Fixed-term work and social inclusion

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1. Introduction

Fixed-term contracts (2) are perceived as «atypical» form of work (3). The reasons are manifold: Despite the Directive 1999/70/EC (4) concerning the framework

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2 Synonyms are temporary employment contracts or definite employment contracts. In the following, only the term «fixed-term contract» is used.


4 OJ L 175, 43-48; in the following «the Directive».
agreement on fixed-term work (\textsuperscript{5}) concluded by ETUC, UNICE and CEEP, people working under fixed-term contracts often risk to be discriminated against employees working on an indefinite basis. Furthermore, protection mechanisms against dismissal might not apply because of lack of seniority, only to name two disadvantages. The following contribution first takes a look at the number of people working in fixed-term contracts and the possible reasons for concluding fixed-term contracts, taking especially into account the employer’s need for flexibility, as well as the specific needs of some groups of employees outside or at the edge of the labour market. To these groups, fixed-term contracts might be a stepping-stone and therefore might cater for their social inclusion. The contribution then analyses the existing legal framework at EU-level, including the relevant case law of the CJEU. After identifying specific risks fixed-term workers face (compared to permanent employees), the contribution shows which legal remedies there are or might be in the future in order to prevent precariousness of fixed-term employees.

2. Definitions and data

According to the framework agreement, a fixed-term worker is someone having an employment contract concluded directly with the employer, which provides that the 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 (\textsuperscript{6}). Since the general aim is to assure that fixed-term workers enjoy the same rights and protection as comparable «standard» workers, the latter ones also need to be defined. According to Clause 3.2. of the framework agreement, a comparable permanent worker, as referred to in the framework agreement, is a worker «with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills». In case there is no comparable permanent worker in the same establishment, the framework agreement provides that «the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice».

With regard to the amount of people working in fixed-term contracts, it is clear that this overview-contribution cannot provide for any comparative statistics. Yet, the following examples suggest that fixed-term contracts might be used as labour market tool in order to get people, especially the young, into employment. When taking a look at the Austrian labour market, e.g., one finds that in 2013, every third fixed-term worker (36 \%) was between 20 and 30 years old,

\textsuperscript{5} In the following «the framework agreement».
\textsuperscript{6} Clause 3.
whereas this group of people only makes out some 22% of the whole labour force. Fixed-term work is thus a mainly «young» phenomenon. In addition, fixed-term work gained popularity: between 2008 and 2013, fixed-term work has risen by 12.1% in Austria (7). Yet, regarding the overall-figures, one finds that in 2013, only about 5.7% of all dependent employees worked as fixed-term employees, with a slightly higher percentage amongst women (6.2%) than amongst men (5.2%). This is a quite low percentage compared to other EU-countries.

Yet, the increase of fixed-term work is not only an Austrian, but an EU-wide phenomenon. Whereas in 1983, only 8.1% of the labour force was employed on a fixed-term contract, the figure for 2005, i.e. even before the crisis, was 14.5% (8). The post-crisis level is nearly the same, with a percentage of 14.0% in the second quarter of 2014. Between the second quarters of 2013 and 2014, a decrease in 11 EU countries and an increase in 14 EU countries can be perceived (9).

Regarding the different rates for men and women, the same phenomenon as in Austria takes place: The figure for women working on a fixed-term contract is slightly higher (15%) than the one for men (14%). The EU-data also confirms the Austrian data on fixed-term work being a «young» phenomenon: the rate of fixed-term workers between the ages of 15 and 24 is 42% (10). This might suggest the use of fixed-term contracts as tool to get young people into employment. Yet, one should not fail to notice that at the same time, employers could try to maximize their profits insofar as they offer young people desperate to work “only” fixed-term contracts in order to keep their costs low. This leads us to the next question of why fixed-term contracts are concluded.

3. Why fixed-term contracts?

Costs are a main factor for concluding fixed-term contracts. Generally speaking, the Commission held already in 1990 that national laws and collective agreements are an essential factor for variations in wage costs between «standard» (i.e. indefinite, full-time employment contract) and atypical employment. For employers, fixed-term contracts can be less expensive, because e.g. costs related to the duration of the contract do not arise at all. In Austria, this was the case regarding e.g. severance payments at the end of the employment contract. One

prerequisite was the minimum duration of the employment contract of at least three years. However, since 2002, all new employment contracts fall under the scope of the «new» severance payment scheme, according to which all employees are entitled to severance payments, without any difference because of the duration of the employment contract.

