

**WHEN THE GOVERNMENT AND THE COURTS ARE AT ODDS
ECJ RULINGS AND THE FIXED-TERM DIRECTIVE**

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Nonstandard employment has entered centre stage in comparative labour market research in recent years. Its alarming growth has triggered a series of studies analysing the (national) politics of nonstandard employment and the increasing dualisation of European labour markets. However, research has largely overlooked the multi-level structure of regulatory politics in the field of nonstandard employment. Labour law, long the sole prerogative of policy-makers at the nation-state level and strongly influenced by long-lasting national labour law traditions, has increasingly become a field of permanent activity of the European Union and in particular the European Court of Justice (ECJ), through the body of EU labour law. This includes the definition of minimum standards for nonstandard employment through EU directives as well as the creation of opportunities for new forms of nonstandard employment through the development of the single market. In this paper, we analyse the impact of ECJ's decisions concerning the fixed-term work directive to gauge the ECJ's role in national dualisation processes. The core issues we are interested in are, first, how EU labour law for atypical workers is interpreted at the EU level and, second, how it is met in member states that aim to deregulate nonstandard employment. We therefore first analyse EU case law in the area of fixed-term work and secondly analyse the role of national courts, governments and social partners in re-interpreting EU legislation for one case (Mangold). This research is important as it addresses the more fundamental question about the power of the ECJ. The research aims to contribute to the literature on the political influence of the ECJ and aims to uncover what, if any, leverage the ECJ has in the context of the development of two-tier labour markets.

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Introduction

Labour market flexibilisation to increase labour supply has often led to the development of a two-tier labour market, consisting of an increasingly clear-cut split between a group of well protected “labour market insiders” and more precarious “labour market outsiders” (Emmenegger et al. 2012). Outsiders are not necessarily external to the labour market as such, but they often have atypical contracts – covering part-time, temporary agency and fixed-term workers – rather than open-ended and full-time contracts. Workers in such nonstandard employment are not as well covered by social insurance as workers in standard employment, and they are more vulnerable with regard to access to human resource development and wages. Related to this, another crucial point is that workers with atypical workers – irrespective of skills levels – are much easier to dismiss than workers on open-ended contracts and have been the first to be hit by the global financial crisis of 2007 that cast a recession on Europe (OECD 2010).

Processes of dualisation can be observed in all types of welfare states, but they are most marked in the Bismarckian welfare states that are classically built up around rewarding loyalty with generous social insurance and high protection of workers (Palier 2010). Since the 1980s, governments as well as business organisations have – successfully – pushed for facilitated use of atypical contracts in order to increase labour supply. All European countries, albeit at different speeds and degrees, have increased labour supply and employment rates, facilitated by flexibilisation strategies and the use of atypical contracts (e.g. Eichhorst and Marx 2011; Berton et al. 2012; Emmenegger et al. 2012).

Recent research on labour law development, in particular with regard to non-standard employment, has focused on changes at the nation-state level (e.g. Hepple and Veneziani 2010; Emmenegger 2013). These analyses document the trends towards an increasingly dualised labour market, but these studies further show two more trends that are important to understand current developments in the field of non-standard employment. First, most European nation-states have undergone a process of decentralisation that increasingly allows unions and employers to derogate from national regulations by means of plant-level or industry-level collective bargaining. Second, recent years have witnessed the proliferation of new forms of employment relationships (e.g. more types of atypical contracts) that blur the previously clear-cut distinction between typical and atypical contracts.

As a result, the regulation of nonstandard employment has become an increasingly complex policy field plagued by multiple and partly conflicting logics, in which policy-makers have considerable freedom to pursue their political goals, while facing constant pressure to increase the flexibility of the labour market to allow for employment growth. In this context, European Union regulations – directives and case law – play an increasingly important role because courts are asked to constantly assess whether new contractual relationships conform to existing regulations or whether they violate fundamental principles such as non-discrimination.

However, in the literature on dualisation, the European level has been overlooked so far. The role of the European Court of Justice (ECJ) has been analysed extensively for issues related to the single market (Alter 1998; Scharpf 2010; Schmidt 2000) and social policy (Martinsen 2005, 2011, 2012; Leibfried 2010). In labour law, there are important leads that we build on by Falkner et al. (2005) and Countouris (2007), but the analyses are as of yet not extensive. Hence, we aim to contribute to the

literature by providing an impact analysis of ECJ decisions concerning the fixed-term work directive to gauge the ECJ's role in national dualisation processes.

The core issue we are interested in in this paper is how EU labour law for atypical workers – that aims to uphold the principle of non-discrimination between atypical workers and workers on regular contracts and some basic principles that discourage the recourse to nonstandard employment – is interpreted at the EU level and met in member states that aim to deregulate nonstandard employment. This research is important, as it addresses the more fundamental question about the power of the European Court of Justice (cf. Kelemen and Schmidt 2012; Wasserfallen 2010). Does the ECJ support de-regulation by interpreting EU legislation in this area minimally or does it support re-regulation by interpreting EU legislation more comprehensively? Fundamentally, the research aims to contribute to the literature on the political influence of the ECJ and aims to uncover what, if any, leverage the ECJ has in the context of the development of two-tier labour markets.

We undertake a two-fold analysis: First, we qualitatively analyse the patterns of all ECJ responses in case law on fixed-term work to discern whether the court supports de-regulation, in line with national political priorities or whether it mainly upholds the principles of the directive of fixed-term work. The core principles are the principle of non-discrimination (clause 4), the requirement for member states to devise measures to prevent abuse of recourse to fixed-term contracts (clause 5), the requirement to provide information about vacancies and training opportunities on an equal footing with comparable permanent workers (CPW) (clause 6) and the provision of information about fixed-term work to existing workers' representative bodies (clause 7). Second, using the ECJ ruling on the Mangold case, we analyse how national courts have interpreted (or rather re-interpreted) EU case law in this area and what the political responses in member states have been, focusing in particular on governments and social partners in the relevant national political processes.

The remainder of the paper is organised as follows: The first section discusses the literature on labour market dualisation, the European Union's role in labour market regulation and the role of EU jurisprudence. By combining insights from these diverse literatures, we develop hypotheses concerning the role of the ECJ in the development of two-tier labour markets. Subsequently, we present our methodological approach and the case selection. The third section presents the core clauses of the fixed-term work directive and thereafter, the results of our comparative analysis of the ECJ judgements concerning the fixed-term work directive. The following section analyses how Germany has responded to the ECJ's ruling in the Mangold case, contextualised with key developments in German labour market law. A final section concludes.

What role for the ECJ in development of two-tier labour markets in Europe?

The European Court of Justice (ECJ) is one of the core institutions of the European Union and plays a central role in the EU integration process (cf. Alter 1998; Leibfried 2010; Martinsen 2011). The ECJ's most important tasks concern the interpretation of community law and the ensuring of its equal application in all EU member states. However, the ECJ's role in countering or re-enforcing domestic logics has long been overlooked (Martinsen 2012). For a long time the literature has focused on the European Commission, the Council or the European Parliament. Only more recently has attention

turned to the ECJ (cf. Kelemen and Schmidt 2012). In this context, scholars have attempted to gauge the importance of the ECJ, both as a driving force of integration as well as shaper of policy-making.

