Member State may have a maximum of one more year if necessary to consider special difficulties in implementation and delayed the implementation until July 2002. Although the implementation process was preceded by a long and extensive round of consultation, the government had clearly indicated that its general stance on the EU employment law was to avoid early implementation.

The 2002 regulations made some significant amendments to the UK law. Firstly, the Employment Rights Act was changed so that the non-renewal of not only a fixed-term contract but also a task and purpose contract and other contracts that ended on the occurrence or non-occurrence of a particular event, was to be regarded as a dismissal in accordance with the Act. This change was made in order to

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921 Articles 1 and 2 of the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.
922 Lorber, Pascale (1999), pg 127.
The provisions of unfair dismissal and redundancy payments in the Employment Rights Act were amended so that there was deemed to be a dismissal where the employee was employed under a limited-term contract and that contract was terminated by virtue of a limiting event without being renewed under the same terms. Inserted definitions determine limited-term contracts as being where (1) the employment under the contract is not intended to be permanent and (2) provision is accordingly made in the contract for it to terminate because of a limiting event. Such an event was defined as the expiry of a fixed term, the performance of a specific task in contemplation of which the contract was agreed or the occurrence or non-occurrence of an event where the contract provides for termination on such occurrence or non-occurrence. Consequently, the task and purpose contracts were inserted in the statutory definition of dismissal, as there had not been any difference between statute and common law concepts of fixed-term contracts in the past. This is expected to be applicable in common law as well.

Furthermore, a provision was introduced (FTER reg 8) for regarding fixed-term contracts as ‘permanent’ in cases of successive fixed-term contracts. Where an employee is employed under successive fixed-term contracts and has continuity of employment of four years or more starting from 10th July 2002, which is the transposition date of the Directive, the term of the contract which limits its duration is to be of no effect from the date on which four years of continuous employment was reached, or from the date on which the contract was most recently renewed, if later, provided that the contract could not be justified on objective grounds. The employer must prove that there was an objective ground at the point where the ‘subsequent contract’ had either been renewed or, if it had not been renewed, when it had been entered into. Thus, an employment contract is regarded as permanent at the point where the employee obtained four years’ continuous employment or alternatively when the ‘subsequent contract’ was either last entered into or renewed, depending on which was later. Therefore, since July 2006, the UK has had a regulation under which, in situations of successive fixed-term contracts, the employee achieves a permanent position at the point at which he or she has four years continuity of employment or when their second or subsequent contract expires.

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925 Clause 3 of the Framework Agreement on Fixed-Term Work: ‘fixed-term worker’ means a person with an employment contract or relationship entered into directly between an employer and a worker under which the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.”


928 Barnard, Catherine - Deakin, Simon (2007), pg 123, FTER reg 8.

929 Barnard, Catherine - Deakin, Simon (2007), pg 123, FTER reg 8.
if later, unless there are objective grounds for the employer offering a contract for a fixed term only.\textsuperscript{930} It should be pointed out that a fixed-term contract does not become permanent until it is renewed. If the contract is renewed before the four-year point, it will become permanent on reaching that point. If renewed after the four-year point, it becomes permanent on renewal.\textsuperscript{931} Deakin and Morris have deemed this amendment to the UK law the most far-reaching concerning the directive.\textsuperscript{932}

According to FTER 8, the four-year period for permanent employment status can be modified by a collective or workforce agreement. The maximum total period for which an employee may be employed on fixed-term contracts before they are regarded as permanent, a maximum number of renewals of fixed-term contracts and more detailed objective reasons justifying fixed-term employment may also be agreed.\textsuperscript{933} The aim of introducing the opportunity to bargain into the regulations was to incorporate specific sectors or occupations in which successive fixed-term contracts are typical, such as actors and sportsmen, into the legal framework.\textsuperscript{934} However, preliminary evidence indicates that a very small proportion of negotiations has led to collective agreements.\textsuperscript{935} For example, the tendency in the UK university sector seems to be to minimise the use of fixed-term contracts and integrate the fixed-term employees into the permanent workforce as well as to stabilise and incorporate them into regular career structures by collective agreements.\textsuperscript{936}

It is not determined in the act precisely what constitutes ‘objective grounds’. The government has produced guidance on the interpretation of FTER, where a stance has been taken on what could constitute an objective reason for renewing the contract beyond four years. In accordance with this, fixed-term contracts may be renewed beyond the four-year period provided it is justified on objective grounds. This renewal will be thus justified if it can be shown that the reason for the use of a further fixed-term contract is to achieve a legitimate objective, such as a genuine business objective, and the use of the fixed-term contract is a necessary and appropriate way to achieve that objective.\textsuperscript{937}

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930 Barnard, Catherine - Deakin, Simon (2007), pg 123 FTER reg 8.
931 Selwyn, Norman: Selwyn’s law of Employment (2011), pg 76.
934 Koukiadaki, Aristea (2010), pg 40.
935 Koukiadaki, Aristea (2010), pgs 40-41. In the university sector, there is so far only one collective agreement which formally varies from the four-year rule. In the Imperial College collective agreement, the period of time prior to which permanent status must be granted has been extended from four to six years.
936 Koukiadaki, Aristea (2010), pg 41.
\end{flushleft}
However, the courts have indicated their willingness to interpret the notion of objective grounds in line with the CJEU. In the Ball v University of Aberdeen case, the question was whether the short-term external funding linked to the fixed-term contracts constituted an objective ground for concluding those contracts successively. The Employment Tribunal relied on the Adeneler judgment and stated that it should consider whether it could identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responded to a genuine need were appropriate for achieving the objective pursued and were necessary for that purpose. Along with this approach, the Tribunal found that external funding or any other reason for that matter should not be treated as an automatic justification for continuing fixed-term employment. The Tribunal also maintained that there must be a genuine business need to be addressed and the use of a fixed-term contract must amount to means that were necessary and appropriate to achieve that need. In respect of this, the Tribunal considered that it must also take into consideration whether the employer could manage the work some other way than by using fixed-term contracts, as well as the adverse impacts of the contracts for the employee.

In 2011, the UK Supreme Court took a position on the maximum total duration of a fixed-term employment relationship on the basis of the FTER. Under consideration was the custom by which teachers may be seconded to work in schools for a total of nine years. This period was made up of an initial probationary period of two years, and a further period of three years which was renewable for a further four years in accordance with valid staff regulations of the employer. The question was whether a custom of this kind was in accordance with the FTER, which implemented the Directive on Fixed-Term Work. The Supreme Court held that it was objectively justified to employ these teachers on the current fixed-term contracts and accordingly that these were not converted into permanent contracts by the operation of regulation 8 of the Fixed-term Regulations. Thus the UK Supreme court found that there was no conflict between the Directive on Fixed-Term Work and staff regulations in this regard.

In the Guidance issued by the Government for the use of fixed-term contracts, it is stated that employers and representatives of employees may agree on objective grounds for the renewal of fixed-term contracts as part of a collective or workforce


941 [2011] UKSC 14. The Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal have all held that the use of successive fixed-term contracts for these teachers was not objectively justified.
agreement. For example, according to the Guidance the employers and union or other representatives of professional sportspeople, actors or other employees in the sectors in which it is the traditional practice for employees to work on fixed-term contracts may agree in a collective or workforce agreement that the nature of the profession or work should be regarded as objective grounds for renewing fixed-term contracts. Finally, employers and employees may agree reasons for renewing fixed-term contracts, which may include the specific needs of particular professions such as professional sport and the theatre provided that these reasons do not permit abuse.  

Furthermore, since the Directive does not stipulate the first fixed-term contract, its length is not limited by the British regulation either. Hence, as Kilpatrick has pointed out, if the first contract is the only one, it follows that the Fixed-term Employment Regulation is not applied. However, the expiry of the first contract will constitute a dismissal for the purposes of making dismissal claims under the Employment Rights Act. If the first fixed-term contract is followed by another fixed-term contract, its duration may be relevant in defining the date on which the use of a fixed-term contract will be considered to be abusive and therefore considered as a contract of indefinite duration unless objectively justified by the employer.  

Finally, the regulation gives the opportunity to derogate from these restrictions by collective or workforce agreements. The employer and employee representatives can negotiate an agreement concerning any of the options originally given by Clause 5 of the Framework Agreement, provided that the agreement intends to prevent abuse of successive contracts. As Koukiadaki has suggested, the parties can therefore agree on rules going above or below four years, or even introduce a completely different system by, for example, requiring that renewal of fixed-term contracts be justified on objective grounds.  

As a consequence of implementing the Directive on Fixed-Term Work by FT Ter, the Employment Rights Act, which provided that someone employed under a

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944 Regulation 8(3) provides that this date will be the later of two possible dates; either that on which the employee acquired four years of continuous employment or the date at which the current contract was entered into or renewed. This means that where the first contract is less than four years, the later date will always be the date on which the employee achieves four year’s continuous employment. This also means that where the first contract is for more than four years, the date on which that contract is either renewed or a new fixed-term contract is entered into will always be the later date. Finally, the two possible dates will coincide where the duration of the first contract is for exactly four years.


fixed-term contract of two years or more could opt out of the right to receive a redundancy payment if the contract was not renewed by reason of redundancy, was amended. Consequently, no valid waiver of the right to a redundancy payment can be included in a contract agreed, renewed or extended after October the 1st 2002. However, McColgan has argued that discrimination against fixed-term employees by contractual redundancy schemes is lawful if objectively justified. The FTER does not have provisions allowing the conclusion of a fixed-term contract in place of a permanent one in order to overcome certain types of labour market disadvantages. Age-discrimination legislation allows employers to offer fixed-term employment in place of permanent employment on the grounds of age. Deakin and Morris have deemed that this legal position is contrary to the EU law determined by the CJEU in Mangold.

3.3 CONTINUITY OF EMPLOYMENT

In order to be entitled to certain statutory rights, it is necessary for the employee to show that for a certain length of time, depending on the right in question, his or her employer has continuously employed someone. Thus, in order to benefit from the four-year rule, the employee needs to show that he has been continuously employed for the purposes of the Employment Rights Act (ERA). The Fixed-Term Employment Regulations regard fixed-term contracts as successive when they fulfil the definition of being continuous in accordance with Chapter 1 of Part XIV of the Employment Rights Act. Kilpatrick has claimed that the implication of this is that fixed-term contracts will not be regarded as successive if a week separates the contracts and the employee is not able to show that, despite the absence of a contract of employment in that week, it counts because under section 212(3) the employee was absent from work because of temporary cessation of work or in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose. Continuity must also be preserved during the

947 If a fixed-term employee signed a waiver clause before 1 October 2002, the waiver would still apply and he / she would not be entitled to statutory redundancy payments if his / her contract expired and was not renewed.


949 Koukiadaki, Aristea (2010), pg 37. Barnard, Catherine - Deakin, Simon (2007), pgs 130-131. This view may not be compatible with the CJEU judgment in Mangold, C-144/04.

950 Barnard, Catherine - Deakin, Simon (2007), pgs 130-131, Koukiadaki, Aristea (2010), pg 37, C-144/04, Mangold, para 64.


periods of incapacity through sickness or injury, up to a maximum of 26 weeks in the case where the employee’s relations with the employer are not covered by a contract of employment.\footnote{953} The continuity of employment is thus dependent on the interpretation of the Employment Rights Act and it is justified to examine the case law related to it. With one major deviation,\footnote{954} any week that cannot be counted towards a qualifying period also breaks continuity, thus cancelling the continuous employment. In Booth v United States of America, the employer avoided the accrual of an employee’s continuity of employment by introducing the practice of regularly inserting a two-week break in between successive fixed-term contracts.\footnote{955} The Employment Appeal Tribunal found that continuity had been broken and that it was not saved by the arrangement for the purposes of section 212(3) of ERA 1996.\footnote{956} As a consequence of the amendments introduced in 1995 following the judgment of the House of Lords in Ex p EOC, the basic rule is that any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts when assessing continuity of employment.\footnote{957} However, if all or some of the separate hirings are for contracts for services only, continuity cannot be established.\footnote{958}

\footnote{953}{Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pgs 186-188.}
\footnote{954}{This exception consists of weeks lost by virtue of strikes and lock-outs. Such weeks do not count towards the qualifying period, but do not cancel out accrued periods either. See ERA (1996), section 216.}
\footnote{955}{Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pg 184.}
\footnote{956}{Kilpatrick, Claire: Has New Labour Reconfigured Employment Legislation in ILJ, vol :32(2003), pg 158. Booth v United States of America [1999] IRLR 16. The EAT came to a similar conclusion in the Letheby & Christopher LTD v Bond [1988] ICR 480, where the Court deemed that a week’s absence from work by reason of an agreed holiday broke the continuity of the employment since the employee worked under a number of separate contracts, and it was not possible to say that any contract of employment would have continued after the cessation of the previous contract and therefore there was no arrangement that the absence would preserve continuity. In the most recent case regarding this provision, the Court of Appeal considered that section 212(3) did not apply to an employer’s maternity leave scheme, under which the employee was required to resign and was guaranteed a management position if she wished to return after the break. The Court held that in view of the fact that she was required to resign, it could not be said that the employee was continuing the employment for any purposes during the maternity leave. Curr v Marks & Spencer plc [2003] ICR 443.}
\footnote{958}{Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pg 185. Hellyer Bros Ltd v McLeod (1987) ICR 525. The question was about redundancy compensation claimed by a number of deep-sea trawlermen whose employers had withdrawn their fleet from service following a decline in fish stocks. In each case, the applicant had worked exclusively for the employer over periods amounting to several decades, being employed on a series of crew agreements which lasted for the duration of each voyage. In between the voyages, the men claimed unemployment benefits. They regarded themselves as bound to their respective employers and did not miss a voyage without their permission. The Court of Appeal found insufficient evidence of mutual commitment to offer work and to accept it: "we do not see how it is possible to infer from the parties’ conduct the existence in between crew agreement of a trawlerman’s obligation to serve, which is part of the irreducible minimum of obligation on the part of the employee required to support the existence of a contract of service". To similar effect is Byrne v Birmingham City District Council (1987) ICR 519.}
There is also case law implying that the question of whether there is a temporary cessation of work or customary absence should not be decided primarily by reference to the contract but on the grounds of a substantive reason for the break instead of the form of words which appeared in the contract. Furthermore, in case law it has been deemed that the terms of employment, which have the effect of removing accrued continuity of employment, will be denied in accordance with section 203 of the ERA which nullifies any contract term to the extent that it aspires to exclude or limit the operation of any provision of the Act.

The House of Lords has also argued that successive periods of employment with the same employer will be continuous in accordance with section 212(3) of the ERA if the length of time between those periods is short compared with the length of time the employment has lasted. Courts have followed the same line of interpretation in cases of intermittent contracts, each of varying duration and separated by varying periods of non-employment. The correct approach in such cases is to consider all the relevant circumstances, in particular the duration of the periods of absence from work in the context of the employment as an entirety. Correspondingly, as far as seasonal workers are concerned, if more time is spent out of employment than in, the period of non-employment cannot be deemed as being an absence because of temporary cessation of work. If the employment has been refused by either side and the worker is subsequently re-employed the employee cannot be deemed absent because of temporary cessation. Through this extensive interpretation of the concept of a temporary cessation of work, fixed-term workers employed on a succession of short-term contracts may be able to...

960 Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pgs 186-188. Secretary of State for Employment v Deary [1984] ICR 413. Section 203 was applied to a term of employment which reduced employees’ hours below the statutory threshold required for continuity after they had previously obtained the necessary qualifying service, enabling continuity to be preserved. The Court considered it possible to invoke the provision irrespective of whether the term was introduced for the purpose of undermining the Act or the whether it simply had such an effect.
establish the continuity of employment which is required for the qualifying period. It does, however, enable employers to circumvent this consequence in intermittent or seasonal work by adjusting the breaks between hiring of a particular employee which are kept substantial in comparison to the periods of actual employment.  

In the light of this, we can conclude that an employee needs to show that he has been continuously employed within the meaning of the ERA. In particular, if a week’s absence from work is not covered by s 212(3)(c), continuity of employment will be broken. Thus if there is a gap of more than one week between successive fixed-term contracts, these cannot be turned into permanent contracts in accordance with the four-year rule. As case law indicates, there are numerous legitimate breaks and ways by which re-employment is not counted as an arrangement by virtue of section 212(3)(c) so that continuity can be interrupted. Therefore, as Selwyn has stated, it seems that there is nothing to prevent an employer from adjusting employment contracts so as to prevent continuity of employment and avoiding successive fixed-term contracts being regarded permanent and the subsequent liability for unfair dismissal and redundancy payments.

If employees can be employed under successive fixed-term contracts of less than four years’ duration indefinitely, provided that the employer ensures that there is a short interruption between the contracts to break continuity, protection against abuse of successive fixed-term contracts included in the Framework Agreement on Fixed-Term Work can easily be circumvented. Therefore, the stance on the requirement of continuity adopted by the British legislator is not consistent with the stance adopted by the CJEU in the Adeneler case. This also constitutes a circumvention of Clause 5 of the Framework Agreement on Fixed-Term Work prohibited by the CJEU in Adeneler. As the CJEU stated, Clause 5 of the Framework Agreement is to be interpreted as precluding a national rule under which only fixed-term employment contracts or relationships that are not separated by more than 20 working days are to be regarded as ‘successive’ within the meaning of the Clause. Consequently, FTER 8 cannot be interpreted as requiring full continuity of the fixed-term contracts when these serve needs that are fixed and permanent. These prohibitions on circumventing the protection laid down by the Framework Agreement must also be applied to private law agreements such as collective

969 C-212/04, Adeneler, para. 88, McCann, Deirdre: Regulating Flexible Work (2008), pg 134.
or workforce agreements when they derogate from the FTER. Moreover, as Koukiadaki has stated, there is a justified reason for the British courts to rely on the interpretation adopted by the CJEU in Adeneler to prevent the circumvention of the Directive. However, an employee whose employment is terminated before attaining permanent status never obtains the right to permanent employment, and it is difficult in these circumstances to identify any other right that has been infringed.

### 3.4 THE RESTRICTED SCOPE OF THE FIXED-TERM EMPLOYEES REGULATIONS

As was clarified by the Trade Union Congress at the time of the implementation of the Framework Directive on Fixed-Term Work, 850,000 workers were likely to be influenced by the Framework Agreement. Despite this, Britain is and continues to be one of the countries with the lowest percentage of workers under fixed-term contracts.

As McColgan has pointed out, the Fixed-Term Employees Regulations 2002 represents a standard minimalist approach to transposition, not only going no further than required by the Directive, but even failing adequately to transpose it in respect of the scope of regulation. The Government has chosen to implement the Directive by restricting its scope to employees rather than also including the larger category of workers within its scope. The latter scope was adopted when implementing the Part-Time Work Directive. The implication of the limited scope of the Regulations is that they do not protect fixed-term workers who are unable to establish employee status, for example, because of the absence of mutuality of obligations. On the other hand, the definition of a fixed-term contract is more extensive than that used in the context of dismissal for the purposes of unfair dismissal and statutory redundancy payments.

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971 Koukiadaki, Aristea (2010), pg 38.


974 Davies, Paul-Freedland, Mark (2009), pgs 57 and 87-88 Davies, A.C.I: Perspectives on Labour Law (2009), pgs 94-95.

In the Employment Rights Act, an employee means an individual who has entered into or works under a contract of employment. Essential in defining an employment contract is the obligation to pay a salary in return for a promise to perform work personally, a degree of control exercised by the employer over the performance of work, the extent to which the employee is integrated into the organisation and the allocation of risks to the worker. The definition of an employee depends basically on how it has been defined in the contract, which is a limiting factor. The common law contains plenty of characteristics of the concept of an employee, based on control, integration, business on one’s own account, economic reality or organisation and mutuality of obligations. There is a clear distinction between the terms employee and worker. According to the Employment Rights Act, a worker is an individual who has entered into or works under any other contract, whether express or implied, whereby the individual undertakes to do or personally performs any work or services for another contract party whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. The British courts have developed this statutory concept further by stating that it was interpreted to create an intermediate class of protected worker who is not an employee, or cannot in the narrower sense regarded as carrying on a business. The concept of worker in the UK law also differs from the concept of worker used in EU law.

As Deakin and Barnard have stated, it is for the courts, not the parties, to determine the nature of a work relationship. However, the courts in the UK pay considerable attention to the rights and obligations, i.e., terms determined in the contract itself and rather less to the objective conditions under which the work is being carried out in deciding whether the contract is deemed to be a contract of employment or some other kind of contract, unlike in some other European jurisdictions such as Finland.

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978 ERA, Section 230.
981 Barnard, Catherine - Deakin, Simon (2007), pg 121. Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pg 127. Ferguson v John Dawson & Partners (Contractors) Ltd (1976) 1 WLR 1213. In the case, the Court overruled the declaration of the parties that the contractual relationship shall be deemed as self-employment even if the declaration is incorporated in the contract if the remainder of the contract terms showed a relationship between employer and employee. See also Lane v Shire Roofing Co (Oxford) Ltd (1995) IRLR, 493.
According to the UK labour law, the main rule is that employees with employment contracts only are entitled to the statutory employment-related individual rights, such as notice periods, compensation for unfair dismissal and redundancy payments. According to the criticism by the Trade Union Congress TUC on the adoption of the Directive on Fixed-Term Work in the UK, the term fixed-term worker in the Framework Agreement with an employment contract or relationship as defined in law or collective agreements in each Member State clearly requires that the Directive applies not only to employees who are on a contract of employment, but also to workers. The Social Partners resisted the use of the word ‘employee’ during the negotiations that led to the Framework Agreement on Fixed-Term Work. UNICE originally argued for the use of the word ‘employee’, but approved the wider definition in the final text. Applying the new rights only to employees excluding the category of workers is therefore clearly inconsistent with the aims and purposes of the Directive as adopted by the European Social Partners.

The CJEU has also taken a stance on the worker concept ‘as defined in law, collective agreements or practice in each Member State’ by stating that it cannot permit a Member State to restrict the rights expressly provided by the Directive. Therefore, the extent to which a Member State’s legal system recognises workers who have an employment relationship, Directive (93/104/EC in question) must apply to such categories of workers. Because the UK law not only recognises workers with a contract of employment but also workers who have an employment relationship with their employer but do not have a contract of employment, confining rights in the FTER only to employees under a contract of employment is not a justified solution and might be contrary to the CJEU case law. Accordingly, the CJEU held that the concept of worker with respect to the right to equal pay included in Article 157 TFEU (ex.141 TEC) should not be interpreted restrictively but also cover independent service providers performing services under the direction of another person, their independence being only of a fictive nature.

Therefore, the rights guaranteed by the Directive on Fixed-Term Work should not have been restricted to the employees under a contract of employment but

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983 Framework Agreement on Fixed-Term Work, Clause 2.


986 C-256/01, Allonby, para 79. Deirde, McCann: Regulating Flexible Work (2008), pg 52.
should also have been conferred on workers who have an employment relationship with their employer but do not have a contract of employment.987

3.5 THE EXCLUSION OF APPRENTICESHIPS

An apprenticeship is a fixed-term employment contract including a clause on education, training and instruction by the employer, as well as an element of work experience in a particular trade or skill.988 Since the 1980s, the number of apprenticeships increased rapidly as the Government offered subsidies to employers if they offered work experience and training to unemployed persons.989 As Deakin and Barnard have stated, the government subsidy schemes and the complex regulations surrounding these schemes helped the courts to decide that the relationships to which this gave rise did not constitute a contract of apprenticeship, or a contract of employment. Instead of this, a ‘contract of training’, which fell outside the scope of existing statutes and so was widely unprotected, was regarded as having come into existence.990

The UK took also full advantage of the opportunity permitted by Clause 2(2) of the Framework Agreement to exclude apprenticeships from the scope of the implementation of the Agreement. In addition, trainees who obtain employee status are excluded from the scope of the Fixed-Term Employment Regulations if they are employed on schemes planned to provide training or work experience in order to assist them to seek or obtain work which is funded by the Government or an EU institution, as are trainee-employees who are on courses of work experience of up to one year which involve attending a higher education course.991

3.6 NON-RENEWAL OF A FIXED-TERM EMPLOYMENT CONTRACT

As Barnard and Deakin have stated, in regard to termination of employment, fixed-term employees, even if they do not have permanence in accordance with the FTTER, are now in a relatively similar legal position to permanent employees. By virtue of the rule that the non-renewal of a limited term contract is a dismissal, a fixed-term employee whose contract of employment is not renewed on the same terms as before can potentially claim for both unfair dismissal and a redundancy payment, provided that he or she has the necessary qualifying period of employment which is two years of continuous service in respect of the redundancy payment and one continuous year in respect of right not to be unfairly dismissed.\textsuperscript{992} In principle, an employee who is employed under a succession of fixed- or limited-term contracts can be dismissed each time a contract expires.\textsuperscript{993} There is also recent case law on the issue. In Biggart v Ulster, the question posed to the tribunal was whether the failure to renew a fixed-term contract after five years was regarded as a redundancy in circumstances where alternative employment was available but not offered to the employee. The tribunal found that the employee had suffered less favourable treatment on the grounds of his fixed-term status than a comparable permanent employee in being refused employment in a suitable alternative when his fixed-term contract expired.\textsuperscript{994}

Furthermore, non-renewal of a fixed-term contract is considered unlawful on discriminatory grounds. The Employment Appeal Tribunal, EAT, argued that the dismissal of a woman who had been employed on two successive fixed-term contracts and was refused a contract renewal after she informed her employer about her pregnancy, was discriminatory since her unavailability was the result of pregnancy.\textsuperscript{995} This interpretation is in line with the case law of the CJEU, according to which non-renewal of a fixed-term contract on such grounds constitutes discrimination prohibited by the equal treatment directive.\textsuperscript{996}

If the contract is terminated prior to the expiry of the fixed term, the employee will have the normal rights in respect of breach of contract and the employer is obliged to pay the employee for the rest of the term, subject to the employee’s duty to mitigate the loss. Furthermore, the employee is entitled to claim unfair dismissal.


\textsuperscript{996} C-438/99, Melgar.
provided that he has been employed for the period required for the continuous employment. 997

According to the Employment Rights Act, where an employee’s contract is renewed, he or she is re-engaged under a new contract of employment in pursuance of an offer made before the end of the employment under the previous contract, and the renewal or re-engagement takes effect either immediately on or after an interval of not more than four weeks after the end of that employment, the employee shall not be regarded as dismissed by the employer by reason of the employment under the previous contract ending. 998 A dismissal is thus regarded as taking place if the new contract is essentially different from the old, as to capacity, place of employment, or in respect of other terms, 999 but the entitlement to redundancy payment will be lost if the employee unreasonably refuses an offer on the same or different terms. 1000

Furthermore, if the contract is terminated by mutual agreement, the situation is not deemed as dismissal. Nor there is a dismissal, as stipulated by the Employment Rights Act, for the purposes of redundancy payment if the employee is employed under a new contract that takes effect within four weeks of the expiry of the old. 1001 Moreover, if, after the expiry of one contract, the employer offers the employee a new contract under less favourable conditions than in the previous one, there will be no breach of contract, since the employee’s previous contract has already expired and, at the time of the offer, he or she has no employment with that employer. 1002

The expiry of a fixed-term contract may also be treated in case law as a termination by agreement. In the Brown v Knowsley Borough Council case, the employee, after being employed as a temporary teacher in a college under a series of fixed-term contracts, was offered a contract for the academic year with an appointment letter according to which the appointment would last only as long as sufficient funds were provided. The employer terminated the contract because it did not receive any funding once the present contract expired. The Employment Appeal Tribunal found the wording of the letter of appointment meant that the contract came to an end automatically in the event which happened when insufficient funds were provided by the employer. 1003 This allowed employers to avoid ending the employment contract by articulating it so that it was accommodated into one statutory definition of dismissal. This is not deemed to be possible under employment relationships

998 ERA 1996, s 138 (1).
999 ERA 1996, s 138 (2-6).
falling under the FTER, because the Fixed-Term Work Directive defines protective dismissal as where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event.  