In 1994, the Commission held that more flexible forms of work were and are established because of the management’s need for flexibility on the one hand and because of the often-shown preference of workers for «alternative work patterns» on the other hand (11). Thus, fixed-term work is definitely perceived as one measure to cater for the employer’s need for flexibility. This is also displayed in the Directive. The explanatory notes refer to the Council when stating that apparently, more flexible work is needed in order to cater for the employment intensiveness of growth, and that these flexible working arrangements particularly aim at «making undertakings productive and competitive» (12). When employers long for flexibility due to economic insecurity and unemployed persons for employment, definite contracts could therefore be a flexible instrument for the employer’s side and at the same time a stepping-stone for unemployed persons. As a result, definite contracts might further social inclusion of people outside the labour market. The ETUC, on the contrary, «has never considered fixed-term contracts to be a means of promoting or creating jobs» (13).

Yet, the question is, why definite employment contracts are regarded as so much more flexible for the employer than permanent contracts. The reasons lie amongst others within the national systems of dismissal protection. If dismissal protection for employees with indefinite employment contracts is strong, employers tend to make more use of fixed-term workers in order to being able to better adapt to economic changes (14). On the contrary, in those countries where dismissal protection is rather weak and thus the employer’s flexibility quite high when it comes to terminating employment relationships, the necessity for fixed-term work is rather low. Thus, fixed-term work always has to be assessed in combination with employment protection legislation for standard contracts. The higher the protection for standard contracts is, the more use is made of fixed-term contracts. The outstanding example is Spain, with more than 30% of the la-

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11 COM(94) 333, 22. However, the argument that workers often show preference for “alternative work patterns” needs some further explanation. As we will see infra, in reality fixed-term contracts seem to be undesirable for the majority of the employees. Thus, it is most likely that the Commission alludes rather to alternative work patterns such as part time work when arguing that workers prefer such flexible patterns.

12 Explanatory notes 5 and 6 of the Fixed-Term Work Directive.


bour force being employed on a fixed-term contract in 2005 (15), and still 14% in the second quarter of 2014 (16). Only in Poland, more people work in fixed-term contracts (28% in the second quarter of 2014) (17).

From an employee’s point of view, fixed-term work is – at least according to the Court – only in certain circumstances «liable to respond to the need of both employers and workers» (18). As the so-called «Supiot report» (19) shows, increased flexibility for employers brings the «pressing need of every employee to enjoy a long-lasting real employment status». This idea is based on the fact that employers demand not only more flexibility from their employees but also more loyalty, willingness to undergo vocational training, adaptation of skills, only to name some requirements to modern workers. In the past, the trade-off on which the employee's status was based on was, in a nutshell, subordination for (relative) job security (20).

Yet, although fixed-term contracts seem to be undesirable (21) for the majority of employees, compared to permanent employment relationships, fixed-term contracts might also cater for employee's need for a family friendly working-environment (22). (Short) fixed-term contracts are perceived as one possible way in order to balance work and family life (23). Barnard even recognizes fixed-term contracts as one of the three strands of the Union’s approach to «family-friendly» policies or «work-life balance» (24).

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16 One could deduce that the Spanish Labour Law Reform in 2012 which made it much easier to dismiss permanent workers compared to the old regime, led to the decrease of fixed-term work. Yet, this decrease is – at least as well – due to the crisis where fixed-term workers were the first ones employers got rid of.


18 CJEU C-121/04, Adeneler, ECLI:EU:C:2006:443, para 62.


20 Supiot Report, 11.


23 Ead., 426.

24 Ead., 401.
However, it is generally acknowledged that fixed-term contracts are per se, by their very nature, insecure and precarious (25). Thus, when assessing the reasons for fixed-term work, it is obvious that it is mainly the employer’s side that makes use of these employment contracts in order to cater for their needs. As a result, legal regulations of fixed-term work intend above all to protect workers (26), or, more radical, to «normalize» (27) fixed-term work. Even the CJEU held that recourse to fixed-term contracts, in comparison to permanent contracts, is «exceptional» (28).

