

Flexibility and Security in Temporary Work: A Comparative and European Debate*

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Preface	5
Chapter 1: France	6
1. The National Context	6
1.1 Statistics	6
1.2. The National Debate on Fixed-Term Contracts	7
2. The Legal Regulation of Fixed-Term Work	8
2.1 The Type of Regulation	8
2.2. Objectives Reasons for the Use of Fixed-Term Contracts	8
2.3 Other Limits to Control the Use of Fixed-Term Work: A limited Duration of the Contract	11
2.3. Measures to Guarantee Security for Fixed-Term Workers	12
2.4. The Termination of Fixed-Term Contracts. An More Secure Employment Contract: The Requirement of a 'Grave Fault' to Breach the Contract	13
3. The Role and Content of Collective Agreements Regulating Fixed-Term Work	14
4. Impact of Directive 1999/70/EC on Fixed-Term Work	15
5. The 'New Recruitment Contract': A Challenge for the Fixed-Term Regulation	16
5.1 The Flexibility in the 'New Recruitment Contract'	16
5.2 The Security in the CNE	17
5.3 The 'Contrat Première Embauche': A Failed Attempt to Extend the CNE	17
Chapter 2: Germany	19
1. The National Context	19
1.1. Statistics	19
1.2. The National Debate on Fixed-Term Work	20
1.3. The Consequences of Being on a Fixed-Term Contract	22

* Originariamente pubblicato come WP C.S.D.L.E. "Massimo D'Antona".INT – 56/2007

2. The Legal Regulation of Fixed-Term Work	22
2.1. The Type of Regulation	22
2.2. Objective Reasons for the Use/Renewal of Fixed-Term Contracts	22
2.2.1. Admissibility on Objective Justification	22
2.2.2. Admissibility Without Objective Justification	23
2.3. Other Limits to Control the Use of Fixed-Term Work	23
2.4 Measures to Guarantee Security for Fixed-Term Workers	24
2.5 The Termination of Fixed-Term Contracts	24
3. The Role and Content of Collective Agreements Regulating Fixed-Term Work	25
4. Impact of Directive 1999/70/EC on Fixed-Term Work	26
Chapter 3: Italy	27
1. The National Context	27
2. The Italian Approach to the Regulation of Fixed-Term Contracts	28
2.1. The <i>Evolution of Italian Legislation</i>	28
2.2. <i>Fixed-Term Contracts and Training Contracts</i>	30
3. The 2001 Regulations and Implementation of Directive 99/70/EC	30
4. The 'Technical, Production, Organisational and Substitutive Reasons' for which Recourse to Fixed-Term Contracts is Possible	31
4.1. The <i>Restrictive Judicial Interpretation of the General Clause</i>	32
4.2. The <i>Role of Collective Bargaining in Regulating the Recourse to Fixed-Term Work</i>	33
5. Implementation in the Italian System of the Clause of the European Agreement which Contains Measures for the Prevention of Misuse	34
6. Interpretation of the Italian Regulations after the ECJ's <i>Adeneler</i> Decision	35
7. The Principle of Non-discrimination and Other Cases Contemplated by the New Regulations	37
8. Fixed-term Contracts as an Issue of Labour Supply Flexibility: 'Contratti di Inserimento' or Starter Contracts	38
9. Fixed-Term Contracts in the Public Sector	39
Chapter 4: The Netherlands	42
1. The National Context	42
1.1 Statistics	42
1.2 The National Debate on Fixed-Term Work	46
1.3 The Consequences of Being on a Fixed-Term Contract Compared to an Indefinite Contract	49

2. The Legal Regulation of Fixed-Term Work	49
2.1 The Type of Regulation	49
2.2 Objective Reasons for the Use/Extension or the Renewal of Fixed-Term Contracts	49
2.3 Other Limits to Control the Use of Fixed-Term Work	50
2.4. Measures to Guarantee Security for Fixed-Term Worker	50
2.5. The Termination of Fixed-Term Contracts	50
3. The Role and Content of Collective Agreements Regulating Fixed-Term Work	50
4. Impact of Directive 1999/70/EC on Fixed-Term Work	51
Sources	54
Chapter 5: Spain	56
1. The National Context	56
1.1 Statistics	56
1.2 The National Debate on Fixed-Term Work	58
1.3 The Consequences of Being on a Fixed-Term Contract Compared to an Open-Ended Contract	59
2. The Legal Regulation of Fixed-Term Work	59
2.1 The Type of Regulation	59
2.2 Objective Reasons for the Use, the Extension or the Renewal of Fixed-Term Contracts	61
2.3 Other limits to control the use of fixed-term work	63
2.3. Measures to Guarantee Security for Fixed-Term Workers	64
2.4 Termination of Fixed-Term Contracts	65
3. The Role and Content of Collective Agreements Regulating Fixed-Term Work	65
4. Impact of Directive 1999/70/EC on Fixed-Term Work	68
Chapter 6: Sweden	70
1. The National Context	70
1.1 Statistics	70
1.1.1 The Incidence of Fixed-Term Work in Sweden	70
1.1.2 Transition from Fixed-Term Work to Indefinite-Term Contracts	71
1.1.3 Trade Union Membership among Fixed-term Workers	71
1.2 The National Debate on Fixed-Term Work	71
1.3 The Consequences of Having a Fixed-term Rather than an Indefinite-Term Contract	73
2. The Legal Regulation of Fixed-Term Work	74

2.1 The Type of Regulation	74
2.2 Objective Reasons for the use of Fixed-Term Contracts	74
2.2.1 Objective Reasons before the Reform	75
2.2.2 Objective Reasons after the Reform	76
2.3 Measures to Prevent Abuse	78
2.4 The Termination of Fixed-Term Contracts	79
3. The Role and Content of Collective Agreements Regulating Fixed-Term Work	80
4. Impact of Directive 1999/70/EC on Fixed-Term Work	81
5. Conclusions	82
Chapter 7: United Kingdom	83
1. The National Context	83
1.1 Statistics	83
1.2 The National Debate on Fixed-term Work	88
1.3 The Consequences of Being on a Fixed-term Contract Compared to an Indefinite Contract.	91
2. The Legal Regulation of Fixed-term Work	93
2.1 The Type of Regulation	93
2.2 Objective Reasons for the Use/the Extension or the Renewal of Fixed-term Contracts	94
2.3 Other Limits to Control the Use of Fixed-term Work	96
2.4 Measures to Guarantee Security for Fixed-term Worker	96
2.5 The Termination of Fixed-term Contracts	97
3. The Role and Content of Collective Agreements Regulating Fixed-term Work	97
4. Impact of Directive 1999/70/EC on Fixed-term Work	98
References	98

Preface

(Bruno Caruso – Silvana Sciarra)

The Italian Ministry for University and Research established a program for the internationalisation of universities in the years 2004-2006. The program provided funding for research projects bringing together universities and researchers from different countries, both inside and outside the EU.

The University of Florence acted as the coordinator of a research project called '*La dimensione europea ed internazionale del diritto del lavoro: un laboratorio fiorentino di ricerca*', launched by Professor Silvana Sciarra in collaboration with the Universities of Boston, Cambridge, Catania, Eichstatt Ingolstadt, EUI, Lyon II, Madrid Complutense, and Venezia. The project was approved and financed (prot. II04CA4DF3). To date, it has given rise to several international collaborations.

One of the sub-headings of the project dealt with labour market reforms in Member States of the EU, linked with the European employment strategy. Following a workshop held at the Law Faculty of the University of Cambridge on 16 and 17 March 2007 entitled 'Flexibility and Security in Temporary Work - A Comparative and European Debate', the topic selected by some members of the research group as a case study was 'Fixed Term Contracts'.

The papers contained in this document reflect the approach adopted during the workshop. They focus on certain common legal features of fixed term contracts, but also rely on statistical figures where relevant. A 'model paper' was circulated in order to acquire homogeneous information from all of the countries involved in this project. The publication on-line of what should be considered as 'work in progress' is meant to stimulate comments and attract interest on a topic which is very central in current European discussions and will constitute the basis of a second stage of future research.

Professors Bruno Caruso and Silvana Sciarra, as editors of this first collection of papers, wish to acknowledge the professional and efficient collaboration of: Catherine Bedford and Sarah Ross of the Law Faculty of the University of Cambridge, who were responsible for the organisation of the March 2007 workshop; Peter Whelan, PhD Candidate in Law, St John's College, Cambridge, who assisted at the workshop and proofread the resultant papers; and Barbara Napolitano and Andrea Baioni at the Dipartimento di Diritto Privato e Processuale, and Marianna Petrillo at the Centre for the Study of European labour law 'Massimo D'Antona' of Catania University, who ensured the effective administrative supervision and management of the relevant funding for this project. They would also like to thank the Centre for European Legal Studies and the Faculty of Law, University of Cambridge.

Chapter 1: France

(Sylvaine Laulom - Christophe Vigneau)

1. The National Context

1.1 Statistics

From the end of the 1970s onwards until 2000, fixed-term work expanded rapidly in France before stabilising. In 2005, fixed-term workers represented 7.7% of the workforce, agency workers 2.1 %, and workers with training contracts 1.9%. The total of temporary work also including apprenticeship is around 13.3 %, which places France in an average position among the EC Member States as regards the use of temporary contracts. Open-ended contracts still are the typical form of contracts of employment and represent 86.4 % of the working population.

Looking at the distribution of fixed-term work among enterprises, fixed-term contracts are used much more in small and very small enterprises than other enterprises. 15 % of the workforce in very small enterprises (less than 10 workers) is fixed-term workers for an average of 7.7 in all the enterprises.

In 2005, the population of fixed-term workers was composed of 58.2% female and 41.8% male.¹ But around 33% of fixed-term contracts are part-time contracts and are mainly concluded with women (75%). Fixed-term work in France also tends to be an occupation predominantly for young workers: 45.5 of fixed-term workers are between 15 and 29 years old; 43.7 % are between 30 and 49 years old; and 10.8% are under 50. 16.1 of the young working population (between 15 and 29) are fixed term workers against 5.4 % for the working population between 30 and 49. Fixed-term work seems to be for an important proportion of workers the way to get their first working experience. Statistics also show that fixed-term contracts are very often used to hire workers. Today, 2 workers on 3 are hired on fixed-term contracts.² Fixed-term workers also tend to be lower qualified than the average of the total workforce.

Usually fixed-term contracts are short, around an average of 2 months and half.³ A recent study also shows that temporary work, most of the time, is not a choice of the workers. 75 % of fixed-term workers would have preferred to have an open-ended contract.⁴ For workers, fixed-term contracts mean a precarious status: they fear unemployment more than workers with an open-ended contract. This feeling is not contradicted by reality: 18% of fixed term workers and 20% of the agency workers in March 2001 were unemployed the year after, while only 3% of workers employed with an open-ended contract were in the same situation. Fixed-term workers also think that their precarious position impedes them from having long term projects like buying their own houses. In the job itself, they do not feel disadvantaged compared to other workers: they mostly think that their job is as interesting as a job with an open-ended contract; they feel well integrated

¹ The figures are different for agency workers: in 2005 the population of temporary workers was composed of 27.7% female and 72.3% male.

² Dares, 'Les mouvements de main d'œuvre en CDD en 1999', [2001], *Premières informations, Premières synthèses*, n°41-3. Also see *Liaisons Sociales*, n°28/2007, LSQ 14799.

³ *Ibid.*

⁴ Dares, 'Les contrats courts vus par les salariés: une précarité de l'emploi qui n'induit pas nécessairement une précarité du travail', [2007], *Premières informations, Premières synthèses*, n°12.3.

in the enterprise; and they are not paid less (even better due to the specific indemnity they receive at the end of the contract).

1.2. The National Debate on Fixed-Term Contracts

There have been several reforms since the first Regulation on Fixed-Term Work in 1979, especially in the eighties and at the beginning of the nineties. At that time, the Regulation was very sensitive to political orientation, and changes of government led to changes in the Regulation, restricting or enlarging the use of fixed-term work.⁵ Since 1990, there has been a certain stability of the legal framework regulating fixed-term work even if several laws have been adopted introducing minor changes.⁶ Thus the Directive on fixed-term contracts has had little impact on the French Regulation, mainly because detailed legal provisions were already in place.

With unemployment growing, fixed-term contracts have also been used not only to give more flexibility to employers but also as an employment policy tool. Since the eighties, there has been a clear trend to developing mechanisms to support unemployed people at work. They are numerous specific fixed-term contracts use to promote employment and/or training. Today 1.9% of the working population are employed under such a contract. These types of contracts are very varied and usually they don't last very long and are replaced by very similar contracts differently named. They are mostly based on incentives offered through exemption from social security contributions and are in favour of targeted beneficiaries (young unemployed people without qualification, long-term unemployed). Some of them, like the 'professionalisation contract', combine training and work. These contracts are most of the time fixed-term contracts but specific rules apply to them because of their aim: they could have a different duration than the 'normal' fixed-term contract; they can also be concluded to fill sustainable position.

With the agency work, the fixed-term contract is considered as an atypical form of employment in contrast to the open-ended contract. The main characteristic of these forms of employment lies in their precarious nature. To the employers' demand of more flexibility, the French legislator responds with the introduction of new categories of contracts concluded for a limited duration. Beside the open-ended contract protected by the legislation on dismissal, new types of contracts appear allowing employers to hire employees on a fixed-term basis. In this, fixed-term contracts will be considered as the first elements of precariousness into labour law. Workers employed with such contracts will be considered as precarious workers. Inherently precarious, these contracts are concluded for a definite duration. At that time, the French legislator tried to achieve a compromise between the employers will for more flexibility and the need for workers security. Even if the concept did not exist at that moment, a sort of 'flexicurity' has been reached by restricting the use of these forms of contract, mainly by requiring an objective ground to use fixed-term workers and by limiting the duration of the contracts. It has also made it more difficult to breach the fixed-term contract before its term; it now requires a grave fault. The open-ended

⁵ After the 1979 Act, an ordinance was adopted in February 1982 limiting the grounds for the assignment of fixed-term contracts. In 1986, a new ordinance gave up the list of authorised grounds and preferred just to establish a general interdiction according to which 'whatever the ground, the temporary contract of employment can have neither as an aim or for effect to fill durably a job related to the normal and permanent activity of a company'. In 1989, a national and inter-professional collective agreement reintroduced a list of authorized grounds and a 1990 Act reproduced the agreement.

⁶ Statutory Act n° 2002-73 of the 17/01/2002; Statutory Act n° 2003-6 of the 3/01/2003; Statutory Act n° 2003-721 of the 1/08/2003; Statutory Act n°2004-391 of the 4/05/2004; Ordinance n°2004-602 of the 24/06/2004.

contract of employment remains the common way to hire workers, fixed-term contracts being an exceptional mode.

From an historical perspective, it is interesting to observe that fixed-term work does not raise as much criticism as before. This might be explained by the growing precariousness of employment in general. Therefore there are few debates today on this form of work and on its regulation. However, the Regulation has been challenged by a new contract of employment, the 'Contrat Nouvelle Embauche'(CNE) or 'New Recruitment Contract'. In fact, the French legislator has recently experienced new ways to give more flexibility to employers. But instead of enlarging the situations when employers may use fixed-term contracts or agency work, or extending the duration of the contract, the French legislator has decided to make it easier to breach open-ended contracts, at least during the two first years of the work relationship. This is the idea behind the 'New Recruitment Contract' adopted in August 2005 and the 'Contrat Premiere Embauche' ('First Job Contract') withdrawn after the demonstrations of Spring 2006. These contracts establish a probationary period of two years during which the employer does not have to justify on objective grounds ('cause réelle et sérieuse') the decision to dismiss a worker. In other words, the open-ended contract can not be considered as the most secure form of employment, at least during the first two years. National debates today focus on the possibility of introducing of a new type of contract of employment, the 'Single Contract' ('contrat unique') which will extend the scope of the 'New Recruitment Contract'. It will replace the current regular and temporary labour contracts by a single type of contract. Clearly the debate on this contract is framed by the new concept of flexicurity and it is supposed to give new flexibility and new security.

2. The Legal Regulation of Fixed-Term Work

2.1 The Type of Regulation

Fixed-term contracts are mainly regulated through law and sometimes ordinance. Little space is left to collective bargaining in this field. The Regulation applies only to private sector, and specific rules apply to fixed-term contracts in the public sector. Some specific rules also apply to training contracts.

The French legal regulation of fixed-term work is based on a definition of reasons for the use of fixed-term contracts which goes with a limitation of the duration of fixed-term contracts, a definition of rights for fixed-term workers, and specific rules for the termination of fixed-term contracts.

2.2. Objectives Reasons for the Use of Fixed-Term Contracts

French law restricts the use of fixed-term contract. A double legal requirement is imposed by art. L.122-1 of the Labour Code. Firstly, this article establishes the general principle according to which 'whatever the ground, the temporary contract of employment can have neither as an aim or for effect to fill durably a job related to the normal and permanent activity of a company'. The second paragraph of this article specifies that a fixed-term contract can only be concluded for a 'precise and temporary task'. The main preoccupation of the legislator is to avoid the use of fixed-term contracts to fill permanent jobs within companies. Only jobs of a temporary character may

justify the recourse to fixed-term work.⁷ In practice, many infringements of this rule exist. In particular, these contracts are often used as a probationary period which is not a ground according to which one can hire fixed-term workers.

Secondly, the legislator thought that this general prohibition was not enough to limit the use of fixed-term contract and French law enacts a typology of situations under which the use of a fixed-term contracts is authorised. The cases of assignment are classified under four headings: the replacement of workers on leave, the temporary increase of activity and seasonal jobs or jobs for which, in some sectors, it is of constant use not to hire workers on an open-ended contract and fixed-term contracts concluded within the framework of employment policies.

The first category of recourse encompasses all situation of on leave workforce in the company. Any employee on leave may be replaced by a fixed-term worker whatever the nature of its contract of employment (open-ended or fixed-term contract, full-time or part-time). The leasing of temporary workers is only prohibited to replace workers on strike. Except this situation, all leave may justify the recourse to a fixed-term contract (vacation, disease, accident, disciplinary action, national service, and transformation of a full time job to a part-time). Employers enjoy certain flexibility concerning the replacement of an employee on leave by a fixed-term worker. The courts have admitted that a fixed-term worker does not have to be posted on the job performed by the employee on leave. The company is entitled to substitute the employee on leave by another employee of the company and to post the fixed-term worker on the station of this last. The courts also consider the successive replacement of several employees by the same worker as lawful. But in this situation, a new employment contract must be concluded for the replacement of each successive employee on leave.

The second category of recourse to fixed-term contracts regards the increases of the activity of the company. This category consequently covers a great number of recourse to fixed-term work justified by 'a temporary increase of the usual activity of the company'. All reasons of increase of the usual activity justify the recourse to a fixed-term worker. But this category also includes situations of an exceptional increase of workload not related to the normal activity of the company. The only condition is the temporary character of the increase of workload. Examples of an exceptional increase of workload not related to the usual activity of the company may be the training of workers, the equipment in computers or an audit of the company. The installation of safety equipment may also furnish a lawful reason to employ fixed-term workers.

The third category of recourse comprises all seasonal activities and activities for which, in certain sectors, it is usual not to resort to permanent workers. The sectors of seasonal character are mainly agriculture, the food industry and the tourist industry. Seasonal work is defined as any activity that repeats itself each year, on about fixed dates, according to the seasonal rhythm or the collective ways of life. Concerning the jobs for which a constant professional use excludes recruitment under open-ended contracts, the employer had to comply with the two legal require-

⁷ The French *Cour de cassation* often recalls this rule and turns a fixed-term contract into an open-ended contract between the user and the worker. For an example: Soc., 21/01/2004, [2004] *Droit social*, obs. C. Roy-Loustanau.

ments. Firstly, the company must be part of a sector included in a list drawn by the labour administration. Nevertheless, the simple fact that the sector is included in the list did not imply that the company may use fixed-term workers. Secondly, the job for which a fixed-term worker is employed should be one of the jobs for which it is used not to employ workers on a permanent basis.⁸ However, in a case held in 2003, this second requirement has been set aside by the French *Cour de cassation*.⁹ This case has been criticised mainly because it contradicts article L.122-1 of the Labour Code. Indeed, this text has a general scope and excludes hiring fixed-term workers for employment of permanent character in the company. This rule applies whatever the ground for the assignment. Here the Directive on fixed-term work, as interpreted by the ECJ in *Adelener, Vassalo et Marrosu*,¹⁰ could have an impact on the French case law. The position of the *Cour de cassation* contradicts the Directive because in these situations, there are no limits on the use of fixed-term contracts: the reason can not be analysed as an objective one, there is no maximum total duration of successive fixed-term employment contracts, and there is no limit in the number of renewals of such contracts. But as of yet the *Court of cassation* has not changed its position¹¹.

The last category comprises fixed-term contracts designed to promote training and employment. France did not make explicit use of the option of the Directive to exclude from the scope of the Regulation employment contracts concluded within the framework of employment policies. However, in France there are numerous types of fixed-term contracts that are used to promote training and employment (contracts of qualification, contracts of professionalisation, contracts of adaptation to employment, youth contracts, etc), and article L.122-2 of the Labour Code very generally authorises the conclusion of fixed term contracts concluded to promote employment. The most recent contract of this type is the fixed-term contract for older workers. This contract was one of the flagship measures of the national agreement reached on promoting employment of older workers in 2006 and also the most controversial. It was introduced in August 2006 by a decree transposing the agreement.¹² This new fixed-term contract is only open to unemployed people over the age of 57 who have either been registered as jobseekers for more than three months or have signed a 'personal reclassification' agreement ('convention de reclassement personnalisé') to enable them to acquire a right to a full pension. The contract seems to conform to the Employment Framework Directive as interpreted in the *Mangold* case.¹³ As highlighted by the ECJ, the German exemption clause that has been called into question by the ECJ indeed only relied upon the age of the worker to determine whether or not it should be applied. This is not the case for the French proposal which is addressed to unemployed workers over 57. The objective of the measure is a legitimate one and, as it was much more targeted than the German one, should be considered as proportionate.

This new fixed-term contract derogates from the general legal framework in two aspects. First it could be concluded without having to justify its use and, secondly, the maximum length, renewals

⁸ Collective agreements can also define the jobs for which it will be possible to hire fixed-term workers (see *infra* point 3).

⁹ Soc., 26/11/2003, [2004] *Droit social* 629, note C. Roy-Loustanau.

¹⁰ ECJ, 4 July 2006, C-212/04, *Adelener*, ECJ, 7 September 2006, C-53/04 *Marrosu et Sardino*, ECJ, 7 September 2006, C-180/04 *Vassalo*; S. Laulom, 'L'actualité du droit social Communautaire', [2006] *Semaine Sociale Lamy*, n° spécial 1288. C. Vigneau, 'Le régime des contrats à durée déterminée en droit communautaire', [2007] *Droit Social* 94.

¹¹ Soc. 29/11/2006, n°04-47792.

¹² Article D.322-24 of the Labour Code and the following.

¹³ ECJ, 22/11/2005, C-144/04.

included, will now be 3 years. The law has already allowed the recruitment of workers on a fixed-term basis when this involves unemployed people. But usually these contracts are subsidised and also involve some training. Here the only incentive for the employers to hire older workers is the flexibility the fixed-term contract gives compared with an open-ended contract. In that this new fixed-term contract could be compared to the 'New Recruitment Contract'.

The requirement of an objective ground to call for fixed-term workers forms under French law the first factor of restriction of fixed-term work. Any use of fixed-term workers in violation to the law of objective grounds exposes the user to civil and criminal responsibility. The fixed term workers can also request that his/her contract be turned into an open-ended contract. The second element of restriction consists of limiting the duration of the assignment period.

2.3 Other Limits to Control the Use of Fixed-Term Work: A limited Duration of the Contract

In terms of duration of the assignments, French law presents a rather complex character mainly because the maximum duration of the assignments differs according to its ground. For most of the situations, the total duration of an assignment must not exceed 18 months, renewal included. This maximum duration is however reduced to 9 months when the assignment is made under specific objective grounds (recruitment of a worker for indefinite duration, urgent work). The maximum legal duration is extended to 24 months in the case of assignments carried out in a foreign country, for replacement of a worker who left the company because of its position being suppressed, or for exceptional export orders. Most of the fixed-term contracts concluded in the frame of employment policies have a specific duration.

Some provisions aim however at giving employers some flexibility for adapting the end of the fixed-term contract. Firstly, the expiration date of the contract may be brought forward or postponed to a limited extent determined by the law. For duration of less than 10 days, the law allows a margin of two days. For longer durations: the duration may be postponed or put forward of a day per five working days. In any case, on the one hand the termination date may not be brought forward for more than ten days and, on the other, the postponement must not attempt to go beyond of the maximum duration set by the legislation. Secondly, French law envisages the possibility for an employer to set an indefinite term to the fixed-term contract in three situations. The replacement of an employee on leave constitutes the first situation under which fixing a definite term is not required. In this case, 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 maximum legal periods. Here, the random character of the return of the employee on leave explains the flexibility given to the employer. The second exemption regards employments related to seasonal work or to sectors in which it is not normal to employ permanent workers. This hypothesis covers all tasks for which there is an uncertainty as to the duration necessary for their execution. Here, as before, a minimal duration must be specified in the contract. The third situation under which no definite term is required concerns the waiting of a worker recruited under permanent contract to take up his post. The contract has to be concluded for a minimal duration and must not exceed nine months, a period which constitutes the legal limit envisaged in this case of recourse. On the contrary to the previous derogatory cases, a maximum period is therefore applicable.

French law only admits one renewal of the fixed-term contract. In addition, this renewal is subject to strict conditions. First, the renewal must not attempt to go beyond the maximum legal duration. Second, the grounds of the renewal must be similar to the initial contract. Third, the renewal is forbidden in situations where an indefinite term is allowed. Another preoccupation of the French legislator has been also to prevent employers from occupying fixed-term workers on a long-term basis by successive contracts. Specific provisions are therefore established to avoid abuses. Article L.122-3-11 foresees that at the end of a fixed-term contract, a period of one-third of the duration of this contract must be respected before hiring for the same position a worker under fixed-term contract or calling for an agency worker. When it comes to decide whether the successive contracts are lawful, the important element is not the worker but the position. An employer may lawfully sign successive contracts for the same worker if his occupation varies from one contract to another. In any case the employer will have to justify a specific ground for each contract. Equally, an employer is not allowed to conclude successive contracts for the same position even though the worker is different. The break period is not required in cases where the use of fixed term workers is due to unforeseeable circumstances: new absence of permanent employee on leave, urgent work needed for safety measures, jobs for which it is not common to resort to workers under open-ended contracts and seasonal employment.

Any infringement of the rules regarding the duration, the renewal and the successive number of contracts exposes the employer to criminal and civil liability. French law also establishes an open-ended contract between the employer and the fixed-term worker each time the contract goes beyond the maximal legal duration or the term of the contract. This sanction strongly deters companies from violating the provisions related to the duration of the contracts.

2.3. Measures to Guarantee Security for Fixed-Term Workers

Several rights are granted to fixed-term workers. Contrary to the common rule which does not impose the written form, fixed-term contracts must be in writing and must specify some elements of the contract, e.g. the ground authorising the conclusion of the contract, the duration, etc. The French Regulation imposes a strict contractual formalism and fixed-term workers can also claim for his/her contract to be converted into an open-ended contract if the contract is not written or if it misses the important elements of the contract (ground and duration).

Article L.122-3-3 of the Labour Code also establishes the equal treatment between employees under a fixed-term contract and employees who have an open-ended contract. It is specified that equal treatment is imposed whatever the legal nature of the granted advantages. It is also specified that the employees under fixed-term contracts benefit from the same rights to training as permanent employees. Fixed-term workers must enjoy similar treatment to the one given to permanent workers of the company and equality regarding pay and all working conditions in the broad sense. Concerning the principle of equal pay, according to a 1988 ministerial circular, permanent workers doing the same job with the same qualification serve as comparators. There is not so much litigation on that issue at least at the Supreme Court level. The French *Cour de cassation* considers that article L.122-3-3 is an application of a general principle of labour law according to which workers have a right to equal pay for equal work. If a difference of treatment

between workers doing the same job can be established, the employer can justify it if he can demonstrate that the difference of treatment is justified by objective reasons.¹⁴

One of the most interesting right granted to fixed-term workers is a right to a wage supplement to compensate the precarious character of their employment. This compensatory mechanism is a 10 % indemnity allowance based on the total remuneration perceived by the worker at the end of his contract. This indemnity allowance is not given when, at the end of the assignment, the employer hires the employee by an open-ended contract.

However this indemnity allowance is not due when the fixed-term contract is concluded for seasonal activities and activities in which in certain sectors, it is normal not to resort to permanent workers. This discrimination between fixed-term contracts does not seem to be justified and is open to criticism.

By collective agreement (at enterprise, establishment or industry-wide level) it is also possible to reduce the indemnity allowance by up to 6% but the collective agreement must provide specific provisions for access to vocational training for fixed-term workers. It is the only space for a collective bargaining to change the Regulation on Fixed-Term Contracts.

2.4. The Termination of Fixed-Term Contracts. An More Secure Employment Contract: The Requirement of a 'Grave Fault' to Breach the Contract

Fixed-term contracts are commonly analysed as precarious employment. This interpretation lies on the fact that those contracts are concluded for a limited duration. To a certain extent, the open-ended contract is linked to stable employment whereas fixed-term contracts are related to precarious employment. If this last proposition seems correct considering French law, the former one appears much more debatable. Fixed-term contracts have a less precarious character than open-ended contracts considering the legal regime of these contracts. It is indeed more difficult for an employer to break a fixed-term contract than an open-ended contract. This situation has increased with the recent reform which has introduced the 'New Recruitment Contract' whereby during the first two years the employer may dismiss an employee with an open-ended contract without any justification.