Thus, the legal position of fixed-term employees is dependent on the legitimate reasons for dismissal under the employment contract defined by the law. Because of the requirement of four years’ continuous employment for deeming a fixed-term contract as being transformed into permanent ones, the grounds for fair dismissal in fact play a considerable role in determining the legal position of successive fixed-term contracts the total duration of which is below four years. On the other hand, a fixed-term contract is transformed into an indefinite duration contract in certain situations explained above and the position of the fixed-term employee becomes dependent on the grounds for fair dismissal. These reasons justify examining the grounds for fair dismissal of employment defined by the British law.

3.6.1 Economic Dismissals and Fixed-Term Employees

3.6.1.1 Introduction

Economic dismissals can be divided into three distinct categories involving redundancy, re-organisation and business transfers and other substantial reasons for fair economic dismissal (SOSR). These categories are examined in this section.

Where a dismissal is for redundancy, an employee is entitled to a redundancy payment if he or she fulfils the qualifying conditions, and a complaint for unfair dismissal is also possible. In cases where dismissal falls into the SOSR category, no statutory redundancy payment is due, and dismissal may be fair, leaving the employee without any compensation. Furthermore, an unfair dismissal claim may also arise in the case of a breach of the rules of procedural fairness by the employer that may happen where the employer has failed to follow good practice relating to redundancy selection.

3.6.1.2 Redundancy

The concept of redundancy means that a dismissal is potentially fair but also makes the employer liable to pay a redundancy payment to the employee calculated by reference to the employee’s seniority, normal weekly pay and age.¹⁰⁰⁷ A point of departure is that with regards to the redundancy payment, dismissal is assumed to be by reason of redundancy, whereas for the purposes of defending an unfair dismissal claim the employer must indicate what the reason was.¹⁰⁰⁸ The implication of this is that in balanced circumstances a dismissal can be deemed as a redundancy for the former purpose but not the latter.¹⁰⁰⁹

In accordance with the Employment Rights Act section 139(1),¹⁰¹⁰ the dismissal of an employee can be deemed to be by reason of redundancy if it is attributable wholly or mainly to the following:

(a) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

In accordance with this provision, an employee’s work may cease and diminish either permanently or temporarily and for any reason.¹⁰¹¹

In their interpretation of Section 139(1), the courts have emphasised the employer’s right to decide matters concerning the size, scope and direction of the enterprise. It has not been regarded as the remit of the courts to examine the motives for the closure of the factory but only whether the closure is sufficient for there be a redundancy in law. It has been indicated in the case law that it is essentially for the employer to decide if and when to close down the business and that law regards a clear cessation of a business a redundancy situation.¹⁰¹² In respect of this, the only

¹⁰¹⁰ ERA 1996 section 139 (1)
obligation for the employer is to provide evidence that it had a relevant reason at the time of the dismissal.¹⁰¹³

The test of ‘diminishing requirements’ under Section 139(1)(b) of the Act is sufficiently broad to cover both the situation in which reduced demand for labour is the result of business difficulties and the situation in which it is the consequence of technological change or workforce reorganisation. However its application to the second situation is unclear. As Deakin and Morris have stated, the definition of redundancy included in the ERA 1996, Section 139(1) is significantly narrower than, for example, the definition used for the purposes of determining the collective consultation and information rights of trade union representatives. Since 1993, redundancy has been defined as including all dismissals except those that are related to the individual concerned. This more extensive definition was introduced to meet the requirements of Directive 75/129/EC. However, no plans have been reported to extend it to Section 139(1) of the Employment Rights Act.¹⁰¹⁴

3.6.1.3 Other Exclusions from Redundancy

The scope of redundancy is confined by the case law in several other ways. For example, the question is not normally of redundancy in cases where the employer rearranges work schedules by adopting a different shift-work pattern in order to increase efficiency.¹⁰¹⁵ The courts have not awarded a redundancy payment in the situations where duties are different or working hours have been changed, but the overall needs of the persons performing the tasks is not less.¹⁰¹⁶ The essential questions to consider are whether the employee’s work is being incorporated into other posts and whether the the employer’s business is affected in that there is no

¹⁰¹⁴ Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pgs 484-485. The CJEU has also deemed in its case law that the UK statutory redundancy rights were in breach of Directive 75/129/EC. In case C-383/92 the CJEU paid particular attention to the fact that the concept of redundancy included in the Employment Protection Act did not cover all of the collective redundancies covered by the Directive and in particular those cases in which workers have been dismissed as a result of a new working arrangement unconnected with the company’s volume of business (para 32). Furthermore, the CJEU considered that the UK had failed to require consultation with workers’ representatives with a view to reaching agreement and covering ways and means of avoiding collective redundancies or reducing the number of workers affected (para 36). Finally, the Court found that the UK sanction for the breach of the obligations to negotiate with the workers’ representatives and to inform them as required by the Directive was not sufficiently deterrent (paras 41-43). Trade Union and Labour Relations (Consolidation) Act (1992) section 195, TURERA 1993 pg 34.
longer a need for a separate and additional employee to carry out the work.\footnote{Sutton v Revlon Overseas Corporation Ltd [1973] IRLR 173, Deakin, Simon-Morris, Gillian, S: Labour Law (2005), pgs 535-536, Bowers, John: A Practical Approach to Employment Law (2005), pgs 421-422.} So, if another employee who is continuing the job replaces an employee in the same job, the dismissal is not deemed to be a redundancy. The mere reorganisation of a work programme which leads to a dismissal is not deemed as a redundancy dismissal.\footnote{Wren v Wiltshire CC [1969] 4 ITR 251, Bowers, John: A Practical Approach to Employment Law, pgs 421-422.}

The courts have also deemed that an employer is entitled to reorganise his business in order to improve its efficiency and while doing so to suggest to his personnel a change in their employment terms and to carry out dismissals if they refuse to agree the new terms. If the same work is to be done after reorganisation, the dismissal cannot be regarded as a redundancy.\footnote{Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pg 482. Johnson v Nottinghamshire Combined Policy Authority [1974] ICR 174, 184. Lesney Products & Co Ltd v Nolan [1977] IRLR 477.} Moreover, the courts have denied employees the right to redundancy compensation where they were unable to adapt to changed methods of working, on the grounds that the change in the nature of their work is not sufficient and thus the work of the employee remained essentially the same.\footnote{Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pg 485. North Riding Garages Ltd v Buttermark [1967] 2 QB 56, 63.}

The concept of work subject to reduction has also been interpreted broadly. In the Nelson v BBC case, the Court of Appeal considered that it was not sufficient to establish redundancy to show simply that the requirements of the employers for work of the kind on which the employee was actually engaged had ceased or diminished. In addition, it is necessary to show that such reduction or cessation was in relation to any work that he could have been asked to do.\footnote{Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pg 486. Nelson v BBC [1977] ICR 649. On the same line of interpretation, see also Cowen v Haden LTD [1983] ICR1, where this ‘contract test’ was invoked by employees in order to show that their employers, by failing to re-employ them on other duties which they could be contractually required to perform were unable to show redundancy as a potentially fair reason for dismissal.} In the Safeway Stores v Burrell case, the EAT argued that in assessing whether the requirements of the business for employees to carry out work of a particular kind had reduced, the employees’ terms of contract are not of significance. According to the court, they become relevant only when asking whether the dismissal was attributable to redundancy as compared, for example, with a refusal to transfer to another job where the employee’s contract requires this.\footnote{Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pg 486. Safeway Stores v Burrell [1997] IRLR 200.}

In Murray v Foyle Meats Ltd, the House of Lords reduced the question of whether there was a dismissal by reason of redundancy to two narrow questions; firstly, whether the employer’s requirements had diminished and, secondly, if so, had the individual been dismissed as a result of that diminution? The House of Lords stated that there was no reason...
in law why the dismissal of an employee should not be attributable to a diminution in the employer’s need for employees, irrespective of the terms of his contract or the function that he performed.\footnote{1023}

The entitlement of fixed-term employees to redundancy payments is not treated very differently in the case law compared to permanent employees. In the X and ors v Secretary of State for Education and Skills case, the tribunal stated that four fixed-term employees who were employed under successive fixed-term contracts had the same right to redundancy payments as permanent employees.\footnote{1024} The EAT, however, has declared that a fixed-term employee who had engaged on a three year fixed-term contract which was not renewed because of the lack of funding had no right to a redundancy payment as lack of funding was assimilated to ending the need for an employee.\footnote{1025}

It is not significant that the employee knows from the beginning of his job that his work is going to decrease, as shown by the Nottinghamshire CC v Lee case, in which the employer offered an employee a temporary post for one year, at the end of which period the post was extended for another year. The employee knew there would be no additional extensions since the employer’s requirements had already decreased. The Court of Appeal rejected the right to a redundancy payment since the statute did not mean that the requirement must cease or diminish during the period of employment.\footnote{1026} As John Bowers has stated, this case shows that fairness of dismissal has nothing to do with redundancy payments.\footnote{1027} Furthermore, if the employee accepts the renewal of his contract by his employer on the same terms as before, he is not entitled to a redundancy payment and the same applies if he is re-engaged in a suitable alternative position.\footnote{1028} As Deakin and Morris have pointed out, these provisions regulating the situation operate in two ways. Either they result in the employee not being treated as having been dismissed for the purposes of claiming a redundancy payment or they disentitle an employee who is treated as dismissed from receiving a redundancy payment which would otherwise be payable.\footnote{1029}

\footnote{1024 Koukiadaki, Aristea (2010), pg 42. Employment Tribunal Case no 2304973-7/04.}
\footnote{1025 Bowers, John: A Practical Approach to Employment Law (2005), pg 418. Association of University Teachers v University of New Castle upon Tyne [1988] IRLR 10.}
\footnote{1026 Bowers, John: A Practical Approach to Employment Law (2005), pg 422.}
\footnote{1027 Bowers, John: A Practical Approach to Employment Law (2005), pg 422 Nottinghamshire CC v Lee [1979] IRLR 294.}
\footnote{1029 Deakin, Simon-Morris, Gillian, S: Labour Law (2009) pgs 488-489.}
An employee who is treated as dismissed for redundancy after being given notice may still not be entitled to receive a redundancy payment. This may take place if the employee unreasonably refuses an offer of alternative employment under a renewed contract or a new engagement. If the conditions of the renewed or new contract differ from the corresponding conditions of the previous contract, the right to a payment will be lost if the employment also fulfils the condition of being suitable.\textsuperscript{1030}

There are still a few situations worth mentioning in which an employee may lose his or her entitlement to a redundancy payment or part of it even though he or she satisfies other requirements. The first relates to misconduct by an employee where he or she has committed a breach of contract that would entitle the employer to dismiss him or her summarily. The employer may avoid liability for redundancy by dismissing the employee without notice, using a shorter notice than would have been required without the employee’s breach or by giving the normal statutory or contractual notice the employee is entitled to in this situation, but including a written statement that the employer is entitled to dismiss the employee at once. This may be the case in situations where an employee after being dismissed for redundancy commits some misconduct which justifies summary dismissal.\textsuperscript{1031} Deakin and Morris have criticised this provision since, if the employer dismisses the employee for some cause, whether incapacity or misconduct, that is not a dismissal for redundancy because it does not fall within the provisions of the ERA.\textsuperscript{1032} The second situation where an employer avoids the redundancy payment relates to strikes. Participating in a strike constitutes a breach of employment contract that entitles the employer to terminate the contract without notice. According to the ERA, the main rule is that employees who take part in industrial action, for example, in the form of a strike, lose their right to a redundancy payment in situations where the employer is entitled to terminate the contract without notice.\textsuperscript{1033} The third exclusion relates to cases of temporary lay-off or short-time working. In situations where an employee is laid-off or kept on for a short time there may be no right to a redundancy payment, even if there would otherwise have been a redundancy. In these circumstances, there is only a redundancy if the employee has been laid off or kept on for short


\textsuperscript{1032} However, in these situations when dismissal for misconduct takes place during a statutory period of notice, the employee may apply to a tribunal which can award all or some redundancy payments. See the ERA 1996, s. 139, 140 (3)-(5) and 136(4). Bowers, John: A Practical Approach to Employment Law (2005), pg 348-359.

\textsuperscript{1033} Deakin, Simon-Morris, Gillian, S: Labour Law (2009). This rule is not applied in situations in which the employee has been given notice of dismissal by the employer and then takes part in a strike during the obligatory period of notice and is dismissed for doing so. According to the ERA 1996 section 143 (2), where a redundant employee takes part in a strike the employer may require him to compensate for the time lost in the strike by extension of notice if he is still to be entitled to a redundancy payment. See also Bowers, John: A Practical Approach to Employment Law (2002), pg 428.
time for four or more consecutive weeks, or has been laid off or kept on a short

time for six or more weeks in any period of thirteen weeks.\textsuperscript{1034} Finally, the right to

a redundancy payment may be excluded if pension rights accrue within one week

of the termination of employment contract and those rights are worth at least one-

third of the employee’s annual pay, the right to a pension is secure and the employer
gives the recipient written notice.\textsuperscript{1035}

3.6.1.4 Dismissal Arising from Utilising the Rights Guaranteed by FTER

A fixed-term employee has the right not to be subjected to any detriment by any
action, such as dismissal, under the rights guaranteed by the FTER.\textsuperscript{1036} It is stipulated
in the regulations that in certain circumstances an employee is automatically to be
regarded as unfairly dismissed if the dismissal is in connection with the regulations.

Firstly, these circumstances exist if the employee has brought proceedings against
the employer under these regulations or requested from his employer a written
statement of reasons for less favourable treatment or variation of his employment.\textsuperscript{1037}
Secondly, the employee shall not be dismissed if he or she has given evidence
or information in connection with such proceedings brought by any employee or
otherwise done anything under these Regulations in relation to the employer or
any other person. However, if the employee alleged that the employer had infringed
these regulations, refused (or proposed to refuse) to forgo a right conferred on him
or her by these regulations or declined to sign a workforce agreement that could
modify the statutory standards designed to prevent abuse of successive fixed-term
contracts for the purposes of these regulations, there is still no express provision
making dismissal for these reasons automatically unfair.\textsuperscript{1038} A prohibited ground
for dismissal is also being related to the employee’s performance as a representative
for the purpose of entering a workforce agreement or as a candidate in an election
to become a representative. Finally, the dismissal is also treated as unfair if the fact
that the employer believes or suspects that the employee has done or intends to do

\textsuperscript{1034} A short time is described in the ERA 1996 s 147(2) as a situation in which, by reason of a diminution in the
employee’s work, the remuneration received is less than half a week’s pay. ERA 1996 ss. 147-152. Deakin,
Simon-Morris, Gillian, S: Labour Law (2009) pgs 491-492. The last situation in which the employee may lose
a redundancy payment relates to the employee wishing to leave during the notice before the notice period
has run out (ERA 1996 s.142).

\textsuperscript{1035} ERA 1996 s.158, Redundancy Payments Pension Regulations 1965.  Bowers, John: A Practical Approach to
Employment Law (2005), pg 429.

\textsuperscript{1036} FTER 3.

\textsuperscript{1037} FTER, reg 6, 5, 9.

\textsuperscript{1038} Deakin, Simon-Morris, Gillian, S: Labour Law (2009), pgs 433-434.
any of the things mentioned above justifies it.\textsuperscript{1039} It is not necessary for employees covered by this provision to fulfil a minimum qualifying period of employment. Nor are employees over the normal retiring age excluded. Selection for redundancy on these grounds is also automatically unfair.\textsuperscript{1040}

The Government declined to make it automatically unfair under the FTER 2002 to dismiss an employee to prevent him or her acquiring permanent status. The Government justified its stance by stating that it was unnecessary to do so because it is unlawful to dismiss a fixed-term employee for enforcing or seeking to enforce their rights. However, it is not regarded as unnecessary in the literature. An employee who is dismissed prior to obtaining permanent status never acquires redundancy or dismissal rights and it is difficult in these circumstances to identify any other right that has been infringed. As Deakin and Morris have stated, if this view is correct, such a dismissal would need to be judged on ordinary unfair dismissal principles.\textsuperscript{1041}

\subsubsection*{3.6.1.5 Other Reasons for Economic Dismissal}

The previous section clarified by numerous examples that the scope of redundancy payments in respect of termination of contracts of indefinite duration is relatively narrow. However, redundancy comprises only one category of fair reasons for an economic dismissal. The statutory definition of redundancy has been narrowly restricted by the case law, whereas the other category, some other substantial reasons (SOSR), has been extended to cover most of the economic dismissals that do not fall into the redundancy category. The implication is that an economic dismissal will not be unfair only because it cannot be regarded as a redundancy if it can be categorised as SOSR. On the other hand, if the dismissal of an employee falls into this category, he or she is not automatically entitled to compensation for loss of employment as is the case with redundancy.\textsuperscript{1042}

The SOSR category has been considered to consist of cases in which employees have been dismissed for refusing to approve changes in working hours and other kinds of shift arrangements made for the business interests of the employer.\textsuperscript{1043} This is the case even if the employer tries to make unilateral changes to terms of employment and the employee terminates the contract as a response to the employer’s breach

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TER, reg 6(3).
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of contract. In SOSR cases, the courts have maintained that an employer may be acting reasonably in making changes which amount to unilateral abrogation of existing collective agreements and, by extension, of terms incorporated from those agreements to individual employment contracts. It cannot be concluded from the Act that either a constructive dismissal or any other dismissal in which the employer operates in breach of contract is unfair. Furthermore, it is important to bear in mind that the terms of the employment contract have no greater protection, because the common law normally allows the employer to terminate the contract by giving notice. Consequently, it seems that collective agreements and employment contracts do not establish minimum rights for employees properly according to the statute. Instead, redundancy or re-organisation in breach of contract is potentially fair reason if the employer can prove it was fair by producing evidence of business necessity. Moreover, SOSR has been applied in cases where temporary workers employed under successive fixed-term contracts were dismissed upon the expiry of the most recent agreement.

The sort of the reason which the employer has to show is described in case law as a good sound business reason. The implication of this is that almost any business-linked reason justifying the dismissal passes the test of substantial reason. Thus, this burden of proof can be met easily by the employer. As Deakin and Morris have stated, although the courts have the right to overrule the reason indicated by the employer and to deem that the reason was not objectively justified and thus conclude that no good business reason existed, they may not substitute their judgments of what is in the commercial interests of business of the employer. Thus, it seems that courts have found it difficult to intervene in the reasons

1044 Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 492.
1046 In accordance with ERA s 95 (1) (c), constructive dismissal takes place where the employee terminates the contract of employment in circumstances in which he is entitled to do so without notice by reason of the employer’s misconduct. Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 409-410
1047 Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 492.
1048 Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 493. Court of Appeal in North Yorkshire County Council v Fay [1985] IRLR 247: “if it is shown that the fixed-term contract was adopted for a genuine purpose and that fact was known to the employee, and it is also shown that the specific purpose for which the fixed-term contract was adopted has ceased to be applicable, then those facts are capable of constituting some other substantial reason.”
1050 The Court of Appeal held in the case that the burden on the employer of showing a substantial reason is only designed to deter employers from dismissing employees for some trivial or unworthy reason. Kent County Council v Gilham (no 2) [1985] ICR 233, Robert Upex: The Law of Termination of Employment (2006), pg 200.
for dismissals offered by employers by deeming these reasons insufficient.\textsuperscript{1052} The Court of Appeal even thought that it was not open to the court to investigate the commercial or economic reasons that caused the closure.\textsuperscript{1053} Although a finding of SOSR does not necessarily lead to the conclusion that the dismissal or redundancy was fair in the circumstances because SOSR is only potentially fair reason, it has appeared to do so in most cases in practice.\textsuperscript{1054}

Nevertheless, even if the employer’s decision is motivated by economic considerations, the employer is still obliged to indicate that there were grounds upon which a reasonable employer could conclude that changes leading to redundancy or re-organisation were needed.\textsuperscript{1055} If the employer fails to provide any convincing evidence of business pressures leading to change, the Tribunal may legitimately find the dismissal unfair.\textsuperscript{1056}

Correspondingly, the employer must show that he operated reasonably in not renewing a fixed-term contract.\textsuperscript{1057} Thus, if there is a genuine need for an employer to have a fixed-term contract only (i.e., of a temporary nature or for a specific purpose, ending a commercial contract, etc.) then it may be reasonable not to renew the contract after its expiry.\textsuperscript{1058}

Since non-renewal of a fixed-term contract can also be assessed by the principle of non-discrimination, fixed-term employees should not be selected for redundancy or dismissal purely because they are under fixed-term contracts, unless this is objectively justified.\textsuperscript{1059} However, where fixed-term employees have been brought in to complete particular tasks or to cover for a peak in demand, it is likely that an employer could objectively justify selecting them for redundancy at the end of their contracts.\textsuperscript{1060} In the case law, it has even been found (although not unanimously) that non-renewal of fixed-term contract cannot be assessed by the principle of

\textsuperscript{1052} ibid.
\textsuperscript{1058} Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 173 and 493.
\textsuperscript{1059} FTER reg. 3. This is the stance taken by the government in its Fixed-Term Work Guidance. See Fixed-Term Work Guidance (URN No. 06/535).http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/pg18475. html#Whatmightbeobjectivejustificationforfixedtermcontractsbeyondtheyeareperiod
\textsuperscript{1060} ibid, Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 173 and 493.
non-discrimination since the comparison for the purposes of this principle cannot extend to the duration of the employment contract.\textsuperscript{1061}

3.6.1.6 Fixed-Term Contract and Period of Notice

Statutory notice periods are applied in the case of successive fixed-term employment contracts which result in the employee being employed for four years or more and the contract is deemed to be transformed to indefinite duration. This is based on the prohibition of differential treatment of fixed-term employees as regards the terms of contract.\textsuperscript{1062} The length of period of notice is determined by the length of continuous service according to the ERA 1996 (86), which provides that after one month’s employment, the employee is entitled to one week's notice, and this will apply until he or she has been employed for two years. Thereafter, he or she will be entitled to a week’s notice in respect of each year’s continual employment; in other words, two week’s notice after two year's employment, up to a statutory maximum of 12 week’s notice in respect of employment that has lasted for 12 years or more.\textsuperscript{1063}

A fixed-term contract can be terminated prior to the predetermined date provided that it includes an early termination clause. In these cases, periods of notice are applied and the employee is entitled to the statutory minimum notice unless the contract specifies a longer period. Employees employed under successive fixed-term contracts the contractual duration of which is one month or less are entitled to statutory periods of notice after three months of continuous employment.\textsuperscript{1064}

Early unilateral termination of a fixed-term contract not including an early termination clause represents a breach of contract.\textsuperscript{1065} When a fixed-term contract ends at a date or event specified in the contract, a period of notice is not applied.\textsuperscript{1066}

\textsuperscript{1061} Lorber, Pascale: Achieving the Fixed-Term Work Directive’s Aims. United Kingdom Implementation and Comparative Perspectives, pg 324. Department of Work and Pension v Webley [2005], IRLR. The question was whether the non-renewal and termination of a fixed-term contract after a 51 weeks’ contract period constituted discrimination under Regulation 3 under circumstances in which a new person was being trained to do exactly the same job, because a permanent employee could not be dismissed and would not be subject to the same rule. The court of first instance, the Employment Tribunal, considered that it was not possible to conclude that non-renewal of fixed-term contract can amount to less favourable treatment since, when fixed-term and permanent contracts are compared, the comparison cannot extend to the duration of employment. The EAT took a different view, stating that non-renewal of a fixed-term contract could potentially lead to less favourable treatment depending on the circumstances in a redundancy situation where fixed-term employees are selected because they are fixed-term and therefore treated less favourably than permanent workers who are not selected. In any case, the Court of Appeal disagreed with EAT and returned to the judgment and reasoning of the first instance.

\textsuperscript{1062} FTER, reg 3 (1).

\textsuperscript{1063} ERA 1996 s 86. (1-2). Selwyn, Norman: Selwyn’s Law of Employment (2011), pg 76.

\textsuperscript{1064} ERA 1996 s 86 (4).

\textsuperscript{1065} Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 363-364.

\textsuperscript{1066} Selwyn, Norman: Selwyn’s Law of Employment (2011), pgs 75-77.
3.7 SANCTIONS IN THE CASE OF ABUSE OF SUCCESSIVE FIXED-TERM CONTRACTS AND THEIR ASSESSMENT IN THE LIGHT OF THE EU LAW

An employee who is dismissed for non-renewal of a fixed-term contract may bring a claim for unfair dismissal before an employment tribunal. An employee who has obtained the required continuity of employment under successive fixed-term contracts so as to be regarded as ‘permanent’ in accordance with the FTER has a right to a written statement from the employer, either converting his or her contract of employment accordingly, or explaining why the contract remains fixed-term, within 21 days of the demand. If the employer argues that there are objective reasons for a fixed-term contract, the statement must contain a specification of those reasons.

There is no remedy if the employer neglects to comply with this request. However, if, in proceedings before an employment tribunal to enforce the fixed-term employee’s rights under the regulations, it emerges that the employer deliberately and without reasonable justification failed to provide an unequivocal statement, the tribunal can draw the conclusion that the employer has violated the right in question. If an employee considers that he or she is a permanent employee under the four-year rule of the FTER, he may make a legal application to an Employment Tribunal for a declaration to that effect provided that he is still employed by the employer and the latter has neglected to provide one.

If an employer neglects to provide a written statement of variation when required, or a statement of reasons for denying permanent employment, the employee may make a claim for compensation and a declaration before an employment tribunal.

The remedies available in court for the unfair dismissal if the claim is presented include reinstatement or re-engagement and compensation. Reinstatement is an order given by a court by which the employer shall treat the employee in all respects as if he or she had not been dismissed at all and must specify benefits payable in respect of the period since dismissal and rights and privileges including seniority and pensions. Furthermore the employee is put back into the job which he or she occupied, restored to the benefits he or she enjoyed and compensated for economic loss during the period.

An employee who is re-employed however does not necessarily have to be in the previous job with similar terms of employment. However, the work offered has to be comparable and suitable employment and it must assimilate the reinstatement,

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1067 Barnard, Catherine - Deakin, Simon (2007), pg 131. FTER, reg. 9 (1).
1068 Barnard, Catherine - Deakin, Simon (2007), FTER, reg. 9(2).
1069 FTER, reg. 9(5), Selwyn, Norman: Selwyn’s Law of Employment (2011), pgs 76-77.
1070 Barnard, Catherine - Deakin, Simon (2007), pg 132. FTER, reg. 7.
1071 Barnard, Catherine - Deakin, Simon (2007), pg 132.
1072 Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 469.
if reasonable. If an employer is not ready to comply with an order of reinstatement or re-engagement, the employee has to be compensated.\textsuperscript{1073} Both re-engagement and reinstatement are very rarely applied in practice.\textsuperscript{1074}

The compensation consists of two parts, the basic and compensatory awards. The basic award is meant to compensate for the loss of accrued continuity of employment following the dismissal. The basic award is calculated in the same way as a redundancy payment, taking the employee’s age, length of service and normal weekly pay at the time of dismissal into account.\textsuperscript{1075} The Employment Protection Act of 1975 first introduced this provision, which is intended to convey disapproval of the employer’s action at the same time. It performs a similar function to a redundancy payment and it is appropriate that they should be calculated in the same way.\textsuperscript{1076}

According to the ERA, the compensatory award may include amounts in respect of expenses reasonably incurred by the employee as a consequence of the dismissal.\textsuperscript{1077} The compensatory award is defined as the amount the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a consequence of the dismissal in so far as that loss is possible to ascribe to action taken by the employer.\textsuperscript{1078} The object of the award is to compensate for the damage fully but not award an additional bonus.\textsuperscript{1079} Where the employer pays a larger redundancy payment than is required by statute, any excess goes to reduce the compensatory award where the dismissal is found to be by reason of redundancy.\textsuperscript{1080} The first of these rules essentially follows the common law. Expenses incurred in seeking alternative employment would normally be taken into account, for instance, in relation to mitigation. The second category would seem to be broad enough to cover some benefits that the employee would have normally expected to receive, such as perks and loss of retirement benefits deriving from occupational pension schemes, the latter of which is however difficult to calculate.\textsuperscript{1081}

\textsuperscript{1073} Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pgs 468-470.
\textsuperscript{1074} Barnard, Catherine - Deakin, Simon (2007), pg 132.
\textsuperscript{1075} Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 472.
\textsuperscript{1077} ERA s 123(2).
\textsuperscript{1078} Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pgs 473-474.
\textsuperscript{1080} Bowers, John: A Practical Approach to Employment Law (2005), pgs 430-431.
On the other hand, only financial loss may be taken into account in assessing the amount of a compensatory award, not an intention to punish the employer for his or her improper behaviour or the injured feelings of the employees subject to dismissal. In other words, where an employee has suffered no loss as a result of the dismissal, for example, as a result of finding new job, the compensatory award may be reduced in principle to zero.\(^{1082}\) In practice, the amounts of compensation have remained at a moderate level, firstly because many of the applicants for unfair dismissal compensation have been low wage earners and with short periods of service.\(^{1083}\) Secondly, according to the research, the explanation for low level of compensation is statutory principles and the manner in which tribunals and courts apply the discretion granted to them in calculating the compensation, which often lacks the element of being preventive and deterrent.\(^{1084}\) The burden of proof is on the employee to show the losses suffered.\(^{1085}\)

Awards are subject to an upper limit. In accordance with the Employment Rights Act, a compensatory award to a person calculated in accordance with section 123 shall not exceed the amount that is currently GBP 68,400 added to the appropriate basic award.\(^{1086}\) The upper limit is adjusted once a year in line with any changes in the retail price index. If the reason for dismissal was health and safety based or if the employee made a protected disclosure or if he was selected for redundancy for either of these reasons, there is no limit on the amount of the compensatory award.\(^{1087}\) Furthermore, no upper compensation limits apply to the principal anti-discrimination statutes.\(^{1088}\)

The Fairness at Work White Paper proposed the abolition of the maximum limit to the compensatory award in 1968, in order to enable individuals to be fully compensated for their losses and encourage employers to establish more effective voluntary systems. However, no measures were taken.\(^{1089}\)

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\(^{1083}\) For instance, the median award compensation was £4000, in 2007-2008 and in1990-1991 only £1773. Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 479.


