The Court of Justice of the European Union and fixed-term workers: still fixed, but at least equal

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Abstract

Fixed-term work benefits employers and increases the prospects of employability of various categories of workers, but it is inherently precarious with regard to dismissal protection and the risk of recurrent fixed-term contracts. Furthermore, workers on this type of contract are vulnerable also in terms of access to training, career development and other important labour rights. The EU directive on fixed-term work emphasises the importance of equal treatment of a worker on a fixed-term contract with a comparable permanent worker, and seeks to prevent abuse of this form of contract. Yet the directive has generated an unusually high amount of litigation, and the research conducted on this case law to date is somewhat piecemeal. We fill this gap by systematically analysing the CJEU case law concerning fixed-term work – an area that is at the crossroads of market-making and market-correcting – and linking it up with the literature on labour market dualisation. To this end, we develop an analytical framework to analyse the Europeanisation of labour law, which we then use to analyse both the directive itself and the case law deriving from it (between 2007 and 2013). Our findings show that the fixed-term work directive is used as an entry point to address the equal treatment of workers, and that it is the principle of anti-discrimination that provides the legal basis for judgements. Equal treatment is affirmed, in the cases analysed, in relation to different provisions of labour contracts. With regard to the question of abusive recourse to fixed-term contracts, by contrast, the position of the CJEU is rather restrictive. While ruling against cases of clear *abuse* of fixed-term contracts (but only in line with the terms of the directive and not with other principles of EU law), the Court does not rule against the *use* of this form of contract. In this way, the Court indirectly supports the politics of labour dualisation, whereby member states can continue to use fixed-term contracts to increase the labour supply.

Introduction[1]

Nonstandard employment has moved centre-stage in comparative labour market research in recent years, triggering a series of studies analysing the national politics of nonstandard employment and the increasing dualisation of European labour markets (Palier and Thelen 2010; Emmenegger *et al.* 2012; Hassel 2014). The alarming growth of nonstandard forms of employment has led to the development of two-tier labour markets, entailing an increasingly clear-cut split between a group of well-protected labour market insiders and more precarious labour market outsiders. Outsiders are often not external to the labour market as such, but they have atypical contracts – covering part-time, temporary agency and fixed-term workers – rather than open-ended and full-time ones. Workers in such nonstandard employment typically lack adequate social insurance cover and are more vulnerable with regard to access to human resource development, wage increases and transition to open-ended contracts.

This dualisation of European labour markets is the result of opportunistic behaviour on the part of employers but also of government policies designed to increase employment rates by deregulating labour markets. Since the 1980s employers' associations have consistently and successfully pushed for the facilitated use of atypical contracts (Emmenegger 2014). In the framework of the Economic and Monetary Union (EMU), the European Union (EU) has also encouraged an increase in employment rates, in particular via 'flexicurity'. The result of this approach has been mixed, however, for many countries have flexibilised their labour markets while at the same time raising requirements for accessing, and shortening periods of entitlement to, unemployment benefits (de la Porte and Jacobsson 2012). Most importantly, all European countries, albeit at varying speeds and to differing degrees, have sought to increase the labour supply; and flexibilisation strategies and atypical contracts have been one means to this end (King and Rueda 2008; Eichhorst and Marx 2012).[2]

1. We would like to thank Stefan Clauwaert, Lisbet Christoffersen, Daniel Clegg, Miriam Hartlapp, Tobias Schulze-Cleven and Wiebke Warneck for helpful comments on earlier drafts of this paper.

2. We do not wish to argue that the 'casualisation' of employment was a deliberate policy goal of European governments. Rather, we simply note that labour market deregulation has contributed to the ever more widespread use of atypical contracts. In response to this development, several European countries have attempted to improve the status of workers on atypical contracts, although typically not by limiting recourse to such contracts. The EU directive discussed in this working paper focuses on improving the status of fixed-term workers vis-à-vis workers on open-ended contracts.

Insofar as most research on the dualisation of European labour markets focuses on the national level, the impact of EU activity tends not to be included; and yet this is surprising insofar as the EU has actually adopted three directives to regulate atypical contracts. We focus our interest in this paper on the Europeanisation of atypical work because we seek to gauge the influence of the EU on labour market dualisation in member states. We do not focus on the transposition of directives, about which there already exists a vast amount of research and knowledge (Falkner *et al.* 2005; Falkner and Treib 2008; Treib 2014). Nor do we analyse the unusually conflict-ridden political context that led up to the framework agreement on fixed-term contracts (Countouris 2007), the process of negotiation of the framework agreement among the social partners, or the trade union perspective on implementation in member states with different models of social partner involvement in relation to labour law issues (Clauwaert 1999; Sulpice *et al.* 2009).

Instead, we focus on the role of the Court of Justice of the European Union (CJEU) as an agent in interpreting EU law and on the directive on fixed-term work (FTWD)[3] which has given rise to the greatest amount of litigation and controversy. Research to date in this area has been piecemeal (Ghaliani 2013). A comprehensive analysis of CJEU case law in the area of fixed-term work is interesting, since it contextualises the role of the EU in the process of labour market reform in member states and identifies the principles most strongly upheld by the CJEU.

The FTWD is characterised by tensions between common EU norms and national political priorities, between market-making and market-correcting and, not least, between representatives of labour and of business. Since this framework directive was developed by the social partners, a particular role is foreseen for them in its implementation, subject to due respect of national circumstances. At the EU level, social partners have at best been consulted for their non-binding 'opinion', while in most cases they have been excluded. In order to accommodate such tensions and different priorities, political compromises – as in this case of regulating fixed-term work in Europe – often result in 'incomplete contracting', a notion used in international relations and Europeanisation research to denote an 'openness' of legal and political agreements. Indeed, some elements of an agreement may be formulated vaguely as a deliberate means of enabling delegated agents – such as the Commission or the CJEU – to interpret ambiguity to enhance their power (Pollack 2003).

The fixed-term work directive was formulated in the context of domestic priorities to increase labour supply. Based on a framework agreement between the European social partners[4], it exhibits a strong focus on equal treatment while laying down only minimal requirements for the legal codification of fixed-term contracts even though the possibilities for such codification are many. Due to this incomplete

3. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43–48.

4. European Trade Union Confederation (ETUC) representing labour; BUSINESSEUROPE (then called Union des Industries de la Communauté européenne, or UNICE), the European Centre of Employers and Enterprises providing Public Services (CEEP), and the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) representing the employer side.

contracting, the framework directive on fixed-term work has led to an unusually high amount of litigation on core issues of the directive: anti-discrimination, age discrimination, prevention of abuse of fixed-term contracts and conversion of fixed-term into open-ended contracts. This situation provides enormous scope for the CJEU to act as an agent of Europeanisation with regard to labour market dualisation.