4. Legal framework at EU-level

Already in 1989, the policy-makers at EU-level had realized that there was specific need for a better protection of atypical work, compared to open-ended contracts. Under the Headline «Improvement of living and working conditions», Article 7 of the Community Charter of the Fundamental Social Rights of Workers states that «(t)he completion of the internal market must lead to an improvement in the living and working conditions of workers...». Particular focus is put on the approximation of employment conditions of standard, open-ended contracts, and other forms of employment, such as fixed-term contracts. In the following, several Directives were proposed, aiming, amongst others, at the improvement of living and working conditions of atypical workers and the improvement of the operation of the internal market. The draft-Directive on certain employment relationships with regard to distortious competition (29) thus stipulated that atypical workers, amongst whom also fixed-term workers (30), were afforded «vis-à-vis employees employed... for an indefinite duration, social protection under statutory and occupational social security schemes rooted in the same foundations and the same criteria, account being taken of the duration of work and/or pay» (31). Furthermore, fixed-term work should be regulated insofar as Member States provided «for a limit on the renewal of temporary employment relationships of a duration of 12 months or less for a given job». The total period of employment should «not exceed 36 months». Furthermore, in case of unjustified break in the employment relationship before the term fixed, Member States

25 Ead., 452.
26 Ead., 438.
29 COM(90) 288 final, in the following «draft-Directive».
30 Article 1 (b) of the draft-Directive.
31 Article 2 of the draft-Directive.
should introduce some form of equitable allowance (32). Yet, the draft-Directive did not challenge the factual need for atypical, fixed-term work. On the contrary, it recognized the increase in fixed-term employment relationships as «favourable development in so far as it meets the need for flexibility in the economy, notably among firms, in the context of job creation», which was regarded a «priority in completing the internal market». Furthermore, apparently it also met «the aspirations of certain workers». Nevertheless, the draft-Directive did not enter into force. However, since the necessity for giving fixed-term workers working conditions broadly equivalent to those for standard workers, as recognized by the Commission in its White Paper «European Social Policy – a way forward for the Union», could not be denied, Directive 1999/70 was adopted at last (33).

4.1. Directive 1999/70/EC concerning the framework agreement on fixed-term work

This Directive is the main instrument regulating fixed-term work at EU-level. As Barnard (34) states, the Directive is, compared to the Part-time Work Directive, more obviously about worker protection (35). The Directive and the framework agreement, respectively, had to be transformed into national law until 10 July 1999. However, as the Austrian (36) case shows, not all the Member States complied with the Directive by legislative measures, but also by applying «equivalent legal measures», e.g. when preventing abuse of the use of successive fixed-term employment contracts.

As clause 1 of the framework agreement shows, the regulation of fixed-term work follows two main strands: First, the prevention of discriminatory practices, second the prevention of the abusive use of successive fixed-term employment contracts. In addition, the framework agreement provides for specific information and consultation obligations the employers have towards fixed-term workers (37). The framework agreement applies to any employees with a fixed-term contract as defined in law, collective agreements or practice in each Member State (38). However, the Member States may provide that the framework agreement does not apply to initial vocational training relationships and apprentice ship schemes and employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported train-

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32 Article 4 draft-Directive
34 Ead., 427-428.
35 See also W. Brose, op.cit., § 9 para 10.
36 In Austria, there is no legal provision declaring continuous fixed-term employment contracts unlawful, but long-term court practice according to which the successive use might be unlawful and the fixed-term contracts thus be regarded as one single permanent employment contract.
37 See infra Sections 5. and 6. of this contribution.
38 Clause 2.1. of the framework agreement.
ing, integration and vocational retraining programme. The Directive thus explicitly acknowledges the need for fixed-term contracts as labour market instrument in order to enhance social inclusion of people outside or at the edge of the labour market. In line with this, the initial conclusion of a fixed-term contract is not regulated by the Directive (39). In other words, the Directive is insofar permissive as it accepts the initial fixed-term contract as stepping-stone. Fixed-term contracts are therefore perceived as a possibility to enhance employment (40).