On the contrary, in order to put an end to a fixed-term contract before its term, French law requires the employer to prove a grave fault of the employee or a situation of '*force majeure*'. The French *Cour de cassation* applies very strictly this rule by denying the employer any other way to put an end to the contract before its term. No other ground is admitted apart from the hypothesis of an agreement between the parties to put an end to the fixed-term contract before its due term. The employer cannot claim the non-performance of the contract by the employee (*Exceptio non adimpleti contractus*). Any contractual clause organising a premature ending are void. The employer must prove a 'grave fault'¹⁵ of the worker if he wants to put an end to the contract. In this sense, these contracts are more secure than an open-ended contract which can be broken just on the basis of a 'real and serious cause'. Therefore, on the scale of the faults of French labour

¹⁴ See for example, Soc. 29/11/2006, n°05-42.853; Soc. 31/10/2006, Bull. V n°320, Soc. 20/09/2006, Bull. V n°270; Soc. 3/11/2005, Bull. V n°309.

¹⁵ A 'grave fault' is defined as an act which constitutes a breach of the labour contract that makes it impossible to retain the employee within the company during the notice period.

law, the one required for breaking a fixed-term contract or an agency work contract is stricter than the one imposed to justify a dismissal of a worker under an open-ended contract.

French law compensates the limited duration of the contract by giving some guarantees to the worker that the contract will last until its specified term. The sanction imposed in case of a breach of a contract before its term by the employer is a financial one: the employer must pay to the worker the wages (and the indemnity allowance) he/she would have received by the end of the contract. By doing this, the French legislation aims to deter employers from breaking the contract before term, making it more secure for the worker.

The whole idea behind the French legislation is to protect the worker against any premature breach of the fixed-term contract. The aim is to give to the worker a certain security about the employment relationship, unless he/she commits a grave fault. To a job of a definite duration, one should not add a precarious contract. The breach of the contract before term by the worker is not sanctioned so rigorously. The worker will only have to pay damages according to the prejudice suffered by the employer. Since 2002, the worker will not have to pay any damage if he/she has been recruited by a company with an open-ended contract.

3. The Role and Content of Collective Agreements Regulating Fixed-Term Work

Fixed-term work is mainly regulated through law; collective bargaining plays a limited role. However national collective bargaining has sometimes influenced the legislator and the Regulation also sometimes allows collective bargaining to deviate from legislation.

The 1990 Act on fixed-term contracts was partly inspired by a national interprofessional agreement signed a few months before. Collective agreement has also directly influenced the definition of the objective reasons for the use of fixed-term contract in extending the list of these reasons. The last type of fixed-term contract introduced in the Labour Code, the fixed-term contract for older people, was one of the flagship measures, and also the most controversial, of the national agreement reached on promoting employment of older workers concluded on 9 March 2006. This measure was later introduced into the Labour Code by a decree.

There are also two possibilities offered by the law to collective bargaining to amend the legal framework on fixed-term contract. Firstly, under Article L.122-1-1 of the Labour Code, it is possible to use fixed-term contracts in certain sectors where it is normal for certain jobs not to resort to permanent workers. The list of the sectors is defined by the labour administration. To avail of this possibility, the company must be part of a sector included in the list drawn up by the labour administration and the job for which the fixed-term worker is employed should be one of the jobs for which it is used not to employ workers on a permanent basis. Collective agreement at sectorial level can also authorise the conclusion of this type of fixed-term contracts. For the company, one of the interests is that some specific rules apply to these fixed-term contracts: they can be renewed without limitation, and the 10% indemnity allowance is not due at the end of the contract. The collective agreement must be extended¹⁶ and should define those non permanent jobs for

¹⁶ The extension of an industry-wide agreement is an Act of the Minister of Labour, whereby a collective agreement is rendered compulsorily applicable in all enterprises falling within its occupational and territorial scope.

which it will be possible to conclude fixed-term contracts. Here again the job for which the fixed-term worker will be employed should be one for which it is normal not to employ workers on a permanent basis. Some negotiations are going on in some sectors: internal navigation, road transport, movies production, TV production, 'subsidised spectacles' (branche des spectacles vivant subventionnés).¹⁷

Finally, it is possible by collective agreement (at plant or sectorial level) to reduce the indemnity allowance up to 6% instead of 10%, but the collective agreement must provide specific provisions for access to vocational training for fixed-term workers.¹⁸ It is the only space for collective bargaining to change the Regulation.

4. Impact of Directive 1999/70/EC on Fixed-Term Work

At first, the Directive on fixed-term contract has had little impact on the French Regulation mainly because detailed legal provisions were already in place. The use of fixed-term contracts was already restricted by requiring an objective ground to conclude such contracts and by limiting the duration of the contracts. The equality principle between employees under a fixed-term contract and employees who have an open-ended contract was also recognised. However some changes were made to adapt the French legal framework to the Directive's requirements.¹⁹ The right to information on vacancies for open-ended contracts was recognised to implement the Directive. According to article L.122-3-17-1 of the Labour Code, equal access to information on vacant open-ended jobs has to be ensured for fixed-term. Thus the right to access to this information is just recognised as long as such information has to be given to workers who have an open-ended contract. As required by the Directive, fixed term workers have the same opportunity to secure permanent positions as other workers, but considering their position, they should have the same right to information about vacancies as permanent workers. According to a ministerial circular,²⁰ this information can be provided by any means guaranteeing each permanent or precarious employee access to information under identical conditions. There is no priority to access to permanent jobs matching the worker's skills which become available in the enterprise as there is for part-time employee for full-time jobs.

After the *Adelener* case²¹, another possible impact of the Directive was made clear. According to the *Cour de Cassation*, when a fixed term contract is concluded because it is normal in certain

¹⁷ See Direction des relations du travail, *La Négociation collective en 2005*, Ministère de l'Emploi, du travail et de la cohésion sociale, Editions Législatives, 2006, at 165 and 341.

¹⁸ However, it seems that for the Cour de cassation, it does not imply that the worker personally benefit of a training (Soc. 7/02/2007 n°05-43462).

¹⁹ C. Roy-Loustaunau, « La lutte contre la précarité des emplois: une réforme du CDD, discrète mais non sans importance », [2002] *Droit Social* 304.

²⁰ Circ. DRT n°2002/08, 2 mai 2002, *Légis.soc.* –A1- n°8288 du 28 mai 2002.

²¹ ECJ, 4 July 2006, C-212/04, *Adelener*, ECJ, 7 september 2006, C-53/04 *Marrosu et Sardino*, ECJ, 7 september 2006, C-180/04 *Vas-salo*; S. Laulom, « L'actualité du droit social Communautaire », [2006] *Semaine Sociale Lamy*, n° spécial 1288. C. Vigneau, « Le régime des contrats à durée déterminée en droit communautaire », [2007] *Droit Social* 94.

sectors not to resort to permanent workers, the contract could be renewed without any limitation.²² This position of the Supreme Court has been criticised mainly because it contradicts the article L.122-1 of the Labour Code which establishes the general interdiction according to which 'whatever the ground, the temporary contract of employment can have neither as an aim or for effect to fill durably a job related to the normal and permanent activity of a company'. Indeed, this text has a general scope and it prohibits hiring fixed-term workers for employment of permanent character in the company. This rule applies whatever the ground for the assignment. Here the Directive on fixed-term work as interpreted by the ECJ in *Adelener, Vassalo et Marrosu* could have an impact on the French case law. The position of the *Cour de cassation* contradicts the Directive because in these situations, there is no limit to the use of fixed-term contracts: the reason can not be analysed as an objective one, there is no maximum total duration of successive fixed-term employment contracts, and there is no limit in the number of renewals of such contracts. But until now the *Court of cassation* has not changed its position.²³

Finally, the Directive has had a very clear influence on the rules applying to contractual staff in the public services. The Labour Code does not apply to them and it was possible, in the public sector, to conclude and renew fixed-term contract with no limitation. The ECJ made it very clear that the Directive can apply to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies. Therefore, France has recently adopted legislation which introduces limits on the duration and numbers of fixed-term contracts in the public sector.²⁴ However the rules applying in the public sector are different from the ones in the private sector. The main difference is the duration of the fixed-term contracts: they can be concluded for a maximum duration of 3 years and renewed once, for a maximum of 6 years. After this period they will be automatically transformed in to open-ended contracts, which is a new category of contract in the public sector.

5. The 'New Recruitment Contract': A Challenge for the Fixed-Term Regulation

The 'New Recruitment Contract' is a new type of open-ended contract introduced, without any consultation or negotiation with the social partners, by decree in August 2005. This measure is part of an emergency employment plan and it is intended to improve the employment situation in France. Many references have been made when presenting this contract to the 'Danish model' and it has been presented as an example of a flexicurity approach.

5.1 The Flexibility in the 'New Recruitment Contract'

The 'New Recruitment Contract' is an open-ended contract only available to businesses with up to 20 employees. When presenting the reform, the government was arguing that small enterprises did not want to hire people because of the cost and of the complexity of the law of dismissal. According to the government, improving flexibility to fire would help small companies to be less reluctant to hire new employment.

The CNE is clearly a mean of undermining open-ended employment contracts. During the two first years, both parties can end the contract of employment without having to state any reason.

²² Soc., 26/11/2003, *Droit social*, 2004, p.629, note C. Roy-Loustanau.

²³ Cass. Soc. 29 November 2006, n°04-47792.

²⁴ Loi n°2005-843, 26 juillet 2005, portant diverses mesures de transposition du droit communautaire à la fonction publique.

Under the legislation on dismissal, an open-ended contract can only be broken on the basis of a 'real and serious cause', and the employer has to follow a procedure before dismissing the worker. The CNE allows the employer to fire at will during the first two years of employment without any specific procedure. However, the dismissal can not be discriminatory and the disciplinary procedure which is very similar to the dismissal procedure has to be followed when the reason for ending the contract is a disciplinary one. This period of two years cannot be defined as a probationary period as it should be used not for controlling the capacity of the workers, but for controlling if the job can be a permanent one. Thus the period of two years is called a 'period of job consolidation' ('période de consolidation de l'emploi'). It is the obvious that a fixed-term contract of two years might appear more secure for a worker than a CNE.

5.2 The Security in the CNE

Some rights are granted to the workers; they have been presented as counterbalancing the flexibility allowed by the CNE. Two main rights are provided by the Regulation. Firstly, if the contract is terminated before the end of the two-year period of job consolidation, the worker will receive a financial compensation to compensate the precarious character of their employment. The compensatory mechanism is an 8% indemnity allowance based on the total remuneration perceived by the worker at the end of her/his contract. An extra 2% contribution is payable to the state employment agencies to fund specific services provided to that employee to help him finding a new job. For the employer the cost of a CNE is the same as a fixed-term contract but it gives him/her more flexibility. Secondly, if the worker is ineligible for unemployment benefit (because he has not worked long enough), he/she would received a specific benefit of 16.4 euros per day for one month. Here there is a clear shift from a security within the employment relationship to a security outside the employment relationship. However the rights granted to the workers are very weak. The CNE clearly is an answer to the employers' demand for more flexibility but it creates a great insecurity for the workers. If we compare the Regulation on Fixed-Term Contracts and the one on CNE, it is also clear that the CNE is more attractive for small business than fixed-term contracts. The cost for ending the contract is the same for the employer and he can break the contract without any justification

5.3 The 'Contrat Première Embauche': A Failed Attempt to Extend the CNE

A few months after the adoption of the CNE, the Government introduced in February 2006 a new employment contract very similar to the CNE, the 'contrat première embauche' (CPE) or the 'first job contract'. Here again the regulation was drafted without any prior consultation with unions or employer organisation. The CPE was very similar to the CNE.

The CPE was part of the Government's fight against youth unemployment. The CPE was eligible for people aged less than 26 years, who were hired by companies with more than 20 employees. As the CPE concerned companies with more than 20 employees, and was almost identical to the CNE it clearly represented an extension of the CNE. It was also very explicitly presented as an answer to the precariousness of youth employment and was intended to replace fixed-term contracts for young people. Apart from the age criterion, the CPE did not target any particular group and was certainly contrary to the EC Non-Discrimination Directive as interpreted in the *Mangold* case. However the reactions were such (strikes in most universities, huge demonstrations) that the government was forced to withdraw the bill.

However the CNE is still in force. Its impact on the employment situation is debated, but 7 employers out of 10 declared that they would have hired the worker even without the CNE, with a fixed-term contract for 56% of them, with an open-ended contract for the others. The precarious situation of workers who concluded a CNE is certain: one year after the conclusion of a CNE, half of the workers were not employed in the company.²⁵

The future of the CNE is uncertain. The use of CNE has led to many contract terminations of which several have been disputed in the labour tribunals. The first decisions of labour tribunals show that judges have the possibilities and are willing to control the termination of contracts.²⁶ More importantly, on 28 April 2006, the same labour court²⁷ judged the CNE as being contrary to the Convention n°158 of the International Labour Organisation. The court considered that the two year period was 'unreasonable' and therefore contrary to the Convention. The authority of a labour court decision is limited but the *Cour de cassation* will certainly in a near future have to answer this essential question. If the *Cour de cassation* decides to give the same interpretation as the labour court, it will be the end of the CNE. This decision will also be essential because there are a lot of debates today on a possible extension of the CNE. The main proposal is the merger of permanent and fixed-term contracts into a single contract with severance pay based on the duration of employment.²⁸ The idea of the single contract has caught the attention of political leaders in France. If Segolène Royal has advocated an abrogation of the CNE, Nicolas Sarkozy wants the introduction of the single labour contract. In this context, the decision of the *Cour de cassation* on the CNE is awaited.

²⁵ Dares, Premières synthèses, mars 2007, n°9.1.

²⁶ See for example Conseil de Prud'hommes de Longjumeau, 20 février 2006, E. Dockès, 'Du CNE au CPE après le jugement du CPH de Longjumeau', [2006] *Droit Social* 356.

²⁷ CPH Logjumeau 28 April 2006, RPDS 165. See S. Laulom, 'L'avenir du CNE après la disparition du CPE', [2006] *Droit ouvrier* 465.

²⁸ P. Cahuc et F. Kramarz, *De la précarité à la mobilité: vers une sécurité sociale professionnelle*, Rapport au Ministre d'Etat, Ministre de l'Economie et des Finances et de l'Industrie et au Ministre de l'Emploi, du Travail et de la Cohésion Sociale, la Documentation française, 2005. See comments B. Reynes, «Variations sur le contrat unique», [2005] *Dalloz* 2348. B. Barthélémy, G. Cette, P.-Y. Verkindt, «A propos du contrat unique», [2007] *JCP, éd. S* 63. X. Lagarde, A. Jeammaud, «Que penser du contrat unique?», [2007] *Revue de droit du travail* 8.

Chapter 2: Germany

(Maximilian Fuchs)

1. The National Context

1.1. Statistics

Fixed-term contracts account for 14.5 % of all contracts of employment (in 2005). The share of men is 15 %, of women 14.5 %. The distribution of fixed-term work according to age is as follows:

Age Group	Fixed-term work employees as a percentage of all employees within a certain age group (2005)
15-20	83.5
20-25	48.6
25-30	21.2
30-35	11.3
35-40	7.4
40-45	6.1
45-50	5.1
50-55	4.2
55-60	4.4
60-65	4.7
65 and older	7.7

The portion of fixed-term work varies widely within different sectors as can be seen from the following table:

Branch	Fixed-term work employees as a percentage of all employees within a certain branch (2005)
Agriculture, forestry, fishing	23.8
Mining and processing	11.1
Energy and water supply	9.0
Construction	14.7
Trade, inns and hotels	15.3
Traffic and communication	9.6
Banking and insurance	8.2
Estate and renting	14.7
Public administration	15.8
Public and private services (without public administration)	18.6

Length of term: 84.2 % of fixed-term contracts run up to 36 months, 14.1 % beyond 36 months.

Fixed-term work is often regarded as a bridge to permanent work. Some empirical studies have been carried out to inquire into this widely held belief. A study by Alda (2002) reports that in Western Germany every fourth temporary employment relation in 2000 and 2001 became permanent, whereas in Eastern Germany (the former GDR) only 17 % developed into permanent position.

Another study by the ZEW establishes the probability to change from temporary work to permanent work at 38 %. The risk of becoming unemployed after the end of a fixed-term contract is a little bit less than 10 %. That means that the risk is twice the risk after the termination of an indefinite relationship. But long-term prospects of both groups of employees are nearly the same. The danger to get stuck in a 'fixed-term-carousel' is considered to be low according to this study.

Voluntary fixed-term work is 42 % due to apprenticeships, 8.7 % due to work on probation and 2 % have opted for this kind of employment out of personal reasons.

1.2. The National Debate on Fixed-Term Work

In 2004 and 2005 the Government had to report before the Parliament on the question whether it has evidence of a steady erosion of the standard employment relationship in German enterprises. In its answer the Government acknowledges the need of enterprises for flexible forms of

employment due to the ongoing structural economic changes. But at the same time it underlines the necessity to create a sufficient protective network for atypical work (evidently the idea of flexicurity defined the outcome of the answer). In this context the Government states that it has established such a protective legal framework by following strictly the respective European Directives. In its answer the Government emphasises that its policy efforts are based on its position, according to which the standard employment relationship (of indefinite duration and fulltime) must remain the normal form of employment. The statement of the Government holds that everything has been done in shaping the legal rights and duties of fixed-term contracts in such a way as to provide for adequate social protection and to avoid the existence of precarious employment relations. The principle of non-discrimination is seen as the most important instrument to guarantee equality of treatment of typical and atypical work. As a consequence the Government denies the existence of an erosion of the standard employment relationship.

The position of the DGB, the umbrella organisation of trade unions, is more critical of the existing legislation. The DGB complains that the application of the existing rules concerning fixed-term contracts have led to a significant reduction of employment contracts of indefinite duration weakening at the same time the position of the staff in the enterprises. Therefore a thorough examination of the current legislation should be undertaken. Among others the DGB requires the legal fixing of preferential treatment of fixed-term workers with regard to filling vacancies for permanent posts.

In contrast to this position of trade unions, the various employers' associations have a quite different mindset. They argue that the Act on Fixed-Term Contracts misses its aim of motivating employers to hire more workers. If this aim should be achieved all employers should be empowered to enter into contracts running up to 4 or 5 years without the need for objective justification.

Provisions on fixed-term contracts are laid down in the Act on Part-Time Work and Fixed-Term Employment (in the following abbreviated as APFE) which entered into force on 1 January 2001. The Act implemented of Directive 99/70. From the Explanatory Memorandum to this Act we can gather that the legislator wanted to act in conformity with the regulative programme inherent in the Directive. Roughly speaking the new Act mainly codified the former legislation and jurisprudence. With regard to the latter the principle that setting a fixed term needs objective justification was enacted. As an exception to this central principle the preceding provisions on the admissibility of fixed-term contracts without objective justification in certain circumstances were maintained. In this mix of rules the legislator saw the best solution to help enterprises adapt to continuously changing market situations and thereby secure their competitiveness. At the same time the Memorandum emphasises the employment creating effect of this approach. Fixed-term work is – in the words of this document – an alternative to overtime and to outsourcing (especially outsourcing abroad). The advantages on the side of the workers concerned are expected in what is often called the bridge function of fixed-term work, in other words the fact that this form of temporary work may lead to permanent employment. This aspect is pointed out particularly with regard to young people after having finished their apprenticeship. Work on a fixed-term basis may facilitate the way to permanent integration into the labour market. The Memorandum quotes studies from 1988 and 1992 which show that more or less half the number of fixed-term relations turned permanent.

Later amendments brought special provisions for fixed-term employment of the elderly (see below 2.2.).

Special legislation exists on apprenticeships (Act on Apprenticeships). Apprenticeship means the education and preparation for the later performance of a profession officially recognised by a Decree of the Ministry of Labour. The length of the education is specified in this Decree. And the Act on Apprenticeships requires fixing the duration of the contract of apprenticeship in accordance with the length of the education provided for in the Decree aforementioned.

1.3. The Consequences of Being on a Fixed-Term Contract

Due to the principle of equality of treatment fixed-term workers do not face disadvantages vis-à-vis their permanent colleagues.

2. The Legal Regulation of Fixed-Term Work

2.1. The Type of Regulation

Fixed-term work is regulated by law, primarily by the APFE and several other provisions concerning specific sectors or professions:

- scientific personnel at universities;
- replacement of employees during their parental leave; and
- qualification contracts of physicians.

There is no distinction between the public and private sector. The APFE comprises both the public and the private sector. Small and medium employers are not privileged. And apart from the Act on Apprenticeships no specific regulation exists for training contracts.

Possibilities to derogate through collective agreements: The APFE gives parties to collective agreements power for specific regulations. These powers are understandable only in the context of the subject matter on which they can influence. Therefore the role and possibilities of collective agreements are treated below (see under 3.).

2.2. Objective Reasons for the Use/Renewal of Fixed-Term Contracts

The APFE provides for two levels of admissibility of fixed-term contracts:

- (1) Admissibility on objective justification; and
- (2) Admissibility without objective justification.

2.2.1. Admissibility on Objective Justification

The primary principle holds that setting a fixed term needs objective justification. This principle was originally developed by the Federal Labour Court on the ground that otherwise the mandatory requirements contained in our Act on Dismissals could be circumvented. As a consequence, the principle only has to be observed if the employment relation in question falls within the scope of the Act on dismissals (in other words the employee is working in an establishment which employs more than 5 employees).

The new Act of 2001 generalised this principle rendering it independent of the ambit of the Act on Dismissals. By doing this the legislator relied on the available case law which had elaborated on different instances of objective justification. The present Act comprises these instances in a (non-exhaustive) list consisting of eight items:

- need of the work to be done is temporarily limited (for example to cover peaks in demand);
- employment contract subsequent to vocational training or studies;
- replacement of an employee for a limited time (to cover for maternity or sick leave);
- inherent characteristics require time-limits (grape harvest);
- employment on probation;
- particular interests of the employee which demand for time limits;
- employment is subsidised by public funds awarded for a limited time-span; and
- fixed term is provided for in a court settlement.

2.2.2. Admissibility Without Objective Justification

The APFE provides for three exceptions to the objective justification requirement:

a) A contract of employment does not require objective justification up to a maximum duration of two years. Three successive fixed-term contracts are allowed within this time limit. These rules do not apply when the fixed-term contract was preceded by another contract, be it fixed-term or not, between the same employer and the same employee.

b) Until recently the APFE allowed for fixed-term agreements when the employee at the beginning of the fixed-term employment had reached the age of 52 (until 31 December 2006 the age of 58). This provision was considered by the ECJ in the *Mangold* case as incompatible with EU law. As a consequence the legislator amended it as follows: Fixed-term contracts between an employer and an employee who has reached the age of 52 can be entered into if he has been unemployed for a period of at least four months or has received a special benefit awarded in cases of restructuring or if he has taken part in a qualification scheme. The fixed-term may amount to up to five years. Within this time-limit successive contracts of employment are allowed.

The elderly are the only group for which legislation has created a special scheme. Other disadvantaged groups (for example handicapped persons or persons with difficulties being placed in employment) frequently have fixed-term contracts either on the legal basis under b) or under the above-mentioned justification clause which is satisfied when the employment is subsidised by temporary funds.

c) Newly founded enterprises

To encourage the foundation of new undertakings the legislator allows for the conclusion of fixed-term contracts within a time framework of four years after foundation without the necessity of stating objective grounds. Successive contracts in this time segment are admitted.

2.3. Other Limits to Control the Use of Fixed-Term Work

The requirements under 2.2. are exhaustive. There are no further limits.

As far as remedies in the case of abuses are concerned any violation of the rules governing fixed-term contracts renders the fixed-term contract a contract of indefinite duration. As a consequence the employment relation is subject to the common rules of contract termination. For example dismissal of the employee requires the observance of conditions laid down in the Act on

Dismissals. In addition the APFE states that the effect of dismissal does not occur before the deadline established for the end of the fixed-term contract. An exception to the latter rule applies if the indefinite character of the contract results from the non-observance of the writing requirement. In this case termination is possible meeting the general requirements.

The APFE sets a time-limit for bringing claims in abuse cases. The employee has to bring action against the employer within three weeks from the end envisaged in the fixed-term contract. Otherwise the setting of the fixed-term is conclusively presumed to be justified.

2.4 Measures to Guarantee Security for Fixed-Term Workers

The principle of equal treatment of fixed-term workers is laid down in the APFE following the wording in Art. 4 of the Directive.

Again following the instigation of the Directive, adequate vocational training of fixed-term workers is required of the employer, albeit this duty is contingent upon 'urgent needs of the establishment or vocational training needs of other employees'. The provision in question may not be construed as a subjective right of the fixed-term worker. It has rather to be seen in its connection with the non-discrimination principle. As far as the employer offers vocational training for his staff he must not preclude fixed-term workers. But when applying the principle of equal treatment the employer may take into consideration the duration of the employment relationship on the one hand and the length and the costs of the vocational training on the other hand, a comparison which decides on whether equal treatment renders a measure of vocational training for the fixed-term worker legally obligatory or not. So far there is no case law in this field. Law commentators regard the function of the provision as merely appealing to employers not to neglect fixed-term workers' interests in this field. And at the same time emphasis is put on the fact that the employer has no duty to improve the employment opportunities of fixed-term workers. And last but not least 'urgent needs of the establishment or vocational training needs of other employees' may be opposed to claims by fixed-term workers. *Summa summarum* the legal position of fixed-term workers concerning vocational training is weak.

Along the lines contained in the Directive, a duty is imposed on the employer to inform fixed-term workers about vacancies for permanent jobs. Violation of this duty goes without any sanction. Contrary to what is provided for in many European countries the APFE does not offer preferential treatment of fixed-term workers in the process of hiring workers for permanent jobs. To insert such a clause into the Act is a reform proposal backed by trade unions.

2.5 The Termination of Fixed-Term Contracts

It is in the nature of fixed-term contracts that they cannot be terminated before the expiration of the time-limit established. But parties to a fixed-term contract are free to insert a clause into the contract which enables them to terminate the contract before the end envisaged. In this case the employee has to give notice pursuant to the general rules. The same is true for the employer, but in addition he has to meet the requirements under the Act on Dismissals (what means in particular produce evidence of an objective reason). If the parties have set a fixed-term longer than five years the employee is empowered do terminate the contract giving a six-months notice.

There are no specific judiciary remedies in case of termination before the end. The general rules apply. That means the fixed-term worker has to challenge the untimely termination on the part

of the employer within three weeks before a labour court. The worker will be reintegrated or, if time has run out, he can claim payment of damages.

3. The Role and Content of Collective Agreements Regulating Fixed-Term Work

Before turning to the topic of regulation of fixed-term contracts through collective agreements it seems necessary to furnish some background information on collective bargaining in Germany. Direct effect of collective agreements on contracts of employment is dependent on two prerequisites:

- the parties to the contract of employment must be affiliated to the signatory trade union or employers' association respectively; and
- the employment relationship must fit within the (material, personal, territorial) ambit of the collective agreement.

There is no automatic *erga-omnes*-effect of collective agreements. Only if certain legally defined requirements are met (especially the representatives of the parties to the collective agreement have given their consent) the Ministry of Labour may pronounce the extension of the collective agreement. Finally, a third way to render a collective agreement binding on contracts of employment is its incorporation (in full or in part) into the individual contract of employment.

In principle collective agreements must be in accordance with standards defined by statutory legislation. Provisions in collective agreements may set higher standards in favour of the employees concerned, but they are not entitled to fall short of the legally defined standards. But there are exceptions to this rule. In recent times, legislation provided more frequently for derogation *in peius* from legal standards through collective agreements. The rationale for this *ius dispositivum* has to be seen in the assumption that social partners of a particular sector are equipped with special knowledge of the circumstances of the sector and therefore know better what kind of regulation is adequate for it. It goes without saying that with this kind of legislation a contribution should be made to flexibility of employment relations.

Against this background those provisions of the APFE have now to be studied which empower parties to collective agreements to regulate specific aspects of fixed-term contracts. Room for manoeuvring is given to collective parties with regard to the use of fixed-term contracts without objective justification. Pursuant to the APFE (see above 2.2.) a two-years-term is admitted and within this time-limit three successive contracts are allowed. Collective agreements may preclude this possibility by laying down that fixed-term contracts are not admitted except in instances of objective grounds. This rule in favour is expressly formulated in the APFE. In addition the APFE opens up for clauses in collective agreements with which the number of renewals and the maximum two-year term may be derogated from. This provision can be applied both in favour and *in peius*. For example the national collective agreement for the Public Service allows for the setting of a four-year term in contracts entered into by high-level managers which in addition can be renewed twice up to eight years.

It is difficult to answer the question concerning the content of collective agreements' regulation of fixed-term work. There is so far no explicit study of this subject. To all appearances the role of collective agreements in this area is modest. The reasons for this may lie in the fact that existing legislation, the APFE, has codified what has been developed over long periods of time, by the case

law of labour courts. And collective parties may have become accustomed to it. To a certain extent the same is true for the two-year arrangement without justification. It was introduced in 1985 so-to-say as an experiment limited in time. The legislator prolonged the time limit several times and finally with the APFE it was made a concrete rule. One might say both trade unions and employers' associations have accepted the existing legislation as the status quo, of course gritting their teeth because both sides could imagine improvements in their favour. And they do not consider it practicable policy to change the status quo through collective agreements.

As a consequence as far as I can see current collective agreements regulate fixed-term contracts only marginally. The national collective agreement for the Public Service states as a principle that fixed-term agreements can be concluded pursuant to the APFE. It adds provisions on probation time and the possibility of terminating the contract before the deadline envisaged in certain circumstances. The only really substantive clause affects high-level managers (see above).

Very often one looks for guidance to collective agreements entered into by the IG Metall (the metalworkers union) which frequently has played a pivotal role in taking new directions. But from an official document of this union we gather that only some of the collective agreements deal with the problems here discussed. It seems that some collective agreements lower the admissible period of time under the legal level, in some agreements down to eight months.