Our analysis of CJEU case law shows that *equal treatment* is the most weighty consideration governing the formulation of CJEU judgments on fixed-term work. In line with the precedents set by the first major Spanish cases, the principle of equal treatment was strongly upheld in subsequent rulings. When we turn to *age discrimination*, however, we find that the CJEU rules weakly against this practice and that it was subsequently codified weakly in Germany. When it comes to *unreasonable renewals* (of successive fixed-term contracts), the CJEU rulings express an opposition in principle, but with discretion being left to national judges to examine the situation. The rulings do, nonetheless, come out more strongly against unreasonable renewals in cases of gross abuse. With regard to *conversion of fixed-term to open-ended contracts* (and the prevention of successive use of fixed-term contracts), the CJEU in principle aims to facilitate such a transition; in practice, however, its legal base is weak, leaving room for national judges to determine the particularities of cases. Furthermore, the CJEU rulings contain repeated reference to clauses of exception, thereby condoning serial fixed-term contracts for the same worker, particularly in relation to the furtherance of social policy objectives. Following the numerous CJEU rulings in this area, therefore, workers are still fixed, but are at least equal. In this way, the CJEU indirectly supports the politics of dualisation, whereby member states can continue to use fixed-term contracts as a means of increasing labour supply.

The remainder of this paper is organised as follows: The first section briefly reviews the literature on the CJEU and social policy. The second section introduces our analytical framework and research questions. The third and fourth sections present the results of our analysis of the fixed-term work directive and of the CJEU judgements. A final section concludes.

Literature review: what role for the CJEU in the development of two-tier labour markets in Europe?

The CJEU plays a central role in Europeanisation processes by interpreting EU law in cases of uncertainty (Leibfried 2010; Davies 2012). There exists a vast literature concerned with the judicialisation of politics at the EU level (Stone Sweet 2010; Wasserfallen 2010; Martinsen 2015). There is also an emerging literature on the impact of EU law, ranging from 'expansive' (Alter 1998; Blauberger 2012) to 'contained justice' (Conant 2002). The literature makes it clear that the CJEU is most influential as an 'agent' when fit is high and when resistance to the principles in rulings is low (Panke 2007). Scharpf (2010) has shown that the EU has strongly defended – and even extended – the principles of the Single Market and that the CJEU has been an agent of liberalisation; Bell (2012), meanwhile, has documented the CJEU's expansive interpretation of anti-discrimination.

For areas that include *both* market-making *and* market-correcting dimensions, such as the regulation of atypical contracts, there has been relatively little research conducted to elucidate the CJEU's role. Furthermore, a systematic analysis of the case law and the principles on which it hinges for areas that have an in-built tension is missing from the literature. We seek to fill this gap by analysing the CJEU case law in this area and connecting it to the literature on labour market dualisation. Our central research question, then, is as follows: does the CJEU, ultimately, have an impact on correcting labour market dualisation, or at least on improving conditions for fixed-term workers, via rulings on the fixed-term work directive, a framework directive that is in the realm of soft law[5] (Armstrong 2010)?

Countouris (2007) has described the adoption of the three directives on atypical contracts as an attempt at achieving a 're-regulation' of labour law. The directives concerned are those on part-time work (Council of the European Union 1997), fixed-term work (Council of the European Union 1999) and temporary agency work (European Parliament and Council of the European Union 2008). One task of the CJEU is to interpret EU legislation in the event of lack of clarity of specific clauses; the tool used for this purpose is known as a preliminary ruling and such rulings are issued in response to 'prejudicial questions' addressed to the CJEU by national courts. Additionally, the Commission is responsible for ensuring that directives are fully implemented in the member states and can launch infringement procedures in cases where implementation is found to be inadequate or inappropriate; for the fixed-term work directive (FTWD), it has

5. Soft law signifies that, while general principles must be implemented, the scope for implementation is broader than under hard law. It takes account of the need to adapt a legal principle in line with the national context.

initiated only one such procedure.[6] Our research here focuses on the CJEU's preliminary rulings, an unusually high number of which have been requested in relation to the directive in question (Bell 2011). This is indeed one of the reasons why the European Commission launched implementation reports on the FTWD (see European Commission 2006, 2007).

The CJEU's task in this area is complex, due to the multi-level structure of labour market regulation (including the derogation from national regulations by means of plant-level collective bargaining), to the proliferation of new contractual forms (that make it increasingly difficult to pin down the definition of employment relationships and labour contracts), and to the ambiguous formulation of the directives (Countouris 2007; Hepple and Veneziani 2009; Emmenegger 2014). The FTWD in particular, though based on a framework agreement concluded between the European social partners, was in fact the outcome of a protracted political process that ultimately ended in compromise, in the effort to respect member states' aim of increasing labour supply via fixed-term work while at the same time seeking to ensure decent working conditions for workers (Countouris 2007).

In this paper, we focus on the FTWD – the directive on atypical contracts that has generated by far the most litigation – exclusively via preliminary rulings issued by the CJEU. At the time of writing, there have been 60 cases relating to the FTWD, 17 to the part-time work directive and 2 to the temporary agency work directive. To delimit the search, the research strategy consisted of seeking out, in the database of EU case law, cases that met with the following criteria: 1) case brought before the CJEU alone (i.e. not the general court or civil service tribunal); 2) reference to directive 1999/70; and 3) reference to this directive in the 'grounds of judgement' and the 'operative part' of a case (i.e. not merely in an 'opinion'). This strategy ensured identification of those cases in which the fixed-term work directive was the principal focus of the litigation.[7] For the 60 cases of applications to the CJEU for a preliminary ruling in relation to the FTWD, a preliminary analysis of all cases revealed that 17 of them led to judgements in which fixed-term work is the central issue (the main grounds for the litigation) and not a merely marginal aspect. These, then, are the cases that will be analysed in greater depth in this paper.

That there have been more cases of litigation concerning fixed-term work than in relation to other atypical forms may be due to the qualitative difference between fixed-term and part-time work. Part-time work, particularly when voluntary, can facilitate the combination of family and working life, though problems exist with regard to gender-segregated labour markets and glass ceilings with respect to women's possibilities for career development compared to men (Datta Gupta *et al.* 2008; Esping-Andersen 2009). However, despite these drawbacks, part-time work does provide social security coverage – albeit with pensions that are relative to contributions – and it can therefore represent a stable form of employment,

6. It opened an infringement procedure against Luxembourg (case C-238/14) by means of 'reasoned opinion', following which the legislation was rectified.

7. URL: http://curia.europa.eu (accessed in January 2016).

and one that allows for career development. It is true that in low-wage Southern European countries part-time work is mainly involuntary; but it is not as widespread in these countries as in parts of Northern and Western Europe (Falkner *et al.* 2005: 163). Fixed-term work, by contrast, is a highly contentious issue throughout Europe.

