



The Court of Justice of the European Union and fixed-term work: Putting a brake on labour market dualization?

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Abstract

While fixed-term work benefits employers and increases the prospects of employability of various categories of workers, it is inherently precarious. The European Union (EU) directive on fixed-term work emphasizes the importance of equal treatment of workers on fixed-term contracts with comparable permanent workers and aims to prevent abuse of this contract form. Surprisingly, the Court of Justice of the European Union (CJEU) rulings in this area have by and large been neglected in comparative labour market research. We fill this gap by systematically analysing the CJEU case law concerning fixed-term work and connecting it to the literatures on labour market dualization and Europeanization of labour law. We develop an analytical framework to analyse the Europeanization of labour law, which we then use to analyse the directive and the case law regarding the directive on fixed-term work. Our findings show that the equal treatment is affirmed in all cases under analysis for different provisions of labour contracts. With regard to abuse of recourse to fixed-term contracts, by contrast, the rulings still represent a zone of legal uncertainty, whereby some judgments allow for fixed-term contracts, such as for social policy purposes, while others prohibit their use. We therefore conclude that the CJEU does not put a brake on labour market dualization, but it does insist on equal treatment of workers, regardless of their contractual arrangements.

Keywords

Case-law, Court of Justice of the European Union, EU labour law, Europeanization, fixed-term contracts, Germany, labour market dualization, Spain

Introduction

Nonstandard employment has moved centre stage in comparative labour market research in recent years (Emmenegger et al., 2012; King and Rueda, 2008;

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Palier and Thelen, 2010). The 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 regarding access to human resource development, wage increases and transition to open-ended contracts.

The European Union (EU) has encouraged the increase of employment rates, notably through ‘flexicurity’, comprising labour market deregulation, together with comprehensive training and reasonable unemployment benefits to allow smooth re-entry into the labour market. However, the result of this has been mixed: many countries have not only flexibilized labour markets but also increased requirements for accessing unemployment benefits and shortened periods of receipt of unemployment benefit (De la Porte and Jacobsson, 2012). European countries, particularly those with rigid labour markets, have attempted to increase labour supply, facilitated by flexibilization strategies and the use of atypical contracts (Eichhorst and Marx, 2012; King and Rueda, 2008).

This increased use of atypical contracts is the result of various factors, not least government policies to increase employment rates by means of labour market deregulation. Atypical work has also been useful to facilitate a shift into the labour market for the unemployed and has received support among employers (Eichhorst, 2014). Governments have seen atypical work – particularly fixed-term work – as a possible stepping stone to an open-ended contract. However, this belief should be treated with caution. Eichhorst (2014) argued that ‘the potential as a stepping stone to permanent employment is undercut if there is a strong degree of segmentation in labour markets’. High segmentation is typical of labour markets with strong corporatist roots in welfare state arrangements (Emmenegger et al., 2012; Palier and Thelen, 2010).

While most research on the dualization of European labour markets focuses on the national level, the impact of EU activity is often excluded. This is surprising since the EU has agreed on three directives to regulate atypical contracts.¹ Countouris (2007) has coined the adoption of these directives as an attempt at achieving the ‘re-regulation’ of labour law. At the same time, they serve a labour market flexibility aim by codifying the use of atypical work. So far, research has not focused on the role of the Court of Justice of the European Union (CJEU) in interpreting these directives. We focus on the Fixed-Term Work Directive (FTWD), which is characterized by tensions between common EU norms and national political priorities and between representatives of labour and business. Furthermore, fixed-term work is precarious with regard to dismissal protection and other labour rights, such as access to training and career development. Not surprisingly, by far most litigations and controversies have taken place regarding the directive on fixed-term work. We are not analysing the conflictual political context leading up to the framework agreement on fixed-term contracts (Countouris, 2007) or the timeliness of transposition of directives, on which a vast amount of research and knowledge already exists (Falkner et al., 2005; Falkner and Treib, 2008; Treib, 2014).