4.2. CJEU-case law

According to the Court, «the benefit of stable employment is viewed as a major element in the protection of workers». However, in case of a fixed-term contract, the needs of both employers and employees are only addressed in certain circumstances (41). In other words, only in certain circumstances fixed-term contracts suit both employers and workers. The Court had to deal especially with questions concerning discrimination of fixed-term workers in comparison to standard workers as well as with the interpretation of Clause 5 of the framework agreement concerning the successive use of fixed-term contracts. This is due to the fact that the framework agreement contains several unspecified legal terms, such as the objective grounds on which less favourable treatment (Clause 4.1.) or the renewal of a fixed-term contract (Clause 5.1.a) may be justified (42).

5. Specific risks for fixed-term workers

The data in Section 2. of this contribution shows that fixed-term workers are over-represented amongst young employees across the EU. Furthermore, in some countries, there are more women working under fixed-term contracts than men. This could lead to the conclusion that there is indirect age- or sex discrimination. However, a general obligation for equal treatment for all fixed-term workers under the Directive would not be effective since there are also fixed-term workers who do not fall within any disadvantaged group (e.g. male and middle-aged) (43). Thus, the remedies in the mentioned discrimination cases can be found in the general anti-discrimination Directives 2000/78 and 2006/54. Nevertheless, especially the case of age-discrimination needs some closer examination, particularly since fixed-term contracts are sometimes explicitly used in order to promote employment of «young» or «old» people.

39 See e.g. J. Murray, op.cit., 273.
40 See also M. Rönmar, op.cit., 179.
41 CJEU C-212/04, Adeneuer, ECLI:EU:C:2006:443, para 62.
42 See C. Barnard, op.cit., 440-443; infra in this contribution in Sections 6.1. and 6.2.
43 M. Bell, op.cit. 43.
5.1. Fixed-Term Contracts and Age-Discrimination

In the famous Mangold (44) case, the Court held that a national provision stating that the principles of non-discrimination and justification of discrimination by objective reasons, respectively, of the framework agreement were not applicable to workers aged over 52 was discriminatory on the grounds of age (45). At that time, the national provision stated that fixed-term contracts could be concluded without any limitation concerning the successive use in case the employee was aged over 60 when first concluding the fixed-term employment contract. Furthermore, for a limited period, it was not necessary to justify the conclusion of a fixed-term contract with those workers aged over 52, whereas in comparison, this was obligatory for any other employees.

In concrete, the German Government argued that these measures were necessary in order to enhance the employment of older people (46). The Court first held that Clause 8(3) of the framework agreement does not prevent the Member States from setting limits regarding the first conclusion of a fixed-term contract, since the Directive did not provide for any such limitations (47). However, the national provisions infringed the principle of non-discrimination because of age, because it was possible to conclude fixed-term contracts with any worker aged over 52 without any restrictions, neither regarding the first, nor the successive use. If the national legislator had wanted to boost the labour market for older employees being unemployed for a long time, it would have been necessary to restrict the use of fixed-term contracts to this group, not to any worker aged over 52, irrespective of the fact whether the worker was long-term unemployed or not (48).

Thus, fixed-term contracts are indeed perceived as lawful measure to promote employment of specific groups of employees having difficulties at finding employment. This is acknowledged by the Court as well as by the Commission and explicitly stated in Article 6 para 1 Directive 2000/78 (49). The current Article 14 para 3 of the German Act on Part-Time and Fixed-Term Work (TzBfG) therefore complies with EU-law when stating that for a period of five years, the successive conclusion of fixed-term contracts is possible for employees who were unemployed for at least four months, entitled to specific unemployed benefits or enrolled in a specific public training program and aged over 52 when concluding the first fixed-term contract. By enlisting these specific conditions and because of the aim of enhancing employment for this specific group of employees, this

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44 CJEU C-144/04, Mangold, ECLI:EU:C:2005:709.
45 See C. Barnard, op.cit., 275-276, on the contentious question of applying the principle of non-discrimination because of age as a general principle of EU-law and invoking it in the national courts.
46 CJEU C-144/04, Mangold, ECLI:EU:C:2005:709 paras 53, 59.
47 CJEU C-144/04, Mangold, ECLI:EU:C:2005:709 paras 51-54.
49 CJEU C-144/04, Mangold, ECLI:EU:C:2005:709 paras 58-60.
provision neither violates Article 6(1) of Directive 2000/78, nor Article 5(1) of the framework agreement.