\(^{1086}\) ERA 1996 s 124.

\(^{1087}\) ERA 1996 s 103A, 124 (1A).


\(^{1089}\) Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pg 474, Fairness At Work, 1968, para 3.5.
It is questionable whether the upper limit of compensatory awards in respect of non-renewal of fixed-term contracts or the use of successive fixed-term contracts contrary to the FTER is in conformity with the requirements for sanctions developed by the CJEU in its case law. Although the Directive on Fixed-Term Work leaves the form of sanction for the Member States to decide, the CJEU has required adequate deterrent national remedies to be available for the violation of rights conferred by the EU law even in the absence of any specific provisions for remedy in the Directive concerned.\footnote{1090} Furthermore, the CJEU has found that it follows from the deterrent effect of the sanction that where a Member State chooses to penalise the breach of the EU law by awarding compensation, the amount must, in any event, be adequate in relation to the damage caused. The Court of Justice has also prohibited setting upper limits in cases of breach of the equality directive.\footnote{1091} The implication of the CJEU’s case law is that financial loss has to be compensated as an entirety. The CJEU has also deemed in Marshall that a British upper limit of compensation relating to unfair dismissal on discriminatory grounds was contrary to Equality Directive 76/207/EC.\footnote{1092} As the minimum requirements of sanctions (effective, proportionate, dissuasive) developed by the CJEU concern violation of all the Directives irrespective of whether these are mentioned expressly in the directive concerned, the Directive on Fixed-Term Work is no different in this regard.

3.8 TRANSFORMATION OF A FIXED-TERM CONTRACT INTO A PERMANENT ONE AND THE EMPLOYMENT SECURITY OF FIXED-TERM CONTRACT: CONCLUDING REMARKS ON THE IMPACT OF DIRECTIVE 99/70/EC

The United Kingdom has adopted the protection provided by the Directive on Fixed-Term Work by introducing two combined options in the Fixed-Term Employee Regulations. This fixes the maximum total duration of successive fixed-term contracts at four years unless the renewal is justified by objective grounds.

Furthermore, the regulation states that the four-year period starts only from the date the regulation should have been effective, July 10th 2002. Therefore, any period of service spent under a fixed-term contract prior to that date was not counted in the four-year period. Hence, as Lorber has stated, in the worst case the employees who had been under fixed-term contracts for a number of years and were expecting

\footnote{1090} C-222/84, Johnston, paras. 18-19 and Malmberg, Jonas: Effective Enforcement of EC Labour Law (2003), pgs 33-34.

\footnote{1091} C-180/95, Draehmpaehl, para. 30.

\footnote{1092} C-278/91, Marshall, paras 31 and 34.
the protection afforded by the Directive had to wait until July 2006 to see their fixed-term contracts potentially turned into contracts of indefinite duration.\footnote{Lorber, Pascale: Achieving the Fixed-Term Work Directive’s Aims: United Kingdom Implementation and Comparative Perspectives (2008), pgs 323-324.} 

The law does not determine objective grounds. It remains to be seen how long it will take for the courts to adopt the definitions on objective grounds outlined in the government guidance or the grounds which have been proved relevant in the context of the law of unfair dismissal, such as the end of an external grant or a commercial contract to which the employment in question was linked.\footnote{Deakin, Simon - Morris, Gillian, S: Labour Law (2009), pgs 173-174. However it is deemed in the British case law that other substantial reasons as a ground for termination applied where temporary workers employed on a succession of fixed-term contracts were dismissed upon the expiry of the final agreement. Terry v East Sussex County Council [1976]. ICR 536.} When the duration of a business contract constitutes an objective reason for renewal of a fixed-term contract beyond four years, this soon leads to a situation in which insecurity about the continuity of the employer’s activity is transferred to the employee’s risk by the successive fixed-term contracts.\footnote{This kind of reasoning resulted in amending the preconditions for the use of successive fixed-term contracts in Finland in 2010. See Government Proposal for Employment Contracts Act, 239/2010, pgs 4-5.} If this kind of reason is deemed to be objective grounds for renewal of a fixed-term contract beyond four years, this, along with the four-year period, may enable almost unrestricted use of successive fixed-term contracts where their renewal is permissible at four-year points an unlimited number of times and which enables circumventing the protection against unjustified dismissals prohibited by Directive 99/70/EC. Thus, if the need of the employer is deemed to be permanent, there should be no objective grounds for renewal of a fixed-term contract beyond four years.\footnote{Lorber, Pascale: Achieving the Fixed-Term Work Directive’s Aims: United Kingdom Implementation and Comparative Perspectives, in Pennings, Frans- Konijn, Yvonne- Veldman, Albertine: Social Responsibility in Labour Relations (2008) pgs 323-326.} This is justified by the need to prevent the unlimited use of successive fixed-term contracts beyond four years.

As Lorber has stated, the courts in the UK must take into account the notion of objective reasons developed by the CJEU in Adeneler in interpreting the concept of objective justification for renewal of fixed-term contracts.\footnote{Lorber, Pascale: Achieving the Fixed-Term Work Directive’s Aims: United Kingdom Implementation and Comparative Perspectives, in Pennings, Frans- Konijn, Yvonne- Veldman, Albertine: Social Responsibility in Labour Relations (2008) pg 326. C-212/04, Adeneler, paras. 69-70.} Although there are few examples of references made by the courts and tribunals to the Adeneler case or even signs of willingness to restrict the use of fixed-term contracts in accordance with ILO recommendation 166,\footnote{Ball v University of Aberdeen: The use of fixed-term contracts had to be justified by the fulfilment of genuine need.} there are still signs of the inconsistency of the notion of objective reason and abusive use of fixed-term contracts between the EU case law and the UK case law, especially after the judgment of the UK Supreme
court in which it held that the Secretary of State for Children Schools and Families may claim the existence of the rule in staff regulations adopted by the European Schools pursuant to a 1994 statute in imposing a nine-year fixed-term rule on his employees.1099

Because of the requirement of a four-year continuous employment period only after which fixed-term contracts can be deemed as permanent, and which employers can still avoid by either concluding single fixed-term employment, or by ensuring that there are one-week breaks between the contracts in order to interrupt the continuity, it is not obvious that the extensive use of successive fixed-term contracts can be prevented very effectively by the FTER. This may also lead to allowing the use of successive contracts for years in the same jobs, not of limited duration but ‘fixed and permanent’, which constitutes an abuse under Clause 5 of the Framework Agreement on Fixed-Term Work.1100

The four-year rule was also heavily criticised by the the Trade Union Congress (TUC). As McColgan has remarked, the TUC believed that the statutory fallback scheme would benefit very few individuals on temporary contracts. The TUC claimed that the four-year maximum period should be reduced to two years or less. Furthermore, according to the TUC, the Government should look seriously at the benefits of legal restrictions on the first use of temporary contracts. A statutory fallback scheme should comprise a combination approach including a maximum two-year period, with only up to two renewals within the period, and an objective justification test. The employer should have the burden of proof of why the contract should not be made for an indefinite duration regarding both renewals and non-renewals within the maximum period.1101

The case law after the implementation of the Directive has also supported the wider use of fixed-term contracts by establishing that non-renewal of successive fixed-term contracts cannot be restricted by a prohibition on less favourable treatment. Therefore, it is not prohibited to fill permanent posts by fixed-term employees and not to renew them since it has been deemed that the duration of employment is not a term of employment in respect of which the comparison between fixed-term and permanent employees’ terms of employment can be made.1102 This decision indicates, as McCann has pointed out, that courts are ready to support the use of fixed-term contracts for other purposes than merely as stepping-stones

1100 C-212/04, Adeneler, para. 88.
to permanent contracts, which is one of the main justifications by government to support the unrestricted use of such contracts. This stance is contrary to what was stated by the CJEU in Adeneler where the Court upheld the use fixed-term contracts in jobs where the need of the employer was permanent against the intention of Clause 5 of the Framework Agreement.

Some commentators such as McCann have also deemed it a grievance that the regulations give the opportunity to opt out of the already weak protection given by Regulation 8. Through collective or workforce agreements, employers and employee representatives can negotiate an agreement in which no objective grounds are applied or adopt even a longer maximum total duration than four years. However, these private law measures must also meet the preconditions for legitimate use of fixed-term contracts determined by the CJEU. On the other hand, as was stated, the position of fixed-term employees is improved by most collective agreements concluded in sectors where fixed-term contracts are widely used compared with the sectors applying the FTER. However, as McCann has stated, there is no general requirement that collective and workplace agreements should treat the provisions of the FTER as minimum standards below which it is not permitted to agree. The only criterion imposed by these agreements is then found in the vague caution that they should prevent abuse arising from the use of successive fixed-term contracts.

Moreover, in the absence of statutory criteria for the recognition of a contract of indefinite duration, concerns have been raised by some commentators such as McCann about the representativeness of the bodies charged with negotiating these derogations, and, in particular, with respect to the bargaining power of employees who negotiate workforce agreements.

Four years is a very long period considering that no restrictions exist on fixed-term contractual arrangements below that. Other Member States which have

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1103 HM Treasury, EMU and Labour Market Flexibility (London:HMSO, 2003), pg 36, McCann, Deirdre: Regulating Flexible Work (2008), pg 142
1104 C-212/04, Adeneler, para. 88.
1106 Koukiadaki, Aristea (2010), pgs 40-41. See, however, the collective agreement between Imperial College and the University and College Union, Unite and Unison where the agreed waiting period is six years instead of four.
1108 McCann, Deirdre: Regulating Flexible Work (2008) pgs 131-134. In this sense, the situation takes full benefit of the legal position adopted by the CJEU in Impact, where the Directive was stated to offer no minimum protection for the employees. See C-268/06, Impact, paras. 59-68.
1109 See, for example, McCann, Deirdre: Regulating Flexible Work (2008), pgs 132-133.
implemented the Directive in this way have a maximum of three years. Because of the weaknesses of the four-year rule explained above, a considerable proportion of fixed-term workers and employee protection consists only of redundancy and unfair dismissal rights. However, as was explained in the previous chapters, the British fixed-term workers have effectively been deprived of unfair dismissal protection by the traditionally long qualifying periods provided by legislation. Thus a qualifying period of one year’s employment in order to be protected by the legislation against unfair dismissal and two years in respect of redundancy rights leaves the shortest fixed-term contracts entirely outside the protection and in a very vulnerable position.

As Rogowski and Wilthagen have concluded, legal regulations for fixed-term contracts in developed labour law systems are shaped by their surrounding legal context and by national solutions on regulating employment protection of permanent contracts rather than by economic or political trends. Therefore, as Barnard and Deakin claim, the United Kingdom confers a ‘permanent’ status on fixed-term employees after four years’ employment, which does not improve their legal position much since they may be dismissed relatively easily on economic grounds either because of redundancy or some other substantial reason.

On the other hand, relatively weak employment protection of permanent employees, leaves no need for the employers to have recourse fixed-term contracts in order to circumvent the employment protection of permanent contracts. In this sense, the FTER also has a slightly different role from the Finnish Employment Contracts Act or the French Labour code, in which the employment security concerning collective redundancies and other economic or production based terminations is tighter. Therefore, the main principles of the Finnish and French regulation on fixed-term employment contracts, which are to prevent circumventing the employment protection related to contracts of indefinite duration and to ensure protection against the precariousness of the employment, are justified.

1111 McCann, Deirdre: Regulating Flexible Work (2008), pg 132. Fixed-Term Work Public Consultation, n 10. The four-year period was also criticised by the TUC, which claimed that it was much too long and should be reduced to two years or less. Lorber, Pascale: Achieving the Fixed-Term Work Directive’s Aims: United Kingdom Implementation and Comparative Perspectives (2008), pgs 323-324.
1112 Koukiadaki, Aristea (2010), pg 33. Two years from 1972, six months between 1974-1979, one year until 1985 and finally one year since 1999.
1113 See, for example, Koukiadaki, Aristea (2010), pg 47, McCann, Deirdre: Regulating Flexible Work (2008), pg 138.
1116 Koukiadaki, Aristea (2010), pg 25.
It is apparent in the case law that employees should not be deprived of their statutory rights by taking an ordinary job as a fixed-term contract.\textsuperscript{1118} This might be the case if the employer cannot show any work-related reason for concluding the employment contract for a fixed term. Nonetheless, when a fixed-term contract expires, an employer may be acting unreasonably if he or she fails genuinely to consider that person for employment in some other suitable post.\textsuperscript{1119}

Generally speaking, it seems that the FTER\textsuperscript{1120} is not very effectively built on the principle that indefinite duration employment contracts are the general form of employment relationships in accordance with the Framework Agreement on Fixed-Term Work.\textsuperscript{1121} As Koukiadaki has stated, this provides for the least strong of the Directive’s available options for converting the employment contract to indefinite duration, while there are no further measures laid down concerning minimum duration or minimum period of notice of renewal of fixed-term contracts used prior to the four-year period. As such, the legislation is based on the presumption that fixed-term contracts are not exceptional in themselves, only their long-term use.\textsuperscript{1122} Moreover, as the law requires objective grounds only at the point of four years’ employment, it cannot be said that objective grounds are an effective means to prevent abuse of successive fixed-term contracts in accordance with the Framework Agreement on Fixed-Term Work, as is the situation in Finland and France. On the contrary, we cannot agree with the Davies’s and Freedland’s conclusion that a relatively tight constraint upon the transposition of the control of the abusive use of successive fixed-term contracts from the Directive was achieved by confining this conversion effect to employment of a minimum of four years’ continuous duration.\textsuperscript{1123}

Nevertheless, there are no plans to reform the regulation of fixed-term work. The report by the House of Lords European Union Committee on the Green Paper states that the British law is not in need of much change, as it has achieved a proper balance on the issue of labour market flexibility by allowing employers and workers to retain significant freedom over the form of employment contract.\textsuperscript{1124} As Koukiadaki has stated, this illustrates the desire of the previous government to promote the supply-side rationale for the labour market flexibility in the interest of employers and the notion that this flexibility could allow workers take control

\textsuperscript{1120} For instance, by the four year rule, the requirement of continuity, restricted scope and the notion of objective reasons.
\textsuperscript{1121} McCann, Deirdre: Regulating Flexible Work (2008), pg 141.
\textsuperscript{1122} Koukiadaki, Aristea (2010), pg 46.
\textsuperscript{1123} Davies, Paul- Freedland, Mark: Towards a Flexible Labour Market (2009), pg 88.
of their careers in the fast-moving economy, selling their skills in a labour market producing high-quality jobs.\footnote{Koukiadaki,Aristea (2010), pgs 48-49.}

The current regulation on fixed-term work is explained via the flexicurity policy on temporary working arrangements adopted by the UK governments during the last decade. As McCann has indicated, the employment policy exercised by the government is consistent with the so-called demand-side notions of flexibility, according to which firms are allowed closely to synchronise labour use and demand by adjusting the size and composition of their workforce easily.\footnote{McCann, Deirdre: Regulating Flexible Work (2008), pg 120.} The availability of a wide diversity of working patterns is understood as the sign of a healthy labour market. The availability of various temporary contracts is seen as a benefit for workers and corresponds with the notion of employability adopted by the UK employment policy. This suggests that security can no longer be expected from permanent job patterns but instead lies in the workers’ readiness to shift between jobs across the course of their lives, which is also valuable because work skills remained honed when they work for different employers, and frequent job changes offer them a challenge rather than disruption. This notion of flexibility, for example, influenced the notion in the Fairness at Work white paper that a reduction of the two-year qualifying period for protection against unfair dismissal would make workers less inhibited about changing jobs and thereby promote a flexible labour market.\footnote{Fairness at Work (Cm 3968) (London:HMSO,1998), pg 13, McCann (2008), pg 120.}

Furthermore, fixed-term contracts are perceived as a stepping-stone to permanent employment, a long-term job or an overall gateway to employment by enabling new labour market participants to gain work experience.\footnote{DTI Fixed-Term Work Public Consultation, n 10. McCann, Deirdre: Regulating Flexible Work (2008), pg 120.} Some commentators like McCann have also contended that widespread use of such contracts may also harm the economy because there would be a reduced incentive for employers to offer training and development opportunities for those whose employment periods are too short to justify the investment.\footnote{HM Treasury, EMU and Labour Market Flexibility (London:HMSO, 2003), pg 36, McCann, Deirdre: Regulating Flexible Work (2008), pg 120.} The government also refers to supply-side related reasons as far as the position of fixed-term contracts is concerned. Such contracts, along with part-time contracts, are seen as a tool for synchronizing paid labour with either family obligations or other elements in workers’ lives, such as education and training. The employment policy document, Full and Fulfilling Employment, refers to the availability of diverse working arrangements, including temporary

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  \item\footnote{Koukiadaki,Aristea (2010), pgs 48-49.}
  \item\footnote{McCann, Deirdre: Regulating Flexible Work (2008), pg 120. DTI, Full and Fulfilling Employment (London: HMSO, 2002), Chapter 1.}
  \item\footnote{Fairness at Work (Cm 3968) (London:HMSO,1998), pg 13, McCann (2008), pg 120.}
  \item\footnote{DTI Fixed-Term Work Public Consultation, n 10. McCann, Deirdre: Regulating Flexible Work (2008), pg 120.}
  \item\footnote{HM Treasury, EMU and Labour Market Flexibility (London:HMSO, 2003), pg 36, McCann, Deirdre: Regulating Flexible Work (2008), pg 120.}
\end{enumerate}
work, as of benefit to workers who are unable to receive standard work. More recently, Success at Work emphasises the notion that employers must have a readily available flexible source of labour to respond to peaks in demand, and employees should have the chance to try out different forms of work. Thus, as McCann has stated, an important feature of the government’s employment policy, by which it justifies not imposing further restrictions on the use of fixed-term contracts, is to emphasise their benefits for employers and employees rather than emphasising the long-term use of fixed-term contracts in the same jobs, i.e., the abusive way.

1132 ibid
V FRENCH LAW ON FIXED-TERM CONTRACTS

1 THE PREVALENCE AND DIVIDING OF FIXED-TERM CONTRACTS IN THE LIGHT OF STATISTICS IN FRANCE

From the end of the 1970s until the year 2000, the prevalence of fixed-term work increased rapidly in France before it was stabilised. In 2005, the proportion of fixed-term workers was 7.7 per cent of the workforce, while same proportion of agency workers was 2.1 per cent, and the proportion of workers under various apprenticeship contracts 1.9 per cent. The proportion of temporary work, including apprenticeships, is around 13.3 per cent of the workforce, which makes France average among the EU Member States as far as the use of temporary contracts is concerned. The contracts of indefinite duration are still the most typical form of employment, representing 86.4 per cent of the working population. However, the tendency today is that almost 70 per cent of new employment contracts are fixed-term.

Fixed-term contracts are much more prevalent in small and very small enterprises than in larger ones. The proportion of fixed-term contracts irrespective of the size of the enterprise is 7.1 per cent, whereas in enterprises with less than 10 employees the corresponding proportion is 11.3 per cent. In the enterprises of this size, fixed-term contracts are concentrated heavily on blue-collar workers (14.8 per cent), whereas the proportion of fixed-term employees among senior salaried groups was less than 10 per cent. The sectors employing most fixed-term workers are the service sector and the show business and art sectors (19.4 per cent), whereas in the industrial sectors the corresponding proportion was around 13 per cent. The most frequent reason for a fixed-term contract was apprenticeship.

In 2005, the proportion of female fixed-term workers was 58.2 per cent and 41.8 per cent of males. Fixed-term work and part-time work are often combined, so that 33 per cent of fixed-term contracts are also part-time and these kind of contracts are mainly concluded with women. Fixed-term work in France also appears to be more prevalent among young employees, 45.5 per cent of fixed-term employees

being between the ages of 15 and 29, whereas 43.7 per cent are between 30 and 49 and, finally, 10.8 per cent are under the age of 50. However, 16.1 per cent of the young workforce between the ages of 15 and 29 are fixed-term workers, whereas among those between 30 and 49, the corresponding percentage was 5.4. Fixed-term work appears to be an important pathway to getting their first work experience.  

Fixed-term contracts are typically short, 2.5 months on average. A recent study also indicates that in most cases temporary work is not the choice of the workers. The proportion among fixed-term workers who would have preferred to have an indefinite duration contract rather than fixed-term is 75 per cent. Correspondingly, 67 per cent of employees under a fixed-term contract have recourse to it only because no positions corresponding to their needs better were available, and because of the necessity to earn incomes more rapidly. Finally, 49 per cent of fixed-term employees resorted to such a contract in order to avoid an interruption in their career, and 50 per cent of fixed-term employees accepted fixed duration at the beginning of the contract only in order to achieve more stable employment.

A considerably larger proportion of fixed-term employees (18 per cent) face unemployment within the next year, whereas the corresponding proportion of permanent employees was 3 per cent. Consequently, it can be inferred that fixed-term work does not work satisfactorily as a pathway to permanent employment relationships, which was also stated by the government as a justification for The ‘New Recruitment Contract’ (Le Contrat Nouvelle Embauche, CNE).

Furthermore, according to the survey carried out in France, a significant proportion of fixed-term employees (56 per cent) share the notion that fixed-term employment has negative impacts in engaging with the enterprise and work motivation.

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1138 In its National Action Plan, France has deemed it highly desirable that information systems should permit better evaluation of the characteristics of jobs in terms of salaries, the nature of the work and working hours in order to be better able to comprehend the process of integration into the workforce and to evaluate the extent of wage poverty and job-insecurity traps following on the heels of unemployment traps. National Action Plan for Employment. 2002. pg 15.


2  FIXED-TERM WORK IN FRENCH LAW PRIOR TO IMPLEMENTATION OF DIRECTIVE 99/70/EC

From a historical perspective, the contracts of indefinite duration have been the main form of employment in France that has been protected by the employment security. Accordingly, fixed-term contracts are considered as an atypical or non-standard form of employment that emerged mostly in the theatre and agricultural sectors.\(^{1141}\) Both contract types are regulated in the Labour Code (Code du Travail), which is one of the cornerstones of the French individual labour law.\(^{1142}\) The Labour Code contains no definition of the concept of employment contract. However, as Despax, Rojot and Laborde have claimed, the French legal doctrine has defined an employment contract as one in which a person, the employee, places his or her work at the disposal of an employer, under the latter’s subordination for a remuneration. Therefore an employee can be called a person who performs the work for remuneration and an employer is a person for whom the subordinate’s work is performed.\(^{1143}\) Since the 1973 reform of the French Labour Code, after which jurisprudence and in a number of collective agreements dealing with unlawful termination and severance pay.

As Lokiec has stated, the regulation of fixed-term contracts in France was initiated through contract law, which rapidly appeared to be insufficient, since the most important guarantee it provided was stability of contract, which implied that a contract could only be terminated on grounds of serious breach, reasons related to force majeure or mutual agreement. This proved to be insufficient, taking into account the need to protect employees under fixed-term contracts that, owing to the high risk of unemployment after the end of the contract period, were deemed to be in a precarious situation.\(^{1145}\) Regulating fixed-term contracts has therefore been labelled by the notion of protecting employees against this precariousness and ensuring that fixed-term contracts are not being used to avoid the security offered by permanent contracts.\(^{1146}\)

\(^{1141}\) According to the Ministry of Labour, the proportion of fixed-term contracts was 1.4 per cent of permanent contracts in 1977. G. Poulain, La Loi du 3 Janvier 1979 Relative au Contrat de Travail à Durée DÉterminée. Droit Social (1979), pg 72.


\(^{1144}\) Camerlynck, G.H. - Lyon-Caen, Gerard: Droit du Travail (1976), pg 112.

\(^{1145}\) Lokiec, Pascal: Fixed-Term Contracts in France (2010), pg 71.

In the 1970s, before the first statutory act was adopted, the French courts tended to limit the category of fixed-term contracts, refused to allow the retention of the fixed-term nature of the contract in a case of renewal and were reluctant to accept the traditional civil law notion of dies incertus. This tendency of the French courts effectively prevented the spread of this form of work during the 1970s. Correspondingly, as the French legislator deemed that a contract of indefinite duration was the only form of contract that could offer the employee a sufficient guarantee of the duration of his or her contractual relationship with the employer, the use of successive fixed-term contracts were impossible in practice. These stances adopted by courts and the legislator made fixed-term contracts extremely difficult to use.

According to the law of 1979, fixed-term contracts could only be concluded on account of the seasonal nature of the work, completion of a predetermined non-durable task, the temporary replacement of an absent employee and for the duration of a building site. As a main rule, the contract period had to be defined accurately and concluded in written form, including the reason for the fixed period. Even after the enactment of the law of 1979, only one renewal was accepted, or a maximum of two, provided that fixed-term relationship would not last, in total, more than 12 months. This was the first time the law had permitted the renewal of fixed-term contracts. Any other extension or violation of the requirements related to the form of the contract resulted in deeming the contract as one of indefinite duration. This creation of a legal regime for fixed-term contracts, rather than limiting their use, boosted the practice of fixed-term employment.

There have been several reforms since the first regulation governing the use of fixed-term work in 1979, especially in the 1980s and at the beginning of the 1990s. As Laulom and Vigneau have stated, in these time periods, the regulation was characterised by sensitiveness to political ambitions, and changes of government
readily produced changes in the regulation, restrictions, and promoting fixed-term work.\textsuperscript{1154}

The 1982 decree made fixed-term contracts, where parties to employment were not allowed to conclude them freely even within the framework of specific time limits but only under specific circumstances, an exceptional contract.\textsuperscript{1155} This ordinance substantially restricted the situations in which it was possible to conclude a fixed-term contract. Firstly, the temporary absence of an employee or the suspension of an employee for some reason other than a labour dispute constituted a valid reason for concluding a fixed-term contract. Secondly, the occurrence of an exceptional and temporary increase in activity, which however could not exceed six months, also constituted a legitimate reason. Thirdly, concluding a fixed-term contract in order to carry out a precisely defined occasional task that, however, could not fall within the usual scope of the enterprise was allowed. Finally, concluding a fixed-term contract was authorised by the decree of 1982, where it could mitigate the employment crisis. Therefore, a fixed-term contract was allowed within the framework of statutory provisions intended to employ unemployed people or to facilitate youth employment.\textsuperscript{1156} The essential terms of employment were to be in writing, including conditions related to renewal and successive conclusion.\textsuperscript{1157} The main rule was that employment contracts must be concluded without limiting their duration.\textsuperscript{1158}

Later, the legislation of 1985 allowed some new justifications for fixed-term work, mainly inspired by a job-creating rationale, and a decree of 1985 authorised the conclusion of fixed-term contracts for whatever reason when the person had been registered as unemployed for the previous 12 months.\textsuperscript{1159}

As Countouris states, the new neoliberal parliamentary majority supported a reform deleting the restrictions on concluding fixed-term contracts in August 1986. Instead, in 1986, a new regulation was introduced.\textsuperscript{1160} It abolished the list of authorised grounds and established a general interdiction, according to which ‘whatever the ground, the temporary contract of employment can have neither as an aim or effect to fill long-term a job related to the normal and permanent

\textsuperscript{1154} Laulom, Sylvaine – Vigneau, Christophe (2007), pgs 11-12.
\textsuperscript{1157} Lyon-Caen, Gerard- Pellissier, Jean- Supiot, Alain: Droit du Travail (1995), pgs 200-201.
\textsuperscript{1160} ibid.
activity of a company'.