Generally, the ECJ is considered to have a pro-centralisation bias, i.e. to insist on a comprehensive interpretation of EU law, applicable directly to member states (Stone Sweet 2004; Kelemen and Schmidt 2012). The ECJ pushes the scope and depth of the European integration process, but some of the literature insists on the pro-market bias of EU law, due to the wide scope of legislation in this area. Most notably, Scharpf (2010, 2012) has argued that the ECJ is an agent of liberalisation by deregulating the socio-economic regimes of EU member states, which ultimately undermines these countries' social market economies. In combination with the high consensus requirements of European legislation, the net effect of ECJ activities is the incremental liberalisation of protective regulations in Europe and thus the convergence of European socio-economic regimes towards Anglo-Saxon-style liberal market economies.

The ECJ's asymmetrical effect in the European integration process is a function of its important role as guarantor of the single market, in a process of market-making. However, the ECJ also watches over the interpretation and implementation of other aspects of EU legislation such as the directives on employment relationships, which can also have a market-correcting imperative. The directives on atypical work adopted by the EU intend to ensure protection for workers and can in this way be considered pro-worker in orientation. Countouris (2007) has coined the adoption of these directives a process of "re-regulation" of atypical work in the area of labour law. The most relevant directives are the directive on part-time work (OJEC 1997) and the directive on fixed-term work (OJEC 1999). The directive on temporary agency work is also relevant, but since it was only recently transposed (2011) and there may be delays in this process, there are not yet any EJC cases (OJEC 2008).

In this paper, we focus on the directive on fixed-term work, since there are by far more ECJ cases, if compared with cases for the directive on part-time work. A first search of the database indicated that there were a total of 71 closed cases for the directive on fixed-term work, while there are only 11 for part-time work (<http://curia.europa.eu>, January 2013). This large difference is likely to be the result of an important qualitative difference between part-time and fixed-term work. Especially among the Nordic countries, Germany and the Netherlands, part-time employment is considered to be a stable form of employment and does not preclude equal access to training, pensions and other rights. This explains why it is supported in these countries by both unions and employers. The directive of part-time work actually stipulates that it is developed in line with the aim to increase part-time employment (OJEC 1997). Among low-wage Southern European countries, however, part-time employment is considered mainly to be involuntary, but it is to be noted that part-time employment is not as widespread in these countries as in parts of Northern and Western Europe (Falkner et al. 2005: 163).

Contrary to the broad consensus on the benefits of part-time employment for equal treatment, labour force participation and the reconciliation of family and working life, fixed-term work is more controversial. Governments and business organisations are generally favourable to this form of employment, while unions are more sceptical. The political motivation for the fixed-term work directive was thus not to unequivocally support the shift to this form of employment, but instead to decrease the abuse of this form of work (OJEC 1999). The aim was to improve the quality of fixed-

term work by applying the principle of non-discrimination. The directive endeavours to ensure protection and equal treatment for fixed-term workers with workers with a “comparable permanent worker” (CPW) or relevant collective agreement. For the area of part-time work, this model has been coined 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. In the case of fixed-term work, the principle of non-discrimination implies among others equal payment, equal access to training and the prospect to obtain an open-ended contract if the employment relationship continues beyond the previously agreed, fixed time period.

Due to ambiguous wording, the directive leaves scope for the member states and the ECJ to interpret the directive either in order to re-regulate or to de-regulate employment conditions for fixed-term workers. This ambiguity applies to issues such as which contracts are included in the scope of the directive as well as issues pertaining to the working conditions, if the fixed- contract at hand is considered to be within the scope of the directive. The major innovation of the directive is to seek to prevent the use of successive fixed-term contracts or relationships, on the basis of the principle of equal treatment. However, there is an element of ‘neo-voluntarism’ (Streeck 1995) with regard to the interpretation of the directive at large and specifically clause 5 that provides various possibilities with considerable margin of manoeuvre to member states in combatting the abusive use of successive fixed-term contracts to the detriment of the worker.

The directives on atypical contracts were a response to the proliferation of nonstandard employment in Europe. After the introduction of a series of new laws in the late 1960s and early 1970s, employers increasingly faced high costs and legal complications when firing workers on indefinite contracts. Hence, they turned to nonstandard employment, in particular fixed-term contracts, to regain their flexibility. Governments and trade unions initially opposed this substitution of typical with atypical employment relationships. However, as Western European countries struggled to overcome mass unemployment and low employment rates, governments began to deregulate nonstandard employment, thereby allowing for unprecedented growth of temporary employment (Emmenegger 2013). Unions have fought this development only half-heartedly. Although generally critical of labour market deregulation, unions, facing demands to allow for more labour market flexibility, preferred the deregulation of temporary employment to the reform of dismissal protection (Davidsson and Emmenegger 2012). The result of this political process was the dualisation of labour markets with a core of insiders benefitting from good salaries and job security and a periphery of outsiders providing the requested labour market flexibility (Emmenegger et al. 2012).

The development of the fixed-term work directive gained momentum once the deregulation of temporary employment started in the early 1980s. However, the development of the fixed-term work directive turned out to be a conflict-ridden and protracted process. Given the different national regulatory regimes and legal traditions, EU member states struggled to find common ground, while some EU member states resisted the regulation of fixed-term work on the EU level altogether. Therefore, the 1999 fixed-term work directive, based on a framework agreement agreed among European level representatives of business and labour, was the result of a political compromise that left member states a lot of flexibility and considerable room for interpretation (Countouris 2007).

In the case of fixed-term work, national governments and the ECJ are thus at odds. National governments have an interest in maximising flexibility, as documented in a large number of labour market reforms that deregulated temporary employment (Eichhorst and Marx 2012; Emmenegger 2013). In contrast, the ECJ is supposed to interpret the fixed-term work directive, to watch over its implementation and to ensure its equal application in all EU member states. In doing so, the ECJ's task has become more complicated due to the multi-level structure of labour market regulation, the proliferation of new contractual forms (that make it increasingly difficult to clearly pin down the definition of an employment relationship and labour contract) and the ambiguous formulation of the directive.

The analysis of the 1999 directive on fixed-term work, its implementation in the EU member states, the ECJ case law on it and the affected EU member states' reactions to the ECJ rulings allow us to gauge the importance of the ECJ in labour market policy. The ECJ's impact can be conceptualised using the two traditional theoretical lenses in European integration research: Neo-functionalists (cf. Burley and Mattli 1993) expect the ECJ to use the fixed-term work directive to further integration, i.e. to uphold principles of EU legislation firmly and to ensure they are implemented subsequently in member states. By contrast, intergovernmentalists (cf. Garrett 1992) expect member states to try to minimise the ECJ's influence in cases of national interest and are able to do so, irrespective of EU decisions. Although the debate between neo-functionalists and intergovernmentalists is somewhat dated (Garrett et al. 1998; Mattli and Slaughter 1998), for the analysis at hand, the two traditional lenses still provide useful starting points.