5.2. Non-application of protection schemes against (unfair) dismissals

With regard to protection against unfair dismissals, many Member States provide for so-called waiting periods, i.e. that employees have to be employed for a certain amount of time in order to fall under the scope of national legislation of protection against unfair dismissals. In Austria, there is, e.g., a six months waiting period in order to being entitled to challenge a termination by notice or an unlawful dismissal on good grounds before court because of so-called social inadequacy of the termination or dismissal. Thus, only workers employed for more than six months fall under the scope of that provision. In practice, indirect discrimination of fixed-term workers might be alleged, because it is impossible for those employees with fixed-term contracts concluded for a period shorter than six months to enjoy dismissal protection, and because fixed-term workers therefore are more frequently affected by the waiting period. However, since the national provision does not directly differentiate between permanent and fixed-term workers and provides for the same length-of service qualification for any employee (see clause 4.4 of the framework agreement), and since the Directive only prohibits direct discrimination (arg. «solely» in Clause 4.1), such a provision is in line with the requirements of the Directive (50).

Regarding the premature termination of fixed-term contracts, the general principle is that fixed-term contracts are terminated by objective conditions, such as those mentioned in Clause 3 f the framework agreement (51). Yet, most legislations allow under certain circumstances the premature termination of fixed-term contracts. However, if such a premature termination is possible, the Court has only very recently stated that a national provision according to which the premature termination of a fixed-term contract follows less favourable conditions than of a permanent contract (in concrete the termination periods), the principle of non-discrimination regarding employment conditions (Clause 4 of the framework agreement) is violated. In short, employment conditions comprise also conditions relating to dismissals (52).

Yet, the principle of non-discrimination (Clause 4 of the framework agreement) only applies in case a «real» fixed-term contract exists. Only recently, the Court had to assess a case regarding the (excessive) use of probationary periods during which employees most often are deprived of essential rights such as complaints against unfair dismissal. The Court held that as long as the contract


(51) See for Austria e.g. F. MARHOLD – M. FRIEDRICH, Österreichisches Arbeitsrecht, 2012, 60-61.

(52) CJEU C-38/13, NIERODZIK, ECLI:EU:C:2014:152, para 28.
is concluded for an indefinite period, the Directive does not apply. It explicitly
states that the duration of probationary periods is not regulated by the Direc-
tive (53). Thus, the national court’s assessment that special indefinite contracts
providing for a longer probationary period, compared to «ordinary» indefinite
employment contracts (with probationary periods of only two to six months),
give rise to a discrimination prohibited by Clause 4 of the framework agreement,
was rejected by the Court. In short, probationary periods which form part of a
permanent contract do not fall under the scope of the Directive.

6. Remedies to prevent precariousness

As seen in the previous sections of this contribution, fixed-term workers are of-
ten at risk of being in a less favourable position than employees with a perma-
nent contract are, provided that the permanency is still regarded as standard and
desirable contract. The following measures try to reduce the differences between
permanent and fixed-term workers (54).

6.1. Anti-discrimination policies

One of the three pillars of the Fixed-Term Work Directive is the principle of
non-discrimination compared to standard workers. According to Clause 4 of the
framework agreement, «fixed-term workers shall not be treated in a less favour-
able manner than comparable permanent workers solely because they have a
fixed-term contract or relation, unless different treatment is justified on objec-
tive grounds». In other words, direct discrimination on the grounds of the tem-
perary period of the employment contract is prohibited, although it might be
– contrary to classical anti-discrimination law (55) – justified; indirect discrimi-
nation is allowed (56).