Furthermore, the act of 1986 permitted concluding fixed-term contracts on the grounds of a specifically defined task. After that, the social partners concluded an intersectoral national agreement in spring 1990 which expanded the list of situations in which the conclusion of a fixed-term contract was possible and laid down the maximum total duration of 18 months for these contracts. In accordance with the intersectoral national agreement, the legislator adopted an act with a restrictive list for the use of fixed-term contracts in 1990 which, by and large, is still in force and, as Contouris states, satisfies the requirements of the Directive on Fixed-Term Work.

To sum up the French legal tradition governing the use of fixed-term contracts, we can agree with Vigneau in that those contracts have been strictly regulated, especially by restricting their duration and the grounds for recourse to this form of employment. The main objective of the regulation has been to restrict the use of fixed-term employment to exceptional circumstances in order to maintain the contract of indefinite duration as the normal way of hiring employees and to compensate the precariousness of employment subject to high risk of unemployment by restricting the premature ending of the contract.

Today, the predominant form of employment is still contracts of indefinite duration, but their proportion is declining. Statistics indicate that on average 70 per cent of new contracts concluded today are fixed-term. Lokiec has commented that the attraction and the reason for the increase in fixed-term contracts is related to the highly protective law on unfair dismissal, which encourages recourse to fixed-term contracts.

3 objective reasons for fixed-term contracts

The restrictions on concluding fixed-term contracts included in the current French Labour Code can be divided into the definition of a general prohibition on such contracts and detailed categories of conditions in which their use is permitted. According to the general prohibition, whatever the ground, the temporary contract of employment can have neither as the aim or the effect of permanently filling a

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1162 Lokiec, Pascal: Fixed-Term Contracts in France (2010), pg 71.


1166 Lokiec, Pascal: Fixed-Term Contracts in France (2010), pg 72.
job related to the normal and permanent activity of a company.\textsuperscript{1167} Furthermore, the law states that a fixed-term contract can only be concluded for a precise and temporary task. The main objective of the legislation has traditionally been to avoid the use of fixed-term contracts to fill permanent jobs within companies by a general interdiction. A fixed-term contract may be justified in jobs of a temporary character only.\textsuperscript{1168} The main intention of the legislator, in this newly formulated 2001 provision, was to emphasise the exceptional nature of fixed-term contracts, which are allowed only in circumstances determined by the Labour Code and to prevent the circumvention of those provisions.\textsuperscript{1169} This reflected the National Action Plan, which announced that a better framing of precarious work must be defined to prevent abuse of fixed-term contracts and temporary work to cover permanent posts in enterprises that would normally be occupied by employees hired under contracts of indefinite duration.\textsuperscript{1170}

The French Labour Code only permits the conclusion of fixed-term contracts in order to replace absent workers with the exception of those suspended from work for industrial action, to cope with a temporary peak in demand, or in activities in certain sectors where it is not the regular custom to conclude contracts of indefinite duration because of the nature of the activity or the temporary nature of the job,\textsuperscript{1171} or with the aim of offering a job to the registered unemployed.\textsuperscript{1172}

The first category of grounds for fixed-term contracts consists of replacing employees on temporary absence or on leave.\textsuperscript{1173} The courts have adopted the interpretation that a fixed-term employee does not have to be placed on the job performed by the employee on leave. The company has the right to replace the employee on leave by another employee of the company and to place the fixed-term employee in the position of this last. The courts have also regarded

\begin{itemize}
  \item \textsuperscript{1168} French Labour Code, Article 1242.1. Laulom, Sylvaine –Vigneau, Christophe (2007), pg 14.
  \item \textsuperscript{1169} An even more stringent provision was proposed by the parliament during the legislative process, according to which fixed-term contracts are an exceptional and precarious form of employment which could only be related to particular circumstances defined by the labour code such as replacement of employees on leave, etc. See Claude Roy-Loustaunau: La Lutte Contre la Précarité des Emplois: Une Réforme du CDD, Discrète Mais Non sans Importance, Droit social (2002), pg 304.
  \item \textsuperscript{1170} Plan National d’Action pour l’Emploi (2000), pg 39.
  \item \textsuperscript{1171} Sectors where the conclusion of fixed-term contracts on this ground is allowed are determined exhaustively by the decree and consist of forestry, repair of ships, moving, the hotel and restaurant sector, professional sport, show business, cultural and audiovisual activities, movie production, teaching, production of information and surveys, meat stocking, construction activities, technical assistance, engineering and foreign research. Décret n°2009-1443 du 24 novembre 2009 - art. 1. In these activities concluding fixed-term contracts is permitted without there being any need to show an increase in workload or the seasonal nature of the work.
  \item \textsuperscript{1173} Labour Code, Article 1242-2.
\end{itemize}
successive replacements of several employees by the same employee as lawful provided that employment contracts are concluded for the replacement of each successive employee, so that the name and qualification of an employee must be mentioned in the replacement contract.\textsuperscript{1174} Thus, the tendency followed by the Court of Cassation in respect of successive fixed-term contracts concluded on the grounds of replacement has been to avoid the risk that fixed-term contracts might become a regular means to manage lack of staff in the company. In order to restrict such a risk, the Court of Cassation has declared that a fixed-term contract can only be concluded for the replacement of one employee at a time.\textsuperscript{1175} The Court has also rejected the possibility for the employer to conclude a fixed-term contract with an employee for the replacement of several employees, even if they are absent in succession.\textsuperscript{1176} Correspondingly, the Court of Cassation has deemed as prohibited systematic recourse to fixed-term contracts with the same employee on the grounds of replacement in order to respond the structural need for labour which is deemed by the Court as a normal and permanent activity of the enterprise and therefore falling under Article 1242-1 of the Labour Code.\textsuperscript{1177}

Furthermore, replacement is deemed an objective reason for concluding a fixed-term contract in order to replace a former fixed-term employee who has left the company, between the expiry of the employment relationship of the former employee and the start of new employment. A fixed-term contract can also be concluded for the replacement of the head of the company or in order to complement the work of an employee who has temporarily moved to part-time work.\textsuperscript{1178}

The second category of objective reasons for fixed-term contracts consists of an increase in the activity of a company.\textsuperscript{1179} This category includes situations of an exceptional increase in workload not related to its normal activity. The only precondition is the temporary nature of the increase.\textsuperscript{1180} Although the French law does not recognise a specific task as a separate ground for concluding a fixed-term contract, this falls into the increase in workload category.\textsuperscript{1181} Accordingly, urgent work the immediate performance of which is necessary to prevent accidents, organise relief measures or repair deficiencies in equipment, facilities, or buildings causing a danger to people are also included in the category of temporary increase in workload.

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\item [\textsuperscript{1178}] Labour code, Article 1242-2. Lokiec, Pascal (2010), pg 73.
\item [\textsuperscript{1179}] Labour code, Article 1242-2. Laulom, Sylvaine –Vigneau, Christophe (2007), pg 15.
\item [\textsuperscript{1180}] ibid.
\item [\textsuperscript{1181}] Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU, pg 195.
\end{itemize}
\end{footnotesize}
The French legislator has offered examples of what may be considered to be an increase in workload not linked to the usual activity of the company. The conditions which must be fulfilled in order to conclude fixed-term contracts on the grounds of temporary increase in activity of the company are described in the circular issued by the Ministry of Labour. The question must be of accidental or cyclical increases in workload that the company cannot carry out with its usual workforce, and which is limited in time. The list includes occasional tasks such as training employees, the computerisation of a department or an audit that may be conceived of as work independent from the usual activity of the company. Exceptional export orders are mentioned as a specific justification for hiring fixed-term employees. The exceptional export order is described as a situation in which it is not possible to cope by using the personnel for usual activities because of insufficient numbers or lack of qualifications. The increase caused by the order should extend at least six months.\footnote{Circulaire du minister du travail, de l'emploi et de la formation professionnelle DRT No 18/90 du 30.10.90. Relative au contrat de travail à durée déterminée et au travail temporaire, Semaine Juridique, 1990, 111, No 1.2, Pascal Lokiec, pg 73.} By contrast, launching a new product or developing a new activity, even if they occasionally cause an increase in activity, do not constitute an objective ground as they fall within the normal activity of the company.\footnote{Lokiec, Pascal: Fixed-Term Contracts in France (2010), pg 74.}

The third category of objective reasons for fixed-term contracts consists of all seasonal activities and activities for which, in certain sectors, it is usual not to conclude contracts of indefinite duration.\footnote{Laulom, Sylvaine –Vigneau, Christophe (2007), pg 15, Labour code, Article 1242-2.} The sectors where such tasks occur are mainly agriculture, teaching, the food and tourist industries. Seasonal work is determined as including tasks that repeat themselves annually, on fixed dates or in accordance with the rhythm of the seasons.\footnote{Laulom, Sylvaine –Vigneau, Christophe (2007), pg 15.} The French Court of Cassation has resolved the question of whether seasonal successive fixed-term contracts are requalified for a contract of indefinite duration on the grounds of whether employee has worked for the whole initial period of the employer’s establishment or not.\footnote{Soc. 6 juin 1991, Bull. civ. V n 288. Soc. 22 janv 1991, RJS 3/91), n 316: An employee was hired as a cashier on seasonal fixed-term contracts first between 19.1.1982 and 30.9.1982 and then from March and October 1983. The two contracts concluded were valid during whole period the establishment was open. This justified requalification of the contract as a global contract of indeterminate duration. Société 25 octobre 2002, Bull. civ. V n 306; Soc. 16 novembre 2004, Dr. soc. 2005.} Furthermore, a season cannot exceed eight months, so that a contract for the whole school year cannot be a fixed-term contract.\footnote{Rép.min. No. 29165, JOAN Q 11 Jul.1983, 3059. Lokiec, Pascal: Fixed-Term Contracts in France (2010), pg 74.}

There are also certain sectors in which their activities or occupations mean that it is not regular custom to conclude contracts of indefinite duration. In order to use
fixed-term contracts on this ground in these sectors, the employer has to comply with further legal requirements. Firstly, the company must be in a sector included on a list provided by the decree. Merely the fact that the sector is included on the list has not meant that the company may use fixed-term employees.\footnote{\citelaurom} Furthermore, the nature of the enterprise’s activity where the employee is working and the custom of the profession concerned have to be taken into account.\footnote{\citelaurom} In addition, concluding fixed-term contracts may be also authorised by collective agreement at sectoral level.\footnote{\citelaurom}

Moreover, employees under fixed-term contracts shall not be employed in jobs for which permanent employees are normally employed. Thus, concluding a fixed-term contract in a sector or occupation determined by the decree provided by the labour administration is subordinate to the general prohibition on filling positions that are normal and permanent activity of the company.\footnote{\citeartlabourcode} In other words, as Roy-Loustau has stated, the predominant idea has been that the structure of the workforce is typically of temporary nature in some enterprises in specified sectors. But even in those activities, employees should benefit from contracts of indefinite duration in cases where their work is not of a temporary nature or the prevailing practice permits exercising certain professions on a permanent basis.\footnote{\citelaurom}

The last category of permissible use fixed-term contracts is situations that are intended to promote training and employment. France did not take advantage of the option provided in the Directive on Fixed-Term Work to exclude the employment contracts concluded within the framework of employment policies from the scope of the national law. Article 1242-3 of the Labour Code authorises the conclusion of fixed-term contracts on the grounds of promoting the hiring of unemployed people and by means of completing professional education and training very generally.\footnote{\citelaurom} The French regulation enables the conclusion of numerous types of fixed-term contracts that purport to promote training and employment of certain groups in the labour market.\footnote{\citelaurom} These contracts may be concluded on the grounds of vocational training and no further justification is required.\footnote{\citelaurom} Furthermore, the general

\footnotesize
\begin{enumerate}
\item Laulom, Sylvaine –Vigneau, Christophe (2007), pg 15.
\item Roy-Loustanau, Claude: Les Contrats à Durée Déterminée Selon l’ Usage: Nouvelle Donne, Droit social (2004), pg 629.
\item Laulom, Sylvaine –Vigneau, Christophe (2007), pg 22.
\item Labour code, Article 1242-1.
\item For example, contracts of qualification, professionalisation, adaptation to employment, and youth contracts. Laulom, Sylvaine –Vigneau, Christophe (2007), pgs 15-16.
\item Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU: pg 201.
\end{enumerate}
interdiction determined by the Labour Code Article 1242-1 and the restrictions for renewals are not applied to these contracts. A fixed-term contract can also be concluded for the purposes of employing the disadvantaged or those who find it difficult to get employed due to their invalidity or social or family situation, for a period of 24 months maximum, even if it has an aim or the effect of permanently filling a job related to the normal and permanent activity of a company which is prohibited by Labour Code Article 1242-1.

A further example of this type of contract is the category of fixed-term contracts for young people for purposes of work and training (contrats de professionnalisation). This kind of contract can be concluded with persons aged between 16 and 25 years and on demand even with older people in order to improve professional qualifications. The minimum duration is between 6 and 12 and in certain situations 24 months, and the proportion of education cannot exceed a quarter of the total duration of the contract. The contract can be renewed once if its objective was not achieved during the first contract period.

The Commission has urged France to continue the implementation of individualised and early intervention schemes for the unemployed and make greater use of such schemes to prevent both youth and adult unemployment. France responded to the Commission in the National Action Plan in 2001, i.e., measures have been taken in France to set up a comprehensive and coherent lifelong learning strategy based among other things on the development of combined job/training contracts.

4 RENEWAL AND TOTAL DURATION OF FIXED-TERM CONTRACTS

The contract period must be defined accurately either in days, weeks or months. In most situations, the total duration of a contract period must not exceed 18 months, including renewal. However, this maximum total duration differs according to

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1201 Lokiec, Pascal:Fixed-Term Contracts in France (2010), pg 76.
its justification and there are plenty of derogations from this main rule. The maximum duration of a fixed-term contract can be extended to 24 months where tasks are related to assignments carried out in a foreign country, cases of replacement of an employee who left the company because of his or her position being eliminated, or cases of increased workload due to exceptional export orders. Moreover, the maximum duration of 18 months is reduced to 9 months when the assignment is made under specific objective grounds such as waiting for the permanent employee recruited to start his employment or urgent work. The maximum total duration is not applied to successive fixed-term contracts concluded on the grounds of replacing an absent employee when the expiry of absence is not known exactly. Furthermore, the Court of Cassation has decided that the maximum total duration of 18 months is not applied to successive fixed-term contracts on the grounds of replacement concluded in sectors and occupations where it is a regular custom not to conclude contracts of indefinite duration by reason of the nature of the activities and the temporary nature of the work. Finally, the maximum total duration is not applied to seasonal contracts or to fixed-term contracts intended to favour the recruitment of the unemployed or to complete professional education in accordance with the Labour Code.

In the French law, fixed-term contracts can be divided into two categories, as Lokiec has indicated: contracts whose term is defined precisely and contracts whose term is unspecified because its precise completion time is unknown beforehand. The contracts in the former category include fixed-term contracts concluded on the grounds of temporary increase in an employer's activity, performance of a specific task or occasional urgent rescue work or performance of a task related to an exceptional export order, the final departure of an employee prior to elimination of his job and the recruitment of a particular category of job seekers. In addition, the Court of Cassation has recently declared that even in seasonal activity the

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1207 Labour Code. Articles 1242-3, 1242-8. There are also sector-specific provisions in the Rural Code concerning successive contracts in some agricultural occupations such as harvesting. According to Rural Code Article 718-5, fixed-term contracts can be concluded successively provided that the total duration of the contracts does not exceed two months within 12 months.
1208 Labour code 1242-2.Lokiec, Pascal (2010), pg 76.
duration of the contract must be defined precisely and the minimum period must be complied with.\footnote{1209}

With regard to contracts including the second category, the parties are allowed to set an indefinite term in the fixed-term contract where expiry is defined by a specific event, the occurrence of which is not determinable by date. Temporary replacement of an absent employee whose return is not known beforehand constitutes the first situation in which fixing a definite term is not required. In this case, the flexibility given to the employer is explained by the occasional character of the return of the employee on leave.\footnote{1210} The second sub-category of derogations where no definite term is required is related to sectors in which it is not normal to employ by contracts of indefinite duration determined by the circular and collective agreements.\footnote{1211} The third sub-category comprises all the jobs in which there is uncertainty in regard to the duration necessary for their execution; for example, the realisation of a restricted project. Furthermore, no definite term is required in situations concerning awaiting an employee recruited under a contract of indefinite duration to take up the post. The contract must be concluded at least for a minimal duration and shall not exceed nine months, a period which constitutes the legal limit in such recourse to fixed-term contracts. By contrast, a maximum duration is applicable to the derogations mentioned above.\footnote{1212} In these cases, only a minimal duration must be mentioned in the contract and the termination of the contract may be postponed until the person on leave returns to work, without consideration of the maximum legal period of 18 months.\footnote{1213}

Most of the fixed-term contracts concluded in the framework of employment policies have a specific duration. Accordingly, the maximum total duration is not applied either to fixed-term employment contracts concluded for the reason of improving the employment of certain categories of unemployed persons or to the contracts intended to complete the professional education of the employee.\footnote{1214}

According to the French Labour Code, only one renewal of the fixed-term contract is permitted and is subject to strict further preconditions. Firstly, the renewal must

\begin{footnotesize}
1211 Labour code Article 1242-7, Pellissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008), pg 433.
1213 Labour code Article 1242-7. The parties are free to determine the length of the minimum duration. The contract ends when, for example, the absent worker returns from leave or the task for which the fixed-term contract was concluded is completed. However, the consequence of failing to determine a minimum duration is that contracts are requalified as contracts of indefinite duration. Pellissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008), pg 434. Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pg 206.
\end{footnotesize}
not go beyond the maximum total duration. Secondly, the grounds for the renewal must be similar to the initial contract and must exist at the date of renewal. Thirdly, the renewal is prohibited in cases where an indefinite term is permitted.\footnote{1215} If these conditions are not satisfied, the contract of employment is requalified as a contract of indefinite duration in accordance with the employee’s demand.\footnote{1216}

In order to achieve the objective of the French legislation on fixed-term contracts, which is to prevent employers from using fixed-term employees on a long-term or permanent basis by successive contracts, it is not possible, except for certain situations, to conclude a new fixed-term contract for identical work with the same employee or a different employee when the previous contract expires before the expiration of a waiting period. The duration of this period differs, depending on the length of the original contract. If the initial contract period was 14 days or longer, a waiting period of at least one-third of the duration of the original contract must be complied. Correspondingly, a waiting period of half of the contract period, including renewals, must be complied with if the contract period was less than 14 days.\footnote{1217}

The notion of the work is considered according to what the employee has to do, and not by the location of the workplace. Therefore, if one employee is expected to perform the same work in different places through successive contracts, the employer is also required to observe the waiting period between each contract.\footnote{1218}

If the employer concludes a new fixed-term contract before the expiry of the waiting period, the contract can be requalified until further notice.\footnote{1219} Furthermore, concluding a fixed-term contract within the six-month period counted from a redundancy on economic grounds is prohibited unless the duration of the contract is less than three months or is a response to an unforeseen peak in exports that justifies its use.\footnote{1220}

These waiting periods between contracts aim at avoiding the abuse that consists of resorting to successive fixed-term contracts for a permanent post.\footnote{1221} An Act of 2002 has specified that this waiting period has to be determined with reference to the days the company has been open. The waiting period obligation can be ruled out in exceptional cases (such as urgent work for safety reasons). However, this

\footnote{1215} Laulom, Sylvaine – Vigneau, Christophe (2007), pg 18. Code, Article 1243-13. These restrictions are not applied to fixed-term contracts concluded by means of favouring of the unemployed or completing the the professional education of the employee in accordance with Labour Code Article 1242-3.

\footnote{1216} Pélissier, Jean- Supiot, Alain- Jemmaud, Antoine (2008), pg 440.


\footnote{1221} Pélissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008), pg 426.
prohibition on concluding fixed-term contracts during the waiting period will not apply if the employee interrupts the first posting before the expiry of its term, or if the employee refuses to renew it once it expired.\footnote{1222} Furthermore, this does not prevent successive fixed-term contracts immediately after the expiry of the first with the same employee on the same tasks in sectors determined by decree or collective agreement, where the regular custom is not to use contracts of indefinite duration because of the nature of the activity and character of the work. The waiting period is not required where the use of a fixed-term employee is due to unforeseeable circumstances, namely, the new absence of a permanent employee on leave, urgent work needed for safety, jobs for which it is not common to resort to employees under open-ended contracts and seasonal employment or in certain fixed-term contracts intended for employees aged over 57.\footnote{1223}

In assessing whether the successive contracts are lawful, the essential element is not the employee but the position. The main rule is that an employer cannot conclude successive fixed-term contracts on the same tasks with the same employee, which constitutes a contract of indefinite duration.\footnote{1224} However, this rule will not apply if replacing an absent employee or the manager of the enterprise, seasonal work and the activities of sectors where fixed-term contracts are the norm. In these circumstances, the employment contracts remain fixed-term.\footnote{1225} Even then fixed-term contracts must not have the effect of permanently filling the job related to the normal and permanent activity of the company when the court can requalify the fixed-term contract as permanent, especially when the employee has worked as a replacement under the same terms for several years.\footnote{1226} The derogations from the prohibition on successive fixed-term contracts has been criticised because it undermines the effectiveness of the rule that fixed-term contracts are not allowed in permanent jobs.\footnote{1227}

Nevertheless, an employer may lawfully conclude successive fixed-term contracts with the same employee if his or her tasks vary from one contract period to another. Furthermore, the employer must justify a specific ground for each contract.

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\item \footnote{1224} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 18, Labour code 1243-11.
\item \footnote{1225} However the French Court of Cassation has rejected the requalifying of successive fixed-term contracts the total duration of which was over 2 years as contracts of indefinite duration on the grounds of the precariousness of the employer’s activity. (Soc 5 déc.2001, RJS 3/02 n 270) French Labour Code Article 1244.1. Pèllissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008)pg 440.
\item \footnote{1226} Pèllissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008), pgs 440-441.
\item \footnote{1227} Lokic, Pascal (2010), pg 77.
\end{itemize}
Correspondingly, an employer is not allowed to conclude successive contracts for the same position even with a different employee.\textsuperscript{1228}

5 PREMATURE TERMINATION OF FIXED-TERM EMPLOYMENT CONTRACT

Since fixed-term contracts are concluded for a limited duration apart from contracts of indefinite duration, they are generally considered precarious employment relationships. In order to avoid further precariousness for fixed-term employees, the fundamental idea behind the French legislation is, as Laulom and Vigneau point out, to protect the employee against any premature breach of the fixed-term contract and thus to increase their contractual security during the contract term.\textsuperscript{1229} A fixed-term contract can thus only be terminated before the expiry of the term by reasons of grave fault, force majeure, the incapacity of the employee certified by a doctor, or by mutual agreement between the employee and employer.\textsuperscript{1230} The employer has the burden of proof on those reasons.\textsuperscript{1231} Instead, otherwise it is not permitted to include in the contract a clause allowing the party to terminate the employment contract unilaterally.\textsuperscript{1232}

*Force majeure* is not determined by the Labour Code. However, the question must be about unforeseen events and independence from accepted economic risk and mistakes by the management of the company that makes fulfilling the obligations of the contract impossible.\textsuperscript{1233} The courts very rarely admit the force majeure reason and economic difficulties do not constitute such an act.\textsuperscript{1234} For example, insufficient professional ability,\textsuperscript{1235} sickness or the disability of an employee cannot be regarded as cases of force majeure. The employer cannot invoke the non-performance of the employee either.\textsuperscript{1236}

\textsuperscript{1228} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 18, Lokiec, Pascal (2010), pg 77.
\textsuperscript{1229} Laulom, Sylvaine –Vigneau, Christophe (2007), pgs 20-21.
\textsuperscript{1231} The Court of Cassation has however argued that in circumstances where the employer terminated the contract by reason of a grave fault of the employee, the improper behavior justified termination on real and serious grounds and therefore the termination did not have the effect of expiry, Soc. 30 mars 2004, Claude Roy-Loustauanau (2008), pg 306. For the employer’s burden of proof, Soc 29 nov 1978.
\textsuperscript{1232} Lokiec, Pascal (2010), pg 78, Soc. 22 Dec. 1988, No 85-42.208.
\textsuperscript{1233} Pèllissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008), pg 561.
A ‘grave fault’ is defined as an act that constitutes a breach of the employment contract that makes it impossible to retain the employee during the notice period.\textsuperscript{1237} The French Court of Cassation has applied this rule very strictly by denying the employer any other way to terminate the contract before its term is up.\textsuperscript{1238} The Court of Cassation has, for example, accepted gross misconduct and gross failure in the work as a grave fault in its case law.\textsuperscript{1239} Additionally, the main rule is that reasons must be of a professional nature.\textsuperscript{1240}

If the employer has terminated the fixed-term contract prematurely for other than the legitimate reasons explained above, he is obliged to compensate the loss for the employee suffered equivalent to the entire salary due for the remaining period of the contract added to an indemnity allowance.\textsuperscript{1241} The objective of the compensation for damage is to make the fixed-term contracts more secure for employees and to prevent employers from interrupting the contract before its term is up.\textsuperscript{1242}

In this sense, fixed-term contracts are more secure during the contract period than contracts of indefinite duration, which can be terminated on grounds of a ‘real and serious cause’.\textsuperscript{1243} For this reason, it is also sometimes in the employer’s interest to get fixed-term contracts requalified as of indefinite duration in order to have recourse to termination of employment.\textsuperscript{1244}

The law first mentioned the notion of real and serious cause as a reason for termination of employment in 1973. The reason must be objective, verifiable and be derived from the employee’s circumstances such as professional incapacity, fault or distrust. Furthermore, in order to be serious the ground for termination shall be sufficiently grave that it is impossible to continue the employment without causing harm to the company. In addition to real and serious causes, the employment relationship may be terminated on economic grounds.\textsuperscript{1245}

A stricter fault committed by the employee is thus required to break a fixed-term contract during the contract period than is required to justify dismissal under

\begin{itemize}
\item \textsuperscript{1237} Pèlissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008), pgs 658-659. Laulom, Sylvaine –Vigneau, Christophe (2007), pg 20.
\item \textsuperscript{1239} Soc 8. janv. 1987, Pèlissier, Jean- Supiot, Alain - Jemmaud, Antoine: (2008), pg 435.
\item \textsuperscript{1240} The Court of Cassation has, however, exceptionally accepted non-professional acts by an employee as grave faults when they create a problem for the objective and functions of the enterprise. Soc. 20 nov. 1991.
\item \textsuperscript{1241} Labour code 1243-4.
\item \textsuperscript{1242} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 21.
\item \textsuperscript{1243} However, the Court of Cassation has deemed that a fixed-term contract which was concluded to replace an absent employee whose employment contract had been terminated on economic grounds because of cessation of the activity causes expiry of a fixed-term contract. Soc., 20 avril 2005, Laulom, Sylvaine –Vigneau, Christophe (2007), pg 20.
\item \textsuperscript{1244} Roy-Loustauau, Claude : Contrat de Travail à Durée Determinée: Requalification-Sanction et Qualification, Droit Social (2003), pg 467.
\item \textsuperscript{1245} Pèlissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008) pgs 586-588.
\end{itemize}
a contract of indefinite duration. Therefore, some commentators have stated that fixed-term contracts have a less precarious character than contracts of indefinite duration considering the legal regime applying to these contracts.\textsuperscript{1246}

6 SANCTIONS FOR ABUSE OF FIXED-TERM CONTRACTS

When a fixed-term contract is concluded in other situations than determined by the law or when it violates the prohibitions imposed by the law, the contract can be requalified as a contract of indefinite duration. Requalification comes into question when fixed-term contracts are intended to or in effect fill a job related to the normal and permanent activity of a company long-term,\textsuperscript{1247} the contracts do not fulfil the requirements laid down by the Labour Code for concluding fixed-term employment contracts with apprentices or retired persons,\textsuperscript{1248} or if they are used in order to replace an employee whose contract of employment is suspended as a consequence of industrial action.\textsuperscript{1249} Furthermore, fixed-term contracts can be requalified as indefinite duration when they exceed the maximum total duration including renewal, violate the total number of renewals,\textsuperscript{1250} the contract is not concluded in writing\textsuperscript{1251} or does not contain some ground authorizing the conclusion of the contract, such as waiting periods, or does not fulfil the other formalities required by the law.\textsuperscript{1252} The intention of requalification is to protect the employee against the risks of precarious employment.