Looking first at the behaviour of the ECJ and following neo-functionalist arguments, we expect the ECJ to further integration. In the case of the fixed-term work directive, this view implies that the ECJ follows a re-regulation logic taking into account anti-discrimination and equal treatment aims and is less concerned about the flexibility preferences of member states. Hence, we do not expect the ECJ to sustain its pro-market bias, which would presume a minimalist interpretation of equal treatment and anti-discrimination. In this line of reasoning, we also expect the ECJ to discourage the recourse to fixed-term contracts altogether.

The potentially conflictual relationship between member states' interests and court rulings, however, does not stop with a judgement. Rather, the decisions of the ECJ pertaining to a particular case are 're-interpreted' in the national context (Martinsen 2005; Blauburger 2012). But how do member states react to ECJ decisions that concern cases originating from their own country? This important question has been long overlooked in the literature, which has been mostly concerned with the judicialisation of politics on the EU level (Stone Sweet 2010: 27-28; Wasserfallen 2010: 1132-1135).

Following intergovernmentalist arguments in their most extreme version, we should expect member states to simply ignore ECJ decisions. However, as Wasserfallen (2010: 1133) notes, total obstructions against judicial interpretations are virtually impossible to legitimise. Alternatively, member states may respond collectively to ECJ decisions by reforming regulations at the EU level or by reversing ECJ decisions through the re-nationalisation of policies. However, given the consensus

requirements at the EU level, EU member states often have little choice but to respond to ECJ decisions unilaterally (Blauberger 2012: 111-112).

How do national governments respond to ECJ decisions? Conant (2002) has argued that national governments respect the ECJ decision in the case at hand, but ignore the general implications of the ECJ decision. This form of “contained compliance” minimises the court’s power as it restricts the decision’s influence to the immediate case. Building on Conant’s pioneering work, Martinsen and Vrangbæk (2008) and Blauberger (2012) have highlighted two further responses by national governments. Martinsen and Vrangbæk (2008) document how national governments have enacted broader policy reforms in the area of health care to limit the ECJ’s influence. The main goal of national policy reforms was not to comply with ECJ case law by adapting policy goals but rather to make regulations EU compatible with domestic policy reforms. Blauberger (2012) demonstrates how ECJ jurisprudence typically leaves considerable room for interpretation that allows member states to reform their policies in various EU compatible ways. As a result, national governments may manage to comply with ECJ decisions without sacrificing autonomous domestic regulation.

These arguments, clearly inspired by the intergovernmentalist framework, imply that national governments try to minimise ECJ influence. In the case of the fixed-term work directive, this view implies that national governments follow a dualisation logic, taking into account the national economies’ need for labour market flexibility. To do so national governments take advantage of their discretion in the interpretation and enforcement of ECJ jurisprudence. As a result, the ECJ’s impact would be minimal. Hence, instead of fully complying with ECJ case law, a response that would award the ECJ considerable leverage, these arguments expect the member states to stick to their flexibilisation strategy by finding ways to circumvent ECJ decisions.

Research design, case selection and data sources

The empirical analysis is organised in two sections. First, we conduct a comparative analysis of all ECJ judgements concerning the fixed-term work directive. This section starts by presenting the content of the fixed-term work directive in detail and then analysing the decisions of the ECJ according to various different parameters in order to provide an overview of the clauses of the directive which are most often disputed and whether there are clear trends in outcome, i.e. are the decisions of the Court more ‘re-regulatory’ or more ‘de-regulatory’ in orientation.

Subsequently, we analyse nation-state level political responses to case law to tap into how the decisions of the ECJ are re-interpreted in the national context, i.e. we aim to scrutinise member states’ reaction to ECJ decisions. More concretely, we analyse the political responses of the German government and the Federal Constitutional Court to the ECJ decision in the Mangold case. This case selection is informed by the three considerations: First, Germany has been involved in a comparatively large number of ECJ judgements. Second, Germany has been witnessing a continued process of labour market dualisation in recent decades. Finally, the Mangold case is one of the first

and most prominent ECJ cases and thus very influential in setting a precedent for the ECJ's interpretation of the fixed-term work directive.¹

Analysis of the case law of the European Court of Justice in the area of fixed-term work

This section first presents the content of the framework directive on fixed-term work, as it provides a clear reference point with regard to the analysis that follows on the ECJ judgements on the directive on fixed-term work. The preamble to the fixed-term work directive states that it “represents a further contribution towards achieving a better balance between ‘flexibility in working time and security for workers’”. The stated aims of the directive of fixed-term work itself are first to “improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination” and second to “establish a framework to prevent abuse arising from the use of successive fixed-term contracts or relationships” (clause 1). On the basis of this overarching aim, it is clear that the ambition of the directive is to re-regulate European labour markets, by increasing protection and improving working conditions for fixed-term workers. This provides an overall re-regulatory anchor within which we expect ECJ responses to fall under.

In the following, the content of the fixed-term work directive is presented according to the principles it puts forward in order to achieve the aim of protecting fixed-term workers, but also the diverse ambiguities that are inherent to the directive. The directive was first formulated as a framework agreement and was thereafter converted to a (framework) directive, which in itself provides ample possibilities for *how* member states implement it. In this way, it is a form of soft law, but it is more consequential than, for example, the Open Method of Co-ordination, due to the legal obligation of member states to implement the directive and due to power of the ECJ to ensure its implementation and to interpret cases of ambiguity.

Clause 2 of the directive specifies the scope of application of the directive as applying to *all fixed-term workers* who have an employment relationship as defined in law, collective agreements or practice in each member state. However, it also stipulates two contractual relationships excluded from the scope of the directive: initial vocational training relationships and apprenticeships 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 programme. Thus, the scope of the directive is very broad, but not all-inclusive. Clause 3 of the directive specifies the notion “fixed-term worker” in more detail as “a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by *objective conditions* such as reaching a specific date, completing a specific task, or the occurrence of a specific event”. The issue of which contracts are covered and

¹ In this section, we focus on a case that originates from the country under investigation. From an intergovernmentalist perspective, national governments are likely to ignore ECJ jurisprudence. However, it is more difficult for member states to ignore cases that originate from their country. Of course, the ECJ often refers back to other cases, building up the jurisprudence (Schmidt 2012). However, for a specific case, direct consequences are more likely to be higher if the case originates in the country under investigation. As a result, focusing on cases that originate in the country allows for a tougher test of the intergovernmentalist hypothesis.

what a fixed-term worker is, is important from a legal perspective in the view of the strategies devised by governments and business to derogate legal norms, represented by the proliferation of various different types of contracts (Countouris 2007; Berton et al. 2012; Emmenegger 2013). We shall see in the analysis that follows whether the scope of the directive is broad enough to cover most, if not all, types of fixed-term contracts that appear before the ECJ.