Analytical framework

The literature suggests that EU legislation entails a varying potential for Europeanisation (Radaelli 2000) depending on 'veto players' in domestic systems or on the congruence of EU policies with domestic policy ideas and agendas. While some scholars highlight the degree of fit as an initial condition for assessing potential EU influence (Börzel and Risse 2000), others single out the role of domestic politics and political agendas as important determinants of Europeanisation (Mastenbroeck and Kaeding 2006). Scholarship on the CJEU shows that, as an agent, this institution can generate either a more *restrictive* or a more *expansive* interpretation of EU legislation (Bell 2011; Blauberger 2012). The scope enjoyed by a national judge to examine a situation is an additional relevant aspect: if wide scope for analysis of the national situation is left to national judges, then the impact of the CJEU ruling may be weaker, because national judges are likely to adhere to national traditions and policies (Davies 2012).

In conjunction with the analysis of the directive *and* the case law concerning fixed-term work, we analyse the implications of case law for the countries to which the rulings were directed. More specifically, we analyse whether EU legislation could, if not actually hinder, at least curb the process of recourse to fixed-term work or, alternatively, whether it could improve conditions for fixed-term workers. In the light of these concerns, our research questions are as follows: What is the potential of the directive itself for Europeanisation (restrictive, neutral or expansive)? How does the CJEU interpret the core principles of the directive (restrictively, neutrally or expansively)? And finally, what scope for interpretation is left to the national judges (wide, implicit or narrow)? Building on the work of Blauberger (2012) and Davies (2012), the analytical framework displayed below in Table 1 summarises how we see the different dimensions (rows) and how they relate to the degree of Europeanisation (columns).

Before moving on to examine the case law, we analyse the content of the EU directive itself, assessing the Europeanisation potential of this legal instrument on a continuum ranging between restrictive (associated with less Europeanisation) and expansive (associated with more Europeanisation). This is important because the directive provides the legal framework and pedestal on which the CJEU can base its responses to requests for preliminary rulings. The second dimension, the CJEU interpretation of the EU law, can also range from restrictive to expansive along the same continuum of less to more Europeanisation. The third aspect is the discretion left to national judges by the CJEU, which ranges from high (with greater likelihood of adherence to national traditions and circumstances) to low (with more likelihood of impact of CJEU ruling).

Table 1 **Framework for analysing the Europeanisation of EU law**

Europeanisation dimensions			
Scope of EU directive	Restrictive	Neutral	Expansive
Interpretation of EU law in preliminary questions to CJEU	Restrictive	Neutral	Expansive
Degree of discretion to national judges (proportionality)	Wide	Implicit	Narrow
Outcome			
Degree of Europeanisation	Low level (contained justice)	Medium level (neutral justice)	High level (expansive justice)

Source: Own conceptualisation inspired by Blauberger (2012) and Davies (2012).

The effect of the rulings on processes of labour market dualisation will be derived indirectly, by deducing whether the FTWD and the case law are likely to correct or at least curb the process of dualisation and/or to improve conditions for fixed-term workers. For instance, if the Court rules strongly against the use of fixed-term work or in favour of the conversion to open-ended contracts, with little scope for interpretation to national judges, this can effectively be regarded as a brake on the process of dualisation. If the Court rules strongly on anti-discrimination, this can be considered to improve the situation of fixed-term workers, while not actually hindering the growth of outsiders on European labour markets. Nonetheless, by adopting an expansive interpretation of anti-discrimination for all aspects of labour contracts, the CJEU could contribute to less dualised labour markets, insofar as insiders would no longer have more favourable conditions than outsiders. We conceptualise the possible impact of the case law as ranging from 'contained' (restricted to a particular judgement and without broader repercussions) to more 'expansive' justice.

Clearly, other factors also influence processes of dualisation. For instance, the literature argues that the crisis context, which characterises the period under investigation, has further strengthened a policy focus on increasing the labour supply (Bermeo and Pontusson 2012; Farnsworth and Irving 2011)., Palier and Thelen (2010: 133) have stated that, especially for countries with a corporatist-conservative welfare state, the use of fixed-term contracts represents the 'typical continental answer to the new economic context'. Overall, the existing literature clearly suggests that increasing the labour supply by means of atypical work is a highly relevant consideration for the period in question (2007-2013), in particular in corporatist-conservative welfare states (Palier and Thelen 2010; Eichhorst and Marx 2012; Emmenegger *et al*. 2012).

Although the case law by itself is unlikely to halt the use of fixed-term contracts, which depends on a variety of factors as suggested above, the examination of CJEU decisions provides important insights as to whether the case law can diminish or correct the use of fixed-term contracts and/or improve conditions for fixed-term workers. As a result, the analysis of CJEU decisions adds to our understanding of dualisation processes.

Europeanisation and the directive on fixed-term work: restrictive scope

The political context in which the FTWD was adopted becomes apparent from a reading of this directive's preamble and general considerations: although it is initially stated that 'contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers' (general considerations, FTWD, clause 6), it is subsequently claimed that 'fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers' (general considerations, FTWD). This statement reflects the fact that, in recent decades, most EU member states that had previously imposed significant restrictions on the use of fixed-term contracts, have deregulated fixed-term contracts in order to increase the labour supply (Countouris 2007; Venn 2009; Palier and Thelen 2010; Emmenegger 2014). Hence, the purpose of the FTWD is not to reverse this trend. Nor is the aim to provide comprehensive coverage for fixed-term workers, but rather, '[t]his agreement sets out the general principles and *minimum requirements* relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations' (preamble, FTWD). Table 2 below presents key aspects of the directive, which will be discussed below.

The first purpose of the FTWD is to ensure protection and equal treatment for a fixed-term worker with a 'comparable permanent worker' (CPW) or relevant collective agreements (see clause 3). For the area of part-time work, this model has been labelled the 'onion skin model' (Falkner *et al.* 2005), indicating that a slimmer working week should have all the same components (protection, insurance, training, wages, bonuses etc.) as a full working week. For fixed-term work, the principle of anti-discrimination (with regard to comparable workers on open-ended contracts, see clause 4) implies equal payment, equal access to training, and the prospect of obtaining an open-ended contract if the employment relationship continues beyond the previously agreed, fixed period of time. Differential treatment may, however, be justified on 'objective' grounds, which, as noted by Bell (2011), is striking since any justification of direct discrimination under EU law is normally ruled out by the anti-discrimination legislation. Furthermore, while a comparator makes sense in the context of labour law, the hinging of equal treatment entirely on the comparator, while allowing for identification of and ruling against direct discrimination, actually prevents a more comprehensive definition of anti-discrimination (Bell 2011: 164). Thus, the anti-discrimination aspects of the directive are relative (to a comparable permanent worker) and could allow discrimination under objective conditions. On this basis, we conclude that the directive embodies a restrictive interpretation of anti-discrimination compared to other EU legislation in this area.