4. Impact of Directive 1999/70/EC on Fixed-Term Work

When the German legislator in 2000 implemented the Directive 1999/70/EC it set great store by underlining its intentions to follow the lines laid down in the Directive. From the explanatory memorandum we can gather that the measures listed in Article 5 of the Directive were the starting point of the different provisions which became part of the APFE. In the past there was no explicit ban on discrimination vis-à-vis fixed-term workers. Very often such a ban was derived from the general principle of equality of treatment, a principle which was developed by the jurisprudence and which governs the employment relation as far as no specific discrimination rules exist. Due to the regulation in Article 4 of the Directive, the German legislator was compelled to enshrine the non-discrimination rule into the APFE.

The judgment of the ECJ delivered in the *Adeneler* case had no impact on the practice in Germany, since there is no such legislation for the public service as there was in Greece.

Chapter 3: Italy

(Bruno Caruso - Loredana Zappalà)

1. The National Context

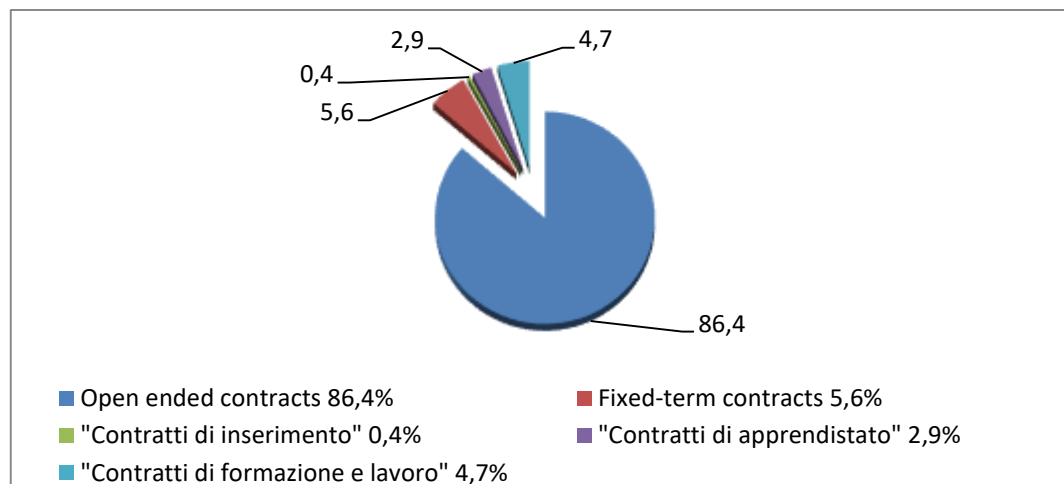
The amount of fixed-term work contracts applied in Italy has increased considerably in the last few years. The percentage registered in 2006 (13.6%) is slightly lower than that of Germany (14.2%), France (13.7%), the 25-member EU (14.9%) and the 15-member EU (14.6%). One element in which the Italian situation differs with respect to the EU as a whole is workers' willingness to accept the fixed-term work option. As emerges from a workforce survey conducted by ISTAT (the Italian national statistics authority) in 2006, 88% of workers with fixed-term contracts (as compared with 55% for the EU as a whole) state that the temporary nature of their contracts was not due to choice but dictated by the supply of labour. The recent increase in fixed-term contracts has also involved exclusively women: the number of female workers has grown by 99,000 while the number of male workers has gone slightly down (- 4,000).

Table I – Source: ISTAT

Year	2003	2004	2005	2006
Percentage of fixed-term workers	9.9	11.8	12.3	13.6

Of the 13.6% of Italian workers with fixed-term contracts, however, only 5.6% have a 'real' fixed-term contract, because the remaining 8% have training contracts – more specifically, contracts that are called 'contratti di inserimento' or 'starter contracts' (0.4%), 'contratti di apprendistato' or 'apprenticeship contracts' (2.9%) and 'contratti di formazione e lavoro' or 'work and training contracts' (4.7%).

Table II – Source: ISFOL



In addition, it is with increasing difficulty that fixed-term work in Italy can be seen as capable of acting as a 'bridge' between phases of temporary and permanent employment. As pointed out in recent studies, the rate of conversion of fixed-term contracts into permanent contracts has, in fact, dropped by 6% and the risk of a fixed-term worker remaining unemployed went from 11.2% in 2002-2003 to 20,7% in 2004-2005.

2. The Italian Approach to the Regulation of Fixed-Term Contracts

Fixed-term contracts have undergone a long, cyclic evolution in the Italian system, featuring lively debate between various 'actors': national and Community legislators, jurisprudence and the social partners. Since the first regulation of fixed-term work in 1962, there has been no doubt that in the presence of a fixed-term contract it is necessary to establish a series of labour standards to guarantee the status of the workers involved, for example the principle of equal treatment, trade union rights and so on. In this sense, the Italian system has always guaranteed many aspects of security for workers hired with this flexible, temporary form of contract.

The main problem in the Italian system, therefore, was not the creation of a system of guarantees for fixed-term workers, but to maintain the central role of the contract of indefinite duration. In this sense, a crucial aspect of the evolution of fixed-term contracts in Italy concerns the way in which the law, collective bargaining and the judges' decisions have guaranteed the persistence of the rule by which the open-ended contract is, and must be, the general form of employment relationship between employers and workers.

In this framework, the most important and controversial aspects of the Italian discipline on fixed-term contracts concern the reasons why it is possible to stipulate fixed-term contracts, the possibility of extending the duration of these contracts or renewing them several times, and the system of sanctions in cases of misuse. This is seen as a central issue regarding the problem of security for workers – in other terms, job security.

Only recently, in particular following the political creed of the previous centre-right government, has the debate on fixed-term contracts partially shifted its focus, paying more attention to the problem of the need to guarantee security, not necessarily in a job, but in the market in general.

In this perspective, in 2001 there was an important reform of fixed-term contracts concerning the possibility of easy recourse to these forms of employment relationships. Moreover, still in this perspective, it is important to highlight the experience in Italy of the important role played by collective bargaining and the jurisprudence of national Courts, and nowadays also by the ECJ, as the recent sentences on Directive 99/70/EC show, in preserving the central role of the open-ended contract. Finally, it must be mentioned that, in the same perspective, the current centre-left government has proposed a reform of the 2001 discipline on fixed-term work. This proposal restricts the possibility of recourse to this type of contract and, at the same time, re-writes the system of sanctions in cases of misuse.

2.1. The Evolution of Italian Legislation

The main feature characterising the evolution of the Italian legislation, with varying degrees of intensity, is an attitude of disapproval towards the possibility of fixing a term for work contracts. This attitude goes back to the early decades of the 20th century, in particular to the first regulations concerning private sector employment issued in 1919, in which only workers on permanent

contracts were assigned certain rights linked to length of service. The *assumption* created at that time was that private sector work contracts were *normally* considered to be for permanent employment. Since then, the possibility of stipulating fixed-term contracts has been subordinate to the existence of objective requirements related to the special nature of the work relationship and/or the presence of a written clause specifying the date on which the contract terminates. Disapproval of fixed-term contracts was first confirmed in the Civil Code in 1942 and then, in a much more rigorous fashion, in Law 230/62.

The 1962 law expressly established a rule/exception relationship between permanent and fixed-term contracts and drew up a detailed list of circumstances in which it was possible, in writing, to set a termination date for a contract. The law also regulated various aspects of the employment relationship: contract extensions, the consequences in the event of the work continuing after expiry of the contract, the requirement for employers to provide proof of the objective existence of the conditions legitimising the expiry or extension of the contract, and the general principle of equal pay and conditions for workers on both permanent and fixed-term contracts.

This situation changed in the 1970s: in those years changes in world production, along with alarming unemployment rates and a lengthy economic crisis, led to a focus in the political and trade union agenda on employment, however temporary. In this context, from 1977 onwards, in the years of what was called 'emergency labour law', a new phase began in Italy, in which the regulations governing fixed-term contracts featured a weakening of traditional protection in favour of greater flexibility. From the early '80s onwards the idea of combating widespread unemployment by favouring a spontaneous balance in the labour market through the introduction of greater flexibility in types of work contract started to gain favour even by trade unions. In those years, the law gave collective contracts stipulated by national or local trade unions belonging to the most representative confederations the possibility of contemplating further kinds of fixed-term contracts than those established by Law 230/62. This measure in favour of collective bargaining gave trade unions responsibility for drawing up balanced regulations that would satisfy both specific company requirements regarding an increase in flexibility in staff management and a general interest in increasing employment rates. The law also established that collective bargaining should lay down the percentage of the total workforce that could be hired via fixed-term contracts. This 'quota system' was a way to force the collective partners to make responsible, pondered decisions, as well as to introduce an element of reasonableness in collective authorisation agreements.

Over the years, collective bargaining injected increasing doses of flexibility into the management of human resources at all levels, while legitimising the recourse to fixed-term contracts on 'subjective' grounds (for young workers or those living in geographical areas particularly hit by unemployment) as an employment policy tool.

It appears possible to state that this model of negotiated and selective flexibility has in the last few years guaranteed trade union monitoring of the real need for flexibility in companies and at the same time respect of certain rules conditioning the recourse to fixed-term contracts and temporary agency-brokered work that are both transparent and judicially verifiable. Although fixed-term contracts are frequently viewed as an 'alternative' to permanent contracts, it cannot be denied that they represent a controlled alternative ensuring a fair balance between flexibility and security.

2.2. Fixed-Term Contracts and Training Contracts

A significant group of legislative measures inspired by employment policy objectives concerned fixed-term contracts for training purposes and, more generally, to promote inclusion in the labour market of 'disadvantaged workers'.

Alongside the process of weakening the rigidity introduced by Law 230/62 described above, a new type of 'subjectively justified' fixed-term contract was contemplated at the end of the 1970s, which admitted the possibility of stipulating fixed-term contracts lasting no longer than six months with young people who were to be engaged in 'training activities', thus further attenuating the original attitude of disapproval towards fixed-term contracts.

Fixed-term contracts for training purposes, subsequently denominated '*contratto di formazione e lavoro*' (CFL) or 'work and training contracts', were the subject of a tormented series of parallel legislative measures which it is impossible to summarise here.

While Law 230/62 was still in force, greatly limiting the possibility of recourse to fixed-term contracts, work and training contracts allowed a large number of young people to be offered fixed-term employment in companies; in particular, by offering them training opportunities at various levels, employers enjoyed a number of financial and legal advantages.

The Constitutional Court itself did not hesitate to recognise that legislation regarding work and training contracts was 'instrumental for the socio-political purpose of favouring subordinate employment relationships for the young and that this purpose prevailed over that of mere training' (see Corte Cost. 25 maggio 1987, n. 190).

The work and training contract served for some time to provide a long 'trial period' for workers during which their aptitude for the work for which they had been hired was tested via training *on the job*. The presence of this kind of contract notably loosened some of the rigidity affecting admissible types of fixed-term contract, providing *subjective* grounds – the young age of the workers involved – for types of contract that were economically advantageous for companies.

Besides work and training contracts, both legislators and collective bargaining gave further proof of considering fixed-term work as a tool to provide employment opportunities, albeit temporary, for 'disadvantaged' workers or those risking social exclusion, irrespective of whether companies had requirements of a temporary nature.

3. The 2001 Regulations and Implementation of Directive 99/70/EC

In 2001 the new centre-right government launched new regulations governing fixed-term contracts, re-baptised in the policy statement of the Government's 'first 100 days' as 'European work contracts'.

The result was approval of Legislative Decree 368/01, which implements Directive 99/70/EC, abrogating the previous restrictive regulation.

Legislative Decree 368/2001 refers to contracts for subordinate work. Certain types of contracts are not covered by the Decree (contracts in the agricultural sector and contracts with companies involved in the fruit and vegetable trade, certain short term contracts in tourism and catering and, as regards specific matters, contracts with managerial staff). Employees in the public sector

are covered by special rules in Legislative Decree 165/2001 which excludes the conversion of fixed-term contracts into permanent contracts, without prejudice to other sanctions.

Although no reference is made in the EU directive, the new regulations introduced by Art. 3 of Legislative Decree 368/01 list a series of cases in which it is not possible to stipulate fixed-term contracts. This is new with respect to the 1962 law: fixed-term contracts cannot be stipulated to replace workers on strike, in companies which have made collective redundancies in the previous six months, or where there is a partial or total reduction in working hours with part of the workers' wages being paid by a special state fund called the 'Cassa Integrazione Guadagni', or finally in companies not complying with health and safety regulations.

Legislative Decree 368 was, without doubt, the first step in a broader design by the centre-right government to reform the labour market, employment relationships and the model of trade union relations consolidated in the Italian tradition. The process of modernising the labour market and employment relationships did not aim to introduce greater flexibility in standard employment and/or reduce worker protection in this kind of employment; the aim was rather, as can be discerned from Legislative Decree 368/01, to marginalise, or better erode, the centrality of traditional full-time, permanent employment in favour of a series of alternative types of flexible employment that employers can have recourse to.

The aim of eroding the centrality of full-time permanent employment clearly emerges from the decree reforming fixed-term contracts. Although EU Directive 99/70 specifies in the introduction and general considerations preceding the clauses of the agreement that permanent contracts remain the prevalent form of work contracts, Legislative Decree 368/01 makes no mention of this.

In connection with this, brief mention should be made of the fact that implementation in the Italian system of EU Directive n. 99/70/CE, containing soft regulation that was much less restrictive than previous legislation, was a 'pretext' for the partial liberalisation of fixed-term contracts, even though this was not allowed by the 'non regression clause' (clause 8, par. 3) of the European agreement.

4. The 'Technical, Production, Organisational and Substitutive Reasons' for which Recourse to Fixed-Term Contracts is Possible

Legislative Decree 368/2001 establishes that a term may be set on the duration of a contract for 'technical reasons or reasons connected with production, organization and replacement'. It should first of all be stated that interpretation of the general clause in Art. 1 led to heated debate among Italian labour law experts. One particular topic of discussion was identification of the technical, production and organisational reasons that justify the stipulation of a fixed-term contract instead of a permanent one. One authoritative line of thought was that the only element that makes it objectively possible to distinguish between the reasons for stipulating fixed-term contracts and those which make a permanent contract necessary is the temporary nature of the reasons themselves: *only* the existence of temporary technical, production, organisational or substitutive reasons legitimises setting a term on a work contract. It is, however, true that even when it is considered necessary for employers' requirements to be temporary, the concept of temporariness still remains essentially vague.

In the attempt to clarify the issue, a Labour Ministry Circular of 2002 stated that 'it is plausible to stipulate a fixed-term contract for work that does not in itself possess characteristics of a temporary nature'. However, the Ministry specified that 'this does not mean that the justifying reasons do not have to be stated as objective, verifiable and, above all, not elusive of the aim pursued by the relative legislation, that is, to prevent any discriminatory or fraudulent intentions by employers'. That said, it is stated that the temporary nature of the work involved represents 'the dimension in which to measure the reasonableness of the technical, organisational, production or substitutive requirements for which a fixed-term contract is stipulated'. Hiring a worker on a fixed-term contract is therefore legal unless 'it is for clearly fraudulent purposes on the basis of the criteria of reasonableness that can be inferred from the combination of the duration of the contract and the work the contract refers to'.

4.1. The Restrictive Judicial Interpretation of the General Clause

As was feared by many when the new regulations came into force in 2001, interpretation of the 'general clause', which allows the apposition of 'fixed-term' to be added to work contracts, gave rise to a large number of lawsuits.

In most cases concerning the new regulations, the main interpretation did not focus so much on the question of whether apposition of the term should only apply to instances of work of an inherently temporary nature, even though this was a subject for debate at a theoretical level, but rather on the more general problem of the objective existence and verifiability of the reasons given in support of limiting the duration of a contract.

From analysis of the jurisprudence that has dealt with the issue so far, there emerges a unanimous trend towards safeguarding the principle of the exceptional nature of fixed-term contracts in the Italian system, which the new regulations appear to doubt.

According to the majority trend, in fact, the judges stressed that the reform did not undermine the principle whereby normal employment contracts are of unlimited duration: as the apposition of a term remained confined to exceptional cases, only allowed in certain circumstances, the latter should be objectively controllable with reference to the specific situation involved. In other words, it is not sufficient to demonstrate that there exist employer requirements such as to justify the hiring of employees for a fixed term; it is also necessary to prove how each specific case falls into the category of temporary requirements.

The continuity between the reform and the previous regulations, as regards the exceptional nature of fixed-term contracts and the necessary existence of objective reasons justifying their stipulation, has been unanimously upheld by jurisprudence for several reasons: at times reference is made to the letter of the law, which requires the reasons justifying recourse to such contracts to be specified in writing; at others arguments are based on the provisions of Directive n. 99/70/EC, as implemented by Legislative Decree n. 368, which expressly require objective reasons; other judges consider that it is the anti-fraud aims inspiring the reform that require employers to state clearly why recourse to fixed-term contracts is justified and that the verifiability of this should remain for the whole duration of the contract, although rating within the broader organisational context of the company is left to the discretion of employers.

4.2. The Role of Collective Bargaining in Regulating the Recourse to Fixed-Term Work

Art. 1 of Legislative Decree 368 states that 'it is possible to fix a term for the duration of subordinate work contracts for reasons of a technical, production, organisational or substitutive nature'. As pointed out in a Labour Ministry Circular in 2002²⁹, the adoption of a general clause allowing fixed-term contracts to be stipulated for technical, production, organisational or substitutive reasons presupposes 'abandoning the criterion of negotiated flexibility to strengthen a regime of individual agreements'. 'Broad outlines' are traced of cases in which there exist objective reasons 'such as to exclude any discriminatory or fraudulent intentions', that allow for the stipulation of fixed-term contracts, (...) thus effecting less compression of private autonomy'.

The new technique used in Legislative Decree 368/01 to regulate flexibility thus tried to take control of a broad area of the labour market away from the trade unions. The only remaining form of trade union control is provided for in Art. 10, clause 7: following the technique previously used in Law 56/87, collective bargaining is assigned the task of identifying the quantitative, possibly not always uniform, limits to the use of fixed-term contracts, that is, the proportion of workers who can be hired on this kind of contract as compared to the number of permanent employees working for a firm. Although the new regulations establish a series of reasons that are exempt from these limits³⁰, experts almost unanimously consider the task to be a significant one: if an employer does not negotiate the percentage of fixed-term workers with the trade unions, he will not be able to stipulate fixed-term contracts.

While in principle entrusting national collective labour agreements concluded by the most representative trade unions with determining quantitative limits for the use of fixed-term contracts (limitations on the proportion of fixed-term workers), the Decree mentions a long list of exemptions from this possibility: in business start-ups, for periods to be defined in national collective labour agreements, even in a non-uniform fashion with reference to geographical areas and/or categories of goods, for reasons connected with replacement or seasonal work, for increased work at certain times of the year and for certain performances or certain radio or television programmes, for contracts after traineeship in order to facilitate young people's entry into the world of work, for contracts entered into with workers aged over 55, or concluded where the recruitment is for the performance of work or a service of a special or occasional nature defined or arranged for in advance. The exemption also applies to contracts no longer than seven months, or of a duration defined in collective agreements in respect of difficult employment situations in specific geographical areas, unless they are individual contracts entered into for the performance of work identical to work forming the object of another fixed-term contract having the same characteristics which expired less than six months previously.

It should, however, be pointed out that, despite introduction of the general clause establishing the conditions regulating the recourse to fixed-term contracts (Art. 1, Legislative Decree 368/2001), the issue of the reasons justifying such recourse remains one of the most recurrent in collective contracts.

²⁹ Ministero Lavoro, Circolare 1 agosto 2002 n. 42, containing indications for application of Legislative Decree 368 of 2001.

³⁰ On starting up new activities, to replace workers on leave or to hire seasonal workers, to intensify production at certain times of year, for specific radio or television programmes, to carry out work or provide a service that is time-limited, or fixed-term contracts stipulated with certain categories of workers (the young or the elderly).

In some contracts the partners refer to the provision in the EU Directive and confirm the principle of the continuing centrality of permanent work contracts. There are also a significantly large number of contracts in which the parties expressly agree to qualify the apposition of a fixed term as legitimate *only* where a detailed list of conditions of a temporary nature is given, entrusting supplementary bargaining with the possibility of indicating further hypotheses (still of a temporary nature). In other agreements, on the other hand, fixed-term contracts have to be justified by the special nature of the employment relationship and can only be applied in cases previously established by the collective contract. There are also instances of agreements which specifically identify the reasons of a technical, production, etc. nature that are economically and socially acceptable, apparently irrespective of whether the company requirements are temporary or not. Finally, in others again collective bargaining has given a list of examples, at times highly detailed, of the reasons justifying the recourse to fixed-term contracts or, more simply, qualifying the list of hypotheses introduced as exemplifying possible reasons of a technical, organisational, productive or substitutive nature.

5. Implementation in the Italian System of the Clause of the European Agreement which Contains Measures for the Prevention of Misuse

Of particular interest is the implementation in the Italian system of Clause 5 of the European agreement, which contains measures for the prevention of misuse. As is known, the clause deals with the *renewal*, and in general the succession, of fixed-term contracts.

Starting with Law 230/62, Italian legislation has always distinguished between two different hypotheses: *extension* of the term fixed in a work contract, which does not involve stipulating a new contract in that it does not require a document in writing but only the existence of specific reasons and the consent of the worker involved, and *renewal* which, on the other hand, presupposes the stipulation of a new fixed-term contract.

In its implementation of Clause 5 of the European agreement, Italian legislation has maintained this distinction, regulating the two cases in different ways.

That having been said, however, one wonders which of the two hypotheses Clause 5, par. 1, of the agreement refers to: that is to say, when the directive mentions the need for 'objective reasons justifying the renewal of such contracts or relationships', or a provision establishing 'the maximum permitted total duration of successive fixed-term employment contracts or relationships' or 'the number of times such contracts or relationships may be renewed', does it refer to the Italian notion of *renewal*, or *extension*, or both?

Italian legislation seems to have given a rather contradictory answer to the question. On the one hand, in fact, Art. 4, c. 1, of Legislative Decree 368/01 regulates contract extensions. The new regulations, which are considered to have been introduced to implement Clause 5, par. 1 of the European agreement, establish that 'a fixed-term contract can be extended, with the consent of the worker, only when the initial duration of the contract is less than three years. In such cases, extension is only allowed once and on condition that it is required for objective reasons and refers to the same work for which the fixed-term contract was stipulated'. The provision continues by stating that 'with exclusive reference to this hypothesis, the total duration of a fixed-term employment relationship shall not exceed three years'.

This solution would seem to comply fully with Clause 5 of the European agreement. But a closer

look at it arouses a certain perplexity since, as mentioned previously, the regulation makes exclusive reference to the Italian notion of *extension*, totally neglecting the notion of *renewal*.

The hypothesis of *renewal* of a fixed-term contract is considered in Art. 5 of Legislative Decree 368/01, which is devoted to the sanctions that can be applied if the employment relationship continues after expiry of the contract or in the event of a succession of contracts. Here, in compliance with par. 2 of Clause 5 of the European agreement, where it is stated that member states shall determine under what conditions fixed-term contracts or relationships shall be regarded as 'successive' and shall be deemed to be contracts or relationships of indefinite duration, the Italian regulations establish that fixed-term contracts are to be considered 'successive' when there is no discontinuity (i.e. no time gap) between one contract and another; in this case the relationship is considered to be a permanent one, dating back to stipulation of the first contract. A new fixed-term contract can, however, be stipulated between the same parties if a certain length of time elapses (10 or 20 days according to whether the original contract lasted more or less than 6 months); only if the period of time between one contract and another is not respected will the second contract be considered a permanent one.

This appears to comply with par. 2 of Clause 5 of the agreement, because it establishes when two fixed-term contracts are to be considered successive and when, on the other hand, a second fixed-term contract is to be considered a permanent one.

However, as regards the measures for the prevention of misuse referred to in par. 1 of Clause 5 of the agreement, it should be pointed out that the new Italian legislation *only* complies with the provision in letter a) which requires 'objective reasons justifying the renewal' because, as we have seen, the stipulation of any fixed-term contract – be it a first contract, or one renewed between the same parties – always has to be justified by the presence of objective reasons.

Legislative Decree 368/01, on the other hand, makes no reference to the maximum duration of renewed fixed-term contracts, nor to the number of possible renewals as provided for by letters b) and c) of Clause 5 of the European agreement.

Although there are no special provisions, however, Italian experts have rightly maintained that in the event of successive fixed-term contracts that *formally* comply with the time required by law between one contract and another a worker can always claim application of the general principle laid down in Art. 1344 of the Civil Code, whereby contracts stipulated with the aim of breaking the law, and thus in the case in point of fraudulently preventing the worker from enjoying the protection and stability of a permanent contract which is, and remains, the *normal* type of employment relationship, are declared null and void.

Further provisions are laid down by Art. 5, clauses 1 and 2 of Legislative Decree 368/01 to cover cases in which an employment relationship continues (without an extension having been agreed on) after expiry of the term fixed or successively extended. In this case, the worker is entitled to an increase in pay for a short length of time (up to 20 or 30 days depending on whether the contract lasted more or less than 6 months); if the relationship has not ceased after this short period, the contract is considered to be permanent as from the end of the period.

6. Interpretation of the Italian Regulations after the ECJ's *Adeneler* Decision

In the light of the aim of the Framework Agreement mentioned above, the ECJ in *Adeneler* (C-

212/04) gave an interpretation of the concept of the 'objective reasons' justifying the renewal of fixed-term contracts within the meaning of clause 5. According to the Court, 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 the use of successive fixed-term employment contracts'. In particular, 'those circumstances may result 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'.

Furthermore, in a different part of the *Adeneler* decision, the ECJ gave another clue that allows the concept of 'objective reasons' to be interpreted in a more restricted sense: there is no 'objective reason' for renewal of a fixed-term contract, and therefore misuse of fixed-term contract itself, if a worker has been hired for the same job to satisfy employer needs which are not of limited duration but, on the contrary, 'fixed and permanent'. In the ECJ's interpretation, therefore, the 'objective reason' justifying the renewal of a fixed-term contract must generally be related to a temporary need of the company and not to a permanent one.

From the decision, which concerned certain provisions of Greek legislation implementing the EU directive, it is possible to draw indications regarding the Italian situation as the 2001 reform governing fixed-term work (Legislative Decree 368) also claimed to be an implementation of Directive 1999/70.

The principles upheld by the ECJ indirectly identify the real scope of Art. 1 Clause 2 of Legislative Decree 368/01, which require 'specification' in the letter of appointment of the reasons leading to stipulation of the contract, summarily grouped in Art. 1 Clause 1 as organisational, substitutive, etc.

The temporary nature of the reason legitimising the application of a fixed-term contract is confirmed in the Italian system – in the light of rulings by EU judges – as the only criterion capable of selecting situations that would justify fixed-term contracts while efficiently fulfilling the anti-fraud role imposed by Clause 5 of the framework agreement, as it is capable of identifying situations that are inherently limited as to duration. Unfortunately, as Legislative Decree 368 does not set a maximum duration on such contracts or a maximum number of renewals, the objectivity of the limited duration of the reason justifying recourse to such contracts is, in fact, the only measure that that can be used to avoid the unmotivated repetition of fixed-term contracts imposed by Directive 1999/70/EC.

Another question submitted to the Court in *Adeneler* concerned interpretation of the notion of 'successive fixed-term contracts' (Clause 5) and, in particular, the evaluation of a national provision providing that successive contracts are contracts concluded between the same employer and worker under the same or similar terms of employment, the contracts not being separated by a period of time longer than 20 days.

As known, one way of preventing misuse deriving from successive fixed-term contracts, according to Clause 5, letter b) of the framework agreement, consists of setting a 'maximum total duration of contracts or successive fixed-term employment relationships'. The framework agreement thus raises the problem of whether there should be a time limit on fixed-term work by the same worker for the same employer, even when this involves a number of contracts.

The ECJ ruled that a provision like the Greek one to which the Adeneler case referred, 'under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive must be considered to be such as to compromise the object, the aim and the practical effect of the Framework Agreement'.

Such a restrictive definition of the successive nature of work contracts would, in fact, make it possible to hire workers on precarious terms for years, as in most cases they would in practice have no choice but to accept interruptions of 20 working days in a series of contracts with the same employer.

A problem arising in the light of this ECJ interpretation is the compliance of Italian regulations with Directive 99/70/EC. Legislative Decree 368, 2001 – like the Greek regulations – in fact allows a worker to be employed by the same employer for long periods of time, with short formal interruptions, but without ever achieving job stability. The conceptual tool that allows this elusion to occur is, once again, the adoption of a very restricted notion of 'successive fixed-term contracts', which, according to Legislative Decree 368, are those concluded 'without a break in continuity' (adopting a unitary interpretation of Clauses 3 and 4 of Art. 5 of the Decree) separated by no more than a 20-day interval (10 days for contracts lasting less than 6 months).

7. The Principle of Non-discrimination and Other Cases Contemplated by the New Regulations

In confirming a provision which had been present in Italian legislation for some time, Art. 6 of Legislative Decree 368/01 also sanctions the principle of non-discrimination between workers on fixed-term contracts and those on permanent contracts, thus once more confirming – in compliance with Community legislation – that standard full-time permanent employment is the reference model on the basis of which the wages and regulations governing workers on flexible contracts are to be established.

The principle of non-discrimination is contained in Article 6 of the Legislative Decree 368/2001, which states that those employed under a fixed-term contract shall be entitled to leave and remuneration (Christmas bonuses, thirteenth months yearly pay, severance pay and all other payments) made by the undertaking to comparable workers with open-ended contracts in proportion to the length of time worked, provided that this is not objectively incompatible with the nature of the fixed-term contract. Article 6 of the Decree concerning the principle of non-discrimination defines 'comparable permanent workers', as being 'those (in the company) classified as being at the same level under classification criteria laid down in collective agreements'.

Of particular importance are the innovations introduced by Arts. 7 and 9 of the new decree, which oblige employers to provide training opportunities for workers on fixed-term contracts and establish the workers' rights to information. These provisions entitle workers on fixed-term contracts to receive sufficient and adequate training for the work for which they have been hired, so as to prevent specific risks connected with the carrying out of the work³¹.