In the view of ensuring fixed-term workers protection equivalent to workers with permanent contracts, the fixed-term work directive defines a “comparable permanent worker” (CPW) as “a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualification/skills.” The existence of a CPW comparator is in principle a strong reference point against which working conditions of fixed-term workers can be assessed. However, a CPW does not necessarily exist in all establishments. The directive therefore further specifies “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” (clause 3).

These definitions of CPW are exactly the same as in the part-time work directive (OJEC 1997) that Falkner et al. (2005) have coined the “onion skin model” referring to the fact that *even if* a contract is slimmer in scope (i.e. hours for part-time work, duration for fixed-term work), the working conditions should be exactly the same. On this basis, the core principle for equal treatment of fixed-term workers with CPW is that of non-discrimination, which 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*” (clause 4, our emphasis). Clause 4 also stipulates that “period-of-service qualifications” shall be the same for fixed-term workers and CPW, “except where different length-of-service qualifications are justified on objective grounds”. The issue of “objective grounds” is not clearly defined and thus open to interpretation. Clause 4 also highlights that “the principle of *pro rata temporis*” shall apply, that is the same pay and rights to paid leave as for CPWs, proportional to the work carried out.

Clause 5 – the requirement for member states to devise measures to prevent abuse of recourse to fixed-term contracts – is one of the most controversial with regard to atypical workers. Clause 5 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. Clause 5 furthermore 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. The elements of this clause do specify some principles, but they are indeed, quite broad, particularly regarding conditions under which fixed-term contracts shall be considered as contracts of indefinite duration.

Clause 6 is the requirement for establishments to provide information about and access to job vacancies and training opportunities to fixed-term workers on an equal footing with CPW. Finally, clause 7 regards the provision of information about fixed-term work to existing workers’

representative bodies, which is not controversial per se. However, as noted above, social partners mainly represent the interests of workers on indefinite duration (Rueda 2007; Davidsson and Emmenegger 2012).

Analysis of ECJ judgements with regard to the directive on fixed-term work

A first analysis of the 17 ECJ judgements provides several striking findings (see Table 1 for an overview).² First, most cases were from continental European countries with corporatist welfare states (Germany, Spain, Italy, Austria and France) that have during the last 20 years increased the use of atypical contracts to increase employment rates. Secondly, most cases emanated from fixed-term contracts in the public, rather than the private sector. While not statistically significant in any way, this is an indication that labour market dualisation is just as relevant for the public as for the private sector (Kroos and Gottschall 2012).

[Table 1]

With regard to the preliminary questions addressed to the ECJ, most cases (15 of 17) concerned the discrimination of a fixed-term worker compared to a CPW with regard to different issues. Seven cases pertained directly to working conditions. In one key case, *Del-Cerro Alonso* (2007), the issue addressed was whether the directive on fixed-term work covers financial conditions other than pay (i.e. bonuses). In the Spanish legislation it was previously allowed to discriminate between fixed-term workers and CPW with regard to extra bonuses. The ECJ ruled that workers on fixed-term contracts cannot be discriminated against with regard to extra bonuses and that 'employment conditions' should include access to extra bonuses. The Spanish legislation should be rectified in this line.

Similarly, in *Gaviero and Torres* (2010), the issue concerned was access to a special benefit (length of service increment) for interim civil servants that had been excluded from such a benefit *exclusively* due to their status as fixed-term workers in the legislation for civil servants. Once again, the ECJ ruled that interim civil servants *can* rely on the directive in order to obtain such benefits and that the national law on civil servants should be rectified accordingly.

Yet another Spanish case, *Rosado Santana* (2010), also concerned a differential treatment between fixed-term workers and CPWs. In this particular case, the issue was consideration of periods as an interim civil servant in order to be able to attain an internal promotion. Yet again, the ECJ ruled that there could be no different treatment between career and interim civil servants on this issue, unless there are *objective* reasons. The national court was to analyse whether there actually were differences in tasks between interim and permanent career civil servants.

² An in-depth analysis of all 71 closed cases for the directive on fixed-term work revealed that there were only 17 'real' cases, i.e. cases with judgements where fixed-term work is the central issue and not only marginal. Hence, Table 1 displays cases only if the case primarily concerned the fixed-term work directive and the ECJ passed a judgement (and not a reasoned order which cite previous judgements in answer to a preliminary ruling case).

There was a comparable case in Italy regarding consideration to be taken of periods as an interim civil servant (Valenza et al. 2012) in a procedure to develop contracts of indefinite duration for civil servants. The plaintiffs claimed that their pay should consider periods as interim civil servants and not start from a lower scale for a starting civil servant. Here, the ECJ ruled that national legislation should not prohibit rules that unconditionally justify difference in treatment (pay) with respect to CPWs compared to fixed-term workers. However, that national court was to examine the conditions in more detail.

In a case emanating from Austria, Zentralbetriebsrat der Landeskrankenhäuser Tirols (2010), the plaintiff argued that a fixed-term contract of six months should not exclude access to benefits and leaves when compared to a CPW. Here also, the court ruled that the discrimination was not allowed. In the Irish case Impact (2008), where interim civil servants were making claims to the same pay and pensions as CPWs, the ECJ ruled that the Irish government (employer) must grant equal treatment.

In all these cases, we see a clear trend whereby the ECJ relies on the CPW to claim equality of treatment between workers undertaking the same task, irrespective of their status. This is a quite unambiguous re-regulation policy. However, in most cases national courts have been invited to examine whether there really are *objective* conditions for differential treatment.

Three cases were on age discrimination, including the landmark Mangold case from 2005 (see analysis below). In line with the strong anchor of anti-discrimination in ECJ judgements, the ECJ ruled in this case that there could be no difference in treatment exclusively on the basis of age. However, the ECJ also endorsed the German government's aim to promote employment via fixed-term contracts for workers above 52. The ECJ therefore attempted to ensure equality of treatment, without meddling with the broader political issue of recourse to fixed-term contracts to increase labour market participation.

In another German case on age discrimination (Kumpan 2011), there was a dispute around a collective agreement for persons working in the airline industry. According to the collective agreement concerned, a contract of indefinite duration would end automatically when a worker reached the age of 55. Thereafter, the collective agreement allowed for fixed-term contracts with that same worker, if they were considered to be "physically and occupationally fit", by mutual agreement until the worker was 60. Miss Kumpan's contract was renewed yearly until she was 60, and she claimed that there was an abuse of recourse to fixed-term contracts exclusively due to age. Here, the ruling of the ECJ was in the footsteps of Mangold case. First, the ECJ 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 age 55 to 60 should not be allowed, i.e. the collective agreement should be altered.

A third case of age discrimination emanates from Bulgaria for university lecturers, that are allowed to be employed only via fixed-term contracts after age 65, which is the official retirement age (Georgiev 2010). The ECJ ruled that this measure was flexible and favourable to professors that otherwise were due to retire as it provided them with a possibility to remain on the labour market.