For an employee’s claim, which must be presented within three weeks of the end of the contract, a court can pronounce the employment contract requalified as a contract of indefinite duration on the grounds explained above. Thus, the court cannot transform the contract \textit{ex-officio} without the employee’s claim and

\textsuperscript{1246} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 21.
\textsuperscript{1247} Labour code Article 1242-1. The Court de Cassation has, for example, requalified a seasonal employee’s contract to a permanent one on ground of Article 1242-1 in cases where the employee has been employed on a fixed-term contract in activities which are the normal and permanent activity of the employer. Soc. 16 juillet 1997, RJS 10/97, n 1073. Soc. 4 déc. 1996, Bull. civ. V, n 414; CSB 1997 A.14; RJS 1/97, n 13. Accordingly, the Court of Cassation has prohibited systematic recourse to fixed-term contracts on the grounds of replacement in circumstances where the need for replacement reflects the structural need of the employer and successive contracts concluded in said activity as a requalified contract of indefinite duration. Soc. janvier 2006 n 02.45.318 PBRI.
\textsuperscript{1248} Labour code Article 1242-4.
\textsuperscript{1249} Labour code Article 1242-6.
\textsuperscript{1250} Labour code Article 1243-13.
\textsuperscript{1251} Soc 30.11.2004, where the Court of Cassation requalified the contract, which was not in writing, as a contract of indefinite duration. Roy-Loustauan, Claude: Droit Social (2005).
\textsuperscript{1252} Labour code 1242-8 and 1242-12. Requalification is also a consequence of violating the provision of L1243-11 or provisions of 1244-3 and 1244-4 on prohibitions on concluding new fixed-term contract for the same task before a waiting period has expired.
no automatic transformation can occur. The employee has to prove that the limitation regarding the duration of the contract was unlawful. If the employer claims the existence of an objective reason for the fixed-term contract, he or she has the burden of proof of this fact as well.

Alongside the requalification, the French Labour Code compensates for the limited duration of the contract by giving some guarantees to the worker that the contract will last its specified term. The sanction imposed in the case of a breach of a contract before the expiry its term by the employer is financial compensation. The employer is obliged to pay the employee the wages (and the indemnity allowance) he/she would have received at the end of the contract term. According to Vigneau, that amount may be reduced if the worker has found another job, or if the employer can prove that the worker would have found another job if he or she had been more diligent.

The premature termination of a fixed-term contract by the employer on some ground other than grave fault, force majeure, agreement of the parties or incapacity of the employee certified by a doctor initiates liability to compensate the employee for the loss. The latter is entitled at least to an amount equivalent to the remuneration for the remaining contract period without prejudicing the right to an indemnity allowance. This compensation must be paid even if the contract was terminated before the commencement of the employment relationship. If a fixed-term contract was concluded without determining the contract term precisely, the compensation can be reckoned in accordance with the foreseeable contract term at the time of interruption. The Court of Cassation has, however, pointed out that although the inability of an employee to perform tasks provided under a fixed-term contract does not constitute a force majeure which authorises premature interruption of the contract but renders it impossible to re-employ him or her, an employer cannot be responsible for the remuneration of the remaining contract period within the period where the employee cannot perform his or her tasks.

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1253 Labour code Article 1245-2.
1256 Vigneau, Christophe - Ahlberg, Kerstin - Bercusson, Brian – Bruun, Niklas: Fixed-Term Work in the EU (1999), pgs 208-209.
1257 Labour code, Article 1243-4, Pascal Lokiec (2010), pg 79, Pélissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008), pg 437.
1259 Soc 13 mai 1992. Pélissier, Jean- Supiot, Alain - Jemmaud, Antoine (2008), pg 437. However, according to the Court of Cassation an employee is not entitled to unemployment benefits while he is receiving compensation for loss. See, Soc 14 janv 1997.
Thus, the French regulation imposes a strict contractual formalism. Any violation of the rules regarding the total duration, renewal, premature termination or successive number of contracts opens the employer to criminal and/or civil liability.\footnote{1261 Laulom, Sylvaine --Vigneau, Christophe (2007), pg 18.}

### 6.1 INDEMNITY ALLOWANCE AND CRIMINAL LIABILITY

Fixed-term employees are entitled to the indemnity allowance due at to the end of the contract period, as the contract did not continue. The intention of the indemnity is to guarantee the right to a wage supplement to compensate for the precarious character of the employment. The amount of the indemnity allowance represents ten per cent of the total remuneration earned by the worker at the expiry of his contract, unless otherwise agreed in a collective agreement.\footnote{1262 Laulom, Sylvaine --Vigneau, Christophe (2007) pg 19. Labour code, Article 1242-8 It is also possible to lower (at enterprise, establishment or industry level) the indemnity allowance to 6 per cent by collective agreement in situations where the collective agreement includes provisions on access to vocational training for fixed-term workers.}

Seasonal employees and employees who are employed in the sectors defined by the decree where it is established practice not to use contracts of indefinite duration are not entitled to the indemnity at the expiry of the contract. There are, however, other exceptions from the obligation to pay indemnity at the end of contract as well. Firstly, when the contract is transferred to a contract of indefinite duration after successive fixed-term contracts, the indemnity must not be paid at the expiry of the last contract.\footnote{1263 Soc. 5 février. 1992.} Furthermore, the indemnity is not paid if the fixed-term employee has refused a contract of indefinite duration including the same or similar tasks under the same terms of remuneration and when the interruption occurs on the employee’s initiative, because of his grave fault or because of force majeure. Finally, an indemnity is not paid when a fixed-term employment contract is concluded by means of employing an unemployed person or vacancies for young scholars in universities. The last exception has been criticised as discriminatory on the grounds of age.\footnote{1264 Péllissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008), pgs 438-439, Labour Code Articles 1242-2, 1242-3, 1243-18, 1243-8. Laulom, Sylvaine --Vigneau, Christophe (2007) pgs 19-20.}

The employer who either concludes fixed-term employment contracts the aim or the effect of which is permanently to fill a job related to the normal and permanent activity of a company, or without objective reasons determined by the Labour Code\footnote{1265 Labour code 1248-2.} can be subject to fines of EUR 3,750.\footnote{1266 Labour code 1248-1, 1242-1 and 1242-2.}

Furthermore, it is
punishable for the employer to conclude fixed-term contracts within six months following the redundancy of an employee on economic grounds in order to satisfy the temporary needs of employer\textsuperscript{1267} or replace an employee whose job is suspended as a consequence of industrial action or in certain dangerous tasks determined by the law, or to failure to conclude a fixed-term contract in writing or to determine the term of employment precisely in accordance with the law.\textsuperscript{1268} Moreover, it is punishable either to conclude fixed-term contracts exceeding the maximum total duration determined by the Labour Code or to renew the contract contrary to the Labour Code or to conclude the contract irrespective of the waiting period determined by the law.\textsuperscript{1269} A re-offence is punishable either by a fine of EUR 7,500 or imprisonment for a maximum of six months.\textsuperscript{1270}

The penal sanctions were originally introduced to limit the illegal abuse of successive contracts, but they are very rarely used in practice. It is, however, a potentially effective measure that is sometimes used by trade unions acting on behalf of employees where the practices of employer in respect of the use of fixed-term contracts are totally illegal, or where abuses are repeated after notification by the labour inspectorate.\textsuperscript{1271}

7 THE IMPLEMENTATION OF DIRECTIVE 99/70/EC AND THE EVOLUTION OF FRENCH LEGAL CULTURE WITH RESPECT TO CONCLUDING FIXED-TERM CONTRACTS

Firstly, the Directive on Fixed-Term Work has had a marginal effect on the French regulation mainly because detailed regulation, including restrictions on the use of fixed-term contracts by the requirement of an objective reason to conclude such contracts and by limiting the duration of the contracts was already in place by the time the implementation period had expired. The principle of equal treatment between employees under a fixed-term contract and those who had a contract of indefinite duration was also already recognised in 1979 and is applied to all aspects of the employment relationship.\textsuperscript{1272}

\textsuperscript{1267} Labour code 1242-5, 1248-3.
\textsuperscript{1268} Labour code 1242-6 and 4154-1. L. 1242-7, 1248-4.
\textsuperscript{1269} Labour code 1248-5, 1248-5, 1243-13, 1248-10, 1244-3, 1248-11.
\textsuperscript{1270} Labour code 1248-1. Lokiec, Pascal (2010), pgs 80-82.
\textsuperscript{1272} Such as remuneration, working conditions, social security, job security during the employment relationship etc. See Pellissier Jean., Travail à durée limitée et droits des salaries, Droit Social 1983, Sylvaine Laulom – Christophe Vigneau (2007), pg 22., Contouris, Nicola (2007), pg 112.
The amendments of legislation for the reason of implementing the directive are related to the right to information on vacancies for permanent contracts. According to Article L.1242-17 of the Labour Code, the employer must provide the same information on vacant open-ended jobs for employees on fixed-term contracts as for the employees under contracts of indefinite duration in order to ensure that they have the same opportunities to obtain a permanent job as other employees. In accordance with a ministerial circular, this information can be provided by any measure that ensures each permanent or precarious employee’s access to information under similar terms.  

Although the French regulation has not been changed much since the implementation of the Directive on Fixed-Term Work, the development of case law has not followed the CJEU interpretation on the Framework Agreement on Fixed-Term Work. The Court of Cassation declared in 2003 that a fixed-term contract concluded because it is normal in certain sectors not to recourse to contracts of indefinite duration could be renewed without further limitation laid down by the Labour Code.  

The Court was asked to requalify a fixed-term contract into one of indefinite duration in a sector covered by decree. The court considered that the existence of custom must be verified solely by sectoral level activities which allow an assumption on the principal activities of the enterprise level as well and thus the court extended the custom to the company without taking into account the permanent nature of the occupation concerned. By doing so, the court considered that only the probability of the custom on the grounds of sectoral activities was sufficient to satisfy the burden of proof of the temporary nature of the position.  

The Court of Cassation repeated this stance in its judgment of 2005. In previous case law, courts had analysed on a case by case basis on a restrictive interpretation of the decree whether the enterprise was acting in the sectors laid down by the decree, the existence of a professional custom of not having recourse to permanent employment contracts and finally the temporary nature of the position for which the fixed-term contract had been concluded. The courts have previously rejected concluding fixed-term contracts in sectors defined by the decree and requalified the

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1275 Soc. 26.11.2003, no 298.
1277 Soc. 25.3. 2005, no 135.
employment contracts of actors, editors and teachers when their position related to the normal and permanent activity of the company.\textsuperscript{1280}

The recent case has been criticised mainly because it is contrary to the general prohibition on the use of successive fixed-term contracts determined by the Labour Code. The implication of this judgment is that the actual duration of the position where the fixed-term contract is concluded is no longer of relevance in assessing whether the activities of the company are permanent but merely the fact that the enterprise concerned is acting in a sector defined by the decree.\textsuperscript{1281}

The legal rule included in the judgment may also frustrate the restrictions related to the other objective reasons for the use and renewal of fixed-term contracts in the sectors in question. For example, seasonal contracts cannot be requalified as contracts of indefinite duration in the hotel and restaurant sector irrespective of how long the employee has worked during the opening hours of the company. Moreover, the question arises in the light of the trend commenced by the Court of Cassation of whether the maximum total duration of fixed-term contracts or the waiting period have to be applied in sectors or occupations where it is the regular custom not to use contracts of indefinite duration.\textsuperscript{1282} As a concluding remark on the judgement, it seems that the court refused to exercise judicial control in respect of this established custom as a reason for concluding fixed-term contracts.\textsuperscript{1283}

The Directive on Fixed-Term Work, as interpreted by the CJEU in Adeneler, should at this point have had an effect on the French case law.\textsuperscript{1284} As Laulom and Vigneau have stated, the position adopted by the Court of Cassation is contrary to the Directive and its relevant case law adopted by the CJEU, because in these situations there are no limits on the use of fixed-term contracts. The reason cannot be regarded as objective since there is no maximum total duration of successive fixed-term employment contracts, and there is no limit to the number of renewals of such contracts.\textsuperscript{1285} This could lead to permitting the use of fixed-term contracts in the sectors determined by the decree in circumstances where the need of the employer is permanent, which was deemed prohibited by the CJEU in the Adeneler, Angelidaki and Vassilakis cases.\textsuperscript{1286} This legal position does not satisfy the requirement of preventing the abuse of fixed-term contracts in a proportionately but sufficiently effectively and deterrent way determined by the CJEU in the Vassallo case, but as


\textsuperscript{1282} Roy-Loustana, Claude (2004), pg 629-631.

\textsuperscript{1283} Roy-Loustana, Claude (2004), pg 631.

\textsuperscript{1284} C-212/04, Adeneler, paras. 68-69 and 88.


\textsuperscript{1286} C-212/04, Adeneler, para. 88, Vassilakis, para. 110, C-378/07, para. 103.
yet the *Court of Cassation* has not changed its position.\textsuperscript{1287} Instead of discharging sectors determined by the decree completely from legal restrictions on concluding fixed-term contracts, the Court of Cassation should have submitted the case to the CJEU for a preliminary ruling.

Finally, the Directive has had an obvious impact on the rules governing fixed-term contracts in the public service. The Labour Code was not previously applied to them and it was permitted in the public sector to conclude and to renew fixed-term contracts with no limitation at the time the Directive on Fixed-Term Work was implemented.\textsuperscript{1288} As the CJEU confirmed in its case law, since the Directive is applied to fixed-term employment contracts and relationships concluded with the public authorities and other public sector bodies as well, France had to change its legislation, adopting a law which introduced limits on the duration and maximum number of fixed-term contracts in the public sector in 2005.\textsuperscript{1289}

However, the rules governing the use of fixed-term contracts in the public sector are different from the Labour code. The main difference is the maximum duration of the fixed-term contracts which is three years in the public sector and, with one permissible renewal, the total maximum duration is six years. Following the maximum duration, fixed-term contracts are transformed into indefinite duration automatically.\textsuperscript{1290} In this regard, the CJEU has stated that it is not necessary that the employment contract of indefinite duration be continued on terms identical to those set out in the previous fixed-term contract. The precondition for this is that the conversion of fixed-term employment contracts into an indefinite duration contract not be accompanied by material amendments to the terms of the previous contract in a way that is unfavourable overall for the person concerned when the person’s tasks and the nature of his functions remain unchanged.\textsuperscript{1291}

### 7.1 NEW RECRUITMENT CONTRACT

The French legislator has retained strict regulation of fixed-term contracts and thus kept the main rule in force according to which the contract of indefinite duration is the primary form of employment irrespective of the employers’ demand for more flexibility. Thus, instead of increasing the number of situations in which employers

\textsuperscript{1287} Laulom, Sylvain–Vigneau, Christophe (2007), pg 22. Soci. 29 November 2006, n004-47792. C-180/04, Vassallo and others, para. 36. See also C-212/04, Adeneler, para. 94.

\textsuperscript{1288} Laulom, Sylvain–Vigneau, Christophe (2007), pg 24.

\textsuperscript{1289} C-180/04, Vassallo and others, para. 32, C-212/04, Adeneler, para. 54, C-53/04, Marros, & Sardino, para 39.


\textsuperscript{1291} C-251/11, Huet, para. 46.
may use fixed-term contracts, the legislator has increased the flexibility of open-ended contracts by introducing new contract types, such as, the new recruitment contract (‘le contrat nouvelle embauche’) and the first employment contract (‘le contrat première embauche’) and the attraction of fixed-term contracts has been reduced as a consequence.\textsuperscript{1292}

The French Government introduced the ‘New Recruitment Contract’ (‘le contrat nouvelle embauche’, CNE), a contract of indefinite duration only available to employers with maximum of 20 employees, by a decree in August 2005.\textsuperscript{1293} Both parties are entitled to terminate the CNE without any grounds during the first two years with the exception of cases motivated by grave misconduct by the employee and force majeure.\textsuperscript{1294} This is an essential derogation from the main rules of employment security, according to which a contract of indefinite duration can only be terminated on the basis of a ‘real and serious cause’, and the employer has to follow the procedure determined by the Labour Code before dismissing the worker.\textsuperscript{1295} Moreover, the CNE permits the employer to terminate employment contracts at will during the first two years of employment without any specific procedure only by complying with the notice period of two weeks if the contract is concluded for a period of less than six months and one month when the contract has lasted between six months and two years.\textsuperscript{1296}

However, there are some restrictions governing the use of the CNE. Firstly, consecutive CNE contracts are not allowed. If the employment contract is interrupted on the employer’s initiative during the first two years, the new CNE contract cannot be concluded with the same employee before the expiry of three months counting from the end of the first contract.\textsuperscript{1297}

In its precedent, the Labour Court has required the CNE to be used only in new positions. The Court considered that because the main objective of the CNE is to create new jobs, using the CNE to replace employees with contracts of indefinite duration which is not a new recruitment pursued by the decree is not allowed, and

\textsuperscript{1292} Vigneau, Christophe (2008), pgs 86-87.
\textsuperscript{1293} The scope of application of this new contract is broad, covering industrial professions, and the agricultural and commercial sectors; in other words, almost all private sectors where some collective agreement has been concluded. However, public sector enterprises are excluded from its scope. Laulom, Sylvaine –Vigneau, Christophe (2007), pg 24. Roy-Loustaunau, Claude: Le Contrat Nouvelles Embauches: la Flexi-Sécurité à la Française, Droit Social (2005), pg 1106.
\textsuperscript{1295} Laulom, Sylvaine –Vigneau, Christophe (2007), pgs 24-25.
\textsuperscript{1297} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 25. Decree ord. 2005-893 du 2 août 2005. On the other hand, no waiting period is required if the employer concludes a new CNE with another employee or in cases where the previous employee under the CNE has resigned. Roy-Loustaunau, Claude: Droit Social (2005), pg 1111.

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therefore this kind of use of the CNE is prohibited as circumventing the provisions of employment security.\textsuperscript{1298} For the same reason, concluding a CNE with existing employees is prohibited.\textsuperscript{1299} The CNE contract cannot be concluded for a fixed-term either, something unambiguously prohibited by the decree governing the use of the CNE.\textsuperscript{1300}

The termination cannot violate the prohibition of discrimination and the disciplinary procedure that is very similar to the termination procedure that has to be followed when the reason for termination is disciplinary.\textsuperscript{1301} This period of two years is called the period of job consolidation (‘\textit{période de consolidation de l’emploi}’) instead of the trial period because its purpose is to assess whether the job can be a permanent one, but not to control the capacity of workers.\textsuperscript{1302}

Some rights are also conferred on the employees in the case of termination during the two-year period. Firstly, if the contract is terminated prior to the two-year period of job consolidation, the employee is entitled to financial compensation for the precarious character of his/her employment relationship. The compensation is an 8 per cent indemnity allowance based on the total remuneration earned by the employee at the end of her/his contract. In addition, an extra 2 per cent subsidy is payable to the state employment agencies to finance specific services provided for that employee to help him to get re-employed.\textsuperscript{1303} The employment costs of the CNE are equal to the fixed-term contract, but it gives the employer more flexibility. Secondly, if the employee does not satisfy the preconditions for an unemployment benefit (because he or she has not worked long enough), he/she is entitled to a specific benefit of EUR 16.40 per day for one month.\textsuperscript{1304} Furthermore, when an employer interrupts the contract during the period of consolidation, the employee is entitled to benefit from measures provided by the law intended to promote re-employment. A personal action plan containing the assessment of the skills and competence of an employee and other supportive measures must be prepared. A

\textsuperscript{1299} Dockès, Emmanuel: Du CNE au CPE, Après le Jugement du Conseil de Prud’Hommes de Longjumeau, Droit Social (2006), pg 359.
\textsuperscript{1301} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 25. If an employee makes a claim that interruption of employment is discriminatory, the employer has to specify the adequacy of the reason before the court. Roy-Loustauanau Claude: Droit Social (2005), pg 1119.
different indemnity allowance is also applied when the employee is re-employed on lower paid work than previously.\textsuperscript{1305}

The creation of the CNE was part of an emergency employment plan which purported to improve the employment situation in France and to enhance the willingness of small employers to take on staff by lowering employment security and reducing the expenses related to termination of employment as the employment security had been criticised by the government as too rigorous to employ effectively enough.\textsuperscript{1306} The government justified the reform by stating that labour market segmentation, especially the low rate of fixed-term contracts switching to open-ended contracts, is a problem in the French labour market. The government’s action prioritizes small enterprises for which the inflexibility of the current contract options may be a major impediment to recruitment. The government believed that these contracts would enable small employers to become more motivated to take on more staff.\textsuperscript{1307} The preparation of the measure occurred without consultation with the trade unions, causing an angry response and resistance from their side.\textsuperscript{1308} Along with excluding social partners from the preparation process, the criticism of the trade unions focused on granting excessive rights to break the contract within the first two years and therefore increasing precariousness and poverty, while giving the employers the full benefits of fixed-term contracts.\textsuperscript{1309}

Subsequently, in 2006, the Government unsuccessfully tried to extend the scope of the CNE beyond small businesses, with the effect again of confronting extremely hostile reactions from trade unions and French society at large.\textsuperscript{1310} The effect of this new contract type was regarded as considerable, as small enterprises employed 30 per cent of the private sector workforce at the time the measure was introduced.\textsuperscript{1311}

The CNE has clearly been seen as an answer to the employers’ demand for more flexibility, while creating insecurity for their employees at the same time. Compared to the fixed-term contract regulated relatively rigorously, the CNE is considered clearly more attractive for small businesses.\textsuperscript{1312} The CNE, however has been criticised for the fact that employers can fall back on it in circumstances in which the preconditions for the use of fixed-term contracts determined by the Labour

\textsuperscript{1305} Roy-Loustaunau, Claude: Droit Social (2005), pg 1116.
\textsuperscript{1306} Lokiec, Pascal (2010), pgs 76-77, Sylvaine Laulom – Christophe Vigneau (2007), pgs 22 and 26, Chérèque, François: La Flexibilité sans la Sécurité, Droit Social (2005), pg 1085.
\textsuperscript{1307} Programme National de Reforme (2005), pg 30.
\textsuperscript{1308} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 24.
\textsuperscript{1309} Chérèque, François: La Flexibilité sans la Sécurité, Droit Social (2005), pgs 1084-1085.
\textsuperscript{1310} Dockès, Emmanuel Du CNE au CPE, Après le Jugement du Conseil de Prud’hommes de Longjumeau, Droit Social (2006), pg 356.
\textsuperscript{1311} Roy-Loustaunau, Claude: Le Contrat Nouvelles Embauches: la Flexi-Sécurité à la Francaise, Droit Social (2005), pg 1106.
\textsuperscript{1312} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 25.
Code are not fulfilled, and thus circumvent the restrictions determined by the Labour Code for the use of fixed-term contracts.\textsuperscript{1313} Furthermore, as the consolidation period is equivalent to the trial period, which is intended only for the assessment of the professional skills of an employee, it has been regarded as very questionable to engage an employee for such a long period and the contract to be broken without real and serious cause determined by the Labour Code (or economic reasons) or any compensation paid for potential loss of wages.\textsuperscript{1314}

The new contract type was justified by the need to further develop new forms of work which adapt to changes more rapidly in accordance with the Lisbon strategy, under which the Member States were encouraged to favour flexibility combined with security and to reduce the segmentation of the labour market. The CNE were also assimilated to the ‘Danish model’ and it has been offered as an example of a flexicurity approach.\textsuperscript{1315} Its effect, however, on the employment situation has been questionable since, according to the survey, seven employers out of ten declared that they would have hired the employee even without the CNE, either on a fixed-term contract or a contract of indefinite duration. Nevertheless, the precarious situation of employees who concluded a CNE has been manifested in the labour market, as one year after the conclusion of a CNE, half of the employees were no longer employed by the company.\textsuperscript{1316}

The future of the CNE is controversial. Its use has resulted in many dismissals which have been disputed in the labour tribunals. The case law has indicated the judges’ tendency to restrict and control the termination of contracts.\textsuperscript{1317} For example, the Labour Court has viewed the use of the CNE concluded immediately after the expiry of previous employment and involving a probationary period as abusive and circumventing the protection against unjustified dismissal.\textsuperscript{1318}

Nevertheless, the CNE reduced the need to revert to fixed-term contracts as the consolidation period made it an attractive contract for employers. On the other hand, the consolidation period and the fact that a fixed-term contract cannot be terminated during a contract period for any other reason except grave misconduct

\textsuperscript{1313} Roy-Loustaunau, Claude: Le Contrat Nouvelles Embarques: la Flexi-Sécurite á la Francaise, Droit Social (2005), pgs 1107-1108.
\textsuperscript{1314} Roy-Loustaunau, Claude: Le Contrat Nouvelles Embarques: la Flexi-Sécurite á la Francaise, Droit Social (2005), pgs 1110-1111 Compare with Labour code Article 1241-10, where the very maximum duration of trial period is one month.
\textsuperscript{1317} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 26.
\textsuperscript{1318} Labour Court (Longjumeau) 15.3.2006.
by an employee or force majeure related reasons means that a fixed-term contract is more secure for an employee than the CNE.\textsuperscript{1319}

In 2006, the Labour Court declared that the CNE was contrary to the Termination of Employment Convention No 158 of the International Labour Organisation. The Court argued that the two-year consolidation period was ‘unreasonable’ and therefore contrary to ILO Convention 158.\textsuperscript{1320} The Court of Cassation drew the same conclusion and considered a contract enabling the employer to terminate the contract at will without a valid and lawful reason during the first two years unreasonable and therefore contrary to the ILO Convention 158.\textsuperscript{1321} This decision has also been predicted to cause a need to remove the two-year period of consolidation from the law.\textsuperscript{1322}

7.2 NEW ATTEMPTS TO USE FIXED-TERM CONTRACTS AS AN EMPLOYMENT MEASURE

In France, there have been several attempts to use fixed-term contracts by way of enhancing the employment and training of particular groups. The European Council’s 2001 recommendation urged France to strengthen measures to keep older workers in working life.\textsuperscript{1323} The most recent contract type to this end is the fixed-term contract for older workers. This is also the very controversial contract type that was one of the measures provided by the inter-professional national agreement that was reached in order to promote the employment of older workers.\textsuperscript{1324} It was introduced in August 2006 by a decree which enforced the agreement. This fixed-term contract is available only for unemployed persons over the age of 57 who have either been registered as job-seekers for more than three months or signed a ‘personal reclassification’ agreement (‘convention de reclassement personnalisé’) in order to enable them to obtain a full pension. This contract type is available to all employers with the exception of those in the agricultural sector.\textsuperscript{1325} It can be concluded for a maximum period of eighteen months and be renewed once for a term which, added to the initial contract period, cannot exceed thirty-six months.

\begin{itemize}
\item \textsuperscript{1319} Laulom, Sylvaine –Vigneau, Christophe (2007), pg 24- 26.
\item \textsuperscript{1321} Soc. 7 Jul 2008, No. 07-44124.
\item \textsuperscript{1322} Laulom, Sylvaine –Vigneau, Christophe (2007), pgs 26-27.
\item \textsuperscript{1323} Council Recommendation of 19 January 2001 on the implementation of the Member States Employment Policies, page 6, See also National Action Plan for Employment, France, pgs 24-25.
\item \textsuperscript{1324} L'accord National Interprofessionnel, 13.10.2005.
\item \textsuperscript{1325} Lokiec, Pascal (2010), pg 75.
\end{itemize}
Compliance with the waiting period in the case of successive fixed-term contracts is not required.\textsuperscript{1326}