We examine the Europeanization of fixed-term work by scrutinizing the role of the CJEU as an agent in interpreting EU law in this area. A comprehensive analysis of the CJEU case law in the area of fixed-term work contextualizes the role of the EU in the process of labour market reform in Member States; it thereby underscores which principles are upheld by the CJEU in an area at the crossroads between employers’ desire for labour market flexibility and workers’ need for job security.

The FTWD is based on a framework agreement between social partners² and in essence represents a political compromise among governments and among social partners (Countouris, 2007). It endeavours to achieve equal treatment of all workers, irrespective of the type of contract they have, and requires that Member States adopt legislation to prevent the abuse of fixed-term contracts. The FTWD is designed with some flexibility; for

example, the codification of ‘open-ended contract’ and ‘prevention of abuse of fixed-term contracts’ can be defined in accordance with the different labour law and collective bargaining traditions that prevail across the EU. Because of this, the FTWD can be regarded as an ‘incomplete contract’, a notion that captures openness and ambiguity of legal and political agreements, allowing actors to interpret such agreements in different ways. Typically, this notion is associated with a rational scholarly perspective, allowing actors to pursue their own agenda and thereby to increase their own power and legitimacy in a decision-making process (Pollack, 2003). For our purpose, ambiguity may lead to various different (national) interpretations of the FTWD, after which the CJEU, as the delegated agent, should clarify the ambiguity surrounding key principles in the directive.

Our analysis of case law shows that where the CJEU has a strong legal base, such as anti-discrimination, the rulings are clear and aim to improve protection and conditions for fixed-term workers. By contrast, in more contentious areas of fixed-term work, such as age discrimination or the conversion of fixed-term to open-ended contracts, the CJEU rules restrictively in most cases. In other areas, such as the abuse of fixed-term work, the rulings of the Court are ambiguous and thus continue to represent legal zones of uncertainty. Therefore, we conclude that the CJEU’s rulings do not stop the use of fixed-term contracts but improve the conditions for workers on fixed-term contracts, insisting on their equal treatment with workers on open-ended contracts.

The remainder of this article is organized as follows. The first section reviews the literature on the CJEU, particularly with regard to its role in labour market regulation. The second section introduces our research questions and analytical framework. The third section presents the results of our analysis of the FTWD, and the fourth section presents the results of the analysis of the CJEU judgments. A final section concludes about the principles upheld by the CJEU in the area of fixed-term work, focusing on how the tension between labour market regulation and worker protection plays out in the case law analysed in this article.

CJEU activity at the crossroads of labour market deregulation and worker protection?

The CJEU plays a central role in Europeanization processes by interpreting EU law in cases of uncertainty (Davies, 2012b; Leibfried, 2010). The CJEU interprets EU legislation in case of lack of clarity of some clauses via preliminary rulings: that is, judgments that arise from prejudicial questions from national courts to the CJEU.³ There is a vast literature concerned with the judicialization of politics at the EU level, whereby the CJEU rulings have political implications for the EU and its Member States (Martinsen, 2015; Stone Sweet, 2010; Wasserfallen, 2010). There is also an emerging literature on the impact of EU law in Member States, ranging from expansive (Alter, 2001; Blauberger, 2012) to ‘contained justice’ (Conant, 2002). The literature shows that the CJEU is most influential as an agent when fit is high and when resistance to the principles in rulings is low (Börzel and Risse, 2000; Panke, 2007). Other scholars highlight the role of domestic politics as important explanations for Europeanization (Mastenbroek and Kaeding, 2006).

Scharpf (2010) has shown that the CJEU has strongly defended – and even extended – the principles of the Single Market. As a result, Scharpf (2010) argues, the CJEU has ‘a liberalizing and deregulatory impact on the socio-economic regimes of European Union member states’ (p. 211). Bell (2012), meanwhile, has documented the CJEU’s expansive interpretation of anti-discrimination. In line with the latter, Howard (2011) and Mazey (2012) have shown how EU equality law – and therefore the legal base on which the CJEU can rely in case of dispute – has been strengthened during the last two decades. While all the advances are important, there are two in particular that are worth highlighting for this article: the coming into force of the Treaty of Lisbon that codifies the EU Charter of Fundamental Rights as EU law and the development of the principle of non-discrimination as a general and fundamental principle of EU law. Mazey (2012) argued that Europeanization is greatest where the EU has specific legal competence, such as in anti-discrimination policy, with regard to employment-related issues.