Table 2 **Key aspects of the fixed-term work directive**

Aim Clause 1	The directive aims to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination' and to 'establish a framework to prevent abuse arising from the use of successive fixed-term contracts or relationships'.
Scope Clause 2	It applies to all fixed-term workers who have an employment relationship as defined in law, collective agreements or practice in each Member State (except initial vocational training relationships and apprenticeship schemes as well as employment contracts that have been concluded within the framework of a specific public or publicly-supported training, integration or vocational re-training programmes).
Purpose of contract/ objective conditions Clause 3	Fixed-term work is defined as 'having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by *objective conditions* such as reaching a specific date, completing a specific task, or the occurrence of a specific event'. Comparable permanent workers (CPW) are workers 'with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualification/skills [...] Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, in accordance with national law, collective agreements of practice'.
Equal treatment/ non-discrimination Clause 4	The principle of equal treatment stipulates that 'fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation *unless difference is justified on objective grounds*' (4.1). The directive also stipulates that 'where appropriate the principle of *pro-rata temporis* shall apply' (4.2). There is some discretion in how the principle is applied, since the application of the equal treatment clause is to be decided by Member States after consultation with the social partners (4.3). Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds (4.4).
Prevention of abuse Clause 5	Requirement for Member States to devise measures to prevent abuse of recourse to fixed-term contracts. The clause specifies that Member States should counter successive use of fixed-term contracts, where such measures do not already exist, by specifying at least one among three measures: (1) objective reasons for justifying renewal of a particular contract or relationship; (2) a maximum total duration of fixed-term contracts; or (3) a maximum number of renewals of fixed-term contracts. The clause further specifies that Member States shall determine the conditions under which employment contracts can be regarded as successive and the conditions under which such contracts shall be considered as contracts of indefinite duration.
Information Clauses 6 & 7	These clauses require establishments to provide information about and access to job vacancies and training opportunities to fixed-term workers on an equal footing with CPW as well as about fixed-term work to existing workers' representative bodies.

Source: Council of the European Union 1999.

The second purpose of the directive is to prevent the use of successive fixed-term contracts or relationships (clause 1). While requiring member states to ensure that there are rules, the FTWD, in order to take account also of the different regulatory frameworks in member states, allows for different paths to preventing the successive use of fixed-term contracts (clause 5). While this may at first sight seem to be a weakness, it caters for the possibility of the directive being implemented in all EU member states. Indeed, the aim is not for it to be a one-size-fits-all solution but, rather, to enable all EU member states to adopt the principles agreed in the directive in order to ensure equal treatment of workers and to prevent successive use of fixed-term contracts. However, it can

indeed be seen also as a weakness, since conditions under which the employment relationship is to be deemed permanent must be defined in national legislation *and* conditions for identifying contracts as 'successive' must also be defined nationally and, importantly, with the involvement of social partners. This purpose is thus open to interpretation and therefore rather restrictive in terms of its potential for re-regulation regarding the use of fixed-term contracts.

Our analysis of the content of the directive on fixed-term work thus suggests that while it does have potential for Europeanisation in respect of anti-discrimination, recourse to fixed-term work, and conversion of fixed-term contracts into open-ended contracts, a number of loopholes in its formulation mean that as a legal base it is rather weak. Though age discrimination is not an explicit aim of the directive, it can be addressed through anti-discrimination in general and we include this aspect in the analysis because it is a relevant issue in the process of labour market dualisation and one on which the views of employer associations and unions tend to diverge and conflict.

CJEU judgements on the directive on fixed-term work

An analysis of CJEU judgements concerned with the FTWD produces numerous striking findings. Among the 60 cases of application to the CJEU for a preliminary ruling on a matter arising from the FTWD, our analysis served to identify 17 cases of judgements where fixed-term work is the central (i.e. the main grounds for the litigation) and not a merely marginal issue. Table 3 below provides an overview of the 17 cases analysed, with a breakdown based on main issues and indicating whether cases emanated from the public or private sectors, the position of the government, the outcome of the case, and whether or not discretion was accorded to the national court. In addition, the large majority of these cases (15 out of 17) come from continental and in particular Southern European countries with corporatist-conservative welfare states (Germany, Spain, Italy, Greece, Austria and France) where social rights are derived from labour market participation. In these countries, the increasing of employment rates by means of labour market deregulation has been high on domestic political agendas. While open-ended contracts remain the core form of labour market relationship in these welfare states, governments, in order to increase labour market flexibility and in the face of union opposition, have resorted to increasing numbers of fixed-term contracts (King and Rueda 2008; Palier and Thelen 2010; Emmenegger 2014). It is however to be noted that recently, in the crisis context, governments have also undertaken several reforms to make it easier to dismiss workers on open-ended contracts (Schömann 2014).

It is worth noting that most cases emanated from fixed-term contracts in the public, rather than the private sector.[8] While not statistically significant in any way, this is an indication that labour market dualisation is, as shown in recent literature, just

8. In several countries, employment contracts of public sector workers are considered to be part of administrative law rather than labour law. However, for the sake of simplicity, we use labour law to refer to both private and public sector employment contracts.

as relevant for the public as for the private sector (Kroos and Gottschall 2012). An additional element of explanation here may be that workers in the public sector, where union density levels are higher, are more likely to challenge issues arising from their employment contract or working conditions.

In the following sections, we analyse the CJEU decisions according to key clauses of the FTWD, and provide in-depth analysis of the principal cases that set a precedent, as well as complementary analysis of subsequent cases on the same issue. We thus present, in succession, analyses of cases addressing anti-discrimination, age discrimination, abuse of fixed-term contracts and conversion of fixed-term contracts to open-ended contracts. The main findings are summarised in Table 3 below.