The contract seems to be in conformity with Directive 2000/78/EC as interpreted by the CJEU in the \textit{Mangold} case.\textsuperscript{1327} As the CJEU has concluded, national legislation that enables fixed-term contracts solely on the grounds of age is more than appropriate and necessary to achieve the objectives related to employment of older workers and thus not in accordance with the Directive, as it has not been shown that the only complicating factor of employability is age.\textsuperscript{1328} This is not the case in this French contract type intended for older workers as, in addition to age, further preconditions related to employment or retirement are required, thus taking other factors related to employability into account. According to Laulom and Vigneau, the objective of the measure is legitimate and, as it was much more targeted than the German one, is therefore considered proportionate.\textsuperscript{1329}

Furthermore, the French legislator has created a fixed-term contract type for job transition (\textit{contrats de transition professionelle}) on an experimental basis, the duration of which is twelve months, including a period of professional training as well as work. The maximum duration of the work period is nine months. The contract type is addressed to employees threatened by economic dismissals in companies employing less than 1,000 employees and firms that are trying to avoid bankruptcy, in order to help them to make a transition to a new job. The use of this kind of contract is promoted by the current government in order to combat unemployment.\textsuperscript{1330}

\textbf{7.3 THE FIRST JOB CONTRACT}

In February 2006, after the adoption of the CNE, the Government introduced the ‘first job contract’, (\textit{le contrat première embauche},’CPE), which can be seen as an extension of the CNE because of the close similarity in its conditions, such as the two-year consolidation period\textsuperscript{1331} and its target group, companies employing more

\begin{footnotes}
\item[1328] C-144/04, Mangold, para 65.
\item[1329] Laulom, Sylvaine –Vigneau, Christophe (2007), pgs 16-17 compared with C-411/05, Palacios de la Villa, para. 68-72 and the operative part of the judgment. In this case the Court deemed a compulsory retirement age included in the collective agreement consistent with Directive 2000/78/EC provided that the employees concerned were entitled to the retirement benefits and the measure concerned related to the national legitimate social policy objective, which was intended to promote full employment by facilitating access to the labour market.
\item[1330] Lokiec, Pascal (2010), pg 75.
\item[1331] The duration of previous employment relationships was taken into account in fulfilling the two-year consolidation period. Dockès, Emmanuel (2006) pg 359.
\end{footnotes}
than 20 employees.\textsuperscript{1332} The CPE was intended to facilitate youth employment and was available to employees under 26 regardless of whether they had been previously employed in the company, as the contract type was meant for establishing new positions instead of continuing previous employment.\textsuperscript{1333}

The regulation regarding the CPE was again prepared without any consultation with the social partners. As the CPE did not contain any training with work or provide any financial incentives to hire young workers, its only benefit for employers was to dismiss employees during the two-year period without a legitimate reason. Furthermore, the CPE was not linked to any particular group facing difficulty in getting employment. On the contrary, an employer could offer this contract to any young worker even if he or she did not have any such problems.\textsuperscript{1334} Although the government claimed that it was adapting the Danish model to French conditions, it only intended to import the flexibility element, and only for the less-qualified young employees, with the danger of increasing the already segmented French labour market.\textsuperscript{1335} The model was widely criticised by the unions and caused strikes, and the government was finally forced to withdraw the project.\textsuperscript{1336} It was also very explicitly presented as a response to the precariousness of youth employment and was designed to replace fixed-term contracts for young people. The CPE was deemed to be contrary to Directive 2000/78/EC as interpreted by the CJEU in the Mangold case. The Court rejected the national legislation, which takes the age of the worker concerned as the only reason for derogating from the individual right without showing that setting an age threshold as such regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned was objectively necessary to the attainment of the objective of integration of unemployed older workers.\textsuperscript{1337}

\section{7.4 THE UNIQUE CONTRACT}

The current administration in France has continued to enhance flexibility in line with the CNE, by introducing a new contract type `the unique contract` (contrat de travail unique). This contract is a combination of a fixed-term contract and contract

\begin{footnotes}
\textsuperscript{1335} Barbier, Jean-Claude: Social Europe and the Limits of Soft Law in the European Social Model and Transitional Labour Market edited by Rogowski, Ralf (2010), pg 181.
\textsuperscript{1337} C-144/04, Mangold, para. 65.
\end{footnotes}
of indefinite duration, not limited by a contract period, but the legal requirements for dismissal are easier than in normal contracts of indefinite duration. This affects judicial control in termination of the contract for economic reasons, where the employer's duty of re-employment and control of the existence of economic reasons for termination are replaced by a separate indemnity. The indemnity is paid at the time of termination, the amount being in proportion to the total wage paid throughout the employment relationship. The proposition aims at avoiding the effects of rupture between fixed-term and permanent contracts. According to the project which prepared the regulation on the unique contract, all forms of fixed-term contracts would disappear. \(^{1338}\)

The project was criticised by the trade unions because it moved French law towards employment at will by undermining the requirement for a fair ground for dismissal, and the CGT (Confédération Générale du Travail) refused to accept it for this reason.\(^{1339}\) The employers have also opposed the project because of the proposition to suppress fixed-term contracts, which the employers have seen as a beneficial because of automatic expiry of the contract at the end of the contract period without the disadvantages of termination.\(^{1340}\) As Lokiec has stated, in the French debate, the unique contract is criticised for enabling circumvention of employment security. It has been claimed that courts would not accept the termination on grounds permitted by the proposition and would instead judge indemnity in cases of abuse of such termination based on the Civil Code.\(^{1341}\)

As Lokiec has concluded, the proposal for the unique contract shows that the law of unfair dismissal is currently subject to intense debate in France, with the idea floated by some economists that the difficulty in dismissing employees explains the reluctance of employers to recruit, which is seen as a partial reason for unemployment. The legal grounds for dismissal particularly are under attack. It is also suggested in the debate, however, that this criticism ignores the importance of the employee being able to discuss and dispute the grounds of his or her dismissal. Furthermore, on the economic side, no serious study has demonstrated beyond question that reducing the level of employment security would reduce unemployment.\(^{1342}\)


\(^{1339}\) Lokiec, Pascal (2010), pg 82. Gaudu, Francois (2008), pg 269.

\(^{1340}\) Gaudu, Fracois (2008), pg 268.

\(^{1341}\) Gaudu, Fracois (2008), pg 268, Article 1780 of Civil code. Lokiec, Pascal (2010), pg 82.

\(^{1342}\) Lokiec, Pascal (2010), pg 82.
7.5 THE PROJECT CONTRACT

The French legislator has also recently pursued increased flexibility, in order to employ unemployed people and especially to facilitate the ability of enterprises to respond to the fluctuation in demand, by creating a new form of fixed-term contract by a statutory act of 2008. According to the preparatory works, this enables fixed-term contract on an experimental basis for five years, the purpose of which is the realisation of a specific task or project the duration of which is not recognised beforehand. Moreover, the preparatory works justified the need for this contract type by stating that enterprises are increasingly organised around such projects. 1343

Furthermore, the new contract type was justified by the fact that current forms of employment do not enable sufficiently easy use of the workforce in these circumstances, and they are not sufficiently accessible to the small and medium-sized enterprises. Moreover, the amendment was justified by the need to clarify situations of precarious employment and to promote the employment of professional and managerial staff. 1344 This new contract type, which fits to the needs of certain sectors such as construction, was introduced as part of a labour market action plan (La Modernisation du Marché du Travail), the intention of which was to improve both labour market functionality by means such as reinforcing the grounds for termination of contracts of indefinite duration and by creating new contract types and increasing their mutual coherence. 1345 The employers associations demanded a contract of indefinite duration model in which the expiry of the project would have constituted a valid reason for interrupting the contract. The trade unions resisted the contract, fearing that this new fixed-term contract would replace the indefinite duration contracts, which naturally reflected the traditional attitude of the French trade unions towards fixed-term work. However, the social partners requested the government to enforce the measure by the law. 1346

The result is a hybrid between fixed-term and permanent contracts which is designed exclusively in employment relationships between enterprises and engineers, managers, experts and other senior salaried employees whose work normally consist of time-restricted projects. Since the duration of the contract can be bound to completion of the defined object it was concluded for, it can to some

1343 Lokiec, Pascal (2010), pg 83
1345 Couturier, Gerard: (2008), pg 302. Accord du 11 Janvier 2008 sur la Modernization du Marché du Travail. In addition, occupational mobility is strongly emphasised in the agreement. This appears in the special focus on competencies, professional training and professional and regional mobility.
1346 Couturier, Gerard: Le Contrat de Projet, Droit Social (2008), pg 300.
extent be left uncertain. In this sense, the project contract represents an exception to the rule that a fixed contract term must be determined precisely. However, the duration of the contract can be agreed for 18 months minimum and 36 months maximum. This type of fixed-term contract expires with the achievement of its purpose, with a minimum notice period of two months before the completion of the project, and it cannot be renewed. It can be terminated by either party after 18 months on a reasonable ground and then annually on the date the contract was concluded on grounds determined by the Labour Code (real and serious cause). No waiting period is required between the contract periods. In cases of termination, the employee is entitled to an indemnity allowance that is equal to 10 per cent of the gross salary of an employee with the exception of instances of gross misconduct by the employee. A contract of this type implies derogation from the main rule laid down by the Labour Code, according to which the term of the contract must be determined precisely at the time when the contract is concluded and can be used only when the completion of the project is uncertain.

The use of this fixed-term contract is dependent on an industry-wide agreement, or an enterprise collective agreement. This agreement must define the economic necessities that these contracts are likely to make an adequate response to, the conditions of guarantees and the conditions under which the employees holding such a contract have priority access to jobs with permanent contracts in the company after expiry of the project. If these preconditions are not fulfilled by the sector- or enterprise-wide collective agreement, a project contract is not permitted.

This contract type has been criticised, as Lokiec has indicated, for enabling unlimited recourse to fixed-term contract instead of permanent ones in the relevant sectors at times when a new task or project emerges without any objective reason, thus undermining the effect of the prevailing employment protection system based

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1347 Accord du 26 mai 2009 Relatif à la Modernisation du Marché du Travail, Article 4.4. According to this agreement, however, the project contract must describe the project and its anticipated expiry, the tasks for which the contract was concluded and the event or result which determines the end of the employment contract and reference to the collective agreement by which this contract type is justified.

1348 Couturier, Gerard: Le Contrat de Projet, Droit Social (2008), pg 303.

1349 Accord du 26 mai 2009 Relatif à la Modernisation du Marché du Travail, Article 4.2.

1350 Accord du 26 mai 2009 Relatif à la Modernisation du Marché du Travail, Article 4.7. Lokiec, Pascal (2010), pgs 83-84. Roy-Loustauau, Claude: Le Nouveau CDD: Un Mauvais Project. Droit Social (2008), pg 308. pg 310. If the contract is terminated by the employer, he is obliged to pay the employee an indemnity calculated as 10 per cent of gross salary for the total duration of employment. Accord du 26 mai 2009 Relatif à la Modernisation du Marché du Travail, Article 4.7.


1352 Lokiec, Pascal (2010), pgs 83-84.

1353 Such as outplacement, priority re-employment and access to vocational training.


on employment contracts of indefinite duration.\textsuperscript{1356} Especially in sectors where the normal and permanent activity of the company consists of projects of varying durations, this contract type is feared to enable the use of fixed-term contracts the purpose of which is to fill jobs long-term related to normal and permanent activity, which is prohibited by the Labour Code and contrary to what was decided by the CJEU in the Adeneler ruling.\textsuperscript{1357} Moreover, criticism on extending the grounds on which the contract can be terminated during the term (real and serious cause) has emerged, which makes this employment relationship based on a predetermined project more precarious than the normal fixed-term contract.\textsuperscript{1358} Finally, precariousness is said to increase because the project contract establishes a fixed-term contract the expiry of which is left uncertain.\textsuperscript{1359}

The trade unions representing sectors in which fixed-term work is prevalent have traditionally resisted the trend intended to promote the use of fixed-term work.\textsuperscript{1360} As far as the project contract was concerned, there were differences in reactions between the sectors. In the information services sector, the trade union (SII) accepted the contract, whereas other unions in the information and telecom sector (MUNCI) strictly resisted the establishment of the project contract. The CDFT complained about the uncertainty in defining the contract period and questioned whether it responded to the real needs of enterprises.\textsuperscript{1361}

8 CONCLUDING REMARKS ON FRENCH LAW ON FIXED-TERM CONTRACTS

Since the driving force of the French regulation on the use of fixed-term contracts has traditionally been protecting employees against precariousness of employment, the contract of indefinite duration is the main and fixed-term contracts an exceptional form of employment, use of which is strictly regulated by the French Labour Code. There are plenty of indications of this in the Labour Code. Firstly, the general interdiction clearly establishes the contract of indefinite duration as a main rule and prohibits continuous use of successive and single fixed-term contracts in the

\textsuperscript{1356} The act authorizing the project contract contains a general prohibition similar to Labour Code 1242-1, according to which whatever the ground, the temporary contract can have neither as an aim or the effect of filling permanently a job related to the normal and permanent activity of a company. See Act No. 2008-596, 25 of June 2008, Article 4.1, Lokièc, Pascal (2010), pgs 83-84.


\textsuperscript{1358} Dockes, Emmanuel: Droit Social (2008), pg 282.

\textsuperscript{1359} Lokièc, Pascal (2010), pg 83-84.


\textsuperscript{1361} Roy-Loustauanu, Claude (2008) pg 308.
normal activities of the company. Secondly, the list of objective reasons which justify concluding a fixed-term contract is very detailed and circumstantial, so much so that it is even criticised by the enterprises as being difficult to apply. 362 Thirdly, successive use of fixed-term contracts is effectively restricted by the maximum total duration of 18 months, restriction of renewals, waiting periods between successive contracts concluded with same employee, and finally by a minimum period before a fixed-term contract can be concluded after the redundancy of a permanent contract. The abuse of successive fixed-term contracts is prevented effectively by these rules as required by the Framework Agreement and the relevant CJEU case law. 363

The same cannot be said about the rules governing fixed-term contracts in the public sector, where the total duration is three years and, when renewed, six years. This is criticised for not being effective in preventing the abuse of successive fixed-term contracts in the public sector, thus compromising the effet utile of the EU employment law in this regard. 364

Moreover, the protection of fixed-term employees is managed by the indemnity, the intention of which is to compensate for the precariousness of employment and to protect employees against premature ending of a fixed-term contract. This has made fixed-term contracts a very exceptional form of employment on the employer’s initiative. 365

The French regulation on fixed-term contracts is built around rigorous formalism. 366 In order to facilitate verification of the correct use of fixed-term contracts determined by the Labour Code, a fixed-term contract must be drawn up in writing. In addition, the reason for the contract must be specified and the other formalities determined by Labour Code 1242-12 complied with. 367 The absence of a written form or objective reason, imprecise wording in the contract or failure to conclude the contract in writing within two days of hiring are sanctioned by requalification of the contract as indefinite duration, or at least constitutes a

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1363 C-212/04, Adeneler, para. 93.
1364 Vigneau, Christophe: Le Regime des Contrats à Durée Determinée en Droit Communautaire, Droit Social (2007), pg 97.
1366 Lokiec, Pascal (2010), pg 78.
1367 According to Article 1242-12, a fixed-term contract must be concluded in writing and include a precise statement of the reason for it. Otherwise the contract will be deemed an indefinite duration contract. The contract must contain among other things the name and the professional education of the employee to be replaced when the reason for the contract is replacement, period of contract, information on renewal when the contract consists of a specified term, the minimum period when the contract is not concluded for a specified term, the precise designation of the post and the duration of any applicable trial period.
presumption of requalification.\textsuperscript{1368} Furthermore, rigid and narrow interpretation has led to difficulty for employers in legitimizing the reasons required by law. The system has been criticised for being complicated or even preventing the hiring of employees in sectors such as agriculture.\textsuperscript{1369}

Strict and formal rules are strengthened not only by compensation for loss and requalification of the contract but strict criminal sanctions are also applied. These sanctions are also criticised for being disproportionate in relation to the violation of the preconditions for the use of fixed-term contracts determined by the Labour Code. For this reason, their efficiency in preventing such violations is very limited and, most of all, excessive for small companies who traditionally use fixed-term contracts.\textsuperscript{1370}

Furthermore, comparison between indemnities related to the termination of a permanent contract (the minimum indemnity is equivalent to six months’ salary) and a breach by the employer of a fixed-term contract before its term expires (10 per cent of the total salary of the term) indicates that a fixed-term employee may even end up in an unfavourable position as far as indemnities are concerned as a result of transformation of the contract into an indefinite one. Therefore, it can be claimed that employers are effectively directed by regulation to use contracts of indefinite duration instead of fixed-term ones or, in other words, the regulation on indemnity effectively prevents the abuse of fixed-term contracts as required by the Framework Agreement on Fixed-Term Work.\textsuperscript{1371}

On the other hand, the interpretation adopted by the Court of Cassation according to which mere fact of undertaking activity in a listed sector justifies the use of fixed-term contracts on the grounds of established custom without the further requirement of the temporary nature of the occupation is clearly against the general interdiction in the Labour Code and is worth further remark. The question is currently debated because, since it can lead to widespread replacement of permanent contracts by fixed-term contracts in sectors defined by the decree, the derogation from the main rule is systematically used in those sectors. The maximum total duration or the rule of renewal determined by the Labour Code is almost never complied with.\textsuperscript{1372}


\textsuperscript{1369} Roy-Loustauau, Claude: Droit Social (2011), pgs 1035-1036.

\textsuperscript{1370} Roy-Loustauau, Claude: Droit Social (2002), pg 312.

\textsuperscript{1371} See Labour Code Articles 1234-9 in respect of indemnity concerning termination of permanent contracts, where the amount is bound to the duration of the employment, whereas in Article 1243-8 the amount of indemnity is bound to the salary of the remaining contract period. Roy-Loustauau, Claude: Droit Social (2003), pgs 468-469.

Furthermore, the waiting period determined by the Labour Code after which a new fixed-term contract can be concluded, is not applied.\textsuperscript{1373} Thus, it has been thought that these sectors are not subject to the restrictions on successive fixed-term contracts at all.\textsuperscript{1374}

Furthermore, as the use of such contracts in the listed sector is free from the general interdiction determined by Labour Code 1242-1 and other legal restrictions determined by the law, it can be asked whether the French legal position is in accordance with Clause 5 of the Framework Agreement on Fixed-Term Work. This is against the main principles of the regulation of fixed-term contracts, which are prevention the circumvention of employment security in permanent contracts and protection of employees against precariousness of employment. It can be questioned whether excluding certain sectors entirely from these measures is permitted by the Framework Agreement, albeit it is deemed permissible to take special sectoral features into account.\textsuperscript{1375} Furthermore, the stance adopted by the Court of Cassation is contrary to the main rule that contracts of indefinite duration are the main form of employment, the application of which cannot be excluded in certain sectors as a whole. Thus this is against the objective and intention of the Framework Agreement. Instead of ruling repeatedly that fixed-term contracts can be concluded without restrictions determined by the Labour Code, the Court of Cassation should have asked for a preliminary ruling on the issue from the CJEU.

The sectoral derogations are also contrary to the requirement for the use of fixed-term contracts adopted by the CJEU according to which objective reasons must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that context of justifying the use of successive fixed-term employment contracts and preventing the effet utile of the EU law by permitting the established custom as an objective reason for use of fixed-term contracts in a prohibited manner.\textsuperscript{1376} This is also contrary to the ILO convention on Termination of Employment according to which it is prohibited to have recourse fixed-term contracts in order to circumvent the employment security provided for contracts of indefinite duration and ILO recommendation 166, according to which the use of fixed-term contracts shall be bound to the temporary nature of the work. France has ratified both the convention and the recommendation. However, the stance adopted by the Court of Cassation is an indication of a less strict attitude by

\textsuperscript{1373} Labour code Article1244-3, 1244-4.
\textsuperscript{1376} C-212/04, Adeneler, paras. 69 and 88, Vigneau, Christophe: Droit Social (2007), pgs 95-97.
the Court and an acceptance of the fact that employers must have a greater option for flexible employment, particularly in certain areas of economic activity.\footnote{1377} As regards of the use of fixed-term contracts to replace absent employees, the interpretation of the Court of Cassation seems to be more stringent than that adopted by the CJEU. As explained above, the Court of Cassation has rejected successive use of fixed-term contracts with the same employee on the grounds of replacement of absent employees when there is a structural need for labour, whereas the CJEU has deemed that the question is not necessarily about the abuse of successive fixed-term contracts even if they are used to satisfy a permanent need for replacement staff.\footnote{1378}

The traditionally exceptional nature of fixed-term contracts means that the French debate is characterised by a fear that a project contract enables their use in the normal and permanent activities of the companies, especially because the work of engineers and professional and managerial employees is characterised by continuous restricted-time project work. As Roy-Loustauana has noted, it is inherently difficult to engage employees temporarily until the completion of a project without violating the general interdiction determined by the Labour Code.\footnote{1379} In order to allay these fears, which are also related to the general interpretation adopted by the Court of Cassation in respect of use of fixed-term contracts in certain sectors, rigid and formal interpretation has been suggested in defining legitimate recourse to project contracts. In this regard, limiting both the number of project employees and the nature of the projects and activities has been suggested, using the contract as a measure to offer training.

Some commentators have warmly welcomed new case law on the obligation of re-employment under the project contract.\footnote{1380} It is uncertain whether a fixed-term employee will retain an enforceable priority for re-employment after the completion of the project under a contract of indefinite duration in accordance with the terms of the national inter-professional agreement or collective agreements, so that it is not certain whether this type of contract will facilitate a permanent employment relationship as intended by the social partners and suggested by the EES.\footnote{1381} Nevertheless, the project contract represents an attempt to balance flexibility and security under a fixed-term contract by the social partners and the aspiration to

\footnotesize{\begin{itemize}
\item \footnote{1380} Roy-Loustauana, Claude: Le Nouveau CDD: Un Mauvais Project. Droit Social (2008), pgs 308-309.
\item \footnote{1381} Couturier, Gerard: Le Contrat de Projet, Droit Social (2008), pg 304.
\end{itemize}
promote employment of professional and managerial staff. While some flexibility is conferred on employers in respect of the temporary needs of enterprise, the priority of re-employment is laid down as a precondition for use of such a contract and guarantees some security for employees.

Criticism is also directed at the possibility of terminating the contract during its term by a real and serious cause that is contrary to one of the main principles on the regulation of fixed-term contracts intended to protect the employee against premature breach of contract. When the project contract is terminated during its term, the traditional objective of the French legislator, which is to deter employers from breaking a fixed-term contract during the contract term and therefore to make it more secure for the worker, is not achieved. In the debate, it has indeed been suggested that other existing types of fixed-term contract should replace those in which the duration is not determined.\textsuperscript{1382}

The purposes determined by the law for the use of fixed-term contracts can be divided into the internal reasons of enterprises and the changes related to their activities and the external reasons related to enhancing their employability function.\textsuperscript{1383} The former are to facilitate the functioning of enterprises and to facilitate solving their temporary organisational problems such as replacement of absent of employees, temporary peaks in demand, the seasonal nature of the work, the established custom of certain sectors, project contracts and contracts intended to facilitate job transitions.\textsuperscript{1384} The latter category is designed to increase the employability of particular groups, notably the young and the older people with difficulty finding a job. This category comprises, for example, fixed-term contracts intended for employees over 57 and the various groups of apprenticeship contracts concluded for a fixed-term and intended to enhance youth employment.\textsuperscript{1385}

As the Court of Cassation has argued, the reactions to fixed-term contracts concluded in order to assist particular groups of the unemployed who find it difficult to find a job are permissive as the Court has decided that these contracts can even be concluded for 24 months and irrespective of whether the aim is to employ those persons permanently in jobs related to a company’s the normal and permanent activity. This is also an indication of a more permissive attitude to fixed-term contracts concluded in the shadow of the employment policy in accordance


\textsuperscript{1383} Lokiec, Pascal (2010), pg 75.

\textsuperscript{1384} Lokiec, Pascal (2010), pg 75. Labour code 1242-1 (general interdiction), 1243-4, (restrictions on successive contracts) 1244-1, 1244-2, 1244-3, 1244-4, L 1242-8 (maximum total duration), 1242-2 (objective reasons), 1242-7 (defining the contract period precisely).

with Labour Code 1242-3 than is accepted by the Labour Code in general.\textsuperscript{1386} It is even argued that a clear distinction should be made between the regulation on the contracts concluded for the purposes of the flexibility needs of employers and the regulation on contracts concluded for the purposes of favouring professional education or employing unemployed people.\textsuperscript{1387} However, using fixed-term contracts in order to provide jobs for disadvantaged people or those who find it difficult to get employment because they are invalids, for social or family situations only, regardless of other factors related to their employability or irrespective of whether their job is a normal and permanent activity of the enterprise may be contrary to the general principle on non-discrimination included in the EU Charter, the TFEU, Framework Directive 2000/78/EC and Clause 4 of the Framework Agreement on Fixed-Term Work.\textsuperscript{1388}

On the other hand, by using the new contract types the French flexicurity arrangements appear to have complied with the recommendations of the Commission, according to which France needs to go further in reforming the existing regulatory framework with a view to combining greater flexibility with security in order to reduce structural unemployment and labour market segmentation.\textsuperscript{1389} This has faced significant resistance from the trade unions, albeit they have not refused to talk with the government about new forms of work in order to create more jobs. This kind of resistance to increasing flexibility is typical and understandable in countries such as France, where the Labour Code represents a form of continuity and protection in the evolution of labour law which is characterised by \textit{ordre public social} in that there is a set of minimum binding conditions which have been applied as a matter of general law to the employment relationship and which the restrictive regulation on fixed-term contracts has partly represented.\textsuperscript{1390} The resistance to this kind of development is surrounded by fear of change in the equilibrium in contracts of employment. In this regard, however, it is also significant that the interpretation of the Court of Cassation has changed this equilibrium towards a more flexible use


Correspondingly, permitting the use of fixed-term contracts in certain sectors or certain groups only on the grounds of established custom irrespective of the interdiction determined by the Labour Code is likely to increase labour market segmentation.