Little is known about the CJEU's role for areas that include both labour market liberalization *and* worker protection, such as the regulation of atypical work.

The CJEU's task concerning regulation of atypical work 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), the proliferation of new contractual forms (that make it increasingly difficult to pin down the definition of employment relationships and labour contracts) and the ambiguous formulation of the directives (Countouris, 2007; Emmenegger, 2014; Hepple and Veneziani, 2009). The FTWD, in particular, though based on a framework agreement concluded between the European social partners, was the outcome of a protracted political process that ended in compromise, to respect Member States' aim of increasing labour supply via fixed-term work while seeking to ensure decent working conditions for workers (Countouris, 2007). Subsequently, there has been an unusually high number of preliminary rulings in the light of this directive (Bell, 2011).⁴

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, although 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 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, and the role of the EU level in this area deserves thorough analysis.

Case selection, data and analytical framework

Due to the in-built tensions around the issue of fixed-term work, this article carries out a systematic analysis of the case law on the FTWD (from 2007 to 2013) to gauge which principles are most strongly and consistently upheld by the CJEU. At the time of writing, there have been 60 cases relating to the FTWD. The data collection strategy consisted of seeking out, in the database of EU case law, cases that met 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 judgment' and the 'operative part' of a case (i.e. not merely in an 'opinion'). This strategy ensured identification of those cases in which the FTWD was the principal focus of the litigation.⁵ 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 judgments in which fixed-term work was the central issue (the main grounds for the litigation), and not a merely marginal aspect. These are the cases that will be analysed in greater depth in this article.

The literature suggests that EU legislation has different potential for Europeanization (Radaelli, 2000). With regard to the CJEU, the scholarship shows that, as an agent, this institution can generate either a more *restrictive* or a more *expansive* interpretation of EU legislation (Bell, 2011; Blauburger, 2012). Our study will add to this literature. Furthermore, it will discuss the findings in relation to developments in Member States to highlight the European level of activity and thereby break with strong traditions of methodological nationalism in comparative labour market research. Our research questions are as follows:

1. What is the potential of the directive itself for Europeanization (restrictive, neutral or expansive)?
2. How does the CJEU interpret the core principles of the directive (restrictively, neutrally or expansively)? And related to this, what

Europeanization dimensions	Degree of Europeanization		
	←		→
Scope of EU Directive	Restrictive	Neutral	Expansive
Interpretation of EU law in preliminary questions to ECJ	Restrictive	Neutral	Expansive
Degree of discretion to national judges (proportionality)	High	Implicit	Low
Outcome			
Degree of Europeanization	Low level (contained justice)	Medium level (neutral justice)	High level (expansive justice)

Figure 1. Framework for analysing the Europeanization of EU law.

- scope for interpretation is left to the national judges (wide, implicit or narrow)?
3. What is the degree of Europeanization of the EU activity in the area of fixed-term work?

Building on the work of Blauberger (2012) and Davies (2012b), the analytical framework displayed in Figure 1 summarizes the interaction between the different dimensions of Europeanization and the resulting degree of Europeanization (outcome).

The first dimension we analyse is the content of the EU directive itself, where the Europeanization potential of the directive ranges on a continuum from restrictive (associated with less Europeanization) to expansive scope (associated with more Europeanization). This dimension is important because the directive provides the legal framework on which the CJEU can rely in its responses to preliminary rulings. Intervening factors (the development of EU law as well as national labour law and employment policy) contextualize the Europeanization of the EU directive. In our analysis, we will discuss these intervening factors. However, we are not making claims of direct causal linkages between the intervening variables and the Europeanization of the directive.