The prohibition of difference in treatment comprises «employment condi-
tions», including pay and occupational pensions and lengths of service allow-
ance (57), but also concerning conditions for dismissals (58). As already stated in
Section 6.2. of this contribution, there is a wide range of examples of less favour-
able treatment the CJEU had to assess, e.g. exclusions from pension schemes, a

53 CJEU C-117/14, Nisttahuz, ECLI:EU:C:2015:60, para 37.
54 See e.g. M. Rönmar, op.cit, pp. 161, 168.
55 See also M. Bell, op.cit. p. 37.
56 M. Rönmar, op.cit, p. 170.
57 CJEU C-307/05, Del Cerro Alonso, ECLI:EU:C:2007:509; C-268/06, Impact,
ECLI:EU:C:2008:223.
redundancy policy or eligibility for service-related pay (59). Barnard (60) also recognizes other disadvantages, such as denial of promotion opportunities, as discriminatory. The same should be valid for denial of participation in vocational training programmes, although the Court held in Rosado Santana (61), that the specific nature of tasks and the inherent characteristics of those tasks, may constitute an objective reason and thus a justification of difference in treatment. In short: as long as fixed-term and permanent workers perform different tasks, different treatment is justified (62). Taking a look at the Austrian Collective Agreement for Universities, it is therefore highly questionable whether a difference in treatment between tenure-track post-doc researchers, who have permanent contracts or fixed-term contracts with the option of a permanent contract, and non-tenure-track post-doc researchers, who work under fixed-term contracts of a maximum period of six years, but who perform the same tasks as tenure-track researchers, is justified. The difference in pay amounts to EUR 647.50 gross per month. Furthermore, tenure-track researchers are granted one more week of holidays (§§ 19 para 7, 48 leg.cit.) and are more flexible regarding actual presence at their workplace.

In parallel to Clause 5 of the framework agreement, emphasis is on how to determine the objective grounds that could justify different treatment. In Del Cerro Alonso, the Court held that the «concept 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 different treatment (63). By analogy, the Court uses the same definition of the identical concept of objective grounds in Clauses 4(1) and (5)(1)(a) of the framework agreement. The Court's case law is manifold; only to give an example, in Land Tirol the Court did not accept budgetary considerations such as «rigorous personnel management» as acceptable justifications (64). In concrete, a national provision excluding workers employed under a fixed-term contract of a maximum of six months or on a casual basis completely from the scope of a specific national Act was deemed to be discriminatory, according to Clause 4(1) of the framework agreement. However, since only direct discrimination is prohibited by the framework agreement, indirect discrimination, e.g. by waiting periods

59 CJEU Joint Cases C-444/09 and C-456/09, GAVIEIRO GAVIEIRO AND IGLESIAS TORRES, ECLI:EU:C:2010:819; C-177/10, ROSADO SANTANA, ECLI:EU:C:2011:557.
60 C. BARNARD, op.cit. p. 440.
61 C-177/10, ROSADO SANTANA, ECLI:EU:C:2011:557 para 73.
62 See also the critical assessment of NUMHAUSER-HENNING (op.cit., 454), who states that «(d)ifferent employment conditions pertaining to the mode of employment, and thus fundamentally to the termination of the employment contract, are a sine qua non for even distinguishing the protected group».
63 CJEU C-307/05, DEL CERRO ALONSO, ECLI:EU:C:2007:509 paras 53, 56.
64 C-486/08, LAND TIROL, ECLI:EU:C:2010:215 para 46.
which are the same for any employee, are in line with the agreement (65). This is also displayed by Clause 4(4) of the framework agreement, according to which length-of service qualifications that relate to particular employment conditions – i.e. also termination periods or waiting periods for falling under the scope of dismissal protection – might even be different for permanent and fixed-term workers, as long as they are justified on objective grounds.

6.2. Limitation of use of successive fixed-term contracts

The limitation of the use of successive fixed-term contracts is one of the main aims of the Directive. In its Clause 5(1), the framework agreement provides that «to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, ... and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

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

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

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

Contrary to the national provisions in many Member States, the framework agreement does not provide for any limitation of the first fixed-term contract (66). In other words: The Member States are not obliged to impose any limits on the conclusion of the initial fixed-term contract.