Furthermore, as France introduced the CNE, where the parties to indefinite duration contracts could terminate them without 'real and serious cause' provided by the Labour Code within the first two years of employment and justified by the adaptability arguments of the Employment Guidelines and the need to reduce segmentation, this can be seen as a national application of the EU employment policy. Although it is supported by the Employment policy guidelines developed after the Wim Kok report,\footnote{See EU part of the research, Chapter 1.5.} in which the Member States were urged to alter the level of flexibility, and is provided for by the standard contracts in areas such as period of notice and costs and procedures for individual or collective dismissal, flexibility is overstressed at the expense of security in the CNE and thus cannot be a considered as a measure which corresponds with the assumptions of the EES, where flexibility and security must be balanced in formulating measures for creating new jobs.\footnote{Wim Kok, Jobs, Jobs, Jobs: Creating more employment in Europe (2003), pg 28. EC Commission, ’Working Together for Growth and Jobs: A New Start for the Lisbon Strategy COM(2005) 24. Ashiagbor, Diamond (2005), pgs 160-164.}

This is also against the general notion of the EES recommendations, so that it should not be used as a justification for deregulation.\footnote{Sciarra, Silvana: New Discourses in Labour Law. Part-Time Work and the Paradigm of Flexibility (2003), pg 11.} However, the CNE must be seen in terms of the recent EES recommendations as reforming the French labour market rules that are considered too rigid.\footnote{Barbier, Jean-Claude: Social Europe and the Limits of Soft Law: Example of Flexicurity in European Social Model and Transitional Labour Markets, edited by Rogovski, Ralf pg 181.}
VI CONCLUSIONS

1 THE IMPACT OF THE FIXED-TERM WORK DIRECTIVE ON THE USE OF FIXED-TERM CONTRACTS AT NATIONAL LEVEL

Directives are used as an ordinary tool to adapt national law to achieve the Treaty’s purposes in the field of labour law in internal markets. The directives are measures intended to advance integration while respecting differences in national legal systems. The directives are also a means to apply the subsidiarity principle in practice in areas of shared competence, which are areas of reciprocal action between the EU and the Member States.\textsuperscript{1396}

Even directives are not intended to unify, merely to approximate national law. The directives are binding only with regard to obligations and the objectives they incorporate.\textsuperscript{1397} The directives are primarily used to harmonise Member State legislation, being used to set frameworks or minimum standards.\textsuperscript{1398} Irrespective of original nation state differences, the EU law is targeted at creating harmony. A process of harmonisation via the adoption of directives implies the creation of equivalence or compatibility between national systems, while differences are allowed to some extent. The directives are addressed to the Member States and leave it to their discretion to decide the measures and methods of achieving the results stipulated by the directives within set time limits. They facilitate setting common standards for the Member States, allowing, however, the application or introduction of more favourable legislation on the degree of protection afforded to workers at the Member State level. The Treaty of Lisbon also emphasises that the extension and nature of the Union action shall leave room for the discretion of the Member States as far as possible.\textsuperscript{1399}

Where necessary, the Member States should be given optional means to achieve the objectives pursued by the Union either at central level or at regional and local level, naturally taking into account the need to ensure effective enforcement.\textsuperscript{1400}

The structure and content of Clause 5 of the Framework Agreement on Fixed-

\textsuperscript{1399} Laulom, Sylvaine (2003), pgs 292-293 and Lamponen, Helena (2008), pg 94.
\textsuperscript{1400} TEU Article 5 and Articles 2 and 4 of the Protocol (no 2 of TFEU).
Term Work fully respects the principle of subsidiarity as it provides options for the Member States to achieve the objective of the Clause and adopt appropriate sanctions. The CJEU has fully respected this principle by not imposing further restrictions on the use of successive fixed-term contracts and by permitting local and sectoral divergences in sanctions. In order to ensure effective enforcement of Clause 5, the CJEU has prohibited too narrow an interpretation of the concept of successive contracts and too broad an interpretation of objective reasons in national law, so that the objective of the Directive cannot be compromised. It is also noteworthy that the special character of the Framework Agreement as legal source created by the social partners has not affected in the interpretation of Clause 5 in the CJEU’s case law.

As this research has shown, Finland and France have strong national traditions in regulating the use of fixed-term contracts. These traditions are mainly built on detailed restrictions in order to prevent circumvention of employment security of permanent contracts and to protect against precariousness of employment. These assumptions are completely different to the history in the UK, where the common law has traditionally allowed the contracting parties to choose the form and the nature of the contract without restrictions before enacting employment security, which was created by the Employment Rights Act. Therefore, as in labour law in general, strong national traditions have made it extremely difficult to design common regulation in the form of acceptable and operative directives for all the Member States. This was foreseeable in the early attempts of the Commission in the 1980s to regulate temporary work and in the negotiations on the Framework Agreement on Fixed-Term Work as well. On the other hand, the more disparate national labour laws are, the more the intervention of the EU is generally justified in order to ensure some level of harmonisation. Flexible labour standards such as framework directives have been seen as a response to this issue.

It is important, however, to note an essential difference between directives and framework directives. While directives aim at partial harmonisation, framework directives do not aim at harmonisation, only imposing goals on the European social policy while leaving room for diversity and self-regulation either by management and labour at the national level or by setting some optional minimum standards for the

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1401 C-268/06, Impact, C-586/10, Kücük, C-53/04, Marruso & Sardino.
1402 C-212/04, Adeneler, para. 88.
1403 C-212/04, Adeneler, paras. 68-69 and 73.
1405 Rodríguez-Pinero Royo, Miguel: Flexibility and European Law: A Labour lawyer’s View of Constitutional Change in the EU, pgs 232-233.
Member States to follow. Minimum standard setting is also deemed a sufficient measure to prevent distortion of competition, which is one of the objectives of the Framework Directive on Fixed-Term Work.

How has the Directive on Fixed-Term Work taken its place in preventing the abuse of successive fixed-term contracts? The use of labour law directives is generally characterised by practicality, but labour law directives also confer rights of an unconditional and precise nature on individuals. They are normally unambiguous, so that the rights conferred by the Directives are identifiable from their wording. An example can be taken from Article 2 of Directive 76/207/EC. The CJEU has maintained that this article prohibits non-renewal of the fixed-term contract in a situation where a pregnant worker has been employed under successive fixed-term contracts. Thus, the labour law directives containing rights are normally directly effective so that they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law correctly or by the end of the period prescribed. Such directly effective rights are included, for example, in Working Time Directive 93/104 concerning maximum daily working time, rest periods and the annual period of paid leave, or in the equality directive 92/85 prohibiting discriminatory termination of employment on the grounds of maternity. Moreover, the CJEU has viewed the application of the principle of equal treatment with regard to working conditions and conditions of dismissals as directly effective in its established case law. Clause 5 of the Framework Directive, however, has no such direct effect due to its conditional, optional and imprecise content.

Minimum standards, such as included Clause 5 of the Framework Agreement, are typically less precise, conditional, ambiguous and vague. Some commentators have commented that the enforcement of minimum standards is hard to trace and has occasionally led to self-interested implementation endangering the homogeneous realisation of the Union law objectives as well as to intentional non-compliance.

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1406 Ashiagbor, Diamond: European Employment Strategy, (2005) pgs 212-213. The CJEU has also confirmed this fact in C-251/11 Huet by saying that the agreement is not intended to harmonise all national rules relating to fixed-term employment contracts but simply aims, by determining general principles and minimum requirements, to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and to prevent abuse arising from the use of successive fixed-term work agreements or contracts. C-251/11 para 41.


1410 See, for instance, Judgments C-152/84, paras. 46 and 49, C-187/00, Bauer-Kutz, para. 70, C-188/89, Foster, para. 21, C-167/97, Seymour-Smith and Perez, para. 40.
at national level.\textsuperscript{1411} This is contrary to the idea of limiting recourse to successive fixed-term contracts by providing employees with protection against abuse of these contracts, in same way as equality directives provide the right not to be discriminated against, and in this way to complement employment security related to contracts of indefinite duration.

The effect of Clause 5 of the Framework Agreement as an instrument laying down minimum standards for national laws has been extremely modest in the countries researched. Furthermore the fact that the Framework Agreement has been negotiated by the social partners has not influenced in the implementation of the Agreement in the research countries. In France and Finland, the legislation restricting the use of successive and single fixed-term contracts was already in place, so that no implementation measures were needed. The UK was one of the rare countries which had to introduce completely new measures to implement the Directive. Even there, the four-year rule after which fixed-term contracts only are transformed into permanent ones if the employer does not have an objective reason, provided that an employee has had continuous employment, combined with the fact that the scope of FTER is restricted to employees excluding large categories of workers, does not suggest a considerable improvement in the protection of fixed-term employees. Taking into account the legal framework before the implementation of the Directive, according to which the parties to the employment contract can choose the form and the duration of the employment contract freely, the implementation process can be called self-interested or characterised by minimalism, rather than introducing real protective improvements to the position of fixed-term work.

More stringent national regulation governing the use of fixed-term contracts might be one of factors explaining that no preliminary rulings have been requested from Finland or France. In the UK, one possible explanation for this might be that the position of a fixed-term employee does not change very much as a result of transformation of the contract into indefinite duration because of vague protection against economic dismissal. Taking into account that no preliminary rulings except one\textsuperscript{1412} have emerged from any of the research countries, it can be said that regulation of fixed-term contracts, as far as the legitimate use of such contracts is concerned, has been retained almost as a matter governed by national law without speaking of any convergence accomplished by Clause 5 of the Framework Agreement. In this regard, we can agree with the legal opinion usually offered in the literature that it is not possible to prevent regulatory differentiation or to establish a body of common provisions applicable to all the Member States by minimum standard

\textsuperscript{1411} Illustration of this comes from the four-year rule adopted by the UK. Vos, Ellen: Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies (1999), 66-67.

\textsuperscript{1412} C-251/11, Huet
setting.\textsuperscript{1413} As far as the use of fixed-term contracts is concerned, the question is about fundamental tension between the Member States and the Union on how fixed-term contracts should be used and governed on an acceptable basis in order to promote the economic interests of enterprises, employability interests and the job security interests of employees.

In this regard, the Directive has not achieved its objective of preventing permanent use; in other words, preventing abuse of successive fixed-term contracts or restricting their use. Therefore, in order to improve working conditions of certain groups at national level, vague and ambiguous provisions leaving too much space for domestic variations, like Clause 5, intended to complement the national legislation on employment security, does not readily achieve its purpose.\textsuperscript{1414} The other possible explanation for the nature of Clause 5 is that it represents policy objectives that are completely at odds. These are increasing productivity, competitiveness, the adaptability of enterprises to fluctuation in demand and increasing employability on employment policy grounds on the one hand and the security of workers on the other.\textsuperscript{1415} However, as the CJEU’s judgments in the Kücük case, for example, indicate, the CJEU’s interpretation of Clause 5 is contrary to the purpose of the Directive and TFEU 151, as it allows the use of fixed-term contracts irrespective of whether the employer has a permanent need of employment and whether the employer could have taken on the employee on an indefinite duration contract provided that the employer has objective reasons for each contract. The same conclusion can be drawn from C-268/06 Impact, as the CJEU concluded that the measures listed in Clause 5 are equivalent. Hence, it is sufficient for a Member State to adopt any measure without further restriction and the measures are not subordinate to the purpose laid down by the Directive.\textsuperscript{1416}

As Sciarra has stated, it should also be noted that fixed-term contracts are adopted in diversified areas of labour law in different countries. However, better coherence should be established in the EU law governing fixed-term contracts. More specific measures recognising enforceable minimum rights for employees should be adopted on recourse to such contracts while the principle of contracts of indefinite duration should be strengthened in the Directive.\textsuperscript{1417}

\begin{itemize}
\item[1414] TFEU Article 151 (ex.136), Directive 99/70EC, preamble, para. 3.
\item[1415] See Chapter 1.5.
\item[1416] C-586/10, Kücük, paras. 53 and 56, C-268/06, Impact, para. 76.
\end{itemize}
2 SHORTCOMINGS OF THE DIRECTIVE WITH RESPECT TO THE USE OF FIXED-TERM CONTRACTS AND FLEXICURITY DEVELOPMENT

In this section we should assess how the Directive on Fixed-Term Work has achieved its objective of preventing abuse arising from successive fixed-term contracts.

There are plenty of shortcomings in the structure of Clause 5 of the Framework Agreement by which abuse shall be prevented, as is apparent in the case law of the CJEU. As the CJEU has indicated, the measures listed in Clause 5 are not subordinate to its objective, and the Member States may have introduced any measure listed in the Clause without the need to impose further restrictions to prevent abuse arising from successive fixed-term contracts. This has led to permission for very long-term use of successive fixed-term contracts, even over 11 years, irrespective of whether the question is of the temporary or permanent needs of employer or whether the employee could have been employed on a contract of indefinite duration, provided the employer has an objective reason for each fixed-term contract. Consequently, some further qualitative or quantitative restrictions for the measures which are intended to prevent abuse of successive fixed-term contracts would be needed to ensure that the Directive is functioning properly. In this sense, the judgment of the Court in Küçük is a setback compared with the earlier judgement of the Court in Adeneler, which prohibited the use of successive fixed-term contracts in tasks that are of fixed and permanent nature. However, it must be kept in mind that the Küçük ruling does not have a precedent value similar to the Adeneler ruling.

The recent case law also indicates that the main rule of contracts of indefinite duration, expressed only in the preamble to the Framework Agreement on Fixed-Term Work, is not strong, independent and binding enough as a general principle in the Union law. The relevant case law of the CJEU indicates that the legal status of general considerations and preambles to the Framework Agreement is still to be determined, and central principles governing the use of fixed-term contracts such as the main role of contracts of indefinite duration and the principle of objective reasons are still too imprecise compared with the universal principle of non-discrimination, which is also mentioned in the preambles to the non-discrimination directives. These principles governing the use of fixed-term contracts cannot be derived from the primary legislation or constitutional traditions common to the Member States, unlike the principle of non-discrimination. This matter and the fact that the preconditions for using successive fixed-term contracts is not determined

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1418 C-586/10, Küçük, paras. 53 and 56, C-268/06, Impact, para. 76.
1419 C-212/04, Adeneler, paras. 69, 88.
precisely in Clause 5 and the fact that the Clause does not have a direct effect, as it is addressed to the Member States only, lead to the conclusion that the Framework Agreement has failed in its objective of preventing abuse arising from successive fixed-term contracts, as the recent case law of the CJEU indicates.\textsuperscript{1421}

The fact that the first use of a fixed-term contract is excluded from the scope of Clause 5 of the Framework Agreement is also an obstacle to the proper functioning of the Directive.\textsuperscript{1422} This enables circumvention of the restrictions laid down by the regulation of successive fixed-term contracts in those countries (like the UK) where the first use is excluded from the scope of regulation intended to implement the Framework Agreement. In order to prevent circumventing the protection guaranteed for successive fixed-term contracts and equalising the protection guaranteed by the Directive on Fixed-Term Work with ILO Convention 158 and Recommendation 166, which are ratified by Finland and France, and to strengthen the fundamental rights of fixed-term employees which are relatively unclear in the light of the EU Charter, the Framework Agreement on Fixed-Term Work should be amended by including first use within its scope. This is also supported by the fact that in the 1990s the EU’s social policy objectives contains no exclusion of the first fixed-term contract when it is intended to increase fixed-term contracts to promote employability and improve the quality of such contracts.\textsuperscript{1423}

The scope of Clause 5 of the Framework Agreement is also problematic from another point of view. It is left for the Member States to determine the conditions under which fixed-term contracts shall be regarded as successive. This enables circumvention of the protection guaranteed by the Directive, leaving too much leeway for the Member States to permit proper enforcement. An example can be taken from the British regulation, where one week’s break between the contracts is sufficient to interrupt the continuity, so that fixed-term contracts cannot be deemed as successive and consequently the contracts are not converted into indefinite duration even at the four-year point. Here, however, the CJEU has prohibited too narrow an interpretation of the concept of successive contracts in national law as contradictory to the purpose of the Directive and therefore ensured the effective enforcement of Clause 5. In this regard, the CJEU has prohibited the opportunity to circumvent the scope of the agreement.\textsuperscript{1424}

The scope of the Non-Regression Clause 8(3) of the Framework Agreement is also problematic in several ways. Firstly, as Sciarra has stated, the scope of the Clause is

\textsuperscript{1421} C-586/10, Kücük, paras. 53 and 56, C-268/06, Impact, paras. 75-78. ERA, Parts X and XI. Kilpatrick, Claire: Has New Labour Reconfigured Employment Legislation in ILJ, vol. 32(2003), pg 158.

\textsuperscript{1422} C-144/04, Mangold and Joined Cases C-378 & 380/07, Kiriaki Angelidaki and Others, para. 107.

\textsuperscript{1423} The Council Resolution of 6 Dec 1994 on certain aspects for a European Union social policy: A contribution to economic and social convergence in the Union.

\textsuperscript{1424} C-212/04, Adeneler, para. 88.
difficult to interpret, since the legal measures under scrutiny must be framed within broader policies, the aim of which is to promote employment for categories of workers who are potentially at risk of exclusion from the labour market. In these situations, the sovereignty of the Member States becomes a priority and the intervention of the Court may be unsuccessful, as the interpretation of the Non-Regression Clause adopted by the CJEU in Mangold indicates. Moreover, as confirmed by the CJEU in the Angelidaki and Mangold cases, the scope of the Non-Regression Clause is restricted to the implementation measures only, leaving space for lowering domestic standards in order to achieve a high level of employment and to satisfy the European employment policy objectives as the French situation to some extent indicates.\textsuperscript{1425}

The Member States may introduce legislative measures the aim of which is to enforce social policy objectives which contradict to the Directive on Fixed-Term Work, and in that way undermine the rights guaranteed by minimum standards of Clause 5. This is against the principle that the Commission determines the minimum standards for protection against using low social standards as an instrument of unfair competition. In this sense, the prevailing narrow interpretation of the Non-Regression Clause of 8(3) is discouraging the idea of upwards harmonisation based on Article 151 TFEU (ex. 136 TEC).\textsuperscript{1426} Narrow interpretation of the Non-Regression Clause can also compromise the achievement of the central objectives of the Directive and their effective enforcement.

Has the Directive managed to achieve its objectives determined by the employment policy goals then? Firstly, in the Green Paper of 1997, the Commission viewed flexible forms of work as an important way to enhance job rotation wherein the existing workforce is able to upgrade their professional skills and in order to achieve better job quality, higher productivity and new forms of work organisation, which involves the need to recruit replacements while workers are being trained. Flexibility was seen as increasing productivity, the quality of working life, and employability, whilst security for workers could also provide the enterprises the benefit for of a more stable, versatile and motivated workforce. In this sense, modernisation of the organisation of work was seen as important, including flexible working arrangements aiming at productive, competitive undertakings able to employ, and achieving the required balance between flexibility and security. As Barnard has put it, however, it is important to note that promoting security by means of employment security instead of job security represents the continuity of


employment at its best.\textsuperscript{1427} However, the EU employment policy expressed in the EU Employment Policy Guidelines intends only to accept the successive fixed-term contracts use as promoting employability and a pathway to permanent contracts, not their permanent use.

How has the CJEU promoted the achievement of this objective? Considering that, firstly, no further quantitative or qualitative restrictions on the use of fixed-term contracts are required except those listed in Clause 5, it has been deemed sufficient for a Member State to introduce whatever measures listed in Clause 5 without further constraint; secondly, that no objective reasons are required if other measures are introduced by a Member State;\textsuperscript{1428} thirdly, that the first contract is excluded from the scope of the Framework Agreement \textsuperscript{1429} and, fourthly, that the existence of objective reasons precludes abuse in principle irrespective of the total duration or number of renewals,\textsuperscript{1430} it can be said that the CJEU has not promoted the objective of preventing permanent use of successive contracts. As explained in Chapter 1.5 of the EU part of this research, the purpose of the EU Employment Guidelines is to encourage the use of fixed-term contracts in order to promote the employability of certain groups and therefore to reduce unemployment and labour market segmentation and, furthermore, to create pathways to permanent employment.

Moreover, the Employment Guidelines emphasise that quality of jobs, including working conditions, employment security and access to lifelong learning are important when jobs are created. However, the purpose of the Employment Guidelines is not to permit the permanent use of successive fixed-term contracts. Employment contracts of indefinite duration are prioritised, taking into account that fixed-term contracts correspond mostly with the needs of the employer only.\textsuperscript{1431} In this regard, there is an obvious contradiction between the EU Employment policy and the EU employment law on acceptable use of fixed-term contracts, as the interpretation of Clause 5 enables almost permanent use of such contracts.

The CJEU’s case law does not promote the effective enforcement of the main objectives of the Directive, which are prevention of abuse of fixed-term contracts and the main rule on contracts of indefinite duration. Therefore, it seems that flexibility predominates in the Framework Agreement governing the use of fixed-


\textsuperscript{1428} C-268/06, Impact, para. 76

\textsuperscript{1429} C-144/04, Mangold, paras. 42, 43.

\textsuperscript{1430} C-586/10, Kücük, para. 43. Except where an overall assessment of the circumstances surrounding the renewal of the relevant fixed-term employment contracts or relationships reveals that the work required of the employee does not merely meet a temporary need. In the case, however, the CJEU considered that 13 successive fixed-term contracts within 11 years in circumstances of structural need for labour did not constitute abuse.

\textsuperscript{1431} See Chapter 1.4.
term contracts at the expense of security, since it is strongly emphasised by the CJEU in its case law. Therefore, in the light of foregoing it can be stated, as Sciarra has concluded, that the fundamental rights of fixed-term employees should be strengthened and specified in this field in order to avoid abuse and to prevent the exclusion of particular categories of such employees from the Framework Agreement, which the Agreement still intends to protect, and to improve the enforceability of these rights.\textsuperscript{1432}

Furthermore, since is required by the EU Employment Policy Guidelines, the equilibrium between the interests of employers and employees must be retained in developing the atypical forms of work, and the abuse of fixed-term contracts is to be condemned, there is a discernible tension between the EU employment policy and the EU employment law when looking at the CJEU’s interpretation of Clause 5 on the use of fixed-term contracts.\textsuperscript{1433} When the preconditions for such contracts are interpreted as broadly as the CJEU has done, for example, in the Impact\textsuperscript{1434} and Küçük cases, the result is that the security of fixed-term employees is diluted.\textsuperscript{1435} As Sciarra has stated in respect of part-time work, it may well be agreed with regard to fixed-term work that labour law would be at its best if future employment policies were to create stronger connections with core areas of individual rights and were to find mechanisms to ensure such rights better.\textsuperscript{1436}

As Clause 5 does not bring satisfactory protection for fixed-term employees, the equality directives, the general principle of non-discrimination included in the EU law, Article 21 of the EU Charter and Clause 4 of the Framework Agreement on Fixed-Term Work bring additional justified protection against discriminatory contracting, non-renewal or restricting the duration of fixed-term contracts, at least when the employer’s need for labour is permanent and comparable employees performing the same tasks are in indefinite duration employment.\textsuperscript{1437} As Clause 5 does not contain any further restrictions or unconditional preconditions for the use of successive fixed-term contracts, such contracts may also easily be used as a mean to promote national employment policy objectives, the scope of which the CJEU has interpreted broadly, provided that age is not a sole reason for derogating from the generally applicable restrictions. Therefore, the more broadly national employment measures concerning the use of fixed-term contracts are accepted by

\textsuperscript{1433} C-268/06, Impact, para. 76, C-586/10, Küçük, paras. 50, 51, 56.
\textsuperscript{1434} C-268/06, Impact, para. 76, C-586/10, Küçük, paras. 50, 51, 56.
\textsuperscript{1435} Fredman, Sandra: Discrimination law in the EU: Labour Market regulation or Fundamental Rights, in Legal Regulation of the Employment Relation (2000), pg 195.
\textsuperscript{1436} Sciarra, Silvana: New Discourses in Labour Law, Part-Time Work and the Paradigm of Flexibility (2003), pg 17
\textsuperscript{1437} Directives 2000/78/EC, 76/207/EC, 92/85/EC.
the CJEU, the narrower the scope of protection afforded to fixed-term employees may be concerning the grounds on which fixed-term contracts can be concluded.\textsuperscript{1438}

On the other hand, the principle of non-discrimination included in the Framework Agreement should more clearly restrict the discriminatory use of fixed-term contracts, as the current wording only prohibits unfavourable treatment on the grounds of duration of employment and thus restricts only direct discrimination, as Fredman has stated.\textsuperscript{1439}

In its case law concerning the use of fixed-term contracts, the CJEU has somewhat favoured flexibility aspects, especially demand side flexibility; but there are counter-arguments that serve the interest of enterprises in the long term.\textsuperscript{1440} As Deakin and Reed have concluded, more rigid labour standards facilitate the long-term aspirations of the enterprises, encouraging them to invest in labour quality and high productivity in order to improve competitiveness. Correspondingly, less rigid standards may cause long-term unemployment and exclusion of less skilled employees from employment. Many researchers have indicated that innovation, flexibility and responsiveness, which are key elements in increasing competitiveness and productivity, cannot be achieved by policy that encourages employers not to engage their labour on permanent contracts.\textsuperscript{1441}

As Deakin and Morris have stated, innovation and dynamism cannot be achieved by making labour resources cheaper or more flexible but by making them more effective, productive and innovative.\textsuperscript{1442} This cannot be achieved by extensive use of fixed-term contracts that affect competitiveness, long-term efficiency and productivity the same way as the low-wage strategy. The general use of fixed-term contracts contradicts this objective, as many surveys have indicated that in precarious employment relationships, the employee’s motivation, loyalty and willingness to cooperate are lower, with negative consequences for corporate productivity, as fixed-term workers are subject to higher turnover rates.\textsuperscript{1443} These facts support correcting the shortcomings of the Directive by strengthening fundamental rights in

\begin{small}
\textsuperscript{1438} C-250/09, Georgiev, C-411/05, Palacios de la Villa, C-144/04, Mangold, para. 64, C-388/07, Age Concern England, paras. 43-46.
\end{small}
terms of concluding fixed-term contracts. This is also confirmed by the fact that the Member States such as France and the United Kingdom have not managed to achieve equilibrium between flexibility and security for the purposes of the Employment Guidelines with regard to regulations governing the use of fixed-term contracts and related areas in labour law. Rather, a more or less unilateral emphasis on either flexibility or security has emerged.

Shortcomings are also related to the sanctions for abuse of fixed-term contracts. As there are no compulsory requirements regarding the content, level or the scope of sanctions in the Framework Agreement, effective enforcement is almost fully dependent on national law and jurisdiction and the full effectiveness of the EU law thus remains incomplete. Furthermore, this state of affairs is confirmed by the CJEU in stating that the Framework Agreement does not lay down a general obligation for the Member States to provide the conversion of fixed-term employment contracts to indefinite duration.\textsuperscript{1444} In this regard, the CJEU’s line in its case law reflects the contemporary notion on the principle of effectiveness, where the Court has approached decentralised enforcement by merely establishing certain minimum standards of effective judicial protection, but otherwise leaving much to the discretion of each Member State to design its own national sanctions and procedural rules.\textsuperscript{1445} This is likely, however, to compromise the effectiveness of the EU law against the restrictions that may result from the dependence of the EU law upon national sanctions. Using this approach to the principle of effectiveness it is not possible either to create common standards according to the Framework Agreement or to approximate the conditions of competition for competitive actors.\textsuperscript{1446}

Compensation for loss requires that an employee fulfils the burden of proof in respect of loss caused by premature breach of an employment relationship. As Zappala has indicated, this is unfavourable for an employee compared with the situation in which the employment contract is converted to indefinite duration, unless the employer cannot supply acceptable reasons for the use of successive contracts.\textsuperscript{1447} Correspondingly, in cases where the sanction on abuse of successive contracts is monetary compensation instead of conversion of contract, the employee may lose his or her opportunity to get the employment contract renewed, which is often a valuable benefit in successive fixed-term contracts. It is also questionable whether monetary compensation, especially after short-term contracts, punishes

\textsuperscript{1444} C-586/10, Küçük, para 52, C-212/04, Adeneler, para 91, C-53/04, Marruso & Sardino para 47.
\textsuperscript{1445} C-19/08, Petrosian.
\textsuperscript{1447} Zappala, Loredana: Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ’s Jurisprudence, pgs 440-441.
the abuse of successive fixed-term contracts in order to nullify the effects of the breaches of the Directive required by Union law. Thus, from the perspective of effective enforcement the conversion of fixed-term contract into indefinite duration might be more an appropriate sanction to prevent the abuse of successive contracts than monetary compensation.

3 REGULATION ON USE OF FIXED-TERM CONTRACTS: A LEGAL COMPARISON AND CONCLUDING REMARKS

In this part, the conclusions regarding the research countries' legal position will be assembled, analysed and compared with each other and in the light of recent flexicurity developments in the EU.

Restrictions on the use of fixed-term contracts are part of employment security, the aim of which is to prevent the circumvention of employment security associated with contracts of indefinite duration. Thus, these restrictions reinforce the employment security of these contracts. Consequently, the sense in imposing restrictions on the use of successive fixed-term contracts depends on how strict the protection against unjustified dismissal in national law is. We can also conclude that regulation on restrictions of fixed-term contracts contains a presumption of proper employment security associated with contracts of indefinite duration. In this sense, the employment security of Finland and France resemble each other essentially more than the British regulation on protection against unfair dismissal. The same can be said of the purpose and the strictness of the regulation on concluding, renewing and sanctioning the abuse of fixed-term contracts.