The second dimension is the CJEU interpretation of the EU law that can also range from restrictive to expansive along the continuum of less to more Europeanization. Linked to this, the third dimension is the discretion left to national judges

by the CJEU, which ranges from high (with higher likelihood of respecting national traditions and circumstances) to low (with more likelihood of impact of CJEU ruling). These two dimensions will be analysed together in one sub-section on the case law on the FTWD. Finally, all three dimensions together determine the level of Europeanization, which can range from contained (to a particular judgment and without broader repercussions) to more expansive justice.

There are also other factors that influence processes of dualization. For instance, the literature argues that the crisis context, which characterizes the period under investigation, has further strengthened a policy focus on increasing labour supply (Bermeo and Pontusson, 2012; Farnsworth and Irving, 2011). Palier and Thelen (2010) 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’ (p. 133). Increasing the labour supply by means of atypical work has been on the political agenda for the period in question (2007–2013) in corporatist-conservative welfare states (Eichhorst and Marx, 2012; Emmenegger et al., 2012; Palier and Thelen, 2010). Fixed-term work has proved to be a useful stepping stone from unemployment into employment, but the transition from a fixed-term contract to an open-ended contract does not often materialize (Eichhorst, 2014).

Although the case law by itself is unlikely to halt the use of fixed-term contracts, which as stressed above depends on a variety of factors, the examination of CJEU decisions provides important insights as to whether the case law could help to diminish the use of fixed-term contracts and/or improve conditions for fixed-term workers. Thus, this analysis on the Europeanization of labour law breaks with methodological nationalism, which characterizes the bulk of literature on comparative labour market policy.

Europeanization and the FTWD: restrictive scope

The aim of the FTWD was not to generalize the use of fixed-term work. The preamble states that ‘contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers’ (OJEC, 1999: clause 6). Yet, governments have sought to use fixed-term contracts to increase labour markets’ flexibility. In addition, governments may find appeal in the ‘stepping stone theory’, which argues that a fixed-term contract may be a step towards an open-ended contract (Davies, 2012a). Whatever the governments’ motives to promote the use of fixed-term contracts, the generalization of fixed-term contracts in corporatist-conservative welfare states has contributed to increasing labour market participation (Emmenegger, 2014; Palier and Thelen, 2010; Venn, 2009). Thus, the directive was agreed due to the increasing use of fixed-term contracts in the topography of European labour markets: ‘fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers’ (general considerations, FTWD). 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, recognizing that their detailed application needs to take account of the *realities of specific national, sectoral and seasonal situations*’ (OJEC, 1999; emphasis added). Table 1 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.

However, differential treatment may 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). Since EU anti-discrimination law has been strengthened over the last decades (Howard, 2011; Mazey, 2012), it is surprising that the FTWD is more limited in this respect. Indeed, the anti-discrimination aspects of the directive are relative (to a CPW) 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.

The second purpose of the directive is to prevent the use of successive fixed-term contracts or relationships (OJEC, 1999: 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 prevent the successive use of fixed-term contracts (OJEC, 1999: clause 5). While at first this may 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

Table 1. Key aspects of the fixed-term work directive (OJEC, 1999).

<i>Aim</i>	
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'.
<i>Scope</i>	
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).
<i>Purpose of contract/objective conditions</i>	
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 (CPWs) 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.
<i>Equal treatment/non-discrimination</i>	
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).
<i>Prevention of abuse</i>	
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.
<i>Information</i>	
Clauses 6 and 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.

directive in order to ensure equal treatment of workers and to prevent successive use of fixed-term contracts. However, it can indeed also be seen as a weakness, since the conditions under which the employment relationship is to be deemed permanent

must be defined in national legislation, and the conditions for identifying contracts as 'successive' must also be defined nationally and, importantly, with the involvement of social partners. Clause 5, on prevention of abuse, as well as clauses 6 and 7 (OJEC,

1999), on information of vacancies and access to training, should be seen in the light of aiming to facilitate a transition of fixed-term to open-ended contracts. This would be in line with stepping stone theory (Davies, 2012a). This objective is open to interpretation and is therefore rather restrictive in terms of its potential for re-regulation regarding the use of fixed-term contracts.