Article 7 (1 and 2) of the Decree provides that fixed-term workers shall be afforded sufficient training appropriate to the features of the tasks covered by the contract in order to preclude risks

³¹ Thus implementing the provisions in Art. 4 of Directive 91/383/EC.

connected with work and also that national collective labour agreements by the most representative organisations may provide for procedures and measures to facilitate access by fixed-term workers to opportunities for appropriate training to improve their qualifications, promote their careers and increase their occupational mobility.

Article 8 of the Decree of 2001 provides that fixed-term contracts lasting longer than nine months shall be taken into account when calculating the thresholds for the constitution of the workers' representative bodies.

Article 9 (1) of the Legislative Decree 368/2001 states that the national collective labour agreements by the most representative organisations shall define the procedures for informing fixed-term workers about vacant posts, to ensure they have the same opportunities to secure permanent positions as other workers. In addition, Article 2 of the Decree lays down that employers in the air transport and airport services sector shall communicate recruitment vacancies to the appropriate provincial trade union organisations.

Finally, Art 10 clause 9 attempts to blend flexibility and security by requiring collective bargaining to establish rights of precedence, whereby workers who have already worked for a company on a fixed-term contract are entitled to be taken on permanently by the same company for the same job.

8. Fixed-term Contracts as an Issue of Labour Supply Flexibility: 'Contratti di Inserimento' or Starter Contracts

Most experts agree that EU Directive 99/70 contains a relatively broad notion of the 'objective reasons' that are suitable to prevent abuse: they must be such as to make a fixed-term contract convenient for both employers and workers and therefore must balance flexibility and security while improving quality of life and work and worker performance. In addition, in accordance with this extensive interpretation of the notion of 'objective reasons', there is nothing to exclude the possibility of recourse to fixed-term contracts also being justified by a particular worker status (for example, the long-term unemployed or members of disadvantaged categories of workers) whereby such contracts can be stipulated on 'subjective grounds' (as already established by Art. 8 of Law 223/91 and certain collective bargaining provisions, above all at a territorial level, in favour of 'weak' and/or geographically disadvantaged categories of workers).

So whereas the EU directive left room for flexibility to be used to meet requirements emerging from labour supply and not only demand, the new regulations introduced by Legislative Decree 368/01 do not appear to include this aspect. Although the directive specifies, in fact, that a fixed-term contract must be convenient for both employers and workers, Art. 1 of Legislative Decree 368/01 – as we have seen – justifies setting a fixed-term for reasons that concern the employer alone. It should be pointed out in connection with this that, at least with a view to assessing possible cases in which fixed-term contracts could really promote employment in certain geographical areas, for certain categories of workers and/or for limited periods of time, it would perhaps have been better to enhance, rather than completely eliminate, the role of collective bargaining in identifying possible 'subjective grounds'.

Legislative Decree 276/03, partially covering the above-mentioned gap in Legislative Decree 368, has, however, introduced a further type of fixed-term contract for 'subjective reasons' called 'contratto di inserimento' or 'starter contract'. It replaces what was called a 'work and training'

contract and aims to 'achieve, by means of an individual plan for adaptation of the professional skills of a worker to a certain work context, to insert, or re-insert, into the labour market' certain categories of young workers or those at risk of social exclusion³². These contracts must last no less than nine and no longer than 18 months, they can be extended up to this maximum of 18 months, and cannot be renewed between the same parties. Collective bargaining is allowed to regulate single aspects relating to the employment relationship, in particular exercising quantitative control: once again, collective contracts can establish the maximum percentage of workers who can be hired on this type of contract.

The reasons that lead an employer to prefer this kind of contract thus do not affect stipulation of the contract; here the possibility the system considers to be prevalent is that the fixed-term contract will meet the needs of a young or 'disadvantaged' worker: what counts is that it represents a chance for a worker to enter the world of work. It is therefore necessary for the worker to belong to a certain category and for there to exist an individual plan of insertion, without which the contract will be considered a permanent one. From the employer's viewpoint, on the other hand, this type of contract would appear to serve as providing a long trial period during which the worker's capabilities and aptitude for the work for which he has been hired can be assessed.

Here again, Legislative Decree 276/03 establishes that 'starter contracts are regulated, where compatible, by the provisions of Legislative Decree 368/01' regarding fixed-term contracts. As we have seen, however, as the idea behind this kind of contract appears to be to meet the specific needs of workers intending to enter the labour market rather than those of employers, the restrictions regarding the extension and non-renewability of these contracts between the same parties appear highly appropriate. It appears, in fact, that the regulations allow starter contracts to be stipulated to meet company requirements even of a permanent nature, but that the more specific purpose is to allow workers to adapt to the work context; if, however, the worker gives proof of having done so, and the employer wishes to use his services again, there is no longer any reason to extend or renew the contract: the worker will have to be hired permanently³³.

9. Fixed-Term Contracts in the Public Sector

Article 36 of Legislative Decree 165/2001 on general rules for the organization of employment by the public authorities contains a *lex specialis* for fixed-term contracts in the public sector.

It provides that the public authorities shall use flexible forms of contracts for the recruitment and employment of staff provided for in the Civil Code and the laws on employment relationships in undertakings. National collective agreements shall include provisions governing fixed-term contracts, training and employment contracts, other training relationships and the provision of temporary employment services. It also, provides that 'In any case, infringement of binding provisions on the recruitment or employment of workers by the public authorities cannot serve to justify

³² Young workers aged 18 to 29, the long-term unemployed between the ages of 29 and 32, workers over 50 without a job, workers who have been out of work for at least two years and wish to start work again, women of any age in geographical areas particularly hit by unemployment, and the disabled.

³³ To prevent starter contracts from being used by employers to meet exclusively unilateral company requirements, without taking into account the law's aim of promoting permanent employment for workers at the end of the insertion programme, Art. 54, c. 3 establishes, in fact, that 'to be able to hire workers on a starter contract, employers must have kept on at least 60% of the workers whose starter contract expired in the previous 18 months'.

the establishment of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction. The worker concerned is entitled to compensation for damage incurred as a result of working in breach of binding provisions. The authorities must recover any sums paid in that connection from the managers responsible, whether the infringement is intentional or the result of gross negligence'.

The Italian Constitutional Court has expressed an opinion regarding the legitimacy of this provision: in judgment 89 of 13 March 2003, it ruled that the first sentence of Article 36(2) of Legislative Decree 165/2001 is compatible with the constitutional principles of equality and sound management set out respectively in Articles 3 and 97 of the Italian Constitution. The Constitutional Court took the view that the fundamental principle that access to employment in public bodies is by way of competition, by application of the third paragraph of Article 97 of the constitution, legitimises the existing difference in treatment between workers in the private sector and those in the public sector where there has been unlawfulness in the conclusion of successive fixed-term contracts.

The ECJ has, however, recently expressed an opinion regarding these regulations. The Court in Genoa, in fact, decided to refer to the ECJ for a preliminary ruling, asking whether, in view of the principles of non-discrimination and effectiveness, having regard in particular to the measures taken by Italy in relation to employment relationships with non-public-sector employers, Council Directive 1999/70/EC must be interpreted as meaning that it precludes national provisions such as those in Article 36 of Legislative Decree 165/2001 which do not determine 'under what conditions fixed-term employment contracts or relationships ... shall be deemed to be contracts or relationships of indefinite duration', and in fact contain an absolute prohibition from the outset on the establishment of employment relationships of indefinite duration resulting from abuse relating to the use of fixed-term contracts and relationships.

In *Marrosu and Sardino* (C-53/04), and in *Vassallo* (C-180/04) the ECJ ruled that the framework agreement neither lays down a general obligation on the Member States to provide for 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, so it gives Member States a margin of discretion in the matter.

However, in order for national legislation to be regarded as compatible with the framework agreement, the domestic law of the Member State concerned must include, in that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts. With regard to the latter condition, it should be noted that clause 5(1) of the framework agreement places on Member States the mandatory requirement of effective adoption of at least one of the measures listed in that provision intended to prevent the abusive use of successive fixed-term employment contracts or relationships, where domestic law does not already include equivalent measures. So where, as in the case of fixed-term work, Community law does not lay down any specific sanctions should instances of abuse nevertheless be established, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation which 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.

That having been stated, according to the ECJ national legislation such as the Italian legislation

which lays down mandatory rules 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 abusive use by public authorities of successive fixed-term employment contracts or relationships appears, at first sight, to satisfy the requirements set out by Community law about sanctions. However, obviously, it is for the national court to determine to what extent the conditions for application and effective implementation of the first sentence of Article 36(2) of Legislative Decree 165/2001 constitute a measure adequate for the prevention and, where relevant, the punishment of the abusive use by the public authorities of successive fixed-term employment contracts or relationships.

In the *Marrosu and Sardino* and *Vassallo* rulings, the ECJ obviously entrusted Italian judges with the task of evaluating the compliance of the system of compensation for damages in the public sector with the principles of EU law.

The effects of the two EC J rulings on the Italian system did not take long to appear. Recently, in fact, certain Italian courts, on the basis of the principles set upheld by the ECJ, have for the first time inflicted heavy pecuniary sanctions on public administrations that had illegitimately used fixed-term contracts, to compensate for the damage caused to the workers involved (see Tribunale di Genova, 5 April 2007 and Tribunale di Rossano, 4 June 2007).

As far as the public sector is concerned, it should finally be pointed out that legislators have recently attempted to restrict the possibility of recourse to fixed-term contracts by public administration and also to resolve the situation of public administration workers employed for long periods of time on such contracts.

On the one hand, in fact, Art. 36, Clause 1-bis, of Legislative Decree 165/2001, updated by Legislative Decree 4/2006, which became Law 80/2006, establishes that 'public administration employers in particular may have recourse to fixed-term contracts only for temporary and exceptional requirements, and following the experimentation of procedures for the temporary assignment of staff', thus effectively restricting the possibility of using fixed-term labour as compared with the private sector.

On the other hand, the so-called 'legge finanziaria' (financial law) for 2007 (Law 296, 27 December 2006) enables public administration to convert temporary contracts into open-ended ones, but only in cases where there exist permanent requirements.

Chapter 4: The Netherlands

(Hester Houwing - Evert Verhulp - Jelle Visser)

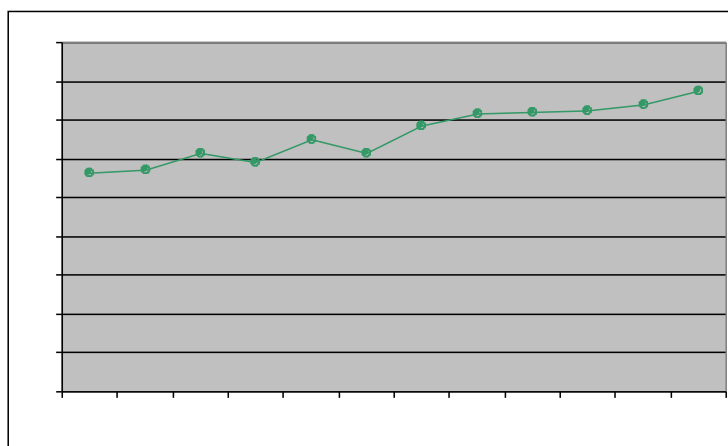
1. The National Context

In the Netherlands fixed-term contracts are not always considered a measure to increase flexibility (OSA 2007). Over half of fixed-term contracts are used as an extended trial period; to determine the suitability of the worker. The second most common reason to hire a worker for a fixed period of time is uncertainty about the future. A quarter of all fixed-term contracts are explicitly associated with the need to increase flexibility. This share rises to 40 percent if one counts uncertainty about the future as a reason for flexible hiring policies, as one probably should.

1.1 Statistics

There is some confusion about the statistics on the development of fixed-term employment contracts in the Netherlands. European figures, based on Eurostat statistics following the methodology of the European Labour Force Survey and in effect based on the quarterly surveys of Statistics Netherlands (CBS, Centraal Bureau voor de Statistiek), indicate a higher incidence and a larger increase in comparison with the data based on the two-yearly panel surveys of the Institute for Strategic Labour Market Research (OSA, Organisatie voor Strategisch Arbeidsmarktonderzoek).³⁴ According to Eurostat data, the incidence of fixed-term employment stood at 15.5 percent in 2005, up from just under 14 percent in 2000 and 11.3 percent in 1994 (Arrowsmith 2006; EIRO 2007; European Commission 2006). As one can see from Figure 1, the trend had been upward during the past decade, interrupted only in 1999, the year of the new Flexibility and Security Act (F&S Act).

Figure 1. Incidence of fixed-term employment (employees on fixed-term contracts as a percentage of all employees in employment)



Source: European Commission 2006 (Eurostat data, European Labour Force Surveys)

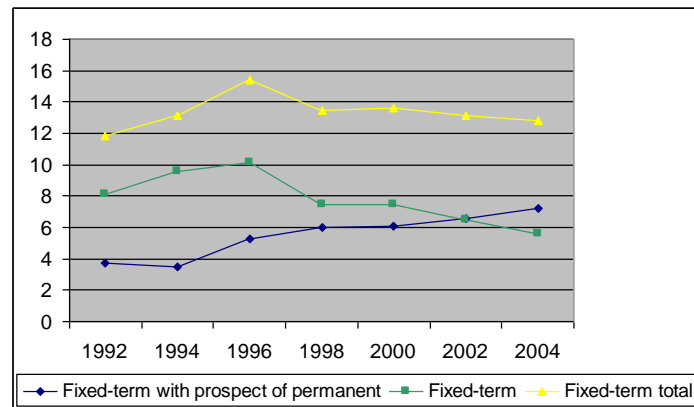
³⁴ Another complicating factor is that CBS-data reports a figure of 8% of *total flexible labour* in the Netherlands (RWI. 2007. 'Arbeidsmarktanalyse 2007'. The Hague: Raad voor Werk en Inkomen.). We will investigate the incompatibility of these figures.

With an estimated 2.5 incidence, agency work, although less than before 1999, is still rather widespread in the Netherlands and is in the EU second only to the UK (Arrowsmith 2006; European Commission 2006). With a 15.5 share of employees working in fixed-term contracts, of whom about half have the 'prospect' of entering permanent employment if they survive their trial period and business is steady, the Netherlands is rather average in the EU (ibid.).

CBS data suggest that the share of flexible labour other than agency work and on-call contracts has increased over the last decade, agency work has slightly declined and on call contracts have decreased (RWI 2006). This may be attributed to the F&S Law, which made small on call contracts in particular a less attractive option for employers, as they had to pay a minimum number of hours even if no work is performed. The rise in other types of flexible labour is interpreted as pointing to an increase in fixed-term contracts. Unfortunately, CBS data do not allow us to distinguish between truly temporary work or fixed-term contracts and temporary work based on fixed-term contracts that 'promise' employees the prospect of a permanent ('open ended') contract (*met uitzicht op een vast dienstverband*). For this distinction we must turn to OSA data.

OSA data (see figure 2) does not indicate that the incidence of fixed-term contracts has substantially increased in the past decade. The percentage of people with a fixed-term contract has, according to OSA data, developed from 11.8 in 1992 to 13.5 in 1998 and then back to 12.8 in 2004. Most recent OSA-figures show that the percentage of people with a fixed-term contract has further decreased to 11 percent in 2005 (OSA 2007).³⁵ This figure includes 'fixed-term' contracts proper, without freelancers and other without an employment contract, and a small number of agency workers that work on the basis of a fixed-term contract with their agency³⁶.

Figure 2. Fixed-term contracts, and fixed-term contracts with the prospect of a permanent contract 1992-2004 (% of people in a paid job)



Source: (OSA 2006)

³⁵ OSA publishes annual reports on developments in the Dutch labour market. In every even year, a labour market demand-report (*Tendrapport Vraag naar Arbeid*) is published on the basis of a survey among firms with at least five employees. The data in these reports apply to the previous uneven year. Every uneven year a survey among households is published in a labour market supply-report (*Tendrapport Aanbod van Arbeid*). The participants are people aged 16-65 who do not attend education. The data presented in these reports are gathered in even years.

³⁶ Here too, we will investigate the reasons behind with the incompatibility of CBS and OSA data.

As figure 2 shows, the share of employees with a fixed-term contract with the prospect of a permanent job has doubled between 1992 and 2004, whereas the share of employees with a fixed-term job without that prospect has decreased. This does not necessarily imply that a larger share of employees with a fixed-term contract actually make the move to a permanent contract. On this we can only offer conflicting evidence. A recent evaluation study of the F&S Act conducted by the Hugo Sinzheimer Institute in cooperation with TNO (Knegt et al. 2007) suggests that the share of employees on fixed-term contracts that actually move on to a permanent job has decreased from 25 percent in 2001 to 14 percent in 2006. Around one-fifth 20 of the employees with fixed-term contracts reported that their employment relationship ended due to the fact that they were entitled to a permanent contract under the new F&S. It was also found that such terminations are more common among older workers. Another recent study, conducted by the Christian Union Federation, CNV, found that 42 percent of the employees with a fixed-term contract have the prospect of a permanent job, a much smaller share than in the OSA surveys, and that this share decreases with the duration of fixed-term contracts. After two years the figure drops to 26 percent (CNV 2007).

In what is probably the best econometric study on the subject, Zijl (2006) finds evidence that temporary and agency jobs raise employment levels and tend to shorten unemployment duration. But she also demonstrates that there is no evidence that these jobs *increase* the probability of finding a permanent job and serve as a 'stepping stone'. Moreover, the risks of a temporary contract are not compensated with a positive wage differential, but rather punished with a small negative differential, holding other job and worker. (Zijl 2006)

In table 1 we turn to another question: who are the employees who work in fixed-term employment contracts (both types grouped together). We see that fixed-term contracts are slightly more common among women than men and also slightly more common among lower than higher educated employees. What comes out most clearly, however, is that these contracts are especially widespread among young people. Almost four out of ten young people, under the age of 25, are employed on the basis of a fixed-term contract.

Table 1. The incidence of fixed-term contracts in 2004, by sex, age and education (percentage of employees in employment in 2004)

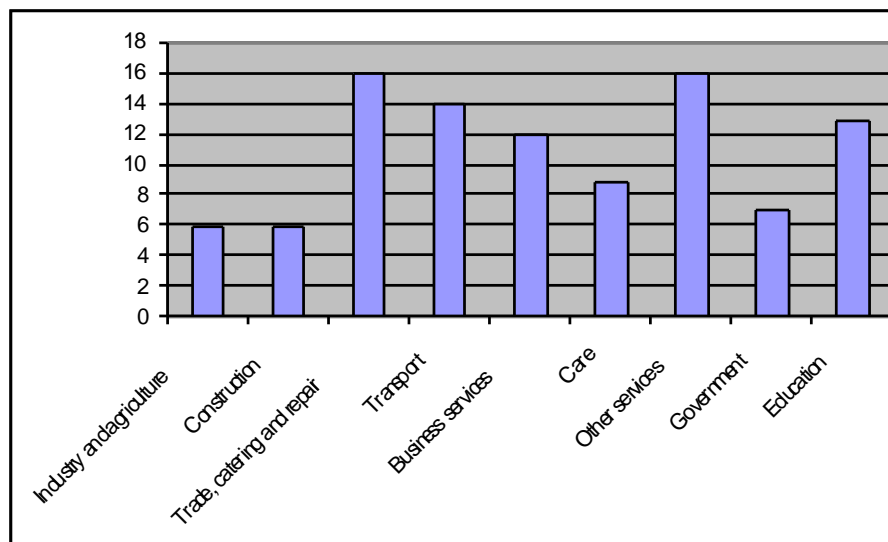
	Sex		Age			Education			
	Total	Male	Female	16-24	25-49	50-64	low	medium	high
Permanent	87.2	88.7	85.5	56.2	89	94.6	85.6	87	88.4
Fixed-term	11	10.5	11.6	37.5	9.5	4.5	11.9	10.8	10.7
Other ³⁷	1.8	0.8	2.9	6.4	1.5	0.8	2.5	2.2	0.9

OSA 2006, p. 114

³⁷ With the term 'other' OSA refers to other contracts such as on-call workers and seasonal workers. OSA does not mention agency workers.

If we turn our attention to the sectors where fixed-term employment contracts are most widespread, five sectors stand out: (1) trade, hotel and restaurants and repair; (2) other (personal) services; (3) transport and communication; (4) education; and (5) business and financial services (Figure 1). We see that fixed-term employment is especially a matter of services (except government and health) and not very much used in agriculture, industry and construction. We can only speculate that business fluctuations, project-based types of work organisation, and the importance of selection (trial) of employees is more important in services than in the more traditional sectors of the economy. In trade and restaurants and in transport these contracts affect one in every six employees. It could also be the case that the supply of labour and in particular the deployment of young people is different. (OSA 2007, p. 80; OSA 2006, p. 114), see figure 3.

Figure 3. Incidence of employees on fixed term contracts per sector (in percentage of all employees in employment)



(OSA 2007)

If fixed-contacts are primarily a temporary phenomenon in the life of young people and students, possibly working part-time, then we need not worry about insider-outsider dynamics or segmentation in the labour market. If fixed-term contracts are rising (although the data for the Netherlands are not clear on this point, as we have seen) and if the transition into permanent jobs is strongly correlated with the level of education and only better educated employees make it into permanent jobs (there is some evidence that this is the case), then worries about segmentation are real (RWI 2006).

Regarding the possible involuntary nature of fixed-term employment, both OSA and CBS only measure the share of involuntary *part-time* employment, showing that most part-time employees do indeed not search for a full-time job. The already cited CNV study suggests that 40 percent of all employees with a fixed-term contract would change job if that would lead to a permanent contract (CNV 2007).

1.2 The National Debate on Fixed-Term Work

The Dutch debate on fixed-term work has to be seen in light of discussions on labour market flexibility related to dismissal law. Employment protection legislation in the Netherlands is considered to be rather strict, in particular for regular employment, although comparison with other European countries shows that the Netherlands is rather close to the European average (Deelen, Jongen and Visser 2006; OECD 2004; OECD 2005). In 1999, the *Flexibility and Security Law* became operative, significantly increasing the possibilities to use multiple consecutive fixed-term contracts (see below). Before 1999, a second consecutive fixed-term contract was treated as an open-ended employment contract that could not be ended without prior permission from the public employment service. There were two ways around this rule. If 30 days lapsed between two contracts, they were not considered consecutive. Meanwhile the employee continued doing the same job, now dispatched by a Temporary Work Agency (TWA). From the early 1990s the courts began to restrict this 'revolving door' construction. The second escape route required a derogation by means of a collective agreement. Under pressure of high (youth) unemployment in the 1980s Dutch trade unions had been willing to accept some flexibility, but as time went by and unemployment levels came down, the unions became unhappy and feared the development of a secondary labour market.

Under present Dutch law, employers need a permission from the director of the Regional Employment Office when they give notice to terminate a regular ('open') employment contract. In 85-90 percent of all cases, a permit is given, although special clauses for older workers and in case of sickness may create considerable delays. Yet, the system of 'permits', which was introduced by the German occupying administration during wartime (1940-45), has been criticised as unnecessary restrictive, a burden on business and source of uncertainty. Moreover, during the 1990s the system was increasingly circumvented. Employers could file a request to terminate the employment contract at the Lower District Court on grounds of 'serious cause' (Article 7:685 Civil Code or CC). In that case the contract will be dissolved with a pay compensation or severance payment. In 1996 there were 60436 permits for terminating employment filed at the regional employment office, against 44426 settlements in court, a ratio of 1.4 to 1. According to Wilthagen (1998), ten years earlier the ratio had been 14 (permits) to 1 (court decisions). Since 1997, the courts openly advertised that they apply a self-invented, informal yet binding 'norm' that they calculate severance payment on the basis of one month pay for each year of service.

Many economists, lawyers, and employers argue that there is no need for two systems and that the official permit system is an unnecessary complication. Unions, on the other hand, want to keep it as a preventive check on dismissals of regular workers, their main constituency.³⁸ The SME sector is in two minds; they favour a simpler system and fewer restrictions on dismissals, but see the official system also as a buffer against expensive settlements in court and lawsuits from employees for wrongful dismissals. In 1993, at the end of his term, the Christian-Democratic Minister of Social Affairs and Employment sent a Memorandum to Parliament in which he announced the

³⁸ A recent attempt to reform the system failed and negotiators in the Social-Economic Council (SER), the country's tri-partite body for consultation, admitted that no 'agreement' on this issue was possible. The employers accused the unions that they wrecked a 'near' agreement at the last moment, expecting the replacement of the Centre-Right coalition by a less-reform minded government with the Labour party, as did happen after the elections of November 2006.

abolishment of the legal requirement on termination of employment contracts. However, responding to union pressure, his Social-Democratic successor withdrew the proposal and argued that the provision served a public policy objective by keeping some control over the inflow into unemployment, lowering the demand on social security and public finance. Instead, he published in 1995 a Memorandum or White Book under the very title *Flexibility and Security*, calling for a new balance between flexible and regular employment and asking the social partners to find a compromise. The Labour Foundation (STAR) — a private foundation combining the central union and employers' organisations for the purpose of mutual coordination and advice to the government — responded by negotiating an agreement. This so-called *Flexicurity Agreement* (1996) became the basis for the *Flexibility and Security Law* (F&S), which became operative in 1999. The law was not so much a new set of arrangements, but rather a codification of developments regarding flexibility in the labour market that were already taking place.

The 1996 Agreement was a package deal. The unions wanted to preserve the system of preventive checks on dismissals of regular contracts. The employers accepted this in exchange for greater flexibility in fixed-term contracts. According to its 'explanatory memorandum' (*Memorie van Toelichting*) the F&S Act intends 'to strike a new balance' and promote labour market flexibility combined with more security for flexible workers, hence to redistribute the costs and risks between employers, temporary work agencies and employees.³⁹ Through the special legal technique of 'semi-mandatory law' or *driekwartbindend recht*, which allows derogation from legal rules and regulations if, and only if, unions and employers sign a collective agreement, the legislator encouraged all interested parties to make a new assessment of their contractual strategies and to renegotiate existing rules and regulations if, as a consequence of the new attribution of opportunities, risks and liabilities embodied in the law, existing contracts were judged too restrictive or too permissive.

The fact that many provisions of the F&S Law (including those on fixed-term contracts) are semi-mandatory is perhaps the most interesting feature as it encourages trade unions and employers to reassess their situation and find customized solutions on a decentralized basis. This practice is in line with the principles agreed in their 'New Course' central agreement of 1993, which tried to set a trend in the direction of 'organized decentralisation' and 'negotiated flexibility' (Visser 1998). This approach to negotiated flexibility relies on the capacity of trade unions to engage in 'informational exchange' (Culpepper 2002) bridging different interests and positions within their own ranks. In various sectors and companies, specific rules and regulations regarding the conditions under which fixed-term work is allowed had been specified in collective agreements before the F&S law became operative. The law presented the need, and opportunity, to renegotiate these 'old' solutions and find a new division in the costs and risks between firms, and (various groups of) employees.

With the F&S law, the possibilities to use consecutive fixed-term contracts were extended and the need for permission to terminate a second consecutive fixed-term contract was abolished; now these contracts end by law. The provision on temporary work has been taken up in article 7:668a of the Dutch Civil Code (CC), and has been termed the 3x3x3-rule, because, first, a maximum of three consecutive temporary contracts can be offered for, second, a maximum of 3 years,

³⁹ Tweede Kamer der Staten-Generaal, *Parliamentary proceedings 1998-99*

which, third, will count as consecutive contracts if they are renewed within three months. After three consecutive contracts, or after three years, the next contract is deemed to be a permanent employment contract. To tackle the previously mentioned 'revolving door' construction, article 7:668a CC states that the 3x3x3 rule applies to two different employers when these can reasonably be considered successive employers (e.g. a TWA).

The Dutch F&S law, aimed at creating a balance between flexibility and security in the labour market, is related to the equal aim at European level, expressed in the 1998 European Employment Strategy (EES)⁴⁰ and the reforms of European labour markets and labour market regulation. Because the F&S law was implemented, the Netherlands is sometimes viewed as a prime example of a 'flexicurity country' by the European Commission (Bekker 2007).

Training contracts are mostly fixed-term contracts as they are terminated when the education ends. The legal foundations of the fixed-term training contract are taken up in the Law on Education and Vocational Education, WEB (*Wet Educatie en Beroepsonderwijs*). When the WEB came into effect in 1996, all schools offering vocational education, apart from some specialised (agricultural) schools, were integrated into Regional Education Centres, ROCs (*Regionaal Opleidingencentrum*). When a person enrolls in a ROC, a contract of education is concluded. When the student starts with the vocational training, the student, the ROC, and the company where the student will work normally conclude a practice contract (*praktijkovereenkomst*). This contract is in many ways regarded as a regular fixed-term employment contract. The difference between the phases where the student is foremost studying and the phase in which he or she is mainly working can be ambiguous. In many CLAs, the difference between these two phases is made explicit (Mulder 2003). Other provisions on training contracts in CLAs usually apply to the duration of the employment contract and duration of the training programme (Smits and Ameele 2007).

Regarding the termination of a fixed-term training contract, this is first and foremost related to the termination of the vocational education. The difference with a regular fixed-term contract is that the termination of the contract is almost always related to a specific point in time (*ontbindende tijdsbepaling*), whereas for a regular fixed-term contract the termination is related to certain conditions (*ontbindende voorwaarde*). This difference ensures that whereas for a regular fixed-term contract the possibilities to terminate are unsure, the possibility of terminating a training fixed-term contract is sure (i.e. completion of the education) (Mulder 2003). Because of the partial overlap with a regular employment contract, the termination procedure of a training contract is a debated issue (Mulder 2003; Mulder 2005). When these issues are brought to court, the discussion is usually about whether the ROC has rightfully terminated the education trajectory, as this automatically leads to the end of the employment contract. Cases where students were found to invest too little in their education, were deemed just; cases in which students have become sick are more ambiguous (Mulder 2005). It is taken up in Dutch law that a permanent employment contract can not be terminated when a worker is ill (art. 7:670 CC). With regard to training contracts, that terminate when the education is terminated, they can be terminated when the student is ill (Mulder 2005, p. 14).