In Finland, the main objective of the regulation is to prohibit recourse to fixed-term contracts in order to prevent circumvention of the legislative protection against unjustified dismissal in contracts of indefinite duration, whereas in France the attitude towards fixed-term contracts is even more stringent, as the Labour code aims additionally at protecting the employee against precariousness of employment. In both countries, the regulation aims at prohibiting the use of fixed-term contracts in jobs where the need for labour is permanent. In this regard, however, it can be argued that the French general interdiction, according to which irrespective of the ground for fixed-term contract, those contracts cannot either have the aim or the effect of permanently employing for a job related to the normal and permanent activity of a company, seems to restrict the abuse of fixed-term contracts more effectively than the Finnish law, which prohibits successive use of fixed-term contracts in jobs where the need for labour is permanent. The Finnish case law has permitted successive use of fixed-term contracts with an employee under circumstances in which the
employer’s activity consists of fixed-term service agreements for a year at a time. The interpretation of the Finnish law is based on the restricted-time duration of the task known beforehand, whereas the general French interdiction prohibits the use of fixed-term contracts in these situations irrespective of time restrictions if it forms part of the normal and permanent activity of the company. Furthermore, in France the regulation on use of fixed-term contracts with a restricted maximum total duration, maximum number of renewals, waiting periods before renewals and new hirings make regulation of those contracts more restrictive than in Finland, where the restricted total duration of successive fixed-term contracts is not determined precisely by the law but have been shaped only in case law. Correspondingly, there is no maximum number of renewals for fixed-term contracts in the Finnish law, unlike the French law. It can be inferred from the Finnish case law, however, that the maximum number of renewals and total duration of successive fixed-term contracts have been taken into account by Finnish courts (to a variable extent) in assessing the existence of objective reasons for concluding successive fixed-term contracts.

In Finland, there is only a general interdiction on use successive fixed-term contracts in circumstances where the need for labour is permanent. Irrespective of the fact that this must be assessed by the total duration and number of renewals and regardless of the gradually tightened Finnish case law in this regard in the Finnish Employment Contracts Act compared with the case law in the 1990s, the Finnish legal system still does not include such additional qualitative or quantitative restrictions as are included in the French law. Compared to the Finnish regulation, the French regulation also corresponds more with the definition of fixed-term contract included in the Framework Agreement, which defines the fixed-term contract by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event. On the other hand, the generally applicable French Labour Code determines express sectoral and occupational extensions.

1448 For example, KKO 2010:11.
1452 For example, Labour code articles 1242-1, 1242-8, 1243-13, 1244-3.
1453 The maximum duration can be extended to 24 months in cases where tasks are related to the assignments carried out in a foreign country, cases of replacement of an employee who left the company because of his or her position being eliminated, or in cases of increased workload due to exceptional export orders. Laulom, Sylvaine –Vigneau, Christophe (2007), pg 17. Labour Code. Article 1242-8. Pêllissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008), pg 432.
and derogations\textsuperscript{1454} from the maximum total duration in certain situations. In this regard, the Finnish situation is different, where the preconditions for the use of fixed-term contracts on the employer’s initiative are determined in generally applicable law without allowing sectoral, occupational or job related leeway in respect of preconditions for the use of fixed-term contracts.

Objective reasons for concluding fixed-term contracts have also been determined differently in the research countries. The temporary nature of the work requirement, which entitles employment contracts to be concluded for a fixed term, is a common feature of the Finnish and the French regulations. Both include specific lists which determine the objective reasons requirement. The list included in the French Labour Code, however, is exhaustive\textsuperscript{1455} and narrower than that included in the Finnish Employment Contracts Act, where the list only provides examples of objective (or justified) reasons, the intention of which is not (at least basically) otherwise to restrict the right to use fixed-term contracts within the limits of the Act whenever the practical needs of working life require such contracts.\textsuperscript{1456} The purpose of the more detailed determination of objective reasons by the law in France is to prevent the use of fixed-term contracts in normal and permanent jobs within the enterprise. In both countries, however, an objective reason is required from the first contract onwards.\textsuperscript{1457} In the UK, an objective reason is defined as a genuine, legitimate business objective which can be appropriately achieved by using successive fixed-term contracts. In the UK, these objective reasons are required only after four years of continuous employment under successive fixed-term contracts.\textsuperscript{1458} This implies that a considerable part of the protection of fixed-term employees consists of protection against non-renewals that are deemed as dismissals under the UK law. Thus, there are substantial differences in regulations governing legitimate use and employee protection against abuse of successive fixed-term contracts between the countries researched.

\textsuperscript{1454} Soc. 8 février 2006 n 04-41.279 PB, SSL 2006 n 1249 p.15. Pèlissier, Jean- Supiot, Alain - Jemmaud, Antoine: Droit du Travail (2008) pg 433. See also Laulom, Sylvaine –Vigneau, Christophe (2007), pg 18. The maximum total duration is not applied to fixed-term contracts on the grounds of replacement when the expiry of the contract of an absent employee is not known precisely beforehand. Furthermore, the Court of Cassation has decided that the maximum total duration of 18 months is not applied to successive fixed-term contracts on the grounds of replacement in sectors and occupations where it is a regular custom not to use contracts of indefinite duration by reason of the nature of the activities and the temporary nature of the work. Finally, the maximum total duration is not applied to seasonal contracts or to fixed-term contracts concluded to favour the recruitment of unemployed persons or to complete professional education in accordance with the Labour Code.

\textsuperscript{1455} For an exception to the main rule, see section 3 of the French part of the research, i.e., fixed-term contracts concluded to promote the employability of particular groups. Rivero, Jean (1991): Droit du Travail, pgs 420-421.

\textsuperscript{1456} See chapters 2.2 and 3 of the Finnish part of the research.

\textsuperscript{1457} Employment Contracts Act para 1:3.2 §. Labour Code Articles 1242-1 and 1242-2.

\textsuperscript{1458} FTÉR reg 8.
Strict employment security of permanent employment contracts seems to correlate with strict regulation on concluding and renewing fixed-term contracts and sanctioning their abuse. This conclusion is also supported by the British regulation, in which employment security is substantially lower than in France and Finland and, correspondingly, the restrictions on the use of successive fixed-term contracts are lower. This being so, there is no similar need for strict limitations for the use of successive contracts as in the countries of strict employment security. Therefore we can conclude that the effectiveness of restrictions governing the use of fixed-term contracts is dependent on the strictness of employment security of indefinite duration contracts. However, even in the UK the role of regulation on fixed-term contracts is to prevent the circumvention of the employment security of permanent contracts, as it was deemed necessary to define the expiry and non-renewal of a fixed-term contract as a ‘dismissal’ in order not to undermine the effectiveness of the legislation. However, as the circumstances in France partly indicate, the consequence of strict employment security and strict restrictions on the use of fixed-term contracts has led to new contractual measures in order to increase flexibility and promote employment. The New Recruitment Contract (CNE), the Unique Contract and fixed-term contracts on the grounds of projects can be mentioned as examples.\footnote{Bourreau-Dubois, Cécile- Chaupain -Guillot, Sabine- Olivier Guillot, L’Impact du Risque Prud’homal sur le Recours aux Contrats à Durée Déterminée: Une Analyse à Partir des DMMO in No126 - Revue TRAVAIL et EMPLOI avril-juin 2011.}

The Finnish legislator has pursued a somewhat contrary direction by recently introducing new regulations on the use of fixed-term contracts which aims to tighten the preconditions on successive fixed-term contracts in circumstances where the need for labour is permanent. According to the amendment, the number of renewals and total duration of fixed-term contracts must be taken into account in assessing whether the need for labour is deemed to be permanent. Its practical effects, however, still remain somewhat unclear since there is no case law on it.\footnote{See chapter 8.7 of the Finnish part of the research.}

Correspondingly, there are also some changes in the Finnish public sector aiming at preventing abuse of successive fixed-term contracts. Actions have been taken to convert successive fixed-term contracts into permanent ones in circumstances where the need for labour is permanent.\footnote{Finland’s National Action Plan for Employment (2003), pgs-22-23, Finland’s National Action Plan for Employment (2004), pg 21. See chapter 3.3 of the Finnish part of the research, page 153.}

As far as sanctions are concerned, the French law provides the most comprehensive list of sanctions among the countries researched. The list of situations where fixed-term contracts can be requalified as indefinite duration is the largest, consisting of cases where fixed-term contracts have the aim or the effect of permanently filling a job related to the normal and permanent activity of
a company, where the contracts do not fulfil the requirements laid down by the Labour Code for concluding fixed-term employment contracts with apprentices or retired persons and, finally, where they are used in order to replace an employee whose contract of employment is suspended as a consequence of industrial action. Furthermore, fixed-term contracts can be requalified as contracts of indefinite duration when their duration exceeds the maximum, including renewals, when they violate the total number of renewals, or strict formal rules on concluding the contract or failing to observe the waiting periods.\textsuperscript{1462}

France is the only one of the research countries where criminal liability is also a consequence of illegal use of fixed-term contracts, although it is relatively rarely applied. The scope of criminal liability is relatively broad, covering various situations. Firstly, the employer who either concludes fixed-term contracts the aim or the effect of which is to fill permanently a job related to the normal and permanent activity of a company, or without objective reasons determined by the Labour Code\textsuperscript{1463} can be fined.\textsuperscript{1464} Secondly, if the employer has concluded fixed-term contracts within six months of the redundancy of an employee on economic grounds in order to satisfy temporary needs, this constitutes criminal liability.\textsuperscript{1465} Thirdly, criminal liability comes into play if an employee whose job is suspended as a consequence of industrial action has been replaced by an employee under a fixed-term contract. The fourth category of criminal liability consists of using fixed-term contracts in certain dangerous tasks determined by the law. Finally, criminal liability is a consequence of failing to conclude a fixed-term contract in writing or determining the term of employment precisely in accordance with the law.\textsuperscript{1466} Moreover, it is punishable either to conclude fixed-term contracts exceeding a maximum duration determined by the Labour Code, to renew the contract contrary to the Labour Code or to conclude the contract irrespective of the waiting periods determined by the law.\textsuperscript{1467} Considering that the practical effects of the sanctions have been employers reluctance in resorting to fixed-term contracts even in situations where the use of fixed-term contracts would have been justified and the economic burden of sanctions on small enterprises is deemed unreasonable, the sanction system may be overly stringent. It does however effectively prevent the abuse of fixed-term contracts by moving towards the use of contracts of indefinite duration.

In Finland, fixed-term contracts are regarded as contracts of indefinite duration once there is a lack of objective reason. Moreover, an employer neglecting to provide

\textsuperscript{1462} See chapter 6 of the French part of the research.
\textsuperscript{1463} Labour code 1248-2.
\textsuperscript{1464} Labour code 1248-1, 1242-1 and 1242-2.
\textsuperscript{1465} Labour code 1242-5, 1248-3.
\textsuperscript{1466} Labour Code 1242-6 and 4154-1. L. 1242-7, 1248-4.
information on the principal terms of work, i.e., the expiry or estimated expiry of a fixed-term term employment contract and the justification for specifying a fixed-term within a maximum of one month from the beginning of the first employment relationship in successive fixed-term employment relationships of less than one month with same employee is punishable by fines.\textsuperscript{1468}

In the UK, successive fixed-term contracts are only deemed to be ‘permanent’ after four years or more of continuous employment provided the employer cannot show an objective reason at the four-year point. Therefore, the exercise of rights conferred by the EU law is excessively difficult and the sanction of abuse is not consistent with the traditional notion of the principle of effectiveness required by the EU law. Instead, the UK regulation in this regard reflects more the tendency to minimalistic adoption of minimum standards as McColgan has pointed out.\textsuperscript{1469}

On the other hand, the conversion of a contract to indefinite duration does not change the position of an employee very much because of uncertain employment security. When the duration of successive fixed-term contracts is less than four years, the use of such contracts is restricted by the unfair dismissal regulation under the ERA, i.e., prohibition of non-renewal of fixed-term contracts unless justified by fair reasons. In these cases, the consequence of non-renewal contrary to the ERA is compensation for loss determined by the ERA. However, due to the relatively broad scope of legitimate economic reasons for dismissals and the generous leeway granted to employers in acting reasonably in terms of using such reasons by the courts, this requirement does not restrict the use of fixed-term contracts very severely.\textsuperscript{1470} On the grounds of the foregoing, it can be therefore concluded that, as the Framework Agreement leaves the conditions under which fixed-term contracts are deemed to be contracts of indefinite duration for the Member States to decide, a relatively different regulation on sanctions has been retained in the legal systems of the countries researched.

Deeming fixed-term contracts successive and continuous also plays a very different role in determining the scope of the protection against abuse of successive fixed-term contracts between these countries. In Finland and France, where the objective reasons for the fixed-term contracts are required from the first contract onwards, and the maximum number of renewals and total duration allowed is considerably lower than in the UK, the requirement of continuity of employment and the interpretation of successive contracts are not so vital in determining the scope of protection. As was mentioned in the UK section, the continuity of employment can

\textsuperscript{1468} Employment Contracts Act 2:4 § and 13:11 §.
\textsuperscript{1469} See section 3.4 of the British part of the research. McColgan, Aileen (2003), pgs195-196.
\textsuperscript{1470} See chapter 3.6.1.5 of the British part of the research.
be broken by one-week breaks between the contracts.\textsuperscript{1471} This significantly affects the FTER’s effectiveness in intervening extensive use of successive fixed-term contracts compared to the Finnish Employment Contracts Act and the French Labour Code.

There are slight differences in mechanisms on how the fixed-term contracts shall be deemed to be contracts of indefinite duration. In France, the contract of employment can be requalified (‘requalification d’un contract de travail’) by the court to a contract of indefinite duration when the preconditions determined by the law are met,\textsuperscript{1472} whereas in Finland the result of successive fixed-term contracts concluded without objective reasons is a condition which renders the duration of employment void. In the UK, the result of using successive fixed-term contracts contrary to the FTER\textsuperscript{1473} is that the term restricting the duration of contract is of ‘no effect’, not automatically, but as as result of an application to an employment tribunal for a declaration to that effect made by an employee (meaning also that the reason for dismissal could be regarded afterwards as preventing the employee obtaining permanent status).\textsuperscript{1474} Consequently the mechanism of conversion of fixed-term contracts is similar in all the research countries, requiring that an employee make a claim in court on the grounds of absence of preconditions determined by the law.

Both the French and the Finnish systems clearly aim at retaining contracts of indefinite duration as the main form and fixed-term contracts as an exceptional form of employment by restricting long-term use of successive contracts in the same tasks on the one hand but permitting the use of fixed-term contracts when the temporary needs of the employer require it on the other. In this regard, both the Finnish and the French regulations reflect the guidelines adopted by the EU Employment Policy well which, while emphasising a need to enhance competitiveness and to respond to fluctuations in demand, also recommends that successive use of fixed-term contracts should be limited and the use of open-ended contracts should be promoted.\textsuperscript{1475}

Unlike France and Finland, concluding or renewing fixed-term contracts freely for four years from the beginning of employment without any further restrictions is permitted by the law in the UK (provided that non-renewals of fixed-term contracts can be justified by fair reasons under the ERA). A large category of workers is also excluded from the scope of FTER and the continuity of employment can easily be broken. Thus it cannot be said that the British law is very satisfactorily based on the

\textsuperscript{1471} See chapter 3.3 of the British part of the research.
\textsuperscript{1472} Labour code Article 1245-2.
\textsuperscript{1473} FTER reg 8.
\textsuperscript{1474} FTER reg 9.
principle that employment contracts of an indefinite duration are the general form of employment relationships in accordance with the Framework Agreement on Fixed-Term Work. This stance adopted by the British legislator reflects the flexibility notions of the Green Papers of 1993 and 1997, which emphasised the enhancement of productivity and competitiveness and saw modern working organisations and an efficient labour market and economy as desirable objectives. In addition to this, liberal regulation governing the use of fixed-term contracts can be explained by the traditional freedom to choose the form, type and duration of employment contract freely. Moreover, the traditionally low level of employment security and employment policy reasons related to promoting employability and job creation (very similar to those adopted by the EU in EES) have provided background justification for not tightening the preconditions for the use of fixed-term contracts.

British regulation implementing the Directive on Fixed-Term Work does not aim at preventing the normalisation of fixed-term contracts but retains this form of work as almost equivalent to contracts of indefinite duration. This is against the objective of the Framework Agreement.

The stringent French restrictions on the use of fixed-term contracts have led to more flexible forms of work such as the CNE. This form of contract has led, however, to extreme contradiction with the Employment security defined by the Labour code, ILO Convention 158 and the EU Employment policy as well. There have not been many deregulatory attempts undertaken by Member States to adopt the European Employment Strategy (EES). The consolidation period of the CNE in France, however, allows an employer who is terminating the employment contract to be discharged from the requirement of real and serious cause within two years of the beginning of employment. This has been justified by the French government job-creation rationale, adaptability arguments and the need to reduce labour market segmentation originating from the Employment Guidelines. This is contrary to what is recommended by the EU employment policy, according to which Member States are not supposed to undertake deregulatory actions in order to adopt EU Employment measures.

The other flexibility tool introduced by the French legislator is a fixed-term contract for a restricted-time project. In accordance with the preconditions for the use of such a contract, the conditions under which the employees have priority

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1477 See Chapter 2.1 of the British research part.
1479 See Chapter 7.1 of the French part of the research.
access to jobs with contracts of indefinite duration in the company after expiry of the project must be guaranteed prior to concluding the contract.\textsuperscript{1481} This kind of priority in employment reflects the EES aspirations, by which the Member States are urged to facilitate the transition from fixed-term contracts to contracts of indefinite duration.\textsuperscript{1482}

A clear distinction can be made in comparing the court reactions to permission to conclude fixed-term contracts on the grounds of established custom of certain sectors in Finland and France. In Finland, the Supreme Court recently straightforwardly prohibited binding the duration of fixed-term employment relationships in the temporary agency sector to the duration of the assignment agreement between agency employer and user-enterprise and provided that even in that sector objective reasons require that the work performed by the employee be on offer for a restricted period of time only.\textsuperscript{1483} In France, the trend in this regard has been somewhat the reverse. The Court of Cassation has permitted relatively free use of successive contracts in sectors where not having recourse to contracts of indefinite duration without the temporary nature of the occupation concerned requirement or other restrictions determined by the Labour code is established.\textsuperscript{1484} In this regard, the legal trend in Finland and in France has gone in opposite directions. The legal position adopted by the Court of Cassation is also contrary to the recent notion of the Employment Guidelines, which suggest extending the use of open-ended contractual arrangements with a gradual increase in protection rights to diminish the existing divisions between those holding atypical and permanent contracts.\textsuperscript{1485} Furthermore, the French case law created by the Court of Cassation on fixed-term contracts on the grounds of sectoral custom is liable to increase rather than decrease the segmentation of the labour market, although reducing segmentation is an objective pursued by the EU in the European Employment Guidelines.\textsuperscript{1486} It can also be concluded that the French law and case law on the use of fixed-term contracts contain more opportunities for sectoral derogations (sectoral flexibility) from generally applicable law than the Finnish law. The French case law has also adopted more a stringent position on successive fixed-term contracts concluded with the same employee on the grounds of replacement of absent employees, the intention of which is to respond the structural need for labour than is accepted in

\textsuperscript{1481} Lokiec, Pascal (2010), pg 83.
\textsuperscript{1483} KKO 2012:10.
\textsuperscript{1486} Council Decision of 21 October 2010 on Guidelines for the Employment Policies of the Member States, Guideline 7
the Finnish case law in comparable circumstances. Correspondingly, the French legal position in respect of fixed-term contracts on the grounds of the project nature of the job is more stringent than the Finnish one. According to the French law, on the ground of realisation of a specified project, a minimum and maximum duration are applied and it is not renewable. According to the Finnish (case) law, similar successive contracts are allowed and the decisive factors in determining legitimate use are whether the employer could have been able to offer the employee work after the expiry of the project and whether there are realistic risks with regard to continuity of task under evaluation i.e., whether the need for labour is deemed to be permanent.

Otherwise it seems that the French law on fixed-term contracts is used more flexibly for employability purposes in accordance with Employment Guidelines than the Finnish law. According to the French law, fixed-term contractual arrangements intended to employ unemployed persons, particular groups who find it difficult to find a job, and apprenticeships are utilized more actively than in Finland. In these situations, it is also easier in France to derogate from the general regulation governing fixed-term contracts than in Finland, where these groups are not subject to special treatment under the Finnish law with the exception of employees who continue their employment relationship beyond the age of 68 on fixed-term contracts. As stated before, this can be done regardless of the restrictions concerning successive fixed-term contracts laid down by the Employment Contracts Act.

However, employing these groups by successive fixed-term contracts solely on the grounds of their age, irrespective of general restrictions determined by the Labour code, might constitute an abuse of fixed-term contracts and discrimination prohibited in the EU Charter, the TFEU and Framework Directive 2000/78/EC if it is not based on a legitimate social policy objective and the principle of proportionality is not followed. Apprenticeship contracts, reclassification contracts and the employment initiative contracts certainly represent national employability measures in accordance with the EU Employment Guidelines.

As far as employment policy is concerned, fixed-term contracts reduce labour market segmentation only if they lead to permanent contracts. However, the French government justified the creation of the CNE on the grounds that there was not enough transition from fixed-term contracts to contracts of indefinite duration, a claim supported by the statistics. As the use of the CNE, however,
has increased the risk of unemployment and employment precariousness in the same way as the use of fixed-term contracts, the CNE was not considered a justifiable tool in reducing the segmentation of labour markets, as Barbier has stated. Correspondingly, unemployment is considerably more prevalent in the UK among fixed-term employees than permanent employees. Consequently, it appears not to be justifiable to lower the threshold for concluding fixed-term contracts or to deregulate the existing employment security of permanent contracts in order to reduce the segmentation of labour markets.\textsuperscript{1490}

There are also similarities between the research countries in regard to the permissibility of terminating fixed-term contracts during the contract period. This is so even though there are marked differences in the legal cultures of the three countries concerning their reaction to fixed-term contracts and their exceptionality. In the UK, where the common law has traditionally imposed no minimum requirement on the content of a fixed-term contract, making such a contract terminable during the contract period is permitted. Thus, a fixed-term contract can be terminated prior to the predetermined date provided that it includes an early termination clause. In these cases, periods of notice are applied and the employee is entitled to the statutory minimum notice unless the contract specifies a longer period.\textsuperscript{1490} In Finland, contracting parties can agree on a termination clause in their fixed-term contract, making it terminable during the contract period on grounds determined by the Employment Contracts Act. This has not been deemed to be contrary to the principle of employee protection as the termination requires the legal grounds to be met.\textsuperscript{1492} Even in France, where premature ending of fixed-term contracts is made very exceptional, the parties to an employment relationship are allowed to terminate a fixed-term employment contract by mutual agreement.\textsuperscript{1493}

Adoption of the comparative method has facilitated the understanding of national labour law traditions in their entirety, a mixture of their protective and supportive legislation adaptable to external changes in the research countries. In concluding this research, we can agree with Sciarra that legal comparison helps to reveal the possible tensions between national and supranational law-making.\textsuperscript{1494} In this sense, the important function of the comparative method is to produce information on how the supranational regulation is implemented, how it works at national level


\textsuperscript{1491} See Chapter 9 of the British part of the research.

\textsuperscript{1492} KKO 2006:4.

\textsuperscript{1493} Lokiec, Pascal (2010), pgs 78-79. Labour Code, Article 1243-1.

\textsuperscript{1494} Sciarra, Silvana: New Discourses in Labour Law, Part-Time Work and the Paradigm of Flexibility (2003), pg 2.
and how it fits into national legal culture. In this way it is possible to assess whether supranational regulation has achieved its objectives and to reveal its shortcomings as well. This research shows very different historical assumptions in respect of regulation and its development concerning fixed-term work in Finland, the United Kingdom and France. These differences in adapting to fixed-term contracts and the level of protection against unjustified dismissal of permanent contracts undoubtedly reflect the potential (and difficulty) of making legal comparison, especially when the UK regulation is compared to the Finnish and the French regulation. However, similarities with regards to these factors make the legal comparison between Finland and France more revealing.

As Sciarra has stated, the differences between national legal cultures may explain the tensions in supranational law-making. These tensions may have partially been reflected in the difficulty in unifying the regulation or even establishing the minimum standards on the use of fixed-term contracts in the regulation as the Framework Agreement on Fixed-Term Work and its effects at national level illustrate.

This legal comparison has also been done in order to clarify the domestic effects of the Directive in respect of restrictions on the use of successive contracts and the sanctions.

In France and in Finland, the Directive has not had effects on the existing regulation in respect of Clause 5 of the Framework Agreement at all. These countries have retained fixed-term work as an exceptional form of employment complemented by the detailed list of situations in which concluding a fixed-term contract is permitted, added to further restrictions on successive contracts. As we have seen, in the UK very light regulation (FTER) introduced to implement the Directive included the four-year rule, the exclusion of workers and the opportunity to opt out of the regulation by breaking the continuity of employment.

Consequently, the Directive on Fixed-Term Work has not managed to bring convergence in these countries, the legal position remaining fragmented as far as restrictions on the use of successive fixed-term contracts are concerned. In this sense, it seems that generally determined minimum standards in the EU law are not an appropriate means of promoting or creating individual rights.

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4 SUMMARY

This research contains an analysis of the regulations on the conclusion and renewal of fixed-term contracts in the European Union, Finland, France and the United Kingdom. The research analyses how fixed-term employment has been restricted in national regulation before the Framework Agreement on Fixed-Term Work was introduced. Further, the research examines the objectives of the Framework Agreement and assesses how it has been implemented with respect to the limits on the use of successive fixed-term contracts and related sanctions, and thus analyses its effects on national laws in the research countries. The research also examines the relevant case law of the CJEU with respect to the provisions of the Framework Agreement and assesses the extent to which national case law and legal developments after implementation correspond with the legal stance of the CJEU. Based on this analysis, the measures preventing the abuse of successive fixed-term contracts in national laws and their effectiveness in achieving the objectives of the Framework Agreement are assessed.

As fixed-term contracts play a central role in the EU employment policy, the research explores whether the stance on acceptable use of fixed-term contracts in EU law and EU employment policy correspond with each other.

As the protection against abuse of successive fixed-term contracts laid down by the Framework Agreement is relatively weak, the relation between the Directive on Fixed-Term Work implementing the Agreement and the fundamental rights of the EU is examined to see whether the rights of fixed-term employees should be strengthened by specifying the grounds on which fixed-term contracts can be concluded in EU law.

The research methods are legal comparison and legal dogmatics mostly in its prevalent form.

The research is divided into six parts. The first part contains the research framework, main research tasks and methodological assumptions. The second part consists of the relevant EU legislation with its evaluation affecting the acceptable use of fixed-term contracts and the development of EU employment policy related to the use of fixed-term contracts. Parts 3-5 cover national law and evaluation in the research framework. The sixth part contains the final remarks, conclusions and summary.

The preconditions for using successive fixed-term contracts are not determined precisely in Clause 5 of the Framework Agreement and the fact that the Clause does not have a direct effect as it is addressed to the Member States only and the individual contracts are excluded from its scope, lead to the conclusion that the Framework Agreement has failed in its objective of preventing abuse arising from successive fixed-term contracts, as the recent case law of the CJEU also indicates.
When it comes to acceptable use of fixed-term contracts, the research also indicates tension between EU employment law and employment policy. While the CJEU has permitted long sequences, even several years, of successive fixed-term contracts in same job, the purpose of the EU Employment Guidelines is to encourage the use of fixed-term contracts in order to promote the employability of particular groups and to create pathways to permanent employment, but not to permit permanent use of successive fixed-term contracts. These facts support strengthening fundamental rights in EU law in terms of concluding fixed-term contracts.

As there are no compulsory requirements regarding the content, level or the scope of sanctions in the Framework Agreement, effective enforcement is almost fully dependent on national law and jurisdiction and the full effectiveness of the EU law remains to some extent incomplete.

The effect of Clause 5 as an instrument laying down minimum standards for restricting the use of successive fixed-term contracts in national laws has been extremely modest in the countries researched. In France and Finland, the legislation restricting the use of successive and single fixed-term contracts was already in place, so that no implementation measures were needed. The UK was one of the rare countries which had to introduce completely new measures to implement the Directive. However, the UK legislation implementing the Directive does not suggest considerable improvement in the protection of fixed-term employees.

Comparison of the domestic law of the research countries indicates that strict employment security of permanent employment contracts seems to correlate with strict regulation on concluding and renewing fixed-term contracts and sanctioning their abuse. Otherwise, the regulations on use of fixed-term contracts are characterised by strong national legal traditions rather than by the Framework Agreement on Fixed-Term Work, which has not approximated the regulations in this regard. In this sense, the Framework Agreement as a generally determined minimum standard has not managed to improve or create individual rights of fixed-term employees.