Thus, our analysis of the content of the directive on fixed-term work suggests that while it does have potential for Europeanization with respect to anti-discrimination, recourse to fixed-term work and conversion of fixed-term contracts into open-ended contracts, a number of loopholes in its formulation means that as a legal base, the directive is rather weak. This contrasts with the extensive legal base in anti-discrimination that has become a fundamental principle in EU labour law.

Europeanization of CJEU judgments on the FTWD?

An analysis of CJEU judgments 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 judgments where fixed-term work was the central issue (the main grounds for the litigation) and not a merely marginal one. Table A1 in the online annex 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.

There are two interesting observations to be made. First, the large majority of these cases (15 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. These countries have traditionally had very rigid labour markets. The governments have resorted to increasing numbers of fixed-term contracts in order to increase labour market participation, resulting in a dualized labour market of protected

insiders with higher wages and less protected outsiders with lower wages (Emmenegger, 2014; King and Rueda, 2008; Palier and Thelen, 2010). However, it should be noted that recently, following the 2008 financial crisis, governments have also undertaken several reforms to make it easier to dismiss workers on open-ended contracts (Schömann, 2014).

Second, most cases emanated from fixed-term contracts in the public rather than the private sector.⁶ While not statistically significant in any way, this is an indication that labour market dualization is, as shown in recent literature, just as relevant for the public sector 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. We provide an in-depth analysis of the principal cases that set a precedent, as well as a 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 to open-ended contracts.

Anti-discrimination: expansive 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 the clause is minimalist (prohibiting direct discrimination) and not comprehensive. Comprehensive anti-discrimination measures would prohibit direct, indirect and other forms of discrimination, as is the case in the directive on anti-discrimination (Bell, 2011, 2012) and in the wider development of anti-discrimination as a

fundamental principle in EU law (Howard, 2011; Mazey, 2012). Thus, the starting point in the FTWD is rather modest.

The case that has set a precedent in this area is Case C-307/05 Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud (2007), in which the main issue addressed was whether the FTWD covers financial terms of employment other than pay (such as bonuses). Under Spanish legislation, special rules were applicable to healthcare 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 (1992–2004) in the healthcare 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 was 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)? Second, if this is the case, can the special legislation for civil servants⁷ be overruled?

The position of the Spanish government was that this worker's terms of employment did 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 CJEU 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), 'the Court is elevating the status of the Directive (or at least its equal treatment provisions) in the direction of a fundamental right' (p. 160). 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 judgment 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. Thus, the national legislation for civil servants in this area was 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.

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. However, no changes were introduced for workers on fixed-term contracts, 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, 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 CJEU also had an expansive interpretation of the principle, in keeping with its strong legal anchor in this area. In Case C-486/08 Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol [2010], the plaintiff argued that a fixed-term contract of 6 months should not exclude access to benefits and leave in comparison with a CPW in transition to a part-time contract. In the Joined Cases C-444/09 and C-456/09 Rosa María Gavieiro (C-444/09), Ana María Iglesias Torres (C-456/09) v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia [2010], 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 C-268/06 Impact v Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport [2008], where temporary civil servants were claiming the same pay and pensions as CPWs, 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 line with the *Del Cerro Alonso* ruling, in these three cases the CJEU ruled 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, because explicit reference is made to the general principle of equal treatment in Community social law. The Member States were required to change their legislation and rules, often stripping civil servants of special status (sometimes 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 – Case C-144/04 Werner Mangold v Rüdiger Helm [2005] ECJ and Case C-109/09 Deutsche Lufthansa AG v Gertraud Kumpan [2011] ECJ – concerned age discrimination (use of fixed-term contracts) against workers under the legal retirement age, but who were 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 do not embody the possibility to prevent labour market dualization in relation to older workers below retirement age.⁸

In Germany, where both these cases originated, the 1996 regulation on increasing labour supply, subsequently extended in 2000 and 2002, permitted employment on a fixed-term contract on no objective

grounds other than age (Emmenegger, 2014: 238–239). In 2002, 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’s 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). Therefore, this 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 judgment was that the national legislation on fixed-term contracts for workers aged 52 or older had to be altered, and an adjustment was made whereby the maximum duration of fixed-term contracts for such workers was to be restricted to 5 years maximum; additionally, recourse to these contracts became limited to workers who had been unemployed for at least 4 months immediately before taking up the new job (Stettes, 2005). Thus, using fixed-term work as a stepping stone for older workers to enter employment was maintained. The 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 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. Second, the successive use of fixed-term contracts from the age of 55 to 60 should not be allowed; that is, the collective agreement should be altered to ensure that there was no automatic recourse to fixed-term contracts after 55 years. There was little room for discretion to the national judge. The CJEU rulings do, in this way, prevent the existence of legislation that discriminates exclusively on the basis of age.