⁴⁰ See website Flexicurity Research Programme/*About Flexicurity*

1.3 The Consequences of Being on a Fixed-Term Contract Compared to an Indefinite Contract

The most important difference between a worker on a fixed-term and a worker on a permanent contract is the lack of dismissal protection (see further 2.4). On the basis of article 7:649 CC an employer is forbidden from making a distinction in employment conditions between workers on a fixed-term and workers on a permanent contract (see also 2.3) unless a distinction can be objectively justified. Another exception concerns agency workers, working on the basis of article 7:690 CC. In addition, certain articles⁴¹ of the 1994 General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling*) apply. The Commission on Equal Treatment deals with cases in which a distinction is deemed unjustified. For example, this Commission presented the results of an investigation in supermarkets in February 2006. They had found that youngsters working in supermarkets rarely obtain a permanent contract, indicating age discrimination.

Despite the fact that inequalities are not permitted by law, it has been found that fixed-term workers, like flexible workers more generally, are less likely to receive training than workers on a permanent contract (Van Velzen 2004). About a quarter of employees with a fixed-term contract report that they have less opportunities for training than their permanent colleagues. Regarding pensions, one out of five fixed-term employees claim they do not build up any pension (CNV 2007).

2. The Legal Regulation of Fixed-Term Work

2.1 The Type of Regulation

The legal framework surrounding fixed-term contracts is taken up in article 7:668a CC and is often termed the 3x3x3-rule, as discussed in section 1. Provision 7:668a CC is of a semi-mandatory nature, however, which means that deviations from the 3x3x3-rule are possible, provided that they are negotiated by social partners in the framework of a collective labour agreement (CLA) (7:668a CC, paragraph 5). This can be a collective agreement on company- or sector-level. Social partners can deviate from each aspect of the 3x3x3-rule as well as the provision on consecutive employers. Possibilities to deviate are taken up in around one-third of CLAs (see section 3), although this does not give information on the number of workers affected. An illustration of how unions and employers can deviate is found in the energy sector, where the number of consecutive fixed-term contracts that can be offered has been extended from 3 to unlimited. Another example is offered by some collective agreements in agriculture, where the period between two fixed-term contracts has been reduced from three months to 7 days.

As with all provisions of Dutch contract law, article 7:668a CC in principle does not apply to employees of a public body (article 7:615 CC), unless provisions apply on the basis of an employment contract, by law, or by decree.

2.2 Objective Reasons for the Use/Extension or the Renewal of Fixed-Term Contracts

The measure in the Directive 1999/70/EC on the need for objective reasons for the renewal of fixed-term contracts are not taken up in article 7:668a. Parties to a CLA however can take up these provisions, as has happened in the CLA for the utilities sector. In the Netherlands, there are

⁴¹ These are the articles 12,13,14,15,20 paragraph 2, and 33.

no special possibilities for concluding fixed-term contracts for disadvantaged workers, such as workers in a reintegration trajectory.

2.3 Other Limits to Control the Use of Fixed-Term Work

Limits to the use of fixed-term contracts are taken up in article 7:668a CC, but deviations are possible via CLA (see above). These limits do not apply for agency workers with an employment contract on the basis of 7:690 CC. The right to re-employment is taken up in article 7:657 CC (see next section). Remedies are the actual employment contract, or can be taken up in a CLA.

2.4. Measures to Guarantee Security for Fixed-Term Worker

Equality is taken up in article 7:649 CC. An employer is forbidden to distinguish between employees on the basis of the temporary nature of their employment contract, unless there is an objective justification for a distinction. This article does not apply to temporary agency workers. As regards access to training there are no special provisions; article 649 applies.

Article 7: 657 CC states that an employer is required to give information to employees on fixed-term contracts regarding vacancies for permanent jobs. This too does not apply to temporary agency workers. With regard to vocational education contracts (see 1.2 above), CLAs sometimes take up a provision stating that students have a right to a job with the firm they were working for during their education (Sol Forthcoming).

2.5. The Termination of Fixed-Term Contracts

If a fixed-term contract is terminated before its original end, the same rules apply as to a permanent contract. Termination before the end is possible when taken up in the employment contract (article 7:667 CC, paragraph 3). This is not termination in the strict sense but rather *opzegging*. The judiciary remedies are equal to those for a permanent contract. The possibility of dissolving a fixed-term contract is taken up in article 7:685 CC, and is also equal to a permanent contract. Article 7:685 CC deals with the dissolving of a contract through the district court.

3. The Role and Content of Collective Agreements Regulating Fixed-Term Work

It is possible to deviate from the provisions laid down in article 668a, on the basis of paragraph 5. Since 1999, the Dutch Ministry of Social Affairs and Employment has commissioned 3 studies into the extent to which provisions in CLAs deviate from the (semi-mandatory) provisions of the F&S Law. Below, we provide a brief overview of the outcomes with regard to deviations from article 7:668a CC. In these studies, a large number of CLAs were scrutinised (120 and 110), covering around three-quarters of all Dutch employees (Smits 2004; Smits and Ameele 2007; Smits and Samadhan 2002). In 2001, 32 percent of the CLAs deviated from the 3x3x3-rule. In most of these CLAs the number of 3 fixed-term contracts has been reduced. In some cases, the period between two consecutive fixed-term contracts has been brought back to zero. In one CLA the maximum period of 3 years has been reduced; in another one the period has been increased (Smits and Samadhan 2002).

For the 2004 report, 110 CLAs were analysed. In 21 of these CLAs deviations were found regarding the maximum number of consecutive fixed-term contracts; in nine the number has been brought down (usually to 2); in twelve CLAs the number has been increased instead (e.g. to 5, 7, or even unlimited in five CLA's). 25 of the 110 CLAs had altered the maximum period of 3 years of fixed-

term contracts. In five CLA's the period has been extended to 5 or 6 years or become unlimited. The final element of the 3x3x3-rule, the period between two contracts, was shortened in 30 of the 110 CLAs (Smits 2004). Comparing the results between 2001 and 2004, the number of deviations has remained basically the same, but where the 2001 response had been towards restriction, the 2004 negotiations had tended to be more lenient. This could reflect business conditions – in 2001 the labour market was tight, whereas 2004 was marked by the economic downturn and a sharp rise in unemployment. The CLAs that increased the number of 3 consecutive fixed-term contracts rose from 21 percent in 2001 to 57 percent in 2004. The derogating CLAs in which the maximum period of three years was extended increased from 12 to 20 percent (Smits 2004, p. V-VI).

The trend between 2004 and 2006 is less clear, but reveals more divergence corresponding with the decentralisation trend in industrial relations. In 2006, 23 of the 110 CLAs contained a deviation from the maximum number of consecutive fixed-term contracts; thirteen CLAs contained a smaller number (mostly 2); in twelve CLAs the number has been increased, in some cases become unlimited⁴². The maximum period has been decreased in 25 CLAs to 1 or 2 years; in thirteen CLAs the maximum period is 5 or 6 years or unlimited. The period of 3 months between two fixed-term contracts has been decreased in 88 percent of the CLAs, mostly to zero or 1 month. In two CLAs, the 3x3x3-rule has been nullified (i.e. no limits on number of contracts or maximum duration); this was the same in 2004 (Smits and Ameele 2007).

Enforcement of the principle of equal treatment lies with the Commission for Equal Treatment, CGB (*Commissie Gelijke Behandeling*), on the basis of the 1994 General Law on Equal Treatment. When an issue is reported to the CGB, they start an investigation. This investigation is based on a legal procedure between two parties. The two parties receive the judgment in which the CGB states whether or not parties have acted in accordance with the Law on Equal Treatment. Sometimes this judgment includes a recommendation.

It is always possible to take issues on equality to court. The judgment of the CGB is not legally binding, although 85% of judgments are followed. In addition, with court cases, the judge is required to incorporate the judgment in an explanation of the verdict. A judge can only deviate from a judgment of the CGB when motivated. In over 70% of cases, the judge follows the judgment of the CGB.

4. Impact of Directive 1999/70/EC on Fixed-Term Work

Article 7:668a CC corresponds with the Directive 1999/70/EC as it regulates the use of fixed-term contracts. In addition, the 1971 Law on Works Councils, WOR (*Wet op de Ondernemingsraden*), contains provisions on equality of fixed-term and permanent contracts regarding thresholds for the implementation of an employees' representative body. Thirdly, articles 7:649 and 7:657 CC on equal treatment and notification procedures (see above) are in line with Directive 1999/70/EC (hereafter: the Directive). To implement the Directive, the Dutch government passed the 'Implementation Law' (*Uitvoeringswet*) in November 2002. I will now discuss the implementation of the Directive per clauses 1-8, as taken up in the Implementation Law (Verhulp 2002).

⁴² These number do not add up to 23 because there are general provisions as well as provisions for specific groups of workers.

Regarding the first clause (goals), the Implementation Law states that no implementation is needed. With regard to the second clause (scope), article III of the Implementation Law states that articles 7:649 and 7:657 apply. Public servants and temporary agency workers are excluded from these articles. The third clause deals with the definition of a fixed-term contract. Dutch law (article 7:667, paragraph 1) does not contain a separate definition of a fixed-term contract. The article states that a fixed-term contract ends on the basis of an objective condition, or after a certain period of time. Clause 3 has not led to specific legislation. The fourth clause on non-discrimination has led to the implementation of article 7:649 CC. The contents of this article have been discussed under 2.4. Clause 5 on measures to prevent abuse is taken up sufficiently in article 7:668a CC; the legislator found that this clause did not require further implementation. To realise implementation of clause 6 on notification of vacancies, the Dutch legislator took up article 7:657 (see 2.4). The provisions on access to training and education were felt to fall under the scope of article 7:649 CC and therefore not in need of implementation (Verhulp 2002, p. 6). Regarding clause 7 on consultation and information rights, the Dutch legislator points to article 1 of the WOR stating that both employees on a fixed-term, as those on a permanent contract should be counted for the threshold. The issues taken up in paragraph 3 of clause 7 on information, articles 31a en 31b contain provisions on the information rights of the works council regarding employment policies of the firm. The final clause, Clause 8, on implementation/enforcement is not in need of implementation. In an assessment of the implementation of the Directive in Dutch law, Verhulp (2002) found that the existing and newly taken up provisions have led to implementation of all clauses of the Directive.

7:668a CC increased flexibility for employers compared to before 1999, but also incorporated a certain measure of security by setting limits to the number and duration of fixed-term contracts, and the possibilities to use a 'revolving door construction' (see above). As a result of the implementation of Directive 1999/70/EC, 7:668a CC is now covered by European labour law. In the *Adeneler* case, the ECJ ruled that the Directive 1999/70/EC also applies to the public sector. In this sense, there is a mismatch with Dutch labour law, as article 7:615 CC states that contract law does not apply to employees in the public sector (Veldman 2007).

The decision of the ECJ in the *Adeneler* case has put the use of fixed-term contracts in a certain perspective (Veldman 2007): the use of fixed-term contracts should be objectively substantiated and only used under special circumstances, when this is required by the special nature of the tasks, or within the framework of social policy such as reintegration. A permanent employment contract should be the main form of protection of an employee. This judgment, which follows from the Directive, can be considered incompatible with the 2006 *Green Paper on Modernisation of Labour Law* from the EC (ibid.).

In the Directive, three measures are taken up to prevent abuse of fixed-term contracts: 1. objective reasons for the renewal of fixed-term contracts; 2. a maximum duration of consecutive fixed-term contracts; and 3. a maximum number of consecutive fixed-term contracts. Member States have to implement at least one of these measures. Article 7:668a does not specify the need for objective reasons for renewal, but does contain provisions regarding the second and third measure.

The *Adeneler* case does not pose many implications for the Dutch situation as the judgment mainly applied to the maximum duration between two fixed-term contracts. The ECJ found 20

days to be too short; article 7:668a provides for a duration of three months, which can be considered sufficiently long (Vandeputte 2007; Veldman 2007). Possible implications should be sought in the goal of the Directive, which is protection against precarious employment relations. As mentioned above, the *Adeneler* case has brought to the fore the fact that the ECJ aims to maintain the goals of the Directive in a strict sense by emphasising the importance of the permanent employment contract.

Article 668a CC is not in conflict with the Directive, although it does not incorporate the requirement of objective justification of renewal of a fixed-term contract. The Dutch legislator has opted for a system restricting the maximum duration of consecutive fixed-term contracts (3 years) as well as the number of times a fixed-term contract can be renewed (3 times). However, paragraph 5 of article 668a CC could lead to undesirable situations in light of the Directive, as this paragraph states that social partners can deviate from the provisions of article 668a CC within a CLA. Consequently, a provision similar to the one judged within *Adeneler* could be taken up in a CLA. For example, in the sectoral CLA for the utilities sector (2005-2007), it is provided that an unlimited number of fixed-term contracts can be offered for an unlimited period of time. However, this CLA poses four conditions under which a fixed-term contract can be negotiated. These four conditions are in line with the first measure of the Directive, as well as *Adeneler*. However, because there are no other restrictions, this could lead to abuse on the side of employers.

Provisions in a CLA are also required to adhere to the goals of the Directive in order to prevent abuse of consecutive fixed-term contracts. If this is not the case, a judge cannot apply the CLA-provision; the general rules of article 7:668a, paragraph 1 should be applied (Vandeputte 2007, p.97). It has been stated that the Dutch legislator assumes that the power balance between the social partners will assure provisions that incorporate the interests of both employers and workers. Therefore, unreasonable deviations are unlikely (Veldman 2007).

List of abbreviations

ABU	<i>Algemene Bond Uitzendondernemingen</i> , Association of Temporary Work Agencies
CBS	<i>Centraal Bureau voor de Statistiek</i> , Statistics Netherlands
CC	Civil Code
CLA	Collective Labour Agreement
CNV	<i>Christelijk Nationaal Vakverbond</i> , Christian National Union Confederation
De Unie	National union confederation for Staff and White-collar Employees
F&S Law	<i>Wet Flexibiliteit en Zekerheid</i> , Law on Flexibility and Security
FNV	<i>Federatie Nederlandse Vakbeweging</i> , Confederation of Dutch Unions
NBBU	<i>Nederlandse Bond van Bemiddelings- en Uitzendondernemingen</i> , Dutch Federation of Intermediary and Staffing Agencies.
OSA	<i>Organisatie voor Strategisch Arbeidsmarktonderzoek</i> , Institute for Labour Studies
ROC	<i>Regionaal Opleidingencentrum</i> , Regional Education Centre
SER	<i>Sociaal-Economische Raad</i> , Social-economic Council
SMU	<i>Stichting Meldingsbureau Uitzendbranche</i> , Foundation of Reporting Bureau in the Agency Work Sector
STAR	<i>Stichting van de Arbeid</i> , Labour Foundation
Stiplu	<i>Stichting Bedrijfstakpensioenfonds voor Langdurige Uitzendkrachten</i> , foundation sector-wide pensionfund for long-term agency workers.
TAW	Temporary Agency Work

TWA	Temporary Work Agency
WAADI	<i>Wet Allocatie Arbeidskrachten Door Intermediairs</i> , Law on the Allocation of Labour through Intermediaries
WEB	<i>Wet Educatie en Beroepsonderwijs</i> , Law on Education and Vocational Education
WOR	<i>Wet op de Ondernemingsraden</i> , Law on Works Councils

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Chapter 5: Spain

(Fernando Valdés Dal-Ré - Jesús Lahera Forteza)

1. The National Context

1.1 Statistics

Fixed-term as a percentage of total employees and other FTC percentages:

The rate of fixed-term contracts in Spain in the last few years has oscillated between 32 and 35 per cent of the active population. In 2006, it stood at 34.03 per cent. A decrease in this percentage is detected during 2007, standing at 32 per cent thanks to the labour reform.

Contracts that are used most are contracts for work or services rendered and seasonal contracts; between the two, they cover 85 per cent of contracts

Internship contracts occupy 7.5 per cent of contracts; their use in the public sector can be highlighted.

Training contracts are used modestly; approximately 4 per cent of contracts.

How fixed-term contracts are distributed among women/men, by age, sectors:

According to a report from the technical cabinet at UGT (Spanish trade union), using official data on fixed-term contracts for the year 2006:

Men: 32.04 per cent fixed-term contracts

Women: 36.74 per cent fixed-term contracts.

There are more fixed-term contracts among women

16 to 19 years old: 82 per cent fixed-term contracts

20 to 24 years old: 62.4 per cent fixed-term contracts

25 to 29 years old: 46.5 per cent fixed-term contracts

30 to 39 years old: 33.7 per cent fixed-term contracts

40 to 49 years old: 23.08 per cent fixed-term contracts

50 to 59 years old: 17 per cent fixed-term contracts

60 to 69 years old: 14 per cent fixed-term contracts

The high rate of temporary employment among young people must be pointed out. As age increases, the rate of fixed-term contracts decreases.

Private sector: 35.08 per cent fixed-term contracts

Public sector: 26.2 per cent fixed-term contracts

The rate of temporary employment in the private sector is higher; however, the excessive rate of temporary staff in public employment must be pointed out.

Agriculture: 61.04 per cent fixed-term contracts

Construction: 56.63 per cent fixed-term contracts

Domestic service: 50 per cent fixed-term contracts

Hotel and restaurant trade: 44.03 per cent fixed-term contracts

Business services: 30.87 per cent fixed-term contracts

Trade: 28.20 per cent fixed-term contracts

Education: 26.76 per cent fixed-term contracts

Transport: 26.08 per cent fixed-term contracts

Mining: 21.20 per cent fixed-term contracts

Banking: 15.54 per cent fixed-term contracts

As the figures show, the rate of temporary employment varies per sector, but is significant in all sectors. The high rate of temporary employment in agriculture, construction, hotel and restaurant trade, and the services sector may be pointed out.

Average duration of fixed-term contracts:

Out of the total number of fixed-term contracts and according to the same source:

1 day: 0.37 per cent

2 days to 1 month: 2.37 per cent

1 to 3 months: 13.04 per cent

4 to 6 months: 18.93 per cent

7 to 11 months: 5.78 per cent

1 to 2 years: 9.43 per cent

2 to 3 years: 1.41 per cent

More than 3 years: 2.90 per cent

Therefore, the average oscillates between 1 and 8 months.

Studies on whether fixed-term workers move on to permanent jobs:

From June 2006 to January 2007 a programme for the conversion of fixed-term employees into permanent employees has been undertaken in Spain with subsidies for undertakings (800 Euros/year per conversion) with positive results. According to official data, 882,970 fixed-term employees have become permanent employees in the last 8 months.

Studies on voluntary fixed-term work:

The principle of voluntary signing of fixed-term contracts is established in Spain.

Employers' preference for certain FTC, for example training contracts:

The contracts preferred by employers are contracts for work or services rendered (autonomous and self-standing fixed-term work or services) and seasonal contracts (circumstances of production, excessive number or orders or accumulation of tasks, with a maximum duration of 6 months).

1.2 The National Debate on Fixed-Term Work

The attitudes towards fixed-term employment (from the government, social partners) from a historical perspective:

From 1984 to 1994, a contract existed for the promotion of fixed-term employment among the unemployed. Fixed-term employees could be contracted freely, for no reason and without justification. This policy increased temporary employment.

Since 1994, this contract no longer exists, and contracts have grounds to be fixed-term (work or services rendered, seasonal and internship) or are aimed at specific collectives (domestic service, trade mediators, artists, sports, disabled, scientists, etc.). However, temporary employment stands at the same levels than the 1984-1994 period. Overcoming the policy for the direct promotion of fixed-term employment has not led to a substantial decrease in the levels of temporary employment.

Fixed-term work and recent labour market reforms:

After a social pact between the most representative trade unions, the most representative employers' organisations and the Government, Decree Law 5/2006, later Law 43/2006, reformed fixed-term contracts by means of a far-reaching measure: imposition of limits to successive fixed-term contracts, as will be explained in detail in section 2.3 below.

In turn, this 2006 labour reform has started a subsidy programme for undertakings contracting permanent employees.

The combination between the limit to successive fixed-term contracts and subsidies for permanent employment is having positive results, with a significant increase in open-ended contracts (1,646,982 new open-ended contracts, directly or through conversion, in 8 months) and a reduction in the rate of temporary employment (from 34 to 32 per cent).

Links with European and national employment policies, including references to flexicurity:

The intention of the 2006 labour reform was to introduce a greater degree of 'flexicurity' in our labour market. The increase of permanent employment and the improvement of unemployment protection and the salary guarantee fund are policies that are inspired by this notion. It is quite usual to use the term 'flexicurity' in the Spanish labour policy debate. The high rate of temporary

employment forces policies in this direction, advancing towards more stable employment, with greater flexibility and, in turn, security for the worker. It is significant that the study carried out by the council of experts prior to the 2006 labour reform, gave the following title to its conclusions: 'More and better employment in a new social and economic scenario: Towards effective labour flexibility and security'. The report was published by the Ministry of Employment in 2005.

Special legislation on fixed-term training contracts:

a) *Fixed-term training contracts for training* (art 11.2 Statute of Workers' Rights – ET, using the Spanish acronym): Contracts for young persons without academic qualifications, between the ages of 16 and 21, or exceptionally 24, with the aim of receiving theoretical training. The duration of this contract lies between a minimum 6 months and a maximum of 2 years. The salary received is specified in collective agreement or, otherwise, an agreed salary that can not be less than the minimum salary for the effective working time. At least 15 per cent of the working day must be dedicated to training courses.

b) *Fixed-term training contracts for work-experience* (art 11.1 ET): Contracts for young university or vocational training graduates with the aim of receiving practical training. The duration of this contract lies between a minimum 6 months and a maximum of 2 years. The salary received is specified in collective agreement or, otherwise, may be less than for a comparable employee, down to 60 and 75 per cent of the salary for the first and second years, respectively.

1.3 The Consequences of Being on a Fixed-Term Contract Compared to an Open-Ended Contract

The most important differences between the two groups and the benefits, if any, that fixed-term workers do not enjoy:

Significant differences exist at the termination of fixed-term and open-ended contracts: termination of fixed-term contracts is undertaken through a report and the payment of 8 days salary per year, whilst for open-ended contracts, dismissal oscillates between 20 days salary per year in the case of fair dismissal (arts. 52-54 ET), and between 33 and 45 days salary per year in the case of unfair dismissal (art. 56 ET) depending on the type of open-ended contract. The exercise of labour rights is also conditioned by stable or permanent employment. For instance, all the rights to reconcile family and labour life (permission to leave, reduction in working hours, extended leave of absence, etc.) are feasible with permanent employment and difficult to exert with temporary employment. From the trade union perspective, the capacity to affiliate and participate is greater for permanent employees than for temporary employees.

Formally, art. 15.6 ET acknowledges the principle of equal treatment and non-discrimination between temporary and permanent employees, including calculation of seniority. The exercise of certain labour rights may be proportional to the duration of the contract; for instance, this is the case for annual leave.

2. The Legal Regulation of Fixed-Term Work

2.1 The Type of Regulation

The form of regulation (law, collective bargaining, ordinance etc):

Grounded fixed-term contracts (*work or services rendered, seasonal, internship due to substitution and internship due to vacancy*) are regulated in art. 15 of the Statute of Workers' Rights (ET, in the Spanish Acronym) and in Decree 2720/1988 on fixed-term contracts.

Part-time grounded fixed-term contracts are regulated in these regulations and related to art. 12.2 Statute of Workers' Rights

Fixed-term contracts of *Temporary Employment Agencies* are regulated in arts 6.2 and 10 of Law 14/1994 regarding temporary employment agencies and in Decree 4/1995 regarding temporary employment agencies

Training contracts are regulated by art. 11 Statute of Workers' Rights and in Decree 488/1998 regarding training contracts.

Workers' collectives with fixed-term contracts are regulated in:

- a) *Sportsmen* (art 6. Decree 1006/1985)
- b) *High-level management* (art. 6 Decree 1382/1985)
- c) *Household domestic service* (art. 4 Decree 1424/1985)
- d) *Artists* (art. 5 Decree 1435/1985)
- e) *Trade mediators* (art. 3 Decree 1438/1985)
- f) *Convicts in prison establishments* (art. 7 Decree 782/2001)
- g) *Catholic religion teachers in public education centres*: (international treaty between Spain and the Holy See)
- h) *University teaching staff* (arts 48-50 Organic Law 6/2001)
- i) *Scientific researchers*: (art. 17 Law 13/1986)
- j) *Disabled persons*: (first additional provision Law 43/2006)

The scope of the regulation:

- o Public/private sector
- o Exemptions for small employers or training contracts

Regulation of fixed-term contracts is the same in the public and private sectors. The only difference to this regard is that an ungrounded fixed-term contract (illegal) in the private sector becomes an open-ended contract, whilst in the public sector, pursuant to the principles of selection in public employment, it becomes a non-permanent open-ended contract until the corresponding vacancy is taken definitely. Hence, the application of the consequences of illegal fixed-term contracts, established in art. 15.3, is different in the private and public sectors.

Regulation of fixed-term contracts is the same for all undertakings; the number of employees is not taken into consideration. No specific provision exists for the small enterprise.

Training contracts are subject to a maximum number of employees depending on the total number of staff and to be determined in collective agreement. If the collective agreement does not

set a maximum number, the table contained in art. 7.2 Decree 488/1998 is implemented (up to 5 employees, 1; 6-10, 2; 11-25, 3; 26-40,4; 41-50,5; 51-100,8; 100-250, 8 per cent; 250-500, 6 per cent; more than 500, 4 per cent)

Possibilities to repeal through collective agreements; regulatory function of collective agreements (limiting percentages with regard to training):

Collective agreements in Spain must respect the grounds and types of fixed-term contracts; there is no possibility to repeal. Collective agreement can not prevent grounded fixed-term contracts nor create new fixed-term contracts as ruled by the Spanish High Court in sentences SSTS 26-X-1999, 17-XII-2001, 23-IX-2002 and 7-III-2003, amongst others.

The regulatory roles of collective agreements in Spain are the following:

As established by art 15.1.a ET, the sectoral collective agreement or the collective agreement at undertaking level may identify, within the modality of specific work or service, the autonomous and self-standing work or services that are object to contract.

As established by art 15.1.b ET, for seasonal contracts, the sectoral collective agreement may specify the activities for which seasonal employees may be contracted and may set general criteria for the adaptation between the total number of employees and employees with this type of contract, as well as increase the maximum duration of seasonal activities to a maximum twelve months.

In general, following Decree-Law 5/2006 and Law 43/2006, art 15.5 ET entrusts the collective agreement to establish limits to successive fixed-term contracts for a given job.

Simultaneously, art 15.7 ET invites the collective agreement to establish objective criteria and commitments to convert fixed-term contracts into open-ended contracts, as well as mechanisms to access professional training. Art. 15.8 ET also invites the conventional conversion of seasonal employees to permanent seasonal employees. Finally, in the framework of art. 49.1.c ET, collective bargaining may increase compensations for the termination of fixed-term contracts (more than 8 days salary per year)

Collective bargaining may also regulate other issues regarding fixed-term contracts that are not established by regulation. However, as mentioned above, collective bargaining may not, in any case, alter the grounds for fixed-term contracts or create new contracts that are not established in labour regulations.

In the case of training contracts, art. 11 ET allows the sectoral collective agreement to modify the duration of work-experience and training contracts, and it allows collective agreement at undertaking level to establish a maximum number of training contracts.

2.2 Objective Reasons for the Use, the Extension or the Renewal of Fixed-Term Contracts

Reasons for the conclusion, extension or renewal of fixed-term contracts:

Fixed-term contracts established by current Spanish regulations are the following:

Fixed-term contracts with grounds for the fixed-term:

a) Contract for *specific work or services rendered* (art. 15.1.a Statute of Workers' Rights, from now on ET): The grounds for the contract are undertaking autonomous and self-standing work or services with an uncertain duration. These grounds, pursuant to case law, cover specific commissions in constant productive cycles, work and services in inconstant productive cycles such as the construction sector, trade contracts and administrative concessions, autonomous and substantial public plans and internal production programmes that do not invade the permanent and constant activity of the undertaking. The contract ends when the work or service rendered ends with a compensation for the employee of 8 days salary per year in service.

b) *Seasonal* contract (art. 15.1.b ET): The grounds for this contract respond to circumstances in the market, accumulation of tasks or an excessive number of orders. The contract, pursuant to case law, may be used to face unforeseeable production circumstances and transitional shortfalls in staff, especially in vacation periods. The seasonal contract is fixed for the duration agreed by the parties with a maximum of 6 months in any 12-month period, and may be extended to 12 months in any 18-month period by collective agreement for seasonal activities. With this maximum, the contract may be extended once. Termination of the contract carries the same compensation as the contract for work or services rendered.

c) *Internship contract due to substitution* (art. 15.1.c ET): The grounds for this contract are the substitution of employees who have a suspended contract with their post reserved, such as, for instance, sick leaves or maternity leaves. The contract is terminated when the person substituted returns or the reasons for suspension and its maximum period end without return. No compensation exists for this contract.

d) *Internship contract to cover a vacancy* (art. 4 Decree 2720/1998): The grounds for this contract are covering a vacancy during employee selection processes. The maximum duration of this contract in the private sector is 3 months. In the public sector, maximum duration is established by the administrative regulations on vacancy selection. No compensation exists for this contract.