Table 3 **Overview of CJEU case law on fixed-term work**

Country	Name and year of case	Issues at stake	Public/ Private	Position of national government	Outcome	Discretion to national court
Spain	*Gaviero and Torres* 2010	Is the Spanish state required to implement the principle of entitlement to 'special benefit'? Is it required to do so retroactively? Clause 4	Public	The LEBEP (Law for civil servants) is to be regarded as a national measure transposing Directive 1999/70, even in the absence of explicit reference to this effect.	Temporary civil servants can invoke the directive against their national state and before a national court in order to obtain recognition of their entitlement to length-of-service increments; after completion of the transposition period, this principle must be considered to apply retroactively.	
Spain	*Del Cerro Alonso* 2007	Does the FTW directive cover financial conditions (other than pay)? Access to special benefit (even for non-career civil servants). Clause 4	Public	The terms of employment do not include any financial bonus.	FTC workers should not be discriminated against with regard to bonuses; 'terms of employment' must be interpreted in such a way as to serve as an admissible basis for a claim to a bonus.	
Spain	*Rosado Santana* 2010	Should periods of service as temporary civil servant be taken into account for the purpose of seeking to obtain internal promotion? Clauses 4&6	Public	The directive is not applicable to this case; there exist differences between career and temporary civil servants with regard to requirements of entry, merits and capacities, some tasks being reserved exclusively for career civil servants.	Periods of service as a temporary civil servant must be taken into account; the directive precludes differing treatment, for promotion purposes, of career and temporary civil servants on the sole basis of contractual difference, in the absence of objective grounds.	X
Germany	*Mangold* 2005 C-144/04	Age discrimination in relation to use of FTC; abuse of (successive) FTC; can national law allow use of FTC on age grounds alone (52 +)? Clauses 4&5	Private	The lowering to 52 of the age at which FTCs were legally permissible was intended, in the context of new social guarantees, to encourage the employment of older persons in Germany.	Differing treatment of FTC workers on age grounds alone is *not* allowed; national legislation lowering the age at which FTCs are permitted is acceptable given the aim to encourage employment.	X
Germany	*Kumpan* 2011	Does EU law preclude national legislation that allows for FTC on the sole basis of age in the absence of other objective conditions? Should national law include provisions to prevent the successive use of FTC? Is the national collective agreement in conflict with EU law? Clause 5	Private	N/A	Discrimination is not permissible in cases where the initial employment relationship is continued for the same activity and with the same employer; the collective agreement is not in line with EU law.	
Germany	*Kucuk* 2012	Can the objective need for serial FTCs be considered permanent on grounds of serial recurring needs? Is a recurrent FT employment relationship justified in association with a social policy aim (i.e. in this case, maternity/paternity support)? Clauses 4&5	Public	Employers should have discretion to assess the need for FTCs, including in situations of serial recourse to such contracts, for this is different from a 'fixed and permanent' need. This practice, what is more, is in line with a social policy aim.	Temporary replacements followed by renewals of FTCs on a recurrent or even *permanent* basis do not mean there is no objective reason for concluding such contracts. The number and cumulative duration of the fixed-term contracts with same employer must, nonetheless, be taken into consideration.	X
Italy	*Vassallo* 2006	Are individuals entitled to compensation for losses caused by failure to adopt appropriate measures to prevent abuse relating to the use of FTC and/or relationships with employers in the public sector? Under what conditions can FTC be considered to be automatically subject to conversion into open-ended contract? Clause 4	Public	Questions inadmissible	The FTW directive does not preclude national legislation that fails to ensure the conversion of two successive fixed-term contracts into an open-ended contract, insofar as there exists another measure to prevent and impose penalties on the abuse of FTC by a public sector employer.	X

Country	Name and year of case	Issues at stake	Public/ Private	Position of national government	Outcome	Discretion to national court
Italy	*Marrosu and Sardino* 2006	Are individuals entitled to compensation for losses caused by failure to adopt appropriate measures to prevent abuse relating to the use of FTC and/or relationships with employers in the public sector? Under what conditions can FTCs be considered to be automatically subject to conversion into open-ended contracts? Clause 4	Public	Questions inadmissible	The FTW directive does not preclude national legislation that fails to ensure the conversion of two successive fixed-term contracts into an open-ended contract, insofar as there exists another measure to prevent and impose penalties on the abuse of FTC by a public sector employer.	X
Italy	*Valenza et al.* 2012	Does loss of length of service under FTC as provided in national legislation fall within the scope of derogation on the basis of objective grounds? Can length of service accrued under FTC be taken into account? Clause 4	Public	Recruitment under the 'stabilisation procedure' is a derogation from normal procedure based on competition; this justifies a starting pay level from the beginning of stabilisation and not the start of the FTC; there should be no reverse discrimination against career civil servants. Taking account of length of service accrued in FTC runs counter to Italian legislation.	Clause 4 of the FTW directive precludes national legislation containing provision for rules that unconditionally justify differing treatment with respect to public officials employed on a fixed-term basis.	X
Italy	*Sibilio* 2013	Is the directive applicable to 'socially useful workers'? Does clause 4 preclude that these workers should be paid less than workers on open-ended contract performing the same task?	Public	These workers are not covered by the directive.	The directive does not cover this type of worker/contract (excluded under clause 2).	
Austria	*Zentral-betriebsrat der Landes-kranken-häuser Tirols* 2010	Discrimination: restriction of entitlement to benefits and special forms of leave for workers on contracts of less than six months. Clause 4	Public	The Tyrol provincial government stated that EU law is not of relevance to national legislation in this area.	Clause 4 of the FTW directive precludes national legislation that excludes from the scope of the law workers employed on fixed-term contracts of less than six months or on a casual basis (no discretion).	
Greece	*Adeneler et al.* 2006	Failure to renew FTC; lack of objective reasons for fixing the duration (during transposition of directive into Greek law). Clause 5	Public (but governed by private law)	Public sector workers are covered by a different presidential decree from that governing the conditions of private sector workers; hence questions concerning the presidential decree for the latter are irrelevant to the former. According to the relevant presidential decree, nine of the 18 workers concerned should receive open-ended contracts.	Objective reasons to justify successive fixed-term contracts require reference to the particular type of employment relationship; 20 working days between two FTC is insufficient to claim that the two contracts are not successive; domestic courts are required to anticipate the directive if it is implemented belatedly; there can be no special exception rules for public sector (no discretion).	
Greece	*Angelidaki et al.* 2009	Failure to renew fixed-term contract (first renewal); lack of objective reason for fixing the duration. Clause 5	Public (but governed by private law)	The reference to an outdated law (1920) to justify complaints is misguided because the law does not apply to public sector workers.	Objective reasons are required to justify the setting of a fixed duration but this does not apply to a first and single use of an FTC.	