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 in general and compared to the stronger EU anti-discrimination law in the workplace (prohibiting direct and indirect discrimination, see Hartlapp, 2012) is compounded by the fact that Member States adapt only minimally to its requirements.

Preventing the abuse of fixed-term contracts: mixed evidence of CJEU activity

Seven of the cases concerned prevention of the *abuse* of fixed-term contracts; in all cases, the CJEU adopted a rather restrictive interpretation. In the *Kumpan* case, the CJEU argued that it was difficult to determine conditions under which the *use* of fixed-term contracts actually constituted *abuse*. For this question, significant wide indirect discretion was left to the national judge to determine these ‘conditions’, suggesting 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. It also reflects the weak legal base of the directive itself in this area, since ‘conditions for

abuse’ is explicitly mentioned as having to be determined in Member States.

In another German case – Case C-586/10 *Bianca Küçük v Land Nordrhein-Westfalen* [2012] ECJ – 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 CJEU’s stance here is 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 from the rest is the *Zentralbetriebsrat der Landeskrankenhäuser Tirols* case. Where workers were hired on the basis of fixed-term contracts, the CJEU 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 CJEU ruled that the reasons were clearly budgetary and that the discrimination was therefore unjustified. Bell (2012) commented 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 could have considerable repercussions. Here, the CJEU adopted an expansive interpretation and the national court was left with little discretion.

There have been numerous 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*, Case C-180/04 *Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006], Case C-53/04 *Cristiano Marrosu, Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie* [2006] and Joined Cases C-378/07 to C-380/07 *Kiriaki Angelidaki and Others (C-378/07) v Organismos Nomarkhiaki Aftodiikisi Rethimnis, and Kharikleia Giannoudi (C-379/07), Georgios Karampousanos (C-380/07), Sophocles Mikhopoulos v Dimos Geropotamou* [2009]). In one case, the ruling was that the body introducing the case was not legally competent to do so, Case C-363/11 *Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou v Ipourgio Politismou kai Tourismou – Ipiresia Dimosionomikou Elenchou* [2012].

With regard to prevention of the abuse of fixed-term contracts, the CJEU adopts, in some cases, a rather restrictive position based on the argument of ‘objective’ conditions, including where these are based on social policy considerations. In other cases, such as for economic purposes or in cases of gross abuse, the CJEU has a more expansive interpretation. Another notable finding is that more discretion is allowed to national courts to examine specific conditions in cases of abuse of fixed-term contracts, where the rulings provide little scope for interpretation by national judges. This may be due to the slim legal base in the abuse of fixed-term contracts, limited to the directive, and where the national level should ensure prevention of abuse of fixed-term contracts.

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

In Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* [2011], 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 Joined Cases C-302/11 to C-305/11 *Rosanna Valenza (C-302/11 and C-304/11) Maria Laura Altavista (C-303/11), Laura Marsella, Simonetta Schettini, Sabrina Tomassini (C-305/11) v Autorità Garante della Concorrenza e del Mercato* [2012], 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 CJEU 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, in relation to the conversion of a fixed-term to an open-ended contract, the CJEU adopts a restrictive interpretation, with an important role in fact-finding for national judges. In the Spanish case, such judicialization of the labour market is problematic since it is based not on common principles but on differing standards. In general, however, the national courts have sought to protect individuals against unfair dismissal, typically by increasing the severance pay. However, the work of judges in Spain does not rest on uniform norms in this area, which is one of the reasons why the 2012 labour reform in Spain reduced the autonomy of labour courts in deciding on cases of dismissal (Gómez Abelleira, 2012).