In sum, for age discrimination, the position of the ECJ was more ambiguous compared to working conditions in the Spanish cases discussed above. Here, the Court claims only that a fixed-term worker should be treated like a CPW. However, the Court is indirectly supportive of policy to facilitate recourse to fixed-term work among workers considered to be more vulnerable in terms of labour market participation on the basis of age. Here, it is important to take account of different age thresholds, since recourse to fixed-term contracts from age 52 can be questioned, whereas fixed-term contracts from age 65 is justifiable as it is the normal retirement age in many countries.

Seven of the cases concerned the lack of conditions to prevent the abuse of the use of fixed-term contracts. In some cases, there were also claims for conversion to contracts of indefinite duration. One of the cases was Kumpan (above), where the ECJ ruled that the collective agreement automatically terminating a contract of indefinite duration for workers above the age of 55 was illegal but that it was difficult to determine conditions under which there actually was abuse of fixed-term contracts.

In another German case (Kucuk 2012), the plaintiff had been employed on a succession of 13 fixed-term contracts over a period of 11 years, but this was related to a social policy aim (maternity or parental leaves). In this case, the ECJ ruled that temporary replacements on recurring or even permanent basis does not indicate that there are no objective reasons for such a practice, particularly if the aim is to pursue another social policy aim. However, the ECJ then complemented this claim, indicating that the number and cumulative duration of fixed-term contracts with the same employer should be analysed. Here it was up to the national court to determine whether these were reasonable or not.

In another case in Ireland (Impact 2008), where civil servants claimed that their (renewed) fixed-term contracts were of unreasonable long duration, the ECJ maintained, contrary to the European Commission, that there should be objective conditions for this. Here the ruling of the Court is clearly re-regulatory.

Finally, in Huet (2012), the plaintiff's contract was changed from a fixed-term contract to a contract of indefinite duration. However, the job description was different and thus the starting salary was lower. Here the ECJ ruled that there was no obligation for employers to convert a fixed-term contract to a permanent contract with exactly the same conditions. However, the national court was to examine whether or not the tasks really were different for this particular case.

For several of the cases concerning abuse of fixed-term contracts, the plaintiffs had only one fixed-term contract (or one renewal of a fixed-term contract). Therefore, the case for (unreasonable or successive) abuse of fixed-term contracts or the claim for their conversion to contracts of indefinite duration was not valid (Vasallo 2006; Marrosu and Sardino 2006; Angelidaki et al. 2009). In one case, the instance introducing the case was not legally allowed to do so (Epitropos tou Elegktikou Synedriou 2012).

Overall, the cases on the abuse of fixed-term contracts show two clear outcomes in the ECJ judgements. First, the European Court does not want to meddle with the use of this kind of contracts by member states. Secondly, where there is a re-regulatory dimension, it is mostly for equal

treatment of fixed-term workers with CPWs or for unreasonably long or successive fixed-term contracts, but excluding other social policy purposes.

Thus, most judgements dealt with the core controversies with regard to the fixed-term work, which is the inherent higher risk for fixed-term workers compared to CPW, irrespective of qualifications. Another interesting observation is that in their positions to the cases, the national governments without exception defended their national legislative arrangements. National governments, in other words, wanted to leave all possibilities open for use of fixed-term contracts and were not concerned with discrimination or abuse of fixed-term contracts.

The ECJ, by contrast, in most cases called for re-regulation, i.e. adapting national legislation in order for non-discrimination between fixed-term workers and CPW to be upheld. Thus, the ECJ interpreted the directive comprehensively, on the basis of the principle of non-discrimination. It acts in line with the expectations of the theory of neo-functionalism, pushing forward integration with a comprehensive interpretation of the EU legislation in this area. Interestingly, it thus positioned itself against member states that clearly defended distinguishing between fixed-term workers and CPW for pay, working conditions and access to career mobility.

However, for successive or abusive use of fixed-term contracts, the position was more ambiguous. While unreasonably long durations of fixed-term contracts or too much abusive behaviour was condemned by the ECJ, when policies promoted active aging through fixed-term contracts this was considered reasonable (Mangold) and when fixed-term contracts were used for social policy purposes this was also accepted.

The part of the puzzle that now remains is how the ECJ judgements have been integrated in and implemented in member states. First, we aim to look at the role of national courts, where they have to examine the working conditions of fixed-term workers, in order to ensure that the tasks of the fixed-term workers are comparable to the CPW or whether the need for a fixed-term worker justifies conversion to a contract of indefinite duration. In half of our cases, the national courts have to examine these conditions in order to determine whether the treatment of the worker (and general or specific rules) should be changed. It is thus an important issue to come to terms with, which we aim to do in future research.

Second, we aim to see whether the member states have integrated the EU case law minimally or in line with the core principles of the fixed-term work directive, that is to prevent abuse of fixed-term work contracts, and to ensure equal treatment between a fixed-term worker and a CPW. As an illustration of this, we analyse the Mangold case below.

The German reaction to the ECJ decision in the Mangold case

Historically, Germany has been a frontrunner with regard to dismissal protection. The 1920 Works Council Act was the first significant restriction of the employers' right to hire and fire at will in a democratic country (Vogel-Polsky 1986: 189) and awarded the workers the right to appeal dismissals to work councils and introduced the right to compensation pay if the labour court found that a

dismissal was based on insufficient objective reasons (e.g. not related to personal conduct or the situation of the company, but rather based on religion or political affiliation). The 1951 Dismissal Protection Act, the 1969 Labour Promotion Act and finally the 1972 Works Constitution Act further strengthened protection against dismissal (Emmenegger 2013). Today, Germany is still characterised by one of the strictest regulatory regimes.

With regard to fixed-term contracts, German labour law was initially more liberal. The Civil Code of 1900 had ruled that fixed-term contracts could be concluded without any pre-condition. However, German labour courts soon began to develop limitations. Already in the Weimar period, labour courts prohibited fixed-term contracts if they were concluded to circumvent the rules against unfair dismissal (Weiss 1987: 46). After the enactment of the 1951 Dismissal Protection Act, labour courts began to develop objective criteria to determine the legality of fixed-term contracts. In particular during the 1970s and early 1980s, the courts restricted the usage of fixed-term contracts to a limited number of cases such as auxiliary employment, seasonal work, work limited to a specific project or the temporary replacement of another worker (Countouris 2007: 90). What is more, the labour courts decided that if the usage of fixed-term contracts is contested in court, the burden of proof is on the employer (Weiss 1987: 47). Hence, in the early 1980s, the German labour market was characterised by a low level of numerical flexibility. Employers were facing high costs and legal complications when firing workers and had few opportunities to replace workers on open-ended contracts with workers on fixed-term contracts.