Country	Name and year of case	Issues at stake	Public/ Private	Position of national government	Outcome	Discretion to national court
Greece	*Epitropos tou Elegktikou Synedriou* 2012	Refusal to approve the payment order relating to the remuneration of a fixed-term employee at the ministry concerned; the ministry argued that employee had been on leave for 34 days during the seven-month period and that the remuneration should be reduced proportionately (for FTC any leave taken is unpaid, unlike for CPW). Clause 4	Public (but governed by private law)		The dispute-resolving body is not a court or tribunal and consequently is not entitled to send a reference for a preliminary ruling to the court. No decision. To obtain a ruling, the parties would have to approach a 'real' national court.	
Bulgaria	*Georgiev* 2010	Is it permissible that national legislation should allow for FTCs only for university lecturers over the age of 65 (up to a maximum of 68)? Age discrimination. Clause 4	Public	Such national legislation is not unfavourable to academics because it enables them to continue working beyond the age of 65 (when they can be required to retire on a pension). The professors in question are offered the opportunity to work beyond 65 on FTC but only up until the age of 68. The government argues that national legislation, in this way, pursues a social policy aim	Directive 2000/78 does not preclude national legislation that enables academics to continue working after the normal retirement age as this allows for flexibility for the individual and the university, and should foster recruitment of younger university staff. It is for national courts to determine whether this policy is appropriately implemented by universities.	
Ireland	*Impact* 2008 C-268/06	Pay and pension conditions for civil servants on FTC: claim for equal treatment with CPW; are there conditions to justify the renewal by government departments of FTC for up to eight years? Clauses 4&5	Public	The fact that there is no definition of 'employment conditions' makes the provision impossible for national courts to apply;	Clause 4 on equal working conditions with CPW is sufficiently precise for workers to be able to invoke it (and to obtain equal treatment); Contrary to the Commission's claim, the Court maintains that there must be objective reasons to justify serial FTC (clause 5).	
France	*Huet* 2012 C-251/11	Conversion of FTC to open-ended contract; is there an obligation to renew the contract on terms identical with the principal clauses of the previous contract, especially as regards job title and remuneration?	Public	The conversion of the material conditions of FTC to regular contract may be detrimental to the individual.	There is no obligation to reproduce the exact terms of an FTC if and when it is converted into an open-ended contract; but the member state must ensure that the conversion of FTCs into open-ended contracts is not unfavourable to the person concerned in cases where tasks and the nature of responsibilities remain unchanged.	X

Source: authors' compilation on the basis of findings in CJEU database on case law regarding fixed-term work.
Note: FTC: fixed-term contract; FTW: fixed-term work; CPW: comparable permanent worker.

Anti-discrimination: expansionist CJEU interpretation with narrow discretion for national judges

The issue of anti-discrimination has been discussed in the literature as the key aspect of the FTWD. Clause 4 of the FTWD stipulates that 'fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers *solely* because they have a fixed-term contract or relation unless difference is justified on objective grounds'. The equal treatment principle is the key aspect on which this clause hinges, but it is minimalist (prohibiting direct discrimination) and not comprehensive. Comprehensive anti-discrimination would prohibit direct, indirect and other forms of discrimination, as is the case in the directive on anti-discrimination (Bell 2011, 2012). The starting point in the FTWD is thus rather modest.

The case that has set a precedent in this area is the *Del Cerro Alonso* case, in which the main issue addressed was whether the FTWD covers financial terms of employment other than pay (i.e. bonuses). Under Spanish legislation, special rules were applicable to health care workers entailing a distinction between staff on open-ended contracts and those subject to fixed-term contracts. This discriminated against fixed-term workers in terms of entitlement to the special 'three yearly allowances'. Del Cerro Alonso had 12 years of service (1992 to 2004) in the health care sector on the basis of fixed-term contracts; she was then granted an open-ended contract, at which point she claimed in-service benefits retroactively and met with a refusal. The local San Sebastian court to which she took her case put two questions to the CJEU: first, does the FTWD also cover financial conditions (other than pay)? Secondly, if this is the case, can the special legislation for civil servants[9] be overruled?

The position of the Spanish government was that this worker's terms of employment do not include extra financial bonuses. However, the CJEU ruled that there was no objective reason why workers on open-ended contracts should be entitled to the bonus if workers on fixed-term workers were denied it. Furthermore, the Court noted that equal treatment is a principle of Community social law, which 'cannot be interpreted restrictively' and that equality of treatment is a 'general principle of EC law'. Thus, as pointed out by Bell (2011: 160), 'the Court is elevating the status of the Directive (or at least its equal treatment provisions) in the direction of a fundamental right'. In this case, although the directive contains a relative interpretation of equal treatment (with a comparator), the CJEU has an expansive interpretation of equal treatment. The Court's judgement was that fixed-term workers should not be discriminated against with regard to bonuses, so that the notion of 'employment conditions' should include access to extra bonuses. The national legislation for civil servants in this area was thus overruled and the Spanish legislation was rectified to prohibit discrimination. However, this re-regulation was minimal and restricted to this area, since other aspects of fixed-term work remained untouched.

9. Here and in the following, 'civil servants' refers to public sector workers.

By contrast, major labour reforms did take place in Spain in the context of the financial crisis, as a result of which the gap between workers on fixed-term and those on open-ended contracts has been narrowed from an anti-discrimination standpoint. The reforms of 2010 and 2012 increased the flexibility applicable to workers on open-ended contracts, particularly with regard to dismissals. Furthermore, the 2012 labour reform reduced the autonomy of labour courts in deciding on cases of dismissal. This has been flagged as a paradigm change in Spanish labour law, since the intention is to decrease the legal uncertainty that has been omnipresent due to the high incidence of litigation. For workers on fixed-term contracts no changes were introduced however, despite demands by unions for improvement of their conditions (and for incentives to reduce this type of contract). In conditions of economic uncertainty, the use of fixed-term contracts in the Spanish labour market is deemed too important to change its status (Gómez Abelleira 2012; Mercader Uguina 2012).

The *Del Cerro Alonso* case served to enshrine an *expansive* interpretation of equal treatment in the CJEU case law on fixed-term work. In subsequent anti-discrimination cases, the Court also came up with an expansive interpretation of the principle, in keeping with its strong legal anchor in this area. In the *Zentralbetriebsrat der Landeskrankenhäuser Tirols* case, the plaintiff argued that a fixed-term contract of six months should not exclude access to benefits and leave in comparison with a permanent worker in transition to a part-time contract. In the *Gaviero and Torres* case, the issue raised concerned access to a special benefit (length-of-service increment) for temporary civil servants who, under the legislation for civil servants, had been excluded from such a benefit *exclusively* due to their status as fixed-term workers. In the Irish case *Impact*, where temporary civil servants were claiming the same pay and pensions as comparable permanent workers (CPW), the CJEU ruled unambiguously that the Irish government (employer) must grant equal treatment. In all three of these cases, the CJEU ruled that equality of treatment must prevail with regard to all aspects of the employment contract, leaving no discretion to national judges. Accordingly, the case law in this area altered the national collective agreements or national labour law.

In these three cases the CJEU ruled, in line with the *Del Cerro Alonso* ruling, that temporary civil servants *can* invoke the directive in order to obtain the types of benefit in question and that national legislation should be rectified accordingly. In all these cases, we see a clear trend whereby the CJEU uses the notion of CPW to require equality of treatment, irrespective of status, between workers undertaking the same task. This is an expansive interpretation of equal treatment, despite the use of a comparator. Explicit reference is also made to the general principle of equal treatment in Community social law, although this principle is not raised to the status of fundamental social right. The member states were required to change their legislation and rules, often stripping civil servants of special status (often requiring a dismantling of special civil servant legislation) *and* enabling fixed-term workers to have the same rights as civil servants.