In Case C-251/11 *Martial Huet v Université de Bretagne occidentale* [2012], 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.

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, Vassallo, Marrosu, Angelidaki* and others). Overall, with regard to the conversion of fixed-term to open-ended contracts, the interpretation of the CJEU is restrictive.

Conclusion

The EU has the potential, via directives, to Europeanize the regulation of fixed-term employment in Member States. Yet, fixed-term work is at the crossroads between employers' desire for labour market flexibility and workers' need for job security. Thus, the goal of 're-regulation' of labour law (Countouris, 2007) may clash with attempts to increase labour supply. Hence, the resulting FTWD, based on a framework agreement between social partners, is indeed an 'incomplete contract' characterized by numerous ambiguous clauses and exceptions, which the CJEU has the jurisdiction to interpret if and when national judges find it to be unclear. The unusually high number of preliminary rulings in relation to the FTWD indicates that a good deal of doubt prevails concerning the interpretation of its provisions.

The analysis of the case law on the FTWD has allowed us to identify the principles the CJEU strongly upholds in areas that are characterized by tensions between labour market deregulation and worker protection. Our findings show that where the CJEU has a strong legal base, the rulings are clear and aim to improve protection and conditions for fixed-term workers. By contrast, in the areas of fixed-term work that are contentious, if they touch upon national politics of increasing labour supply, the CJEU tends to rule restrictively. In some areas, the rulings of the CJEU are rather ambiguous and thus represent legal zones of uncertainty.

More precisely, our analysis shows that the CJEU uses the FTWD as an entry point to address questions concerning the (equal) treatment of workers. The CJEU has an expansive interpretation of equal treatment which is in line with the strong EU

jurisdiction on equality and anti-discrimination. A side effect of the improvement of conditions for fixed-term workers is that workers on open-ended contracts have sometimes seen the removal of their special privileges.

However, in case of age discrimination, the CJEU bases its judgment on a broader understanding of social policy purposes, in line with Member States' priorities of increasing labour supply. Thus, while judgments 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 and age discrimination in Community law (see Hartlapp, 2012).

Similarly, with regard to conversion of fixed-term to open-ended contracts, the CJEU adopts a restrictive stance. With regard to abuse of fixed-term contracts, in most instances the CJEU rules restrictively, although the Court rules against cases of gross abuse. Still, this area represents a zone of legal uncertainty, with some cases allowing for fixed-term contracts (e.g. for social policy purposes) and others prohibiting the use of fixed-term contracts (e.g. for economic reasons).

In sum, the CJEU cannot and does not decry the use or abuse of fixed-term contracts, as it is beyond the scope of its delegated authority. However, the CJEU does insist on the equal treatment of workers, regardless of their contractual arrangements. By interpreting the fixed-term work directive - with strong reliance on the legal base of equal treatment - the CJEU does influence working conditions in changing European labour markets, but without becoming a political actor.

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Notes

1. These are the directives on part-time work (OJEC, 1997), fixed-term work (OJEC, 1999) and temporary agency work (OJEC, 2008).
2. European Trade Union Confederation representing workers' side and BusinessEurope (then called *Union des Industries de la Communauté européenne*), the European Centre of Employers and Enterprises providing Public Services and the European Association of Craft, Small and Medium-sized Enterprises on the employers' side.
3. In addition, the Commission ensures that the directives are fully implemented in the Member States and can launch infringement procedures if they are not implemented accordingly.
4. For the Fixed-Term Work Directive (FTWD), the Commission has only started one infringement procedure against Luxembourg (Case C-238/14) through 'reasoned opinion', after which the legislation was rectified. Therefore, we choose not to focus on this in our analysis, which instead focuses on the preliminary rulings.
5. See <http://curia.europa.eu>.
6. 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.
7. Here and in the following, 'civil servants' refers to public sector workers.
8. The Joined Cases – C-250/09 and C-268/09 Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv (2010) ECJ – 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 dualization. Although this case will not be discussed here in detail, its key aspects and those of the judgment are given in Table A1 in the online annex.

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