Labour market policies under the Kohl government (1982-1998) took a decisive turn toward more market-led solutions (Thelen 1991: 160-161). Most importantly, the government wanted to combat unemployment by relaxing rigidities in the labour market, which in its view impeded the free allocation and reallocation of resources (Leaman 2002: 139-140). In line with these demands and with the international trend toward supply-side economics, the deregulation of hiring barriers also became a prominent issue on the governments' agenda (Schmidt and Oschmiansky 2005: 249-250).

The first tangible result of the paradigm shift in labour market policy was the 1985 Employment Promotion Act. Before 1985 the recourse to fixed-term contracts was possible only in presence of 'justifying reasons' that the Federal Labour Court had defined rather narrowly over the years (Weiss 1987: 47; Countouris 2007: 90). The 1985 act stopped this development. With regard to fixed-term contracts, the act introduced the possibility to conclude fixed-term contracts of up to 18 months (previously six months) with newly hired (additional) employees or immediately after an apprenticeship. The maximum duration was extended to 24 months if the company had been founded in the last six months or if the company employed less than 20 employees (Weiss 1987: 48).³

The recourse to fixed-term contracts was further liberalised by the 1996 Employment Promotion Act. Among other things, the 1996 act extended the maximum duration of fixed-term contracts to 24 months and allowed for three renewals (within the 24 month period). In addition, it abolished the

³ The act also extended the maximum duration of assignments by temporary work agencies and slightly relaxed protection against dismissal in case of open-ended contracts by revising the regulations concerning the firm size threshold.

requirement to offer valid reasons for the conclusion of fixed-term contracts in case of workers aged 60 or more (Zohlnhöfer 2001: 283; Jahn 2002: 40-41). Hence, the 1996 act first introduced the differential treatment according to age, which later led to the Mangold ruling.

The opposition Social Democrats and the trade unions rejected the labour market reforms enacted by the Kohl government (Zohlnhöfer 2001: 273-309; Hassel and Schiller 2010: 201). Their victory in the 1998 election gave them the possibility to repeal these reforms. After taking power in October 1998, the new centre-left Schröder government immediately repealed some of the labour market reforms enacted by its predecessor. However, the new government exclusively focused on those aspects of the 1996 act that concerned open-ended contracts. With regard to temporary employment, the government argued that it would postpone any legislative activity until it could be combined with the implementation of two new EU directives concerning part-time and fixed-term work.

The resulting 2000 Act on Part-Time and Fixed-Work only modestly re-regulated the recourse to fixed-term contracts (Schmidt 2002: 5). The act contained a non-exhaustive list of possible 'justifying reasons' for the conclusion of fixed-term contracts and maintained that the regulations concerning 'justifying reasons' applied independent of firm size and duration of contract (previously the requirement to provide 'justifying reasons' was restricted to companies with more than five employees and fixed-term contracts longer than six months, see Jahn 2002: 41). There were, however, two exceptions to the requirement to provide 'justifying reasons' for the conclusion of fixed-term contracts: Fixed-term contracts of up to 24 months continued to be possible in case of newly hired (additional) employees and the 2000 act allowed fixed-term contracts of unlimited duration for workers aged 58 or more (Jahn 2002: 43; Schmidt 2002: 10-11). Finally, the 2000 act explicitly prohibited, for the first time, discrimination against workers with fixed-term contracts (Countouris 2007: 115).

Rising unemployment soon forced the Schröder government to reconsider its labour market policies. Facing low approval ratings, increasing unemployment numbers and an election only a few months away, Schröder was willing to take a risk. The result was the Hartz commission, which gave rise to some of the most radical labour market reforms in post-war Germany (cf. Clasen 2005; Hassel and Schiller 2010; Eichhorst and Marx 2011). Taking advantage of a scandal concerning manipulated job-placement records produced by the Federal Labour Institute, Schröder appointed a commission for the 'modernisation of the labour market' chaired by the then Volkswagen personnel manager Peter Hartz and vowed to implement the commission's recommendations (to be delivered a few months before the 2002 general election) immediately after the election, thereby forcing the party's left wing and the trade unions to refrain from attacking the reform proposals (Clasen 2005: 74).

The Hartz recommendations led to significant reforms of unemployment benefits, dismissal protection and the regulation of temporary employment. With regard to fixed-term contracts, the Schröder government lowered the age threshold that applied to repeated fixed-term contracts without valid reason from 58 to 52 years in 2002 and allowed newly established companies to use fixed-term contracts for up to 4 years without providing a valid reason in 2003 (Jahn 2005: 287; Eichhorst and Marx 2011: 79).

In contrast, the reform of dismissal protection was more timid. Most importantly, the 2003 act increased the firm size threshold under which the 1951 Dismissal Protection Act did not apply from 6 to 11 employees and reintroduced an exhaustive list of social selection criteria in case of collective dismissals, while allowing employers to exclude employees whose employment is in the company's legitimate interest from social selection (Seifert and Funken-Hötzel 2005: 495-506). Interestingly, these changes imply that the Schröder government reintroduced the reforms of dismissal protection in case of open-ended contracts that the Kohl government had already introduced in 1996 and the first Schröder government repealed in 1998.

Hence, by 2005, Germany had a two-tier system of labour market regulation with still comparatively high levels of protection against dismissal in case of open-ended contracts and few regulations that restricted the recourse to fixed-term contracts. In addition, German labour market policies had introduced a qualitative distinction between fixed-term contracts for workers below and above the age of 52 years. While fixed-term contracts for the former typically necessitated a 'justifying reason', this requirement had been dropped for the latter.

From the beginning, labour law researchers warned that the qualitative distinction between fixed-term contracts for workers below and above 52 years was probably not lawful (Schmidt 2002: 11). Indeed, the new law was already challenged in 2003. Mr. Mangold, a lawyer aged 56, was hired by Mr. Held for the period from July 2003 to February 2004 on a fixed-term basis for the very purpose of challenging the law in the courts (Stone Sweet and Stranz 2012: 100-101), arguing that the 2000 Act on Part-Time and Fixed-Work and its 2002 revision were in violation of the 1999 fixed-term work and the 2000 anti-discrimination directive. The Munich labour court then referred several questions to the ECJ, in particular whether exempting employees aged 52 or older from the limitations to the conclusion of fixed-term contracts was compatible with community law (Schmidt 2005: 505).

In November 2005, the ECJ argued that the exemption was not compatible with community law and therefore requested Germany to revise its labour laws. In response, the German government immediately declared that the law would be changed in spite of protests by the German employers' association (Stettes 2005). Since May 2007, the maximum duration of fixed-term contracts for workers aged 52 or older is restricted to five years and the recourse to these contracts is limited to workers who had been unemployed for at least four months immediately before the new employment.

At first glance, this ECJ ruling and the subsequent labour market reform seems to provide strong evidence in support of the re-regulation thesis. However, the Mangold case is in fact considerably more complicated and the support for the re-regulation thesis more ambiguous. Most importantly, the ECJ ruled that the German law did not violate the 1999 fixed-term work directive. In particular, the court argued that the directive did not apply because the directive only limits the use of successive fixed-term contracts (while the contract in question was Mr. Mangold's first one) and the reason for the differential treatment (encouraging the employment of older workers) was sufficient to satisfy the directive requesting a justification for the less favourable treatment of certain groups (Schmidt 2005: 512-513).