Fixed-term contracts for specific collectives of workers

The following collectives have their own fixed-term contracts, pursuant to the aforementioned regulation, without prejudice to open-ended contracts being possible in some cases:

a) *Sportsmen* (art. 6 Decree 1006/1985). Fixed-term contracts are compulsory

b) *High-level management* (art. 6 Decree 1382/1985). Freedom between fixed-term and open-ended contract

c) *Household domestic service* (art. 4 Decree 1424/1985). Renewable annual contracts.

d) *Artists* (art. 5 Decree 1435/1985). Special contract for work or services rendered.

e) *Trade mediators* (art. 3 Decree 1438/1985). Fixed-term contract with a maximum duration of 3 years.

f) *Convicts in prison establishments* (art. 7 Decree 782/2001). Special contract for work or services rendered

g) *Catholic religion teachers in public education centres* (international treaty between Spain and the Holy See). Contract per school year.

h) *University teaching staff* (arts. 48-50 organic law 6/2001). Different types of fixed-term contracts.

i) *Scientific researchers*: (art. 17 Law 13/1986). Contracts per project.

j) *Disabled persons*: (First additional provision Law 43/2006). Fixed-term contract.

Part-time fixed-term contracts:

All fixed-term contracts, except training contracts, may be part-time (art. 12.2 ET). Furthermore, there are two specific part-time fixed-term contracts that are connected between each other: the *partial retirement* contract, for the pensioner reducing working hours, and the *relief* contract for the unemployed person covering, at least, the reduced working hours.

Temporary Employment Agency contracts:

Temporary Employment Agencies (TEA) are legal in Spain since 1994. They have since then been regulated by Law 14/1994, substantially reformed in 1999 (LETT, in its Spanish Acronym).

TEA can only subscribe availability contracts with user undertakings in the cases established in art. 15 ET, as required by art. 6.2 LETT. Therefore, employees can be requested to a TEA in the following cases:

a) Autonomous and self-standing *work or service* of uncertain duration. Refer to section 1.

b) *Seasonal* grounds due to production circumstances, excess orders or an increase in demand, with an agreed termination and a maximum duration of 6 months in every 12-month period. Refer to section 1.

c) On the grounds of *internship due to substitution* in cases of contract suspension with job reservation, and *internship due to vacancy*. Refer to section 1.

The employment contract signed between the TEA and the employee usually coincides on the grounds and duration of the availability contract, although it may also be open-ended (art. 10.1 LETT). Hence, the signing of *work rendered, seasonal or internship* contracts with employees of the TEA is usual. When the contract has been signed for a fixed term, the employee receives a compensation of 12 days salary per year in service at the termination thereof (art 11.2 LETT).

The possibility of holding fixed-term contracts on subjective grounds ('handicapped' workers, the age of the workers, etc.):

Only a contract to promote fixed-term employment for the disabled exists, regulated by First additional provision Law 43/2006. It is a 1 to 3-year contract aimed at this collective.

2.3 Other limits to control the use of fixed-term work

Time limits, possibility of extending the contract, number of consecutive contracts, share of the workforce, sectors, priority right to re-employment, etc.:

With the aim of reducing the level of fixed-term employment and transposing Directive 1999/70/EC, the recent 2006 labour reform articulates a legal limit to the number of consecutive fixed-term contracts with a given worker. Art. 15.5 ET establishes that *employees who in a 30-month period have been contracted for more than 24 months, with or without resolution to continue, for the same job in the same undertaking, by means of two or more fixed-term contracts,*

either directly or through availability of temporary employment agencies, shall be granted the condition of permanent employees. The contents of this section shall not apply to the use of training, relief or internship contracts. The elements of the case for art. 15.5 ET are:

- a) subjective: contracts with a given employee;
- b) contractual: two or more fixed-term contracts, direct or through TEA, consecutive; not applicable to training, relief or internship contracts;
- c) objective: contracts in the same undertaking and job; and
- d) time: 24 months in any 30-month period.

The concurrence of these four elements implies the automatic conversion from fixed-term to permanent employee.

Finally, collective agreements must establish similar limits to successive fixed-term contracts with the same employees for the same job, as will be analysed in detail in section 3 of this guide.

Remedies in cases of abuse (lack of objective grounds, abuse of successive fixed-term contracts, lack of written form):

Illegal fixed-term contracts, due to a lack of grounds for them, imply the conversion of employees into permanent employees by art. 15.3 ET.

Fixed-term contracts without a written form imply conversion of the employee into a permanent employee unless the undertaking may prove the temporary nature of the contract, as established by art. 8.2. ET.

Exceeding the time limit to successive fixed-term contracts as established in art. 15.5. ET, analysed above, implies the automatic conversion of the employee into a permanent employee.

These conversions into permanent employee open up the possibility to employees of interposing dismissal actions in order to receive the corresponding compensation (45 days per year) if they do not continue in the undertaking.

2.3. Measures to Guarantee Security for Fixed-Term Workers

Equal treatment:

Art. 15.6 ET guarantees equal treatment and non-discrimination between fixed-term and permanent employees. The calculation of seniority in the undertaking must be identical. Some labour rights may be exerted proportionately to the duration of the contract, such as annual leave.

Access to training:

Fixed-term employees have formal access to training in the undertaking. In practice, the exercise of this right is difficult for the fixed-term employee. Art. 15.7 ET invites collective agreement to ensure professional training to fixed-term employees. This is an important issue towards collective bargaining.

Information on vacancies for open-ended contracts and the 'right' to be contracted:

Art. 15.7 ET obliges the undertaking to inform fixed-term employees on the vacancies existing in the undertaking with the aim of guaranteeing equal opportunities to access these vacancies. Information may be through a public notice board or by means of the instruments established in collective bargaining.

2.4 Termination of Fixed-Term Contracts

The conditions under which fixed-term contracts can be terminated before the end of the period stipulated in the contract (by the employer, by the employee):

The general regulation on dismissals applies to fixed-term contracts. During the period in which the contract is valid, the undertaking can dismiss the employee through the means established: dismissal on economic, technical, organisational or production grounds, established in arts. 52.c and 51 ET; an objective dismissal, established in art. 52 ET; or a disciplinary dismissal, established in art. 54 ET.

The fixed-term employee has the right to resign and leave the undertaking at any moment during the period in which the contract is valid, handing in their notice to the undertaking at the time established by collective agreement.

Judicial measures in the case of termination before the end of contract:

The fixed-term employee whose contract is terminated before the end may always bring a lawsuit for dismissal. If the judge declares that the dismissal is unfair, compensation will be 45 days salary per year in service, which is normally impossible as the undertaking will choose to readmit the employee as the contract will have ended by the time the sentence is issued. Salaries until the sentence is issued are paid until the end of the fixed-term contract.

3. The Role and Content of Collective Agreements Regulating Fixed-Term Work

Legal possibilities to implement or to deviate from legislation:

Art 15.1.a ET establishes that the sectoral collective agreement or the collective agreement at undertaking level may identify, in the case of contracts for work or services rendered, the autonomous and self-standing work or services that may be object to contract.

Art 15.1.b ET establishes that, in the case of seasonal contracts, the sectoral collective agreement may specify the activities for which seasonal employees may be contracted and set general criteria to adapt the volume of this type of employees with respect to the total number of employees, as well as increasing the maximum duration of seasonal activities up to twelve months.

In general, following Decree Law 5/2006 and Law 43/2006, art. 15.5 ET entrusts the collective agreement with establishing the limit of consecutive fixed-term contracts for a given job.

Simultaneously, art 15.7 ET invites the collective agreement to establish objective criteria and commitments to convert fixed-term contracts into open-ended contracts, as well as mechanisms to access professional training. Art. 15.8 ET also invites conventional conversions from seasonal contracts to permanent seasonal contracts. Finally, in the framework of art. 49.1.c ET, collective bargaining may increase compensations for termination of a fixed-term contract.

Collective bargaining may regulate other issues regarding fixed-term contracts that are not established in regulation. However, as mentioned earlier, collective bargaining may not, in any case, alter the grounds for fixed-term contracts or create new contracts that are not established in labour regulations.

With regard to training contracts, art. 11 ET allows sectoral collective agreements to modify the duration of work-experience and training contracts; it also allows collective agreements at under-taking level to establish a maximum number of training contracts.

Content of the collective agreements' regulation of fixed-term work:

Conventional clauses may treat the following, amongst other issues:

- a) Identification of the contract for work or services rendered;
- b) Identification of the seasonal contract;
- c) Percentage of seasonal employees in total staff;
- d) Increase in the maximum duration of seasonal contract;
- e) Changes in the duration of training contracts;
- f) Maximum number of training contracts;
- g) Increase in compensations for the termination of a fixed-term contract;
- h) Percentage of fixed-term employees in total staff;
- i) Limits on the use of temporary employment agencies; and
- j) Successive subrogation of outsourcing contracts with contracts for work rendered.

Conventional clauses may set limits to successive fixed-term contracts for a given job, by the following means:

A maximum number of fixed-term contracts for a given job without a reference period. Contracts, direct or from temporary employment agencies, with or without continuity, are added up to the number established. For instance, 4 consecutive fixed-term contracts for the same job.

Maximum duration in the chain of fixed-term contracts for a given job without a reference period. The durations of fixed-term employment, with or without continuity, are added until the maximum duration established is reached. For instance, 24 months of successive fixed-term contracts for the same job.

Maximum number of fixed-term contracts for a given job with a reference period. Contracts, direct or from temporary employment agencies, with or without continuity, within a limited time period, are added. For instance, 4 consecutive fixed-term contracts for the same job within a 30-month period.

Maximum duration in the chain of fixed-term contracts for a given job with a reference period. The durations of fixed-term employment, with or without continuity, within a limited time period, are added. For instance, 24 months of successive fixed-term contracts for the same job in a 30-month period, transferring the legal limit to the given job.

Maximum number or maximum duration in the chain of the same fixed-term contract for a given job. The contracts or durations of one contract only, that which is used the most for that job, are added. For instance, 12 months of temporary contracts in 24 months, or 3 temporary contracts in a given job.

Once the successive use of fixed-term contracts in a given job has been defined, subject to the limit established, the collective agreements will associate the exceeding of this limit to either the conversion of the employee into permanent employee or a commitment to a future open-ended contract. Obviously, the addressee of this conversion from fixed-term to open-ended contract will be the last person or the next person contracted for that job, without effect on other fixed-term employees who occupied that job along the chain. The last or next person contracted will become a permanent employee when the limit is exceeded.

Collective bargaining may promote the conversion from fixed-term to permanent by means of the following clauses:

- a) Exceeding the conventional limit to the succession of fixed-term contracts;
- b) Conversion to permanent employee once the maximum duration of fixed-term contracts has been exceeded;
- c) Conversion of seasonal employee to permanent seasonal employee;
- d) Conversion of employee in work-experience or in training into permanent employee;
- e) Obligation of open-ended contract of a new outsourced employee in a succession of outsourced contracts;
- f) Trial periods instead of prior fixed-term contracts; and
- g) Commitments with regard to interns in the public sector.

Enforcement of the principle of equal treatment:

For many years, the Spanish Constitutional Court has rejected the exclusion of the collective agreement of fixed-term employees (sentences SSTC 52/1987, 136/1987 and 177/1993).

The acknowledgement of the principle of equal treatment between fixed-term and permanent employees in art. 15.6 ET has overcome jurisprudence that denied the seniority bonus to fixed-term employees. The Spanish High Court now fully acknowledges the seniority bonus to fixed-term employees (sentences SSTS 7-X-2002 and 23-X-2002, amongst others).

The equal calculation of seniority established in art. 15.6 ET has led to case law that counts all the time in successive fixed-term contracts of an employee in an undertaking, to the effects of salary (sentences SSTS 16-V-2005, 7-VI-2005 and 28-VI-2005).

Therefore, and especially since Directive 1999/70, Spain has advanced substantially in the acknowledgement and enforcement of the principle of equal treatment between fixed-term and permanent employees.

4. Impact of Directive 1999/70/EC on Fixed-Term Work

At the time of implementation:

Directive 1999/70 has been adequately transposed in Spain:

- a) The principle of equal treatment and non-discrimination between fixed-term and permanent employees is, as explained above, established in art. 15.6 ET. See section 2.3.
- b) Information of vacancies to fixed-term employees is acknowledged in art. 15.7 ET, as explained above. See section 2.3.
- c) Prevention on the abusive use of successive fixed-term contracts is achieved, since the 2006 labour reform, through the limiting of successive fixed-term contracts. See section 2.3 for a detailed explanation

After Adeneler:

The *Adeneler* sentence has a great impact in Spain. Spanish case law adopts the *20-day view* in the legal control of successive fixed-term contracts with a given worker, which this sentence declares to be inadequate under Directive 1999/70. This case law may be summarised into four rules arising from sentences SSTs 20th and 21st February 1997, 25th March 1997, 24th April 1997, 5th and 29th May 1997, 21st January 1998, 15th February 2000, 22nd April 2002 or 28th February 2005, amongst others:

1st. If no resolution of continuity exists in successive fixed-term contracts, all successive contracts must be examined.

2nd. If an interruption that is shorter than 20 days, corresponding to the expiry period of the dismissal action, has taken place in the chain of successive contracts, all successive contracts must be examined.

3rd. If an interruption that is longer than 20 days, corresponding to the expiry period of the dismissal action, has taken place in the chain of successive contracts, only the contracts held after the interruption shall be controlled and examined.

4th. However, legal control may be undertaken for the whole chain of contracts, without looking into the duration of interruption in a precise manner, in those exceptional cases where an essential unity of the employment bond can be proven.

These four rules, strictly originated in case law, have been the starting point to locate fraudulent use of successive fixed-term contracts and have determined the time period to be counted to the effect of setting compensation for unfair dismissal or seniority of the fixed-term employee in the undertaking with all its legal consequences.

The arguments raised by the Court of Justice of the European Communities (from now on, CJEC) in the *Adeneler* case may be transferred to this jurisprudence with significant conclusions. The 20-day view in case law regarding fixed-term contracts is 'a strict and restrictive definition' that 'may allow keeping employees in temporary employment for years, and undertakings to use successive fixed-term contracts in an abusive manner', with the risk of rendering inefficient the national measures implementing clause 5, Directive 1999/70/EC, that is, in our sphere, with regard

to prevention of abuse, the new art. 15.5 ET that imposes limits to legal successive fixed-term contracts, and with regard to penalties to frauds, the older art. 15.3 ET, which penalises illegal successive fixed-term contracts, both measures leading, as a consequence, to the conversion of the fixed-term employee into a permanent employee. The *20-day* view in our case law does not achieve the useful effect of this European regulation. Hence, in view of this Community jurisprudence, the view in our case law must be overcome with regard to the legal control of illegal successive fixed-term contracts, and discarded in the legal control of legal and conventional limits imposed on legal, successive fixed-term contracts. We believe this is a reasoned conclusion that may be deduced from the solid arguments laid out by sentence CJEC of 4th July 2006, which should influence Room IV of our High Court. Hence, we can only expect new jurisprudence of the Spanish High Court pursuant to the *Adeneler* sentence.

In turn, this sentence and sentence CJEC of 7th September 2006 require, in view of Directive 1999/70, compensation, at least, to non-permanent employees with open-ended contracts in the public sector, who hold an illegal fixed-term contract, when their vacancy is taken. In Spain, non-permanent employees with open-ended contracts in the public sector are not granted compensation when their vacancy is taken and the contract terminated. Therefore, these sentences may have an impact on new case law that grants compensation to these public sector workers.

How national systems have reacted:

Until now, no regulation or sentence of the Spanish High Court exists that has reacted to the *Adeneler* sentence with regard to either the control of successive fixed-term contracts or to non-permanent employees with open-ended contracts in the public sector. Nevertheless, a change in case law may be expected from this sentence with regard to the calculation in successive fixed-term contracts, overcoming the current 20-day view in case law, and to the termination of the open-ended contract of a non-permanent employee, granting compensation to the employee when the vacancy is taken.

Chapter 6: Sweden

(Samuel Engblom)

1. The National Context

1.1 Statistics

1.1.1 The Incidence of Fixed-Term Work in Sweden

According to the Swedish Labour Force Survey (2006)⁴³, just less than 17 per cent of all employees have fixed-term contracts, as compared to 10 percent 15 years ago.⁴⁴ Compared to other EU countries, Sweden is just above the average when it comes to fixed-term employment.⁴⁵ As in other countries, it is the service sector, both private and public, that shows the highest incidence of fixed-term employment, 19 per cent, while the share in manufacturing is 9 per cent.

Fixed-term employment is more common among women (18 per cent) than among men (14 per cent), and more common among young people (16-24 years of age), where 58 percent have fixed-term jobs, than in other age groups. Fixed-term work is, nonetheless, far from only a phenomenon among new entrants in the labour market. The biggest increase over the past 15 years has occurred among 25-34 year-olds. A 2004 study based on data from the period 1991-1999 also found that fixed-term employment is more common among foreign-born workers than among Swedish-born workers.⁴⁶

The increase in fixed-term employment has occurred simultaneously with a change in the types of temporary contracts. Between 1990 and 2001 the number of substitute fixed-term jobs, where a worker replaces another worker who is on leave, was more or less stable if changes in the general demand for manpower is considered, while on-call jobs, project contracts and probationary contracts increased.⁴⁷ There are also important differences between men and women. In 2001, substitute contracts accounted for 40 percent of female fixed-term work but only 20 percent of male fixed-term work. Also on-call work was more common among female fixed-term workers (25 percent) than among men (<20 percent). Project contracts were more common among men (>20 percent) than among women (12 percent), as were probationary contracts.

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⁴³ <http://www.scb.se/statistik/AM/AM0401/2007M01/AKU2006.pdf>.

⁴⁴ TCO (2007) *Anställningsformernas utveckling 1991-2006*. TCO, Stockholm.

⁴⁵ According to Eurostat definitions, in 2005 the share of fixed-term contracts (% of total employment) was 16.0 for Sweden as compared to 14.3 for the EU25. *Employment in Europe 2006*, Office for the Official Publications of the European Communities: Luxembourg.

⁴⁶ Walette, M (2004a), 'Tillfälliga jobb som en ny form av segregering på arbetsmarknaden?' *Arbetsmarknad och Arbetsliv*, årg 10 nr 4, pp.249ff.

⁴⁷ Walette, M (2004b) *Temporary jobs in Sweden. Incidence, Exit and On-the-Job Training*. Lund Economic Studies number 120. Lund University, Lund, pp. 9ff. The study is based on survey data from the Labour Force Survey, why categories used in the does not correspond to legal categories of fixed-term contracts.

1.1.2 Transition from Fixed-Term Work to Indefinite-Term Contracts

A commonly used argument in favour of fixed-term contracts is that they can serve as a stepping-stone to enter the labour market. Employers can use temporary contracts as a screening device in order to find workers who they are willing to offer an indefinite-term contract. It can also be a way for workers to gain experience that will allow them to compete for indefinite-term positions.

Research done on Sweden in the 1990s showed that there were great differences in transition rates between different types of fixed-term contracts.⁴⁸ It should come as no surprise that probationary contracts showed a much higher rate of transition to indefinite-term contracts than other types of temporary work. Within six months of the first observation, more than two-thirds of employees with probationary contracts had already landed an indefinite-term contract. This is a natural effect of the legal framework for this kind of contracts, which put a time limit on 6 months before the employer must decide whether they want to keep the employee or not (below 2.2.2).

For other types of fixed-term work, the figures were less encouraging, with more than half of the workers still having fixed-term contracts after one and a half years. For on-call workers, the figure was over 60 percent. Regardless of the form of fixed-term work, the transition rate of women was lower than that of men. In addition, as mentioned above, it is less common among female fixed-term workers to have probationary contracts, which more often lead to an indefinite-term contract.

1.1.3 Trade Union Membership among Fixed-term Workers

Trade union membership is lower among workers with fixed-term contracts than among workers with indefinite contracts. Only about half of fixed-term employees, 53 percent, are trade union members, compared to more than 80 percent of those with indefinite-term contracts. This is partly explained by the fact that fixed-term workers include groups that are marginal on the labour market, such as full-time students who work in their spare time. Another explanation is the fact that some trade unions do not allow workers who work less than a certain number of months to become members, thus excluding for example students who work during the summer vacation. Nonetheless, there has been a confirmed decrease of trade union membership among fixed-term workers which is down from 60 percent in 2001.⁴⁹

1.2 The National Debate on Fixed-Term Work

Over the past five-years, the regulation of fixed-term work has been undergoing reform, culminating in new legislation, effective from July 1, 2007. At the heart of the reform is the radical shortening of the list of permitted types of fixed-term work found in the *Employment Protection Act*, and the introduction of fixed-term-at-will (*allmän visstidsanställning*), a type of fixed-term contract which does not require an objective reason.

⁴⁸ Wallette, M (2004b), *Temporary jobs in Sweden. Incidence, Exit and On-the-Job Training*. Lund Economic Studies number 120. Lund University, Lund, pp. 97ff.

⁴⁹ <http://www.tcotidningen.se/Sites/TCOTidningen/templates/Article.aspx?id=6183>

The Swedish trade union movement has long accepted the existence of fixed-term contracts in the labour market. Instead of opposing fixed-term contracts as such, the trade unions have concentrated their efforts on reining them in, and to promote the transition from fixed-term to indefinite-term contracts. That indefinite-term contracts are the main rule and fixed-term the exception is an important trade union tenet. To uphold this, trade unions have supported legislated limits to the objective reasons which can justify fixed-term contracts, as well as limits of the duration of, and the number of workers under, such contracts. Fixed-term contracts have also been an important topic for collective bargaining, where arrangements to suit particular sectors have been devised jointly by employers and trade unions.

The idea to radically shorten the long list of forms of fixed-term contracts and introduce fixed-term-at-will was developed in a 2002 report written for the government by the *National Institute for Working Life*.⁵⁰ The main argument was that the regulation – which consisted of a list of permitted forms of part-time employment, formulated as objective reasons for limiting the duration of an employment contract – had become too fragmented. The different types of fixed-term contracts were subjected to different kinds of limitations apart from the objective reasons, for example time-limits and limits as to the number of employees on a particular type of contract. The solution proposed by the *National Institute for Working Life* was to introduce a new type of contract, fixed-term-at-will, which did not require any objective reason. The only other two types would be probationary employment and substitute employment. Instead of requiring employers to give objective reasons for limiting the duration of an employment contract, the primary measure to prevent abuse would be a time limit of 18 months during a five-year period for each of fixed-term-at-will and substitute employment. Probationary employment would, as earlier, be allowed for six months.

The proposal to replace the majority of the existing forms of fixed-term contracts with fixed-term-at-will was well received both by the trade unions and employers' organisation representing the private and public sectors. The differences in opinion mainly concerned the time limits, with the trade unions advocating the necessity to make these short so that the main rule of indefinite-term contracts could be upheld and reduce the risk that employees got caught in a circle of consecutive fixed-term contracts. The employers' organisations emphasised the need for fixed-term contract of long duration, for example in the field of research.⁵¹

Despite concerns over the precarious situation of fixed-term workers, and the expressed goal of reducing fixed-term employment, in 2006, the social democratic government adopted the idea of reducing the list in the *Employment Protection Act*. The government bill included only three kinds of fixed-term contracts: fixed-term-at-will, substitute employment and fixed term contract for employees over the age of 67.⁵² In addition, probationary employment would be allowed under the same conditions as earlier. To prevent abuse, other rather strict restrictions on fixed-term employment were to be imposed. If an employee had been employed by the same employer on

⁵⁰ Swedish Government Memorandum: Ds 2002:56 Hållfast arbetsrätt för ett föränderligt arbetsliv.

⁵¹ Swedish Government Bill 2005/06:185 Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen, pp. 40f.

⁵² Swedish Government Bill 2005/06:185 Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen.

one or several fixed-term contracts, including probationary employment, for more than 14 months during a five-year period, the contract would be transformed into a contract of indefinite duration. A bill with the new regulation was passed by the Swedish government, and the regulation was supposed to enter into force on 1 July 2007.

After the elections in September 2006, the new centre-right government decided to propose its own reform and in haste prepared a bill to abrogate parts of the reform.⁵³ Seasonal employment was added to the list of part-time contracts, and the time limit was made much more liberal. Firstly, it was increased from 14 to 24 months during a five-year period for fixed-term-at-will. Secondly, periods spent in the different forms of fixed-term employment were made non-cumulative. It will thus be possible for an employee to be employed, by the same employer, two years on fixed-term-at-will, two years as a substitute and six months on probationary employment, all within the same five-year period.

The reform drew trade union criticism, both for its content and the speedy process which did not allow for the standard consultation procedure. The blue-collar confederation LO questioned the need for a reform and expressed preference for the old regulation, requiring objective reason. To LO, the regulation of fixed-term work must be an efficient barrier against employers filling their permanent need for manpower with fixed-term employees. Apart from that, the main disagreement between the social partners was over the length of the limit to the maximal duration of fixed-term contracts and whether time spent in different types of fixed-term contracts should be accumulated or counted separately. While employers' and business organisations, supported by universities, found the time limits to be too strict, trade unions, supported by the Equal Opportunities Ombudsman and the Ombudsman against Ethnic Discrimination found the time limits too liberal.⁵⁴ The white-collar confederation TCO also questioned whether the proposed regulation was in conformity with the EU directive on fixed-term work as it did not provide adequate protection against the abuse of consecutive fixed-term contracts.

1.3 The Consequences of Having a Fixed-term Rather than an Indefinite-Term Contract

In general, workers with fixed-term contracts enjoy the same legal rights as workers with indefinite-term contracts, with the natural exceptions following from the lack of dismissal protection. The personal scope of labour legislation is defined as *employees*, without any further qualifications, and the Swedish Labour Court has not found the short duration of an employment contract to be an obstacle for considering someone an employee. It is, however, more difficult for fixed-term workers to exercise rights given to them in law and collective agreements, in particular in cases where they wish for, or are dependent on, subsequent fixed-term contracts with the same employer.

The Swedish social security system accommodates fixed-term workers in the sense that the bare fact that they have a fixed-term contract does not disqualify them from protection. Fixed-term workers may, however, have greater difficulties fulfilling the work requirements necessary to qualify for unemployment benefit (more than 80 hours per month in six of 12 months preceding unemployment) and periods without work can significantly reduce the amounts of benefits paid

⁵³ Swedish Government Bill 2006/07:111 Bättre möjligheter till tidsbegränsad anställning, m.m.

⁵⁴ Swedish Government Bill 2006/07:111 Bättre möjligheter till tidsbegränsad anställning, m.m, pp. 21ff.

as they are calculated on the average monthly earnings over the past 12 months. Similarly, the Swedish pension system which is built on lifetime earnings does not penalise fixed-term contracts as such, but the gaps in earnings that can result from this type of work.

In general, collective agreements do not differentiate between employees with fixed-term and indefinite-term contracts as far as pay and most other working conditions are concerned. A difference between Sweden and many other countries is that fixed-term employees are included in supplementary pension schemes, at least if their employment lasts for more than a couple of months. Most Swedish supplementary pension schemes are not tied to a single company but based on cross-industry collective agreements. For that reason, fixed-term employees do not lose acquired pension rights when they move from one employer to another. The collective agreements which grant extra income and other support to workers in cases of redundancies, however, still tend to cover only indefinite term workers, as one condition for receiving support is to have been subject to a dismissal for economic reasons.⁵⁵

A further important consequence of having a fixed-term rather than an indefinite-term contract concerns difficulties getting a mortgage to buy a house or an apartment. Fixed-term workers are often either denied this or other kinds of credits, or are forced to pay higher rates than persons who can show more stable employment.

2. The Legal Regulation of Fixed-Term Work

Fixed-term work is currently the subject of reform and substantial changes to the legal regulation will take effect on 1 July 2007.⁵⁶ The core of the reform is the radical reduction of the list of objective reasons that can justify a fixed-term contract and the introduction of a new type of contract, fixed-term-at-will, which does not require any objective reason.

2.1 The Type of Regulation

The regulation of fixed-term work is found in the *Employment Protection Act (SFS 1982:80)*. It applies to both the public and the private sector. The only exemptions are for employees who occupy a managerial position, members of the employer's family, employees employed to work in the employer's household, and employees who are employed for work with special employment support or in sheltered employment.⁵⁷ There are no exemptions for small companies.

The key provisions concerning fixed-term work are all *semi-mandatory*, and can be deviated from by means of collective agreements. To have this effect, the collective agreement must have been entered into or approved by a trade union federation (below 3).

2.2 Objective Reasons for the use of Fixed-Term Contracts

As mentioned above, the core of the current reform is the reduction of the list of objective rea-

⁵⁵ An example of this kind of agreement is Omställningsavtalet between the private employers and white-collar unions in the private sector: <http://www.trr.se/upload/material/Omställningsavtalet.pdf>.

⁵⁶ Swedish Government Bill 2006/07:111 *Bättre möjligheter till visstidsanställning, m.m.*

⁵⁷ *Employment Protection Act (SFS 1982:80), Section 1.*

sons that can justify the use of fixed-term rather than indefinite-term contracts, and the introduction of fixed-term-at-will, which does not require any objective justification. The main rule in the *Employment Protection Act* will still be that contracts of employment are valid for an indefinite term (Section 4). After the introduction of fixed-term-at-will, all that is left of this rule is the presumption that a contract of employment is for an indefinite-term unless otherwise stated, and the established practice of the Labour Court to allocate the burden of proof to the party which claims that the contract is not for an indefinite period.⁵⁸

2.2.1 Objective Reasons before the Reform

Before the reform, Section 5 of the *Employment Protection Act* stated that a contract of employment for a fixed-term could be concluded in the following circumstances:

1. A contract for a fixed term, a specified season, or specified task, if necessitated by the special nature of the work.
2. A contract for a fixed term, as regards temporary substitute employment, traineeship or vacation employment.
3. A contract for a fixed term, not exceeding a total of six months during a two-year period, where occasioned by a temporary peak in the employer's workload.
4. A contract for the period pending commencement of compulsory military service by the employee.
5. A contract for a fixed term when the employee has attained the age of 67.

In addition, Section 5a of the Act, introduced in 1996, provided the possibility for *agreed fixed-term employment* (överenskommen visstidsanställning). In this case, the employer did not have to motivate why the employment needed to be fixed term. Instead, the Act imposed limits on the time an employee could work under such a contract (in aggregate at most 12 months under a three year period) and the number of employees with such contracts employed by the same employer simultaneously (five). For undertakings or businesses that previously have had no employees, the first of the two limits was more generous, 18 months during a three-year-period.