Age discrimination: anti-discrimination, but on fixed-term contracts

Two cases (*Mangold* and *Kumpan*) concerned age discrimination (use of fixed-term contracts) against workers under the legal retirement age, but regarded as 'older workers'. In these cases the CJEU dampened the possibilities for (ab) use of fixed-term contracts; yet there was no clear prohibition, indicating that the rulings reflected a very restrictive reading of the directive's clauses relating to abuse of the fixed-term contract. These rulings thus do not prevent labour market dualisation in relation to older workers below retirement age.[10]

In Germany, where both these cases originated, the 1996 regulation on increasing labour supply, subsequently extended in 2000 and 2002, permitted employment on fixed-term contract on no objective grounds other than age (Emmenegger 2014: 238-239). In 2002, in the framework of the Hartz reforms to increase labour market participation, the age threshold as an 'objective' reason for the use of fixed-term contracts had been lowered from 58 to 52 years. It was this legislation that was challenged in the *Mangold* case. Mr Mangold, a lawyer aged 56, was hired by Mr Helm on a fixed-term basis for the very purpose of challenging the law in the courts (Stone Sweet and Stranz 2012: 100-101), the argument being that the German 2000 Act on part-time and fixed-term work and its 2002 revision were in breach of the 1999 fixed-term work and the 2000 anti-discrimination directives. The Munich labour court referred several questions to the CJEU, in particular whether subjecting employees aged 52 to fixed-term contract on sole grounds of age was compatible with Community law (Schmidt 2005: 505).

The German government position was that this provision was intended to encourage employment of older persons in Germany. In November 2005, the CJEU ruled that there should be no differential treatment between workers on fixed-term and those on open-ended contracts. The CJEU also ruled that in relying solely on the 'age' criterion, German labour law was in breach of Community law in the area of anti-discrimination (Schmidt 2005: 515). This therefore represented an expansive interpretation of anti-discrimination. However, considerable discretion was left to the national judge to examine the particular situation. The consequence of the judgement was that the national legislation on fixed-term contracts for workers aged 52 or older had to be altered. An adjustment was thus made whereby the maximum duration of fixed-term contracts for such workers was to be restricted to five years maximum; additionally, recourse to these contracts became limited to workers who had been unemployed for at least four months immediately before taking up the new job (Stettes 2005). As this alteration suggests, this EU-compatible re-regulation by Germany was minimal.

In the second case on age discrimination (*Kumpan*), the dispute centred on a collective agreement for airline workers. According to the collective agreement

10. One case (*Georgiev*) concerned the use of fixed-term contracts for workers above the legal retirement age. In this case, there was no prohibition, but there were no risks with regard to labour market dualisation. Though this case will not be discussed here in detail, its key aspects and those of the judgement are given in Table 3.

concerned, an open-ended contract would end automatically when a worker reached the age of 55. Thereafter, the collective agreement allowed for fixed-term contracts with such workers, by mutual agreement and insofar as the worker in question was considered to be 'physically and occupationally fit', up to the age of 60. After Miss Kumpan was 55, her contract was renewed annually until she was 60, and she claimed that this represented an abuse of recourse to fixed-term contracts on the exclusive grounds of age. Here, the ruling of the CJEU was in the footsteps of the *Mangold* case. First, the CJEU ruled that discrimination should not be allowed when the initial employment relationship continued for the same activity, with the same employer. Secondly, the successive use of fixed-term contracts from age 55 to 60 should not be allowed, i.e. the collective agreement should be altered to ensure that there was no automatic recourse to fixed-term contracts after 55. There was little room for discretion to the national judge.

In sum, in relation to age discrimination, the CJEU softens the use of fixed-term contracts under the age of 65, but does not generally prohibit their use for this age group. The rather weak nature of the ruling is compounded by the fact that member states adapt only minimally to its requirements.

Preventing the abuse of fixed-term contracts: restrictive interpretation

Seven of the cases concerned prevention of the *abuse* of fixed-term contracts. In all cases, the Court adopted a rather restrictive interpretation. In the *Kumpan* case, the Court argued that it was difficult to determine conditions under which *use* of fixed-term contracts actually constituted *abuse*. This rather ambiguous ruling and the rather large indirect discretion left to the national judge to determine these 'conditions' suggest that the CJEU does not wish to interfere in Germany's policy of using fixed-term work for 'older workers' below the statutory retirement age.

In another German case (*Kucuk*), the plaintiff had been employed – in the context of a social policy aim (parental leave) – on a succession of 13 fixed-term contracts over a period of 11 years. In this case, the CJEU ruled that the recurrence of temporary contracts, even on a permanent basis, is not necessarily indicative of the absence of objective reasons for such a practice, particularly if the practice is in the service of another social policy aim. However, the CJEU then complemented this observation with an indication that the number and cumulative duration of fixed-term contracts with the same employer should be analysed by the national judge, thereby leaving broad discretion to the latter. The court's stance here is overall quite weak.

In another case in Ireland (*Impact*), where civil servants claimed that their (renewed) fixed-term contracts were of unreasonably long duration (8 years), the CJEU maintained that there were no objective reasons for this long duration on a fixed-term contract. This constituted a case of gross abuse, where the CJEU ruled expansively, but in line with the aims of the directive.

A case that stands apart is the *Zentralbetriebsrat der Landeskrankenhäuser Tirols* case. Where workers were hired on the basis of fixed-term contracts, the Court here ruled that they should be accorded equal treatment and that the form of contract was illegal, the implication being that open-ended contracts should have been used instead. The government of the Austrian state Tyrol argued that fixed-term contracts were used for administrative reasons, but the Court ruled that the reasons were clearly budgetary and that the discrimination was therefore unjustified. Bell (2012) comments that prior to this ruling it was not clear whether financial reasons could be invoked as 'objective justification' for fixed-term work; this case suggests that they cannot. Given the current financial recession, the lack of a possibility to justify the use of fixed-term contracts on grounds of budgetary constraint is likely to have considerable repercussions. Here, the Court adopted an expansive interpretation and the national court was left with little discretion. Other cases should be analysed, however, to confirm whether or not in the current economic climate this interpretation continues to be upheld.

Another instance in which this issue was addressed is the *Mangold* case, where the CJEU argued that the directive did not apply because its provisions limit only the use of *successive* fixed-term contracts (whereas the contract in question was Mr. Mangold's first one) and because Mangold had been hired to perform one specific task. On these grounds, the CJEU ruled that the German law was not in breach of the FTWD. There have been many other cases concerning the abuse of fixed-term contracts in which plaintiffs had only one fixed-term contract (or one renewal of a fixed-term contract), a circumstance which invalidated the claim of (unreasonable or successive) abuse of fixed-term contracts (*Mangold, Vasallo, Marrosu/Sardino* and *Angelidaki et al.*). In one case, the ruling was that the body introducing the case was not legally competent to do so (*Epitropos tou Elegktikou Synedriou*).