As the Court held in Adeneler, the Member States have a margin of appreciation (67) in the matter, yet they are required to guarantee the result imposed by Community law, which apparently is the prevention of abuse when concluding successive fixed-term contracts. However, the Court then also clarifies and specifies that the «objective reasons» in 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». Thus, the Member States are provided with clear criteria the justification has to fulfil. As a result, the simple fact that national provisions merely authorise recourse to

65 See already supra in Section 5.2. of this contribution.
66 In Austria (F. Marhold – M. Friedrich, op.cit., 62) and UK (C. Barnard, op.cit., 442), the initial use of a fixed-term contract does not need justification, whereas in Germany, generally speaking already the initial use is restricted (see Article 14 of the German «Teilzeit- und Befristungsgesetz - TzBfG»).
67 C. Barnard, op.cit. p. 442, attests the Member States a «significant» margin of appreciation.
successive fixed-term employment contracts in a general and abstract manner, without stating precise and concrete circumstances, does not fulfil the above-mentioned criteria the Court established in Adeneler (68).

In Kücük, the Court stated more precisely what can be such an objective reason. It held that the conclusion of successive fixed-term contracts could be justified if the employer has to replace or cover a position because of the original employee taking a leave protected by EU-law (e.g. maternity, parental, sick or other leaves). Thus, the taking of a leave of an employee is an objective reason which justifies the conclusion of successive employment contracts (69). However, fixed-term contracts must not be concluded in order to meet fixed and permanent needs of the employer (70). Yet, the Court referred the question whether the conclusion of 13 successive fixed-term contracts over a period of 11 year was in line with Clause 5(1) of the framework agreement, to the national court (71), although the Commission held that this amounted to abuse (72). The logical consequences of the Adeneler and Kücük cases are that in certain circumstances, i.e. when the employee being replaced by the fixed-term worker takes a protected leave, or in other cases where the employer can justify on objective reasons, e.g. temporary external funding of the fixed-term workers’ position, the successive conclusion of fixed-term contracts does not amount to abuse (73).

Other questions the Court had to deal with were e.g. avoidance techniques, i.e. that between two successive fixed-term contracts, a certain period of time was letting passed by. The Court held in Adeneler that a national rule providing that a period of more than 20 days separated two successive fixed-term contracts from another should guarantee the lawfulness of the two fixed-term contracts, was not compatible with the framework agreement (74). However, a national provision stating that a period of three or more months’ separation led to the non-abusive use of successive fixed-term contracts, was again referred to the national court because of the Member States’ margin of appreciation (75).

Yet, although the Member States’ margin of appreciation when taking measures to prevent the abusive use of successive fixed-term contracts indeed seems to be quite significant, several Member States have recently amended their national provisions. Most interestingly, these changes were to the employees’ benefit, because the use of successive fixed-term contracts is being rather restricted (76). In

69 CJEU C-586/10, Kücük, ECLI:EU:C:2012:39, paras 30-33.
70 CJEU C-586/10, Kücük, ECLI:EU:C:2012:39, para 39.
71 CJEU C-586/10, Kücük, ECLI:EU:C:2012:39, para 55.
72 CJEU C-586/10, Kücük, ECLI:EU:C:2012:39, para 35.
73 See also C. Barnard, op.cit. p. 443.
74 CJEU C-121/04, Adeneler [2006] ECR I-6057, para 89.
76 Only in Malta, voices are calling for more flexibility, http://www.eurofound.europa.eu/
the Netherlands, e.g., the maximum duration of successive fixed-term contracts was reduced from 36 to 24 months. Furthermore, after two years, a new contract will automatically become a permanent employment relationship. In addition, one worker cannot have more than three successive fixed-term contracts with the same employer in this two-year period. The successive fourth contract is then deemed to be permanent (77). It thus seems that Member States have started realizing that the use of fixed-term contracts should be limited to those cases where the employer is in actual need of temporary work-force, but that work performed for a longer period should be carried out by standard, permanent employees.

6.3. Information- and investment-obligations

In its Clause 6, the framework agreement provides that employers shall inform fixed-term workers about vacancies in the undertaking or the establishment, e.g., by general announcement at a suitable place. The aim is to give fixed-term workers the same opportunity to «secure permanent positions» as other workers. Furthermore, the framework agreement provides for an obligation to include fixed-term workers when calculating «the threshold above which workers’ representative bodies provided for in national and Community law may be constituted in the undertaking as required by national provisions». In short, fixed-term workers shall be included in terms of employee representation.