Finally, Section 6 of the Act provided the possibility, and does so also after the reform, to conclude contracts for probationary employment for a period of up to six months.

Even though these forms have now been abolished, two of the objective reasons for fixed-term employment in the old regulation merit a closer look: fixed-term contracts justified by the *special nature of the work* and a *temporary peak in the employer's workload*.

Fixed-term contracts necessitated by the *special nature of the work*, included situations where a person with special skills was hired to do a specific task which was temporary by nature and required special skills. If the worker performed duties that were normally a part of the employer's activities, this spoke against a fixed-term contract being permitted. Over time, the Labour Court

⁵⁸ AD 1996 nr 7, AD 1990 nr 92, and AD 1988 nr 143.

became increasingly liberal in this respect and accepted fixed-term contracts even when the employer had other, permanent, employees performing the same tasks. It seemed to be enough that the employer, at the time of the hiring, could not guarantee that he would need the employee's services at a later stage.⁵⁹ Section 5.1 also included *seasonal employment*, where the circumstance justifying the fixed-term contract was the fact that the work due to changes in weather and temperature only can be carried out during part of the year.

Section 5.3 allowed for contracts for a fixed term, not exceeding a total of six months during a two-year period, where occasioned by a *temporary peak in the employer's workload*. The purpose was to give employers a possibility of solving temporary and short-term needs for extra manpower. It was the employer who decided whether there were such needs, and the possibilities for the courts to second guess the employer were very limited.⁶⁰

2.2.2 Objective Reasons after the Reform

After the reform, Section 5 of the *Employment Protection Act* states that a contract of employment for a fixed-term can be concluded:

1. for fixed-term-at-will;
2. for substitute employment;
3. for seasonal work; and
4. when the employee has attained the age of 67.

This does not, however, amount to any reduction in the scope of fixed-term employment as the new form which is introduced to replace the majority of the existing forms – *fixed-term-at-will* (allmän visstidsanställning) – does not require any objective reason for why the employment should be fixed-term rather than of indefinite duration.

Table 1 provides a comparison of the legislation before and after the entry into force of the reform.

Table 1. Forms of Fixed-Term Contracts in Sweden

Before the Reform (up until June 30, 2007)		After the Reform (from July 1, 2007)	
<i>Form of fixed-term contract</i>	<i>Limitations</i>	<i>Form of fixed-term contract</i>	<i>Limitations</i>
		Fixed-term-at-will	Not exceeding a total of two years during a five-year period
Fixed term necessitated by the special nature of the work.		<i>Abolished</i>	

⁵⁹ In AD 2000 nr 51, the Labour Court permitted consecutive fixed-term contracts due to the fact that the employer – a company involved in adult education – could not foresee neither the number of teachers that would be needed in the future, nor the fields in which they were to teach.

⁶⁰ Swedish Government Bill. 1981/82:71 p. 50f.

Temporary peak in the employer's workload.	Not exceeding a total of six months during a two-year period	<i>Abolished</i>	
		Temporary seasonal employment	
Temporary substitute employment, traineeship or vacation employment.	Not exceeding a total of three years during a five-year period	Temporary substitute employment	Not exceeding a total of two years during a five-year period*
Period pending commencement of compulsory military service		<i>Abolished</i>	
Employee has attained the age of 67.		Employee has attained the age of 67. (No change)	
Agreed fixed-term employment	Not exceeding 12 months during a three year period. Not more than five employees simultaneously.	<i>Abolished</i>	
Probationary employment	Not exceeding six months.	Probationary employment (No change)	Not exceeding six months. <i>(No change)</i>

* This part of the reform does not take effect until January 1, 2008 and does not apply to contracts entered into before this date.

Substitute employment is left untouched by the reform. In principle, *substitute employment* requires that the fixed-term employee replaces someone else who temporarily is not working. In practice, the Labour Court has accepted arrangements where substitutes cover for several employees, as long as the substitute is used to maintain the total manpower of the workplace.⁶¹ A worker can have several consecutive substitute contracts, as long as each contract is permissible. In fact, the rules on priority for re-employment (below 2.3) often oblige the employer to rehire the same substitute. There is, however, a limit to the total duration of such consecutive contracts (below 2.3).

One of the reasons, noted both by the former and current Swedish governments, to give ample room for substitute employment is the fact that Swedish labour law contains a number of provision that gives employees the right to rather long periods of leave, most notably the right to take parental leave of up to 18 months.⁶²

Before the reform, contracts for a specified season were allowed if necessitated by the special

⁶¹ Lunning & Tojter (2002) *Anställningsskydd – Kommentarer till anställningsskyddslagen* (8 ed) p. 213f. In AD 2002 nr 3, the employee had been dismissed and then rehired as a substitute by the same employer 61 times during six-year period, and continuously for the last 18 months. Despite this, the Labour Court found nothing wrong with the substitute employment contracts.

⁶² *Föräldraledighetslagen* (1995:584), Section 5.

nature of the work. After the reform, *seasonal employment* will be a type of fixed-term contract in its own right. Even though the legislative text is silent on this point, the preparatory works clearly indicate that seasonal employment, as earlier, only will be allowed when necessitated by the special nature of the work.⁶³

The final category of fixed-term contract, for *employees who have attained the age of 67*, is fairly self-explanatory. This mirrors another provision in the *Employment Protection Act*, which allow employers to dismiss, without cause and with one month's notice, employees who have attained the compulsory retirement age, or in absence of such, the age of 67 (Section 33).

Finally, Section 6 of the Act provides the possibility to conclude contracts for *probationary employment* of a limited duration. The probationary period may not exceed six months. An employer or employee who does not wish for the employment to continue after the end of the probationary period must notify the other party no later than at the end of the probationary period. If no such notice is made, the probationary employment becomes an indefinite-term employment. Unless otherwise agreed, the probationary employment may be terminated prior to the expiration of the probationary period.

2.3 Measures to Prevent Abuse

The reform marks a shift in the method chosen by the Swedish lawmaker to prevent the abuse of fixed-term contracts. Before the reform, the main method was to require objective reasons justifying the choice of a fixed-term employment contract rather than a contract for an indefinite period. As shown above, Sections 5, 5a and 6 of the *Employment Protection Act* provided an exhaustive list of reasons which could justify fixed-term employment contracts.

In the case of *agreed fixed-term employment*, which was an open category and did not require any particular objective reason other than the will of the parties, there were instead limits put on the maximum duration (12 months in three-year period) and the highest number of employees with such contract employed by the same employer simultaneously (five).

Through the introduction of fixed-term-at-will, there will no longer be any need for the employer to provide objective reason for fixed-term contracts. Instead, the main method to prevent abuse will be time limits (see table 1). If a worker is employed on one or several fixed-term-at-will contracts for the same employer for more than two years during a five-year period, the contract will be transformed into an indefinite-term contract. The same applies in the case of *substitute employment*.⁶⁴ For seasonal employment and employment of persons over the age of 67 no time limits apply. Periods spent in different forms of fixed-term employment are non-cumulative. It is thus possible for an employee to be employed, by the same employer, two years on fixed-term-at-will, two years as a substitute and six months on probationary employment, all within the same five-year period. In addition, there is the (unlimited) possibility of seasonal employment.

There is no limit to the number of consecutive fixed-term contracts. The Labour Court has, repeatedly, found that the fact that a person has had several different fixed-term contracts for the

⁶³ Swedish Government Bill 2006/07:111 *Bättre möjligheter till visstidsanställning, m.m.*, p. 50.

⁶⁴ *Employment Protection Act (SFS 1982:80)*, Section 5, second paragraph.

same employer does not constitute abuse, as long as each individual fixed-term contract was in accordance with the law.⁶⁵

In addition to the time limits, the *Employment Protection Act* affords protection to fixed-term employees through the *rights of priority to re-employment* found in Sections 25-27 of the Act. Under these provisions, employees (indefinite-term and fixed-term) whose employment has been terminated as a consequence of shortage of work (economic dismissals), shall have rights of priority for re-employment in the business in which they were previously employed. To enjoy this right, they must have been employed by the employer for a total of more than twelve months during a three year period, and be sufficiently qualified for the new employment. In the case of seasonal employees' right of priority to new seasonal employment, six months worked during the past two years is sufficient. The right of priority applies during nine months, counted from the time when the employer notifies the worker that the fixed-term contract will not be prolonged or renewed. Such notice should be given at least one month before the end of the period of employment (below 2.4). For seasonal employees, the nine months run from one month prior to the beginning of the new season.

As mentioned above, the right of priority for re-employment is one of the causes of consecutive fixed-term contracts in Sweden. There is, however, no reliable data on what share of consecutive fixed-terms contracts that are caused by this.

Employers who violate provisions of the *Employment Protection Act* are liable for damages (Section 38). The damages may consist both of those for compensation for losses sustained by the employee, and those for violation of the act. As violations of the *Employment Protection Act* commonly also involve violations of a collective agreement, employers tend to be liable for damages to the trade union as well.

If an employer refuses to comply with a court order that a fixed-term contract should be valid for an indefinite term, the employment relationship is deemed to have been dissolved, and the employer should pay damages according to the employee's total period of employment with the employer (Section 39). Employees that have been employed for less than five years should receive 6 months' pay, employees with more than five but less than ten years of service should receive 24 months' pay, and those that have been employed for more than ten years 32 months' pay. If the employee is over the age of 60, the amounts are 24, 36 or 48 months' pay respectively. The damages can, however, never exceed the number of months actually employed, but may at the same time never be less than 6 months' pay even when the period of employment is shorter.

2.4 The Termination of Fixed-Term Contracts

In principle, a fixed-term contract can not be terminated before the end of the contracted period, unless either party has grossly violated the terms of the agreement.⁶⁶ This applies to both employers and employees. While permanent employees normally can leave their employment after

⁶⁵ In AD 2002 nr 3, the employee had been hired as a substitute by the same employer 61 times during six-year period, and continuously for the last 18 months.

⁶⁶ AD 1991 nr 36.

a notice period of between one and three months, fixed-term employees are obliged to stay until the end of the contract.

To avoid the problems that this can create, it is not uncommon that employment contracts have a duration formulated as 'indefinite term, but no longer than', a construction which has been accepted by the Labour Court.⁶⁷

If the employee has been employed by the employer for more than twelve months during the past three years, the employer must notify the fixed-term employee that he or she will not be given further employment not less than one month before the expiration of the period of employment (Section 15). In the case of seasonal employment, where the worker has been employed by the employer for more than six months during the past two years, the notice should be given at least one month prior to the beginning of the new season.

3. The Role and Content of Collective Agreements Regulating Fixed-Term Work

As mentioned (above 2.1), all the key provisions concerning fixed-term work (Sections 5, 5a and 6) are *semi-mandatory*. This means that they can be deviated from by means of collective agreements. To have this effect, the collective agreements must have been entered into or approved by a central organisation of employees (trade union federation). This means that the local section of a trade union does not have the power to conclude such agreements with their employer. If the parties are already bound by a collective agreement regulating other subjects, entered into or approved by a federation, they can nonetheless conclude agreements on the conditions for fixed-term work.

Most collective agreements contain provisions which specify for which reasons, and under what conditions, fixed-term contracts can be concluded. In general, the collective agreements aim at adjusting the rules of the *Employment Protection Act* so that they suit better the sector to which the agreement applies. Trade-offs are made between on the one hand the objective reasons justifying fixed-term contract and, on the other, time limits and other types of restrictions, including consultations and co-determination for the trade unions before the use of fixed-term contracts.

In a 2002 study, the *National Institute for Working Life* found that many agreements contain provisions that date back to the time of the first Employment Protection Act in 1974. Changes in regulation have therefore not had the immediate impact that otherwise would have been the case.⁶⁸ The status of collective agreement in the face of legislative reforms also draws strength from international instruments guaranteeing the right to organise and collective bargaining. In 1994, the government wanted to prolong the maximum duration of probationary employment from six to 12 months. In order for the regulation to have an immediate impact, the legislation stated that collective agreements signed before the entry into force of the new legislation would be void in so far as they stipulated a maximum period of probationary employment shorter than 12 months. In 1994, the ILO found that Sweden through this had violated ILO conventions 98 and 154, with the effect that Sweden abolished the controversial provision.

⁶⁷ AD 1990 nr 98 and AD 1997 nr 42. Lunning & Toijer (2002) *Anställningsskydd – Kommentarer till anställningsskyddslagen* (8 ed) p. 134.

⁶⁸ Swedish Government Memorandum: Ds 2002:56 Hållfast arbetsrätt för ett föränderligt arbetsliv, p. 233f.

4. Impact of Directive 1999/70/EC on Fixed-Term Work

When *Directive 1999/70/EC concerning the framework agreement on fixed-term work* was implemented in Sweden, the government made the assessment that no legislation and no collective agreements in force at the time violated the principle of non-discrimination found in Clause 4 of the framework agreement.⁶⁹ Nonetheless, the government decided in favour of a law prohibiting the discrimination of fixed-term workers.⁷⁰ The reason was both to prevent future discrimination and to achieve symmetry with the implementation of the Part-time Work Directive⁷¹, where special equal treatment legislation had been deemed necessary.

Apart from equal treatment, the Fixed-term Work Directive also requires Member States to adopt measures to prevent abuse of successive fixed-term employment contracts. Clause 5(1) of the framework agreement obliges the Member States to introduce at least one of three measures:⁷²

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

When Sweden implemented the Directive, the government considered Swedish law to already be in compliance with the requirements imposed by Clause 5.⁷³ Their assessment was based on the fact that fixed-term contracts only can be concluded for the objective reasons found in the *Employment Protection Act*; that the Act only can be deviated from by means of collective agreement entered into or approved by trade union federations; the three year time limit for substitutes; and the fact that the Swedish Labour Court on repeated occasions have decided not to accept fixed-term contracts that proved to be attempts to circumvent employment protection regulation.

Translated into the terms of Clause 5.1 of the directive, Sweden relied mainly on the first of the three options, requiring objective reasons for the renewal of fixed-term work contracts, and, in the case of substitutes and a temporary peak in the employment workload, on the second option, a time limit, as well.

The proposed reform, could however, result in Sweden not applying any of the three measures to prevent abuse found in Clause 5. Through the introduction of *fixed-term-at-will*, Sweden will effectively abandon the requirement that the fixed-term contract must be justified by an objective reason. In *Adeneler*, the ECJ stated that the concept of objective reason 'requires recourse to this particular type of employment relationship [...] to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out'. *Fixed-term-at-will* does not require any such specific factors to be present.

⁶⁹ Swedish Government Memorandum: Ds 2001:6, pp. 57f

⁷⁰ *Lag (2002:293) om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning.*

⁷¹ *Directive 1997/81/EC concerning the framework agreement on part-time work.*

⁷² That member states are obliged to adopt at least one of these measures has later been confirmed by the ECJ. *Case C-212/04 Adeneler, para 80*

⁷³ Swedish Government Memorandum: Ds 2001:6, pp. 60f.

The time limits imposed on *fixed-term-at-will* and *substitute employment* – that they must not exceed two years during a five year period – could be interpreted as a measure corresponding to the second option in Clause 5. The problem is that the time limits are non-cumulative, which means that different forms of fixed-term contracts can be combined with the result that an employee works for the same employer more or less indefinitely. Without providing any justification, an employer can employ the same employee, during a five year period:

- 24 months in fixed-term-at-will;
- 24 months in substitute employment; and
- 6 months in probationary employment.

This amounts to no less than four and a half years during a five-year-period, with the possibility to repeat the exercise the next five-year period. In addition, there is the undefined possibility of seasonal employment.

In *Adeneler*, the ECJ found that the that the margin of appreciation left for the Member States when defining the maximum total duration of successive fixed-term employment contracts is not unlimited, 'because it cannot in any event go so far as to compromise the objective or the practical effect of the Framework Agreement. In particular, this discretion must not be exercised by national authorities in such a way as to lead to a situation liable to give rise to abuse and thus to thwart that objective'.⁷⁴ Further, the ECJ found that the possibility for employers to circumvent the rules introduced to prevent abuse must not be too large, as this would call into question the protection of workers against the misuse of fixed-term employment contracts.⁷⁵ In light of the *Adeneler* judgment, it could be questioned whether Sweden's fulfils its commitments to the European Union.

5. Conclusions

The reform gives Sweden a rather liberal regulation of fixed-term work, also from a comparative perspective. Through the introduction of *fixed-term-at-will*, employers who wish to hire someone for a fixed period of time does not have to provide any objective reason for why the employment should be fixed-term instead of indefinite-term. It is true that the two year time-limit puts a restriction of fixed-term-at-will, but this can easily be circumvented through a combination of fixed-term-at-will and other fixed-term contracts, in particular substitute contracts. As time spend on different kinds of fixed-term contracts is non-cumulative, the employer can without difficulty keep the same person on consecutive fixed-term contracts indefinitely.

The most important restrictions on fixed-term work in Sweden are not in the legislation but in the collective agreements. The experiences from earlier reforms show that collective agreements often prevent reforms from having an immediate impact on the labour market. In the long run, reforms nonetheless change the bargaining strengths of the parties. In the future, unions will thus have to pay a greater 'price' at the bargaining table in order to achieve restrictions on fixed-term work and protection for fixed-term workers.

⁷⁴ Case C-212/04 *Adeneler*, para 82.

⁷⁵ Case C-212/04 *Adeneler*, para 88.

Chapter 7: United Kingdom

(Catherine Barnard - Simon Deakin)

1. The National Context

1.1 Statistics

The *Labour Force Survey* or LFS is the main source of data on patterns of non-standard or temporary work in the UK⁷⁶. The LFS defines temporary workers as including people on fixed-term contracts, agency temps, casual workers and seasonal workers. The number of employees with temporary work of some kind 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 or 1.7 million people. The increase in temporary work was in fixed period contracts, which formed about half of all temporary employment, and in agency temping. However, following January-March 1999 the percentage of temporary workers decreased steadily until in the first quarter of 2007 when temporary workers consisted of 6 per cent of the total workforce or 1.5 million people. Table 1 includes information on the take-up rate of temporary employment from 1997 to the first calendar quarter of 2007. As evident, the percentage of fixed-term employees declined in the group of temporary employees as a whole declined, i.e. 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, agency temping increased from 13.5 per cent to 17.8 per cent of all temporary employees.

In terms of gender distribution, evidence suggests that the proportion of men working under a fixed period contract decreased from 51.9 per cent to 41.6 per cent of all temporary employees during the period between 1997 and 2007. A lower decline was found in the percentage of women under a fixed period contract, which from 48.6 per cent where it stood in 1997 it was reduced to 46.1 per cent in the first quarter of 2007. Interestingly, the percentage of men agency temping increased significantly during the same period, i.e. from 13.3 per cent to 20.1 per cent of all temporary workers. The highest proportion of temporary employees between 2001 and 2007 was found in the professional occupations category, where 19.5 per cent of employees were employed on a temporary basis in 2001; this number rose to 21 per cent in 2007. Regarding the socio-economic classification of temporary workers, the LFS recorded that the majority of temporary employees under a fixed period contract was in the lower managerial and professional (24.5 per cent in 2001 and 25.1 in 2007), the semi-routine occupations (20.2 per cent in 2001 and 20.8 per cent in 2007) and the intermediate occupations (19.5 per cent in 2001 and 18 per cent of all temporary workers in 2007).

Concerning the distribution of temporary work by industry sector, the LFS reported that there was no significant fluctuation in the proportions of employees employed in the public and private sector between 1997 and 2007. In more detail, 37.7 of all temporary workers were employed in the public sector in 1997 (62.3 in the private) while in 2007 the figure for the public sector stood at 37.9 per cent (62.1 in the private sector). A decline in the proportion of temporary employees

⁷⁶ The LFS asks respondents whose jobs are not permanent to categorise their employment as fixed period or project, seasonal, casual, agency work or other non-permanent. It may though underestimate the extent of non-standard working as due to difficulties of definition the boundaries of non-standard work may not be captured by surveys. This may well lead to some under-counting of fixed-term contract employees, who regard their job as 'permanent' even though it takes the form of a fixed-term contract. See Burchell, Deakin and Honey (1999) for discussion.

was evident in the manufacturing sector, i.e. from 12.1 per cent in 1997 to 9.5 per cent of all persons in 2007, in construction, i.e. from 4.5 per cent in 1997 to 3.4 per cent in 2007, and in the banking, finance and insurance sector, i.e. from 14.7 per cent in 1997 to 13.3 per cent in 2007. The most significant increase in the percentage of temporary employees was found in the public administration, education and health sector, where from 37 per cent in 1997 the proportion of temporary employees increased to 41.8 per cent in 2007. The proportion of temporary employees also rose in the distribution, hotels and restaurants sector, i.e. from 16.3 in 1997 to 17.7 in 2007.

According to the findings concerning the reasons for temporary working, the LFS reported a significant decrease in the proportion of all employees working on a temporary basis because of not being able to find a permanent job, i.e. from 35.9 per cent in 1992 to 26.4 per cent in 2007. The proportion of employees not wanting a permanent job stood the same, i.e. from 28.3 per cent in 1992 to 28.6 per cent in 2007. The percentage of employees that had a contract with a period of training increased from 5.3 per cent of all temporary employees in 1992 to 6.5 per cent in 2007. Finally, the percentage of employees citing other reasons increased significantly during the same period, i.e. from 30.4 per cent in 1992 to 38.3 per cent in 2007.

Table 1: All temporary employees

All Persons	All (000s) ⁷⁷	Fixed period contract (%)	Agency temping (%)	Casual work (%)	Seasonal work (%)	Other (%)
1997 Q2	1,740	50.1	13.5	20.3	6.2	9.9
Q4	1,807	50.0	13.2	18.5	7.5	10.8
1999 Q2	1,623	49.0	15.9	21.1	5.5	8.5
Q4	1,715	46.6	17.3	19.0	6.6	10.5
2001 Q2	1,663	48.0	16.2	19.2	4.6	11.4
Q4	1,630	46.6	17.9	18.0	6.1	10.0
2002 Q2	1,533	46.8	18.3	20.1	4.9	10.2
Q4	1,621	46.5	17.6	19.4	6.2	10.6
2003 Q2	1,426	48.2	17.3	19.0	5.0	10.6
Q4	1,558	45.9	16.4	20.5	6.4	10.8
2004 Q2	1,452	46.7	16.2	20.5	4.9	11.7
Q4	1,524	44.4	17.6	19.5	7.2	11.3
2005 Q1	1,380	47.2	18.1	18.8	4.2	11.7
Q2	1,392	45.8	18.5	19.0	5.2	11.5
Q3	1,541	43.0	17.2	20.1	9.2	10.6
Q4	1,406	45.5	17.5	19.7	6.4	10.8
2006 Q1	1,402	46.8	17.8	19.5	4.2	11.7
Q2	1,406	45.1	17.7	21.3	4.8	11.2
Q3	1,510	40.9	17.7	21.8	8.5	11.1
Q4	1,526	42.1	17.3	20.7	6.9	13.1
2007 Q1	1,451	44.1	17.8	21.4	4.1	12.7

Source: ONS Labour Force Survey

⁷⁷ Includes people who did not state type of temporary work.

Further information on why workers undertake temporary work, why employers demand it, and what the costs and benefits for both sides are, is available in the form of the Temporary Employment Survey which was carried out in 1999 (Tremlett and Collins, 1999). For this, the Department for Education and Employment commissioned research on temporary workers that sought to establish why they took temporary work and its costs and benefits to those employees. The main findings were the following⁷⁸:

- The majority of those in temporary work were female, just under 70%. Just over half the respondents were 25-49 years old; around 15% were aged between 16-24 years and just under a third were over 50 years old.
- Temporary workers tended to work in professional, clerical/ secretarial or associate, professional and technical occupations (around 20%, 20% and 15% respectively).
- The most common industries employing temporary workers were public administration, education and health, banking/finance and distribution, hotels and restaurants (around 30%, 20% and 10% respectively).
- Temporary workers were employed in a variety of ways: just under half were employed on fixed term contracts, a third worked on a casual/seasonal basis and just under a fifth worked as 'agency temps'.
- Just over a half of temporary workers were either in post or had been temporarily employed for less than one year.
- Of those who worked with permanent staff doing a similar job (around 50% of all respondents), three quarters felt they were treated the same as their permanent counterparts.
- When asked if temporary work had any benefits, around 70% of respondents said that there were benefits to temporary work. Amongst those who said there were benefits, two fifths said that flexibility was the main benefit. A further quarter mentioned the freedom to choose the type of work or better pay than permanent work as the main benefits.
- When asked if temporary work had any drawbacks, around 80% of respondents said that there were drawbacks to temporary work. Amongst those who said there were drawbacks, two fifths said that job insecurity was the main drawback. A further two fifths mentioned the lack of benefits such as sick pay or uncertain wages as the main drawback of temporary work.
- 2 out of 3 respondents said the main reason for taking temporary employment was 'wanted to do the job'/'job satisfaction' or 'needed the money'. Only 1 in 10 respondents said that not being able to find a permanent job was the main reason for taking temporary employment.
- Around 60% of respondents currently working in a temporary job said that they would take their job on a permanent basis - around 4 in 5 would without any conditions.

⁷⁸ The main component of the study was a telephone survey of temporary workers. The telephone survey involved a screening exercise and interviews. 5,613 people took part in the screening exercise, which identified 607 temporary workers who were then interviewed. Temporary workers were defined as: 'people aged 16 years and over who were working, or had worked in the previous 12 months prior to their interviews, in a paid job that was in some way not permanent. A job was not permanent if it was either seasonal, casual or as and when required, under a contract for a fixed period of time or for a fixed task, agency temping, home working or under a zero hours contract'.

- 20% of the temporary workers identified in the survey were in permanent jobs at the time of the survey – what this means is that 20% of the sample had been in temporary work in the past 12 months and had then found permanent jobs. Amongst the remaining respondents, around two thirds were not looking for permanent work. Amongst those not looking for permanent work, 75% said they would prefer permanent work sometime in their working life - around 60% said the main reason would be greater job security.

The survey provided detailed background evidence on the characteristics of temporary workers in terms of the gender division and sectoral location of temporary work. Amongst both men and women, the most popular type of temporary work was a fixed-term contract - just over 50% of men and 40% of women were employed in this way. Women were more likely to work on a casual/seasonal basis - 4 in 10 women compared with 3 in 10 men. One in three 16-24 year olds were agency workers where the percentage of around 30% was at least double the proportion in older age groups. For those aged 25-49 year olds and those over 50 year olds, the percentage employed as agency temps was around 15% and 10% respectively. There were differences in occupation by gender - men were more likely than women to work in craft jobs (1 in 5 men compared with 1 in 20 women); or as plant/machine operatives (1 in 10 men compared with 1 in 20 women). In contrast, women were more likely to work in clerical/secretarial jobs (1 in 5 women compared with 1 in 10 men) and in personal and protective occupations (1 in 5 women compared with 1 in 20). There were also marked gender differences across industrial sectors. Just under half of the women respondents worked in public administration, education and health sector compared with just under a fifth of men. Men were much more likely than women to work in construction (1 in 5 men compared with 1 in 100 women) and manufacturing sectors (1 in 5 men compared with 1 in 10 women).

In terms of nature of temporary work, the type of temporary work was found to be correlated with the level of educational attainment. Those without qualifications were more likely to work in seasonal/casual jobs than those with qualification - just under half compared with just over a quarter of those with university or equivalent qualifications. Those with a university qualification were more likely to be employed on a fixed term contract (just under 60%) than those with no qualifications (just under 40%). Those working on a fixed term contract tended to be in the professional, managerial & associate & technical professions (just under 60%). Those working as agency temps were found predominantly in clerical and secretarial occupations (just under 50%). Agency temps were in a temporary job for the shortest period of time - half of agency temps had only been in their present or most recent job for less than 3 months; compared with a fifth of those on fixed term contracts; and a third of those working on a casual or seasonal basis. It was those working on a casual/seasonal basis that had been employed for the longest period - just under 40% for those employed as casual/seasonal staff had been employed for two years or more; compared with just over 30% for those on fixed term contracts; and just under 10% of agency workers.

More up to date information is provided by the latest *Workplace Employment Relations Survey* (WERS). WERS 2004 (both employees and management are surveyed) covered a number of arrangements which offer employers the potential for adjusting the size of the workforce (Kersley et al., 2005: 80-82). 92 per cent of employees reported that they had a permanent contract, while 5 per cent were employed on a temporary contract with no agreed end date, and 3 per cent had a fixed-term contract. Management respondents reported that 7 per cent of employees were on

temporary or fixed-term contracts (henceforward referred to in combination as fixed-term contracts). The use of fixed-term contracts was most common in Education and Other community services, with 14 per cent of the workforce in these workplaces on these contracts, while their use was least common in Electricity, gas and water (1 per cent) and financial services (2 per cent). Just under one third (30 per cent) of workplaces had employees on temporary or fixed-term contracts in 2004, a similar proportion to that found in 1998 (32 per cent).

However, there was considerable variation between different types of workplaces. Larger workplaces were more likely to have some staff on fixed-term contracts than smaller workplaces, and workplaces which were part of a larger organisation were more likely to make use of fixed-term contracts than single independent workplaces (34 per cent compared to 21 per cent). More than three-fifths (61 per cent) of workplaces in the public sector had some employees on fixed-term contracts, compared to less than one quarter (23 per cent) of private sector workplaces. Workplaces where at least one union was recognised were also more likely to make use of fixed-term contracts than workplaces where no unions were recognised, but this appeared to be due to the fact that, on average, workplaces where unions were recognised were larger than those without union recognition as this relationship disappeared when workplaces of a similar size were compared. Workplaces in the Education sector were particularly likely to make use of fixed-term contracts (76 per cent did so), while over half of all workplaces in public administration (54 per cent) employed some staff on fixed-term contracts. Workplaces in the Wholesale and retail and Hotels and restaurants sectors were particularly unlikely to have any fixed-term employees. Just 15 per cent and 11 per cent respectively had employees on such contracts.