In sum, with regard to prevention of the abuse of fixed-term contracts, the CJEU adopts a rather restrictive position based on the argument of 'objective' conditions, including where these are based on social policy considerations. Cases of gross abuse have, however, been condemned. Another notable finding is that more discretion is allowed to national courts to examine specific conditions in cases of abuse of fixed-term contracts and the related issue of conversion of a fixed-term to an open-ended contract than in equal treatment issues where the rulings provide little scope for interpretation by national judges.

Conversion of fixed-term contracts to open-ended contracts: restrictive stance with high discretion to national judges

In the *Rosado Santana* and *Valenza et al.* cases, the issue was the differential treatment between fixed-term workers and CPWs in relation to the conversion of fixed-term contracts into open-ended ones, as provided for in the FTWD. In the *Rosado Santana* case, the issue was consideration of periods as a temporary civil servant for the purpose of obtaining internal promotion. In the *Valenza et al.* case, the issue was pay differences for civil servants who had just obtained

open-ended contracts after periods as civil servants on fixed-term contracts. The CJEU ruled that, in the absence of *objective* reasons, there could be no differing treatment between career and temporary civil servants on this issue. In this case, the Court left full (fact-finding) scope to the national judges to examine whether or not there actually existed differences in tasks between temporary and permanent career civil servants.

Hence, while issues of equal treatment in relation to terms of employment (bonuses, access to social security, etc.) are strongly upheld, in relation to the conversion of a fixed-term to an open-ended contract, the CJEU adopts a restrictive interpretation, since a more expansive stance would be seen as meddling with member states' policies of increasing their labour supply. This allows considerable discretion to national judges in matters of conversion of fixed-term to open-ended contracts in countries with a strong tradition of court decisions in the area of labour law. In the Spanish case, such judicialisation of the labour market is problematic, since it is based not on common principles but on differing standards. In general, however, the Courts have sought to protect individuals against unfair dismissal, typically by increasing the severance pay (Gómez Abelleira 2012).

In the *Huet* case we see once again that the issue of conversion of fixed-term to open-ended contracts is interpreted rather restrictively by the CJEU. In this case, the plaintiff's contract was changed from a fixed-term to an open-ended contract. However, the job description had been changed and the starting salary was lower. Here, the CJEU ruled that there was no obligation for employers to convert fixed-term contracts into open-ended ones with identical conditions. This ruling places on national courts the responsibility for analysing concrete conditions and assessing whether or not there existed abuse of recourse to fixed-term contracts. Given the political pressure to deregulate the French labour market in the face of high unemployment rates, national courts are likely to accept the prerogative of employers who are seeking to reduce their costs.

In other cases concerning the conversion of fixed-term to open-ended contracts, there had not yet been successive contracts and the claim was thus ruled invalid by the CJEU (*Mangold, Vasallo, Marrosu/Sardino* and *Angelidaki et al.*).

In sum, concerning the conversion of fixed-term to open-ended contracts, the interpretation of the CJEU is clearly restrictive.

Conclusion

The EU has the potential to Europeanise the regulation of fixed-term employment in member states. Yet because the directive, based on a framework agreement between social partners, is an 'incomplete contract' characterised by numerous ambiguous clauses and exceptions, member states are able to subject its provisions to differing interpretations. Importantly, the CJEU is the body that has the jurisdiction to interpret EU law if and when national judges find it to be unclear. The unusually high number of preliminary rulings in relation to this directive indicates that a good deal of doubt prevails concerning interpretation of its provisions.

Our findings show that the CJEU uses the FTWD as an entry point to address questions concerning the (equal) treatment of workers. The Court has an expansive interpretation of equal treatment – with regard to a comparator – concerning pay, bonuses, access to training and promotions. This interpretation of equal treatment is in line with a general Community emphasis on equality as a fundamental social right. Individual rights for fixed-term workers are therefore strengthened through CJEU judgements in the area of fixed-term work. A side effect of the improvement of conditions for fixed-term workers is that workers on open-ended contracts have sometimes seen the removal from their employment contracts of their special privileges. From the standpoint of labour market dualisation, accordingly, the gap between workers on fixed-term contracts and those on open-ended contracts may be narrowed.

With regard to age discrimination, the CJEU bases its judgement on a broader understanding of social policy purposes, in line with member states' priorities of increasing labour supply in a cost-effective manner. Thus, while judgements in this area do uphold the need for the use of fixed-term contracts for older workers to be subject to certain conditions, the CJEU does not regard this practice as illegal – a rather surprising finding, given the strong stance on anti-discrimination in Community law. Similarly, with regard to conversion of fixed-term to open-ended contracts, though the CJEU adopts a strong stance in cases of gross abuse, in most cases the definition of conditions of conversion is left to the national judges, who here enjoy considerable discretion. As such, CJEU judgements in this area do not strongly impinge upon domestic agendas of increasing labour supply.

With regard to abuse of fixed-term contracts and unreasonable renewals, our findings suggest that while the CJEU rulings are hinged on the directive's provisions, the Court does not tend to challenge the use of these contracts. In most instances, the Court argues that there exist sufficient objective grounds – such as 'social

policy aims' – to allow the conclusion of fixed-term contracts. In general, the Court does not stop the predominantly continental European countries (Austria, France, Germany, Greece, Italy and Spain) from relying primarily on fixed-term contracts in their efforts to raise labour supply. This may be due to the restrictive scope of the directive and the weak legal base it offers the Court for a re-regulation of fixed-term work, compared to the area of anti-discrimination.

The expansive interpretation of EU legislation by the CJEU is often coupled with little discretion for national judges; this is probably because the interpretation hinges on EU principles that are considered fundamental. By contrast, when the CJEU formulates a more restrictive interpretation of EU law, based on the provisions of the directive alone, as in the case of abuse of fixed-term contracts, national judges are given greater scope for interpretation and fact-finding. This finding is to be viewed in relation to the need to render EU directives compatible with national policies which, frequently, relate to areas of high domestic salience and, in particular, the effort to promote labour market participation by means of fixed-term work in the public sector. We thus tentatively conclude that the Court tends to adopt a more cautious stance when its rulings concern issues of high domestic salience.

In sum, the Court is expansionist in its interpretation of equality in relation to the actual terms of the employment contract. However, as exemplified by the age discrimination cases, this expansionist stance does not extend beyond these limits and the Court does not uphold strong principles to decry the use or abuse of fixed-term contracts. The CJEU therefore sticks closely to the terms of its delegated authority, namely, to interpret the meaning of EU law. Now and for the future, a large portion of the workforce, while remaining 'fixed', is at least treated as 'equal'.

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