The first caveat to be mentioned regarding the information-obligation is that not in every case, a permanent position is as «secure» as the parties concluding the framework agreement had in their mind, taking into account recent changes in dismissal-protection e.g. in Italy or Spain. Second, it is doubtful whether the sole information-obligation about vacancies will indeed lead to the transition from fixed-term to permanent contracts. Most probably, an obligation to offer vacancies prior to employees with fixed-term contracts, would lead to better results. However, this would infringe the principle of private autonomy; not even the anti-discrimination Directives oblige the employer to conclude an employment contract with a specific person.

Another risk fixed-term workers might be confronted with is that employers could feel less inclined to invest in fixed-term workers’ vocational trainings and other programs to further their professional development. The consequence could be a segmentation of the labour market insofar, as fixed-term workers have not only lower employment security, but also lower human capital investment (78).


78 http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-industrial-relations-law-and-regulation/fixed-term-contracts-individual-employment-
Thus, in its new Agenda for Skills and Jobs (79), the Commission presents gradual increase of protection rights, access to training, life-long learning and career guidance for all employees as one possible measure in order to reduce the divisions between employees with temporary and those with permanent contracts. However, these suggestions have not been implemented into any hard-law document yet, and it is doubtful whether this might happen in the near future.

6.4. «Uniform social security» and «portability of entitlement»-schemes
Since the EU is not competent in setting law regarding social security matters, but only in coordinating social security protection schemes, it is clear that also the fixed-term Directive leaves matters relating to statutory social security for decision by the Member States (80). Yet, the European Union’s flexicurity approach also focuses on employment security and the support of transition between jobs. Thus, fixed-term workers, who are more likely to suffer from redundancies than permanent employees, simply because of the fact that their contract is not renewed, should be guaranteed equal access to the social security system (81).

As the Austrian example shows, fixed-term workers generally speaking do enjoy the same social security protection as employees with a permanent contract, because the national social security system provides for coverage from the very beginning of an employment contract, irrespective of its length. Yet, when the secured event, e.g. unemployment, occurs, indirect differences in treatment between temporary and permanent employees due to waiting periods – similar to protection against unfair dismissal – might appear. Taking the case of unemployment, in order to being granted unemployment benefits, an employment period of at least 52 weeks during the last 24 months prior to the unemployment has to be fulfilled. In practice, this will most probably be harder to fulfil for fixed-term workers, especially in those cases where several fixed-term contracts are interrupted by (longer) periods of unemployment.

Although the suggestion of a «fully-fledged scheme of portability of entitlements» does not directly deal with the above-mentioned problem of possible non-entitlement to social security benefits for fixed-term workers due to lack of waiting periods, it might be a guidance into the right direction. According to Murray, this would be «the true countervailing measure» to the Directive’s flexibility and employability-focussed approach. In concrete, Murray suggests to recognise, for any employment conditions or rights governing the current work,
all relevant working experience, even those with different employers and with breaks in between (82).

7. Final remarks

Generally speaking, fixed-term employment contracts are perceived as precarious and insecure. However, a caveat lies in the Member State’s legal system concerning protection against dismissal. In case dismissal protection is weak, working under (long-time) fixed-term contracts might even be more secure, especially when termination by notice prior to the end of the contract is prohibited, or at least sanctioned by redundancy payments until the envisaged end of the contract. Furthermore, fixed-term contracts are not only used as flexible instrument by employers, but also as a labour-market instrument to promote employment of specific groups of workers for whom it is difficult to (re-)enter the labour market. Social inclusion has thus a double-meaning regarding fixed-term work. First, fixed-term contracts are perceived as an instrument that might further employment and thus social inclusion of persons at the edges of the labour market, although critics hold that it might not lead to an increase of employment at all. Second, since the «ideal» or «standard» way of working is still perceived as being employed under a permanent contract, and since there is still a multitude of examples where Member States via national provisions or employers via the employment contract treat fixed-term workers differently from permanent workers, EU-law tries to close this gap between fixed-term and permanent workers. The rules regulating fixed-term work, as presented in Section 6. of this contribution, therefore try to prevent precariousness and thus social exclusion of fixed-term workers. In combination with uniform social-security schemes for permanent and temporary workers, these remedies can lead to a maximum of security for employees whereas at the same time, the sometimes-necessary flexibility for employers is guaranteed.

82 J. Murray, op.cit., 274.