Workplaces were most likely to have Professional and Administrative and secretarial staff on fixed-term contracts (8 per cent of all workplaces had staff from either group on fixed-term contracts). But in workplaces that employed staff in Caring, leisure and other personal service occupations, managers were just as likely to use fixed-term contracts for this group as for Professionals. Workplaces were least likely to use fixed-term contracts for Managers and senior officials and for Skilled trades. In addition, fixed-term contracts were more commonly used when an occupation formed the core group within a workplace. Kersley *et al.* (2005: 81) noted that this finding demonstrates 'the persistence of the use of fixed-term contracts to augment the core workforce, as observed by Cully *et al.* (1999: 37-38), and is counter to the core-periphery model of labour market segmentation which suggests that fixed-term contracts are primarily used among the peripheral, rather than the core, workforce'.

Managers were also asked whether fixed-term contracts had been introduced for employees who in the past would have been employed on open-ended contracts. In almost one-third (30 per cent) of workplaces with some fixed-term workers all of these employees were carrying out work previously done by staff on open-ended contracts. In a further 8 per cent of workplaces, fixed-term contracts were used for some employees who were previously in permanent positions, while in the remaining three-fifths of workplaces this had never been the case. The most common reason for using fixed-term contracts was to respond to a temporary increase in demand. More than one-third (36 per cent) of workplaces with some fixed-term employees made use of them for this reason. Almost one quarter (24 per cent) of workplaces used fixed-term contracts to cover for maternity leave or long-term absence. Fixed-term contracts were used to obtain specialist skills in 17 per cent of workplaces with such contracts, and 16 per cent of workplaces with some

fixed-term employees used them to decide whether an employee should be taken on in a permanent job. Less than one in ten workplaces used fixed-term contracts to respond to a freeze on permanent staff numbers, in pursuit of enhanced performance, because of time-limited funding, or due to budget restrictions or financial constraints.

1.2 The National Debate on Fixed-term Work

- *What are the attitudes towards fixed-term work (from the government, social partners) in an historical perspective?*

It is possible to find references to debates about 'decasualisation' in particular sectors, such as the docks and low-paying 'sweated trades', going back to the late nineteenth century, and many statutory reforms of the mid-twentieth century welfare state, such as those relating to social insurance legislation and the National Dock Labour Scheme, penalised casual work and attempted to regularise it (see Deakin and Wilkinson, 2005). In general terms, regularisation and stabilisation of work was the prevailing policy of governments up to the election of Mrs. Thatcher's first administration in 1979, strongly supported by the trade unions. The Thatcher governments pursued a policy of labour market deregulation which aimed, among other things, at loosening controls on flexible forms of work including fixed-term employment. The Blair government, elected in 1997, tightened some of the controls on fixed-term employment and implemented the Fixed-Term Employment Directive, but also took the view that fixed-term employment contributed to labour market flexibility and as such should not be the subject of excessive regulation.

- *Has fixed-term work been part of any recent labour market reform?*

The basic approach of the common law to temporary work in general, and to fixed-term work in particular, was for a long time a highly permissive one. There was (and is) no common law rule in English law placing a limit on the form in which work relations are constituted: the parties are free to contract for either an indeterminate duration, or for a fixed one. The common law places no minimum or maximum limits on the duration of a fixed-term contract and allows such a contract to be renewed any number of times without it being deemed to be permanent (these rules have only recently been amended by virtue of the implementation of the Fixed Term Employment Directive in the UK). The parties to a work relationship may make an agreement for a contract to be discharged on completion of a particular task. There is no legal impediment to agreeing a casual work contract which involves intermittent work, or a 'zero hours contract'. Nor does the common law place any constraints on the use of agency work.

It is for the courts, and not the parties, to define the nature of any particular work relationship, and thus to decide whether it gives rise to a contract of employment or to some other kind of contract; however, the courts pay considerable regard to the terms of the contract in determining its legal nature, and rather less to the objective conditions under which the work is being carried out than seems to be the case in some other European jurisdictions. Fixed-term workers will tend to be employees with a contract of employment but those on casual or intermittent work contracts, and agency workers, will in most instances not be employees (although each case must be examined in relation to its own facts) (see generally, Deakin and Morris, 2005: ch. 3).

The concept of fixed-term work only entered legal and policy discourse comparatively recently, as a result of the introduction of unfair dismissal legislation in the 1970s. This made it necessary to define the non-renewal of a fixed-term contract as a 'dismissal' in order not to undermine the

effectiveness of the legislation, and, as a result, a debate about the necessity and desirability of fixed-term employment was initiated. The legislator arrived at a compromise: the failure to renew a fixed-term contract in the same terms as before was a dismissal, but the employee could waive his or her right to claim unfair dismissal rights and the right to redundancy compensation, as long as the fixed-term was for a duration of at least two years. The waiver had to be in writing and a number of procedural conditions were attached to it which gave rise to a complex case law.⁷⁹ However, the complexity of the 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.

The law on fixed-term employment did not change very much in the course of the 1980s, notwithstanding the deregulatory stance taken by the Thatcher governments at this time. No major change was thought to be needed, as employers had the flexibility they desired thanks to the waiver rule. However, one important change was the raising of the qualifying period for unfair dismissal from six months (between 1975 and 1979) to one year (from 1979) and then two years (with effect from 1985). The waiver rules were changed with effect from 1980 so that the employer was only required to offer a fixed term of one year, rather than two, for the employee's opt-out from unfair dismissal to be valid (a two-year waiver was still required for redundancy compensation purposes). This meant that whereas, up to 1979, a fixed-term employee could expect two years of employment before the agreement came to an end, and would acquire basic unfair dismissal rights after only six months (which might be triggered if the employer failed to observe the waiver rules correctly, for example by failing to renew an opt-out), by the mid-1980s the position was much less favourable: a fixed-term employee could be given a contract for only one year, but would require two years of service before acquiring basic unfair dismissal protection.

The Labour government which was returned to office in 1997 considered the issue of fixed-term work in its *Fairness at Work* White Paper of 1998. This took the view that some control of the waiver option was desirable in order to counter the practices of 'unscrupulous employers', but that complete prohibition of waivers was undesirable since this would 'remove a useful flexibility for genuine employers'.⁸⁰ The Employment Relations Act 1999 accordingly struck a new compromise: the waiver was abolished for unfair dismissal claims but retained for redundancy compensation. The waiver option for redundancy compensation was abolished with effect from 1 October 2002 with the coming into force of the Fixed-Term Employees (Prevention of Less Equal Treatment) Regulations 2002 ('FTER'),⁸¹ implementing the Fixed Term Employment Directive.⁸²

The 2002 Regulations made further significant alterations to UK law.

Firstly, dismissal law was changed so that the non-renewal of not just a fixed-term contract, but also a task contract and other contracts which terminated on the occurrence or non-occurrence of a particular event, constitutes a dismissal (these three categories of contracts are now known collectively as 'limited-term contracts').⁸³

⁷⁹ This is described in the first edition of Deakin and Morris, *Labour Law* (Deakin and Morris, 1995: ch. 5). Arguments that the two year rule was indirectly discriminatory against women were ultimately unsuccessful in Case C-167/97 *Seymour-Smith* [1999] ECR I-623

⁸⁰ *Fairness at Work*, White Paper, 1998, para. 3.13.

⁸¹ SI 2002/2034.

⁸² Directive 99/70/EC concerning the Framework Agreement on Fixed-Term Work concluded by ETUC, UNICE and CEEP.

⁸³ ERA 1996, s. 95(1)(b); s. 235(2A), (2B) define 'limited term contract'.

Secondly, a measure was introduced for deeming fixed-term contracts to be 'permanent' in cases of successive fixed-terms where the employee had four years or more continuous employment under the last or 'subsequent' contract or under that contract and a previous one, but only counting the period after 10 July 2002; and where the employment of the employee on a fixed-term contract could not be justified on objective grounds at the point where the 'subsequent contract' had either been renewed or, if it had not been renewed, when it had been entered into. The employment was to be deemed to be permanent at the point when the employee acquired four years' continuous employment (counting from 10 July 2002) or when the 'subsequent contract' was either last entered into or renewed, whichever was the later.⁸⁴ Thus to put the matter slightly more simply, from July 2006 UK law has a rule under which, in cases of successive fixed-term contracts, the employee gains permanent status at the point when they have four years continuity of employment or when their second or subsequent contract comes to an end, if later, unless there are objective grounds for the employer having offered a fixed term. The four-year waiting period for permanent status may be amended by a collective or workforce agreement.

Thirdly, the Regulations give effect to the principle of equal treatment between fixed-term employees and permanent employees, by way of implementation of the Directive.⁸⁵

Some other reforms made by Labour governments after 1997 are relevant here. The scope of labour law was widened from the 'employee' concept to cover other 'workers' who, while self-employed, were economically dependent on their employer and did not contract to supply services in the context of a professional or customer-client relationship. The 'worker' concept has helped to ensure that some casual and intermittent work relationships now come under the coverage of core labour standards legislation on such matters as the minimum wage and working time controls, as well human rights legislation including the protection of whistleblowers and protection of individual rights in relation to trade union membership and non-membership. Anti-discrimination legislation laws also apply to 'workers' in this sense as a result of the extended definition of 'employment' which they use. 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 passed by the Labour government.⁸⁶

• *Links with European and national employment policies; include references to flexicurity*

As we have seen, the view of the current Labour government is that fixed-term employment should not be unduly discouraged, as it constitutes an important source of flexibility in the labour market. The assumption here is that over-regulation of fixed-term employment could deter employers from offering this type of contract. The changes made to the law governing fixed-term employment, and temporary work more generally, since the late 1990s, do not seem to have been a direct response to the development of the EU's employment strategy, nor to the 'flexicurity' debate. However, it is relevant to note in this context that the UK labour law system has been commended by the European Commission, in its recent Green Paper on the modernisation of labour law, for achieving an effective equilibrium between security and flexibility. The Green Paper makes specific mention of the UK practice, which has come to the fore after 1997 although

⁸⁴ FTER, reg. 8.

⁸⁵ FTER, regs. 3-4.

⁸⁶ For an account of these various changes, and their implications for the law, see Deakin and Morris, 2005: 3.19-3.72.

to some degree it predates this point, of having a two-tiered employment status, with basic labour standard and human rights laws applying to 'workers' and most employment protection rights applying only to the more narrow category of 'employees', with the need to show continuity of employment a further limit on statutory protection within the 'employee' category.⁸⁷ A recent report by the House of Lords European Union Committee on the Green Paper concludes that UK law is not in need of much change, as it has struck the right balance on the issue of labour market flexibility by allowing employers and workers to retain a considerable degree of autonomy over the form of the employment contract.⁸⁸

- *Special legislation on fixed term training contracts*

Most labour legislation applying to 'employees' also applies to 'apprentices'. Apprenticeship is a fixed-term contract involving the provision of education and training by the employer, as well as an element of work experience.⁸⁹ From the early 1980s, governmental schemes offering employer subsidies if they offered work experience and (in some cases) training to unemployed persons proliferated. The element of government subsidy and the complex body of regulations surrounding these schemes helped to persuade the courts from an early stage that the relationships to which gave rise did not create a contract of apprenticeship, nor one of employment. Instead, a 'contract of training' was deemed to come into existence, which fell outside the scope of existing statutes and so was largely unprotected.⁹⁰

Since the mid-1980s, specific laws have been passed, extending the protection of health and safety legislation and anti-discrimination legislation, as well some other aspects of labour law regulation, to such trainees. However, they remain excluded from employment protection law. Trainees and apprentices are covered by working time laws but are subject to a number of derogations in the case of minimum wage legislation.⁹¹

In addition, trainees who do acquire employee status are excluded from FTER if they are employed on schemes designed to provide training or work experience for the purpose of assisting them to seek or obtain work which are funded by the UK government or by an EC institution, as are trainee-employees who are on courses of work experience of up to one year which involves attending a higher education course.

1.3 The Consequences of Being on a Fixed-term Contract Compared to an Indefinite Contract.

- *What are the most important differences between the two groups? Are there benefits etc that fixed-term workers miss out on?*

The right to equal treatment under FTER relates to the terms of the contract of employment and incorporates a right not to be subjected to a detriment by the employer which is related to fixed-

⁸⁷ Green Paper, *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, at p. 12.

⁸⁸ House of Lords, European Union Committee, *Modernising European Union labour law: has the UK anything to gain?* 22nd. Report of Session 2006-7 (HL Paper 120).

⁸⁹ See Deakin and Morris, 2005: para. 3.49.

⁹⁰ *Daley v. Allied Suppliers Ltd.* [1983] IRLR 14.

⁹¹ See Deakin and Morris, 2005: para. 3.50.

term status.⁹² The right to equal treatment covers qualifying periods of service for employment benefits, opportunities for training, and opportunities for permanent employment.⁹³ Equality here means equal treatment subject to the *pro rata temporis* principle,⁹⁴ which is defined to refer to a proportionate right to receive pay or benefits similar to those received by a comparable permanent employee, taking into account 'the length of [the applicant's] contract of employment and to the terms on which the [relevant] pay or other benefit is calculated'.⁹⁵ The right to equal treatment is subject to certain limitations. The most important is that FTER only applies to employees, thereby excluding casual and intermittent workers who do not have employee status. There is also a specific exclusion for agency workers.⁹⁶ In addition, for the right to equal treatment to apply, the ground for unequal treatment must be the fixed-term status of the applicant;⁹⁷ the employer has an open-ended justification defence;⁹⁸ the comparator must be a 'comparable permanent employee' employed in the same in the same employment on broadly similar work as the applicant, and working in the same establishment (and may not be a former employee of the employer);⁹⁹ and there is a defence if the employer can show that the applicants' terms are on the whole not less favourable than those of the comparator.¹⁰⁰ The scope of these limitations is unclear in any particular case and there is no empirical research yet on the specific question of how far the implementation of FTER has led to an alignment of the conditions of fixed-term employees and comparable permanent workers, or of to what extent the limitations on the equality principle might have restrained such an alignment.

In respect of termination of employment, fixed-term employees are now in a very similar legal position to permanent employees. This is so even if the employee does not have permanent status under FTER. Following the abolition of waiver clauses, a fixed-term employee whose contract of employment is not renewed in the same terms as before will have a potential claim for both unfair dismissal and redundancy compensation, if they have the necessary qualifying period of employment.¹⁰¹ Termination of employment for economic reasons – that is, because the funding for the post in question has run out – will constitute a potentially fair reason for dismissal, which could be either a redundancy, in which case the employee will be entitled to redundancy compensation, or 'some other substantial reason' for dismissal, in which case no right to redundancy compensation arises. In practice, many employers in the public and education sectors take the view that a redundancy payment is due if a fixed-term employment contract cannot be renewed on financial grounds. An unfair dismissal claim may also arise in the case of a breach of the rules of procedural fairness by the employer which may happen if the employer has failed to follow good practice relating to redundancy selection.¹⁰²

⁹² FTER, reg. 3(1).

⁹³ FTER, reg. 3(2).

⁹⁴ FTER, reg. 3(5).

⁹⁵ FTER, reg. 1(2).

⁹⁶ FTER, reg. 19.

⁹⁷ FTER, reg. 1(3)(a).

⁹⁸ FTER, reg. 1(3)(b).

⁹⁹ FTER, reg. 2.

¹⁰⁰ FTER, reg. 4.

¹⁰¹ This follows from the rule that the non-renewal of a limited term contract is a 'dismissal' under ERA 1996, s. 95(1)(b).

¹⁰² On the law governing 'economic' dismissals generally, see Deakin and Morris, 2005: paras. 5.164-5.192.

A 'permanent' worker whose employment is terminated for economic reasons is in a not very different position. Very few workers have 'no redundancy' clauses in their contracts of employment, and the employer therefore has the option, in nearly all cases in both the public and private sector, of ending the employment relationship on financial grounds, with the only cost being that of a redundancy payment. Again, an unfair dismissal claim is only likely to arise if the employer has committed a serious breach of norms governing redundancy selection.

The approximate parity of treatment of fixed-term and permanent employees under dismissal law is, to a large degree, the consequence of the relatively weak protection of permanent workers in the UK context: as just explained, they may be dismissed if economic conditions justify this. It follows that the granting of 'permanent' status to fixed-term contract workers may not make much *legal* difference to their position. It may have a *practical* impact in contexts where the employer chooses to treat workers it deems to be 'permanent' differently from others for organisational and career purposes, although as we have just seen, there are limits to how far the employer can now discriminate on the grounds of fixed-term status, thanks to FTER.

2. The Legal Regulation of Fixed-term Work

2.1 The Type of Regulation

- *Where is it regulated? (Law, collective bargaining, ordinance etc)*

The law governing fixed-term employment is mainly set out in the Fixed-Term Employees (Prevention of Less Equal Treatment) Regulations 2002 ('FTER'), SI 2002/2034. Certain provisions of statutes governing particular aspects of labour law are also relevant. For example, the law stipulating that the failure to renew a limited-term contract under the same terms is a 'dismissal' is contained in section 95(1)(b) of the Employment Rights Act 1996 (as amended). The definition of a limited-term contract for this purpose is that contained in section 235(2A) and (2B) of the same Act. Collective and workforce agreements may be a source of derogation from some of the rules set out in FTER. In addition, many of the legal rules governing fixed-term employment are derived from the common law.

- *The scope of the regulation*
 - *Public/private sector*
 - *Exemptions for small employers or training contracts*

FTER and other sources of labour law governing fixed-term work apply equally to the public and private sector. There is no exemption from dismissal law for small employers as such, although the size of the undertaking is a factor to be taken into account by an employment tribunal when determining whether dismissal has been unfair in a particular case.

- *Possibilities to derogate through collective agreements*
 - *At what level (plant, company, sector, national)?*

Regulation 8 of FTER, which deems a fixed-term employee to be employed permanently if certain conditions are met, may be varied by either a collective agreement or a workforce agreement.¹⁰³

¹⁰³ For the definitions of these terms, see FTER reg. 1(2) and Sch. 1.

A collective agreement is one made with an independent trade union. A workforce agreement is one made with specified representatives of the workforce or, under certain circumstances, with a majority of the workers themselves. A workforce agreement may only be made in respect of those workers who are not covered by a collective agreement; thus it can only operate in respect of employers who do not recognise a trade union, or where there is partial recognition, and then only to the part of the workforce not covered by the collective agreement. More precisely, a workforce agreement can be one of two types: (1) an agreement covering *all* members of the employer's workforce (that is, all employees of the employer) who are not covered by collective agreements, or (2) all members of the workforce who 'belong to a particular group'. In the case of type (2), a 'particular group' means 'members of a workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within their employer's business'. The agreement must be signed by representatives of the employer's workforce (type (1)) or the particular group (type (2)). In the absence of trade union recognition, the 'representatives' are those elected by either the workforce (type (1)) or the group (type (2)). Rules setting out the procedure for the election of representatives are set out in the Regulations. If the employer employs 20 employees or less, the agreement may be signed by a majority of employees in the employment at that time. A workforce agreement must be in writing, and must take effect for a specified period not exceeding five years. Before it is signed the employees covered by it must be sent a copy in writing by the employer and must be provided with guidance from the employer concerning its effects.

It can be seen from the above that either a collective agreement or a workforce agreement derogating from FTER can take effect at one of several levels: at the level of the enterprise or company as a whole (referring here to the concept of the employer's 'workforce'); at the level of part of the enterprise or company (if only part of it is not covered by a collective agreement, for example, or if a workforce agreement is made in respect of workers undertaking a particular function, or who work in a particular department or unit within the employer's business); or at the level of the workplace (if that is the level at which the collective agreement applies; in addition, specific provision for a workplace-level agreement is made in the rules relating to workforce agreements). FTER does not make provision for a multi-employer workforce agreement, but it does not rule out a role for multi-employer *collective* agreements, which could, in principle, operate at sector level or at some other level above that of the individual enterprise.

o *Regulatory function of collective agreements (limiting percentages, dealing with training)*

The regulatory function of agreements which derogate from Regulation 8 of FTER is to vary the rules which lay down a normal four-year waiting period for permanent status in the case of successive fixed-term contracts. Specifically, such agreements may do one of three things: specify the maximum total period for which employees may be continuously employed on a fixed-term basis; set a maximum limit to the number of renewals of fixed-term contracts; and provide objective grounds justifying the use of fixed-term contracts.¹⁰⁴

2.2 Objective Reasons for the Use/the Extension or the Renewal of Fixed-term Contracts

- *For what reasons can fixed-term contracts be concluded, extended or renewed?*

¹⁰⁴ FTER, reg. 8(5).

At common law, there was no restriction of any kind on the reasons an employer might have for offering fixed-term employment, nor any need for the employer to notify the particular reason to the employee. Under Regulation 8 of FTER, where an employee has four years of continuous employment after 10 July 2002 under successive fixed-term contracts, his contract will be deemed to be permanent if his or her 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.¹⁰⁵ FTER is silent on precisely what 'objective grounds' constitute here, and there is no significant reported case law yet on this point. As we have just seen, a collective or workforce agreement may vary the four-year rule and other aspects of Regulation 8 by, among other things, spelling out in more detail what constitute objective grounds for the use of fixed-term contracts. Thus UK law has in effect devolved the question of what constitutes objective grounds to collective bargaining or, where there is no recognised trade union, to a workforce agreement.

- *Is there the possibility of concluding a fixed-term contract for subjective reasons (disadvantaged category of workers, the age of the workers, etc.)*

There are no provisions permitting the conclusion of a fixed-term contract in place of a permanent one in order to overcome particular types of labour market disadvantage. For the employer to offer a worker a fixed-term contract, as opposed to a permanent one, on one of the prohibited grounds of anti-discrimination law would, for that reason, be unlawful, unless a defence of justification or of genuine occupational qualification or requirement were available. The extent of these defences differs from one context to another under the anti-discrimination statutes.¹⁰⁶

UK disability discrimination legislation¹⁰⁷ allows employers to offer disabled workers more advantageous employment than that made available to those not suffering from a disability; the treatment of disabled and non-disabled person is not symmetrical as it is under other parts of anti-discrimination law. However, it is doubtful that an employer would be able to justify offering a fixed-term contract to a disabled person on this ground when a permanent contract was available, as this would most likely be seen as *disadvantaging* them.

UK age discrimination legislation contains an open-ended justification defence.¹⁰⁸ In addition, the statutory scheme which requires employers to consider a request from an employee not to retire upon reaching the normal retirement age for that employment, one option open to the employer, if it grants the employee's request, is to specify that the employee's employment shall continue for a further, fixed period.¹⁰⁹ Thus UK legislation purports to allow employers to offer fixed-term employment, in place of permanent employment, on the grounds of age. How far this is compatible with the ECJ judgment in *Mangold*¹¹⁰ remains to be seen. Moreover, there is no clear authorisation for statutory scheme for considering requests to work after retirement under the Framework Directive. The UK government has taken the view that it is compatible with the open-ended

¹⁰⁵ FTER, reg. 8(2), (3).

¹⁰⁶ See generally, Deakin and Morris, 2005: ch. 6.

¹⁰⁷ This is contained in the Disability Discrimination Act 1995, as amended.

¹⁰⁸ Employment Equality (Age) Regulations, SI 2006/1031 ('EEAR'), reg. 3.

¹⁰⁹ EEAR, Sch. 6, para. 7(a)(ii).

¹¹⁰ Case C-144/04 *Mangold v. Helm* [2006] IRLR 143.

justification defence which the Directive allows for age discrimination, but this view may be open to challenge.

2.3 Other Limits to Control the Use of Fixed-term Work

- *Time limits, possibility of extending the contract, number of consecutive contracts, share of the workforce, sectors, priority right to re-employment, etc*

FTER sets a time limit of four years before fixed-term employment under successive contracts becomes permanent.¹¹¹ As we have seen, this period may be varied by a workforce or collective agreement.¹¹²

There is no right to priority re-employment under UK labour law, except in the case of workers returning from maternity or paternity leave.

- *Remedies in case of abuses (lacks of objective reasons, abuse of successive fixed-term contracts, lack of written form)*

An employee who is dismissed for non-renewal of a fixed-term contract may bring a claim for unfair dismissal before an employment tribunal in the normal way. The remedies available to the tribunal if the claim is made out include reinstatement or re-engagement (but this is very rare) and compensation.¹¹³

An employee who has acquired the necessary continuity of employment under successive fixed-term contracts to be treated as 'permanent' is entitled to a written statement from the employer, either varying his or her contract of employment accordingly, or explaining why the contract remains fixed-term, within 21 days of the request.¹¹⁴ If the employer claims that there are objective grounds for fixed-term employment, the statement must indicate what those grounds are.¹¹⁵

An employee who considers that he has permanent status within the terms of FTER may make an application to an employment tribunal for a declaration to that effect.¹¹⁶

If an employer fails to issue a written statement of variation when required to do so, or a statement of reasons for denying permanent status, the employee may make a claim for compensation and a declaration before an employment tribunal.¹¹⁷

2.4 Measures to Guarantee Security for Fixed-term Worker

- *Equal treatment*
- *Access to training*

¹¹¹ FTER, reg. 8(2)(a).

¹¹² FTER, reg. 8(5).

¹¹³ See generally, Deakin and Morris, 2005: paras. 5.148-5.163.

¹¹⁴ FTER, reg. 9(1).

¹¹⁵ FTER, reg. 9(2).

¹¹⁶ FTER, reg. 9(5).

¹¹⁷ FTER, reg. 7.

- *Information on vacancies for open ended contracts and the 'right' to be hired*

FTER stipulates that a fixed-term employee has the right not to be treated less favourably than a comparable permanent employee 'as regards the terms of his contract' and 'by subjected to any other detriment' by the employer.¹¹⁸ The treatment must be on the grounds that the applicant is a fixed-term employee, and must not be capable of being justified on objective grounds.¹¹⁹ In relation to objective justification, the terms of the fixed-term employee's contract of employment must be 'taken as a whole' when judging whether they are 'as favourable as the terms of the comparable permanent employee's contract of employment'.¹²⁰ The right to equal treatment is stated specifically to refer to; the right not to be subjected to a different period of service qualification; the opportunity to receive training; and the opportunity to secure a permanent position in the establishment.¹²¹ To that end, a fixed-term employee must be informed by his employer of available vacancies in the establishment.¹²² In determining issues of equal treatment, the pro rata temporis principle is to apply 'unless it is inappropriate'.¹²³

2.5 The Termination of Fixed-term Contracts

- *Under what conditions can fixed-term contracts be terminated before the end of the period stipulated in the contracts (by the employer, by the employee)?*
- *Judicial remedies in case of termination before the end*

There is nothing in principle to prevent the parties to the employment contract inserting a notice clause into a fixed-term employment contract. If the employer terminates the contract by giving notice, this constitutes a dismissal. If the employer terminates without giving notice, the normal rules of employment law apply – there is no difference between fixed-term and permanent contracts in this regard. The dismissal may be a breach of contract and it may also be unfair, depending on the circumstances of the case.

3. The Role and Content of Collective Agreements Regulating Fixed-term Work

- *Legal possibilities to implement or to deviate from legislation.*
- *Content of collective agreements' regulation of fixed-term work.*
- *Enforcement of the principle of equal treatment.*

The passage of FTER appears to have stimulated some collective bargaining over fixed-term employment, but not all of this makes use of the powers contained in the Regulations to derogate from the rules they lay down (Deakin and Koukiadaki, 2007). In the university sector there appears to be only one agreement which formally varies the terms of regulation 8. This is an agreement at Imperial College, London, which extends the period of time prior to which 'permanent' status must be granted from four years (as stipulated by the Regulations) to six. In return, the unions

¹¹⁸ FTER, reg. 3(1).

¹¹⁹ FTER, reg. 3(3).

¹²⁰ FTER, reg. 4.

¹²¹ FTER, reg. 3(2).

¹²² FTER, reg. 3(6).

¹²³ FTER, reg. 3(5).

which negotiated the agreement, the AUT (now UCU), Amicus and Unison, obtained undertakings from the employer to minimise the use of fixed-term employment and to integrate fixed-term employees into the permanent workforce where possible. It seems that this agreement is, however, an outlier within the sector as a whole. In other universities, the UCU and other campus-based unions have reached agreement with university management on the stabilisation of fixed-term work and the integration of fixed-term workers into regular career structures, without going down the route of a formal collective agreement varying regulation 8. Indeed, some of these agreements go so far as to specify that they are *not* to be construed as collective agreements within the meaning of the Fixed-Term Employment Regulations, precisely in order to avoid the possibility that they will be viewed as derogating from the basic rights of employees which are set out in the Regulations. This is for two reasons: firstly, there is pressure on union officials from members not to waive what are seen as statutory entitlements; and secondly, the unions are concerned about the possibility of litigation from dissatisfied members if they give away rights too easily.

4. Impact of Directive 1999/70/EC on Fixed-term Work

- *At implementation.*
- *After Adeneler.*
- *How national systems react*

As will be clear from the above, the impact of Directive 99/70 has been considerable. It led to the removal of the last vestiges of the waiver system, prompted the inclusion in UK law of the right to equal treatment for fixed-term employees, and brought about the insertion into UK law of potential limits on the use of successive fixed-term contracts, following the continental European model. It also led to changes in the definition of dismissal in the context of fixed-term contracts, most notably its extension to cover task contracts and contracts determined by the occurrence of an event.

However, it is not clear that FTER complies with the Directive in all respects. Issues which have been the subject of discussion and commentary include the restriction of FTER to employees, and the narrow definition of the comparator for the purposes of the right to equal treatment. The provisions made for bargained statutory adjustments have not been widely taken up, but there is evidence of a growing focus in collective bargaining on the issue of fixed-term work. It would be premature to conclude that the strategy of devolving some of the more controversial questions under the Directive, such as the definition of objective justification, to the social partners, has failed.

So far there has been no discernible impact of the *Adeneler*¹²⁴ case on UK law or practice, but this may be expected to change as more cases come before the courts.

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