Instead, the ECJ referred to the 2000 anti-discrimination directive, which explicitly bans discrimination on the basis of age. The ECJ argued that by solely relying on the criterion 'age', German labour law violated community law because the 2000 act and its 2002 revision lead "to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times" (Schmidt 2005: 515).

There was, however, a big problem: At the time of the ruling, in 2005, Germany had not yet transposed the 2000 anti-discrimination directive. What is more, the deadline for transposition was December 2006, while the stipulation exempting employees aged 52 or older from the limitations to the conclusion of fixed-term contracts was set to expire on 31 December 2006. Nevertheless, the ECJ considered the German law to be in violation of community law. Controversially, the ECJ argued that, first, Germany could not introduce measures contrary to the directive during the period of implementation and, second, the source of principle of equal treatment in community law was to be found in various international instruments (such as the, at that time, not yet implement EU Charter of Rights) and the principle of equal treatment therefore to be considered a general principle of community law (Schmidt 2005; Thomas 2006; Sawyer 2007; Stone Sweet and Stranz 2012).

The ECJ decision stirred controversy, including a public call by the former German President (1994-1999) and President of the German Federal Constitutional Court (1987-1994) Roman Herzog to "Stop the European Court of Justice" (Herzog and Gerken 2008). Indeed, the ruling was significant because it for the first time introduced the notion of "general principles of community law" and directly applied to a legal dispute between two individuals (and thus had a horizontal direct effect, thereby bypassing the necessary national implementation of directives). Not surprisingly, the ECJ decision was taken to the German Federal Constitutional Court to assess whether the ECJ was legally entitled to rule in this case (Mahlmann 2010; Beyer-Katzenberger 2011).⁴

In a long-awaited decision, the German Federal Constitutional Court ruled in July 2010 that the ECJ decision was not beyond the ECJ's powers (*ultra vires*) because the violation of the principle of conferral was not manifest ("*offensichtlich*") and the act had no serious impact on the distribution of competences between member states and the European Union. The German Federal Constitutional Court, however, doubted the existence of "general principles of community law", but considered the breach not serious enough to constitute a violation of the principle of conferral (Beyer-Katzenberger 2011: 519-521).⁵ Hence, the ECJ's decision in the Mangold case remained intact.

⁴ It is easy to see why the ECJ decision was challenged in Germany: Employers that had followed German labour law now suddenly faced a situation in which some fixed-term contracts were turned into open-ended contracts (because the ECJ considered the reasons for fixing the term null and void).

⁵ It should also be emphasised that ECJ decision in the Mangold case mirrors the standing case law of the German Federal Constitutional Court with regard to age discrimination (Mahlmann 2010: 1417). In addition, given the transposition of the 2000 anti-discrimination directive in 2006 and the implementation of the EU Charter of Rights in 2009, the Mangold case had lost some of its controversial content. Finally, the German Federal *Labour* Court had quickly embraced the ECJ decision in the Mangold case and generated a wave of

In sum, the Mangold case provides some evidence for the re-regulation thesis. The fixed-term work directive, however, played only a secondary role. As Stone Sweet and Stranz (2012: 101) note, the fixed-term work directive was decisive in allowing the Munich labour court to refer several questions to the ECJ (which would not have been possible in the absence of the directive given the belated transposition of the 2000 anti-discrimination directive and the then absence of “general principles of community law”). However, the ECJ ultimately ruled that German legislation did not violate the 1999 fixed-term work directive. Instead, the ECJ controversially referred to general principles of the European Union to ban the fixed-term contracts in question. Hence, it was anti-discrimination regulations and not the introduction of new protective (minimum) regulations that led to a re-regulation of atypical work.

Conclusions

This analysis of the role of the ECJ with regard to fixed-term work has revealed several interesting findings. First, the analysis shows that the issue of equal treatment – also linked to European Union directive and equal treatment principles more generally – is clearly the main anchor on which ECJ judgements on fixed-term work hinge. In line with the precedent set by the first major Spanish case (Del Cerro Alonso) and the first major German case (Mangold), the principle was strongly upheld in subsequent rulings. The CPW as a reference point is a strong pillar to which the ECJ systematically refers in its judgements on fixed-term work. This is thus in favour of the worker. However, second, the position of the ECJ with regard to prevention of abuse of fixed-term workers is more ambiguous. While the ECJ condemns very unreasonable renewals or the succession of multiple contracts, the ECJ does not seem to actually oppose the use of fixed-term contracts.

references from German courts to the ECJ. The German Federal Constitutional Court had thus little to gain in declaring the ECJ’s Mangold decision invalid under German law (Stone Sweet and Stranz 2012: 102).

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Table 1: Analysis of re- or de-regulation of judgments of ECJ with regard to fixed-term work

Country	Name of case, year	Issues	Public/private	Position government	Outcome	De-reg/re-reg	Discretion national court
Spain	Gaviero & Torres 2010	Is the Spanish state required to implement principle of access to "special benefit"? Is it required to do so retroactively? Clause 4	Public	The LEBEP (Law for civil servants) should be regarded as a national measure transposing Directive 1999/70, even though there is no reference to Directive 1999/70.	Interim civil servants can rely on directive against State before a national court to obtain recognition of their entitlement to length-of-service increments; when period of transposition of the directive is terminated, the principle must be considered retroactively	Re-regulation	
Spain	Del Cerro Alonso 2007	Does the directive on FTC cover financial conditions (other than pay)? Access to special benefit (even when not a full civil servant). C 4	Public	Employment conditions do not include extra financial bonus	FTC workers should not be discriminated against with regard to bonus; 'employment conditions' must be interpreted as meaning that it can act as basis for a claim of extra bonus	Re-regulation	
Spain	Rosado Santana 2010	Consideration taken of periods of service as interim (fixed-term) civil servant in the view of seeking to attain an internal promotion. C 4&6	Public	Directive not applicable to this case; there exist differences between career and interim civil servants with regard to requirements of entry, merits and capacities; some tasks reserved ONLY for career civil servants	Periods of service previously completed as interim civil servant must be taken into consideration; the directive precludes difference in treatment between career civil servants and interim civil servants based solely on the basis of contractual difference for purposes of promotion, unless there are objective reasons.	Re-regulation	X
Germany	Mangold 2005 C-144/04	Age discrimination allowing for using FTC; abuse of (successive) FTC; is national law precluded from use of fixed term contracts only on	Private	Lowering of age to 52 for fixed-term work was to offset new social guarantees; it is intended to encourage employment of older persons in Germany	Difference in treatment exclusively on the basis of age via fixed term contracts is NOT allowed; national legislation decreasing age for fixed term contracts is allowed due to the aim to encourage employment	Re-regulation	X

		basis of age (52 +)? C 4&5					
Germany	Kumpan 2011	Does EU law preclude national legislation that allows for fixed term contracts solely on basis of age and no other objective conditions? Should national law include provisions to prevent successive use of FTC? Is national collective agreement in conflict with EU law? C 5	Private	N/A	Discrimination should not be allowed when the initial employment relationship continued for the same activity, with the same employer; collective agreement not in line with EU law.	Re-regulation	X
Germany	Kucuk 2012	Can objective need for replacement be considered permanent due to multiple replacement needs that reoccur? is f-t employment relationship with replacement justified when associated with social policy purpose (support maternity/paternity), even if recurring? C 4&5	Public	Employers should have the discretion to assess need for fixed term contracts, even if recurring. It is different from a 'fixed and permanent' need. Also, it is in line with social policy objective	Temporary replacements on recurring or even PERMANENT basis do not mean there is no objective reason for agreeing that contract. However, the number and cumulative duration of the fixed-term contracts with same employer must be taken into consideration	Re-regulation	X

Italy	Vassallo 2006	Do individuals have the right to indemnity for loss caused by failure to adopt appropriate measures to prevent abuse relating to the use of FTC and/or relationships with employers in public sector? Under which conditions can FTC be considered to be converted to contract of indefinite duration. C 4	Public	Questions inadmissible	FTC directive does not preclude national legislation which does not ensure conversion of two successive fixed-term contracts to contract of indefinite duration, if another measure prevents and punishes abuse of FTC by public sector employer.	Status quo	X
Italy	Marrosu and Sardino 2006	Do individuals have the right to indemnity for loss caused by failure to adopt appropriate measures to prevent abuse relating to the use of f-t contracts and/or relationships with employers in public sector? Under which conditions can f-t contract be considered to be converted to contract of indefinite duration. C 4	Public	Questions inadmissible	FTC directive does not preclude national legislation which does not ensure conversion of two successive fixed-term contracts to contract of indefinite duration, if another measure prevents and punishes abuse of f-t contracts by public sector employer.	Status quo	X

Italy	Valenza et al. 2012	Does loss of length of service under FTC as provided in national legislation fall within scope of derogation on the basis of objective grounds? Can length of service accrued under FTC be taken account of? C 4	Public	Recruitment under 'stabilisation procedure' is a derogation from normal procedure based on competition; this justifies starting pay level from the beginning of stabilisation and not the start of the f-t contract; there should not be reverse discrimination against career civil servants. Account being taken of length of service accrued in FTC is contrary to Italian legislation	Clause 4 of framework agreement precludes national legislation which prohibits rules that unconditionally justify difference in treatment with respect to public officials on a fixed-term basis	Re-regulation	X
Italy	Sibilio 2013	Is the directive applicable to "travailleurs socialment utiles"; does clause 4 preclude that these workers receive less remuneration than workers on contract of indefinite duration for same task?	Public	Framework agreement does not cover these workers	The directive does not cover this type of worker (it is a type of contract excluded by the directive according to clause 2 of the directive)	De-regulation permitted	
Austria	Zentralbetriebsrat der Landeskrankenhäuser Tirols 2010	Discrimination: access to benefits and leaves restricted for employees employed for less than six months. C 4	Public	National legislation not concerned by EU law (province of Tyrole)	Clause 4 of FTD precludes national legislation which excludes from the scope of law workers employed under fixed-term contracts of a maximum of six months or on a causal basis (no discretion)	Re-regulation	

Greece	Adeneler et al. 2006	Failure to renew fixed-term contracts, lack of objective reasons for fixing the duration, during transposition of directive into Greek law. C 5	Public (but governed by private law)	Public sector workers are covered by different presidential decree; hence questions concerning presidential decree for private sector workers are irrelevant. According to the relevant presidential decree, nine of the concerned 18 workers should get indefinite contracts	Objective reasons justifying successive fixed-term contracts require recourse to the particular type of employment relationship, 20 working days between two fixed-term contracts are not sufficient to claim that two contracts are not successive, domestic courts need to anticipate directive if directive is implemented belatedly, no special exception rules for public sector (no discretion)	Re-regulation	
Greece	Angelidaki et al. 2009	Failure to renew fixed-term contract (first renewal), lack of objective reason for fixing the duration. C 5	Public (but governed by private law)	Reference to an old (1920) law to justify complaints are misguided because law does not apply to public sector workers	Objective reasons justifying fixation of duration necessary, but does not apply to first and single use of a fixed-term employment relationship	De-regulation permitted	
Greece	Epitropos tou Elegktikou Synedriou 2012	Refusal to approve the payment order relating to the remuneration of an (f-t) employee at the concerned ministry, ministry argues that employee had been on leave for 34 days during the 7 month period and the remuneration should be reduced in proportion to the length of that leave (for FTC, leaves are unpaid, unlike CPW). C4	Public (but governed by private law)		The dispute resolving body does not constitute a court or tribunal and consequently is not entitled to send a reference for a preliminary ruling to the court. No decision. First, the parties would have to approach a 'real' national court.		

Bulgaria	Georgiev 2010	Is it allowed to have national legislation that allows for ONLY fixed term contracts for university lecturers having reached the age of 65 (until 68 MAX)? Age discrimination. C 4	Public	Such national legislation is not unfavourable to the professors because it makes it possible for them to continue working after reaching the age of 65, when they can be made to retire with pension. These professors have an opportunity to work after 65 via fixed term contracts but until 68. The government argues that in this way, national legislation pursues a social policy aim	Directive 2000/78 does not preclude national legislation that allows university professors to continue working after the normal age of retirement as this allows for flexibility for the individual and the university, and should allow for recruitment of younger university staff. It is for national court to determine whether this policy is actually implemented by universities	Status quo (no breach of principles of fixed-term work)	
Ireland	Impact 2008 C-268/06	Pay and pension conditions for civil servants on fixed-term contracts: claim for equality of treatment with comparable permanent worker; are there conditions for renewal of fixed term contracts by government departments for up to 8 years? C 4&5	Public	The fact that there is no definition of 'employment conditions' makes that provision impossible for national courts to apply;	Clause 4 on equal working conditions with comparable permanent worker is sufficiently precise for workers to be able to invoke it (and to obtain equal treatment); Contrary to Commission claim, Court maintains that there must be objective reasons to justify the renewal of fixed-term contracts (clause 5)	Re-regulation	
France	Huet 2012 C-251/11	Conversion FTC to contract of indefinite duration; is there obligation to renew contract in identical terms with the principal clauses of the previous contract, esp. Concerning job title and remuneration	Public	Conversion of material conditions of f-t contract to regular contract may be detrimental to the individual	No obligation to convert exact terms of FTC to terms of contract of indefinite duration; BUT member state must ensure that the conversion of fixed term employment contracts to contracts of indefinite duration is not unfavourable to the person concerned when the tasks and nature of functions remain unchanged	Re-regulation	X