Strengthening the protection of precarious workers: fixed term workers

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(iii) Extract from C-212/04 Adelener v Ellikinos Organismos Galaktos [2006] IRLR 716, (European Court of Justice)

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Objectives

- To identify the forms of disadvantage that can be experienced by fixed term workers
- To introduce the contents of the principal international (primarily European) labour standards applying to fixed-term work
- To explore key legal issues that arise when implementing international (primarily European) labour standards on fixed-term work

1. Introduction: Fixed-Term Work and Precarious Work

Fixed term work can be defined, in a general fashion, as any work for which there is an end which could be a specific date, the completion of a specific task (for example a research project), or the return of an employee. There are therefore objectives reasons which limit the duration of the work. While the contract is temporary, agency workers will not be considered here as their wage is paid by a third party and tend not to be included in the scope of regulations\(^1\). The number of people working under fixed term contracts has increased over the years. In a European context (EU 15), there was a rise of 25% between 1995 and 2006. In 1995, workers on fixed contracts represented 11.8% of the overall workforce while in 2006 it had moved up to 14.7%\(^2\). However, there has been a recent decrease. In the EU 27, the number of employees under fixed term contracts was 13.5% in 2009, down from 14.0% in 2008 and 14.5% in 2007\(^3\). In the EU 25, in 2005, 13.9% of men worked under fixed contracts while the figures was 14.9 for women, an increase from 2000 in both cases\(^4\). Women are therefore slightly more likely to be in fixed term work than men. The figures also show that a greater proportion of under 30 are employed under fixed term contracts\(^5\). Finally, fixed term workers are more likely to be in the low wage earners category than permanent employees\(^6\). Spain, Portugal and Poland appear as the highest users of such temporary workers. It is more difficult to obtain


\(^2\) See ILO 8\(^{th}\) European regional meeting - Delivering decent work in Europe and Central Asia, Report of Director General, volume 1 part 1 (2009), page 21


\(^5\) ibid

clear data from other sources such as OECD where temporary work covers not only fixed term contracts but also seasonal workers and agency workers.\(^7\)

Workers on fixed term contracts have been included in the category of precarious work for several reasons. The contractual arrangements trigger precariousness. First, fixed-term work is associated with insecurity. The end of a fixed term contract is synonymous with uncertainty and loss of earnings. Second, fixed term workers may be less protected. They can be treated differently within the workplace because of the temporary nature of their tasks and presence in the enterprise. They could be denied, for instance, access to certain benefits or contractual terms (such as access to occupational pension schemes or training facilities). Finally, staff on fixed term contracts risk losing continuity of services which can be the key to entitlement to rights such as redundancy pay, maternity benefits, pension packages, etc. The lack of ‘seniority’ would not necessarily systematically mean lack of access to right but it will erode the amount of benefits that could potentially be received.

As the use of fixed term contracts increased in a number of countries, pressure for the law to intervene mounted. While the International Labour Organisation has not issued a Convention on this form of labour (by contrast with the situation in relation to part time work), the European Community produced a European Directive on Fixed Term Work\(^8\) which implemented an agreement between the European social partners. Nationally, a number of European countries, such as Italy, France or Germany already had put in place legislation to limit the use of fixed term contracts and emphasised the exceptional nature of such form of labour.\(^9\) The remaining of the materials will focus first on the nature, the aim and the form of the law regulating fixed term work, primarily in relation to the European Directive. Cases of the European Court of Justice will also illustrate how the Directive has been interpreted to maximise the protection afforded to fixed term workers. Examples of national legislation will also be referred to, notably to contrast countries where the use of fixed term work is highly regulated with countries such as the United Kingdom where the introduction of the European Directive led to significant changes in employment law.

2. The regulation of fixed-term work

Statutory intervention in the use of fixed term work was first considered necessary to prevent employers from exploiting a form of atypical working. Permanent contracts of employment were the norm and recourse to fixed term contracts should be exceptional and justified. Measures in Italy or France were therefore aimed at guaranteeing protection to workers employed temporarily. For example, the French

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\(^7\) See http://www.oecd.org/dataoecd/28/60/45590204.pdf

\(^8\) Council Directive 1999/70/EC (above n 1)

\(^9\) See next sections for more details
legislation only authorised fixed term contracts in statutorily defined situations and only for determined length of time\textsuperscript{10}.

However, as unemployment rose, the language of market flexibility and employment policies seems to take precedence over employment protection. Fixed term contracts were seen as a tool to create new jobs in the panoply of measures to encourage employment growth without burdening employers with the ‘red tape’ associated with permanent employment and the catalogue of employment rights attached to that status\textsuperscript{11}. It was in this environment that the European Directive was enacted. The measure had to respond to the need of flexibility to encourage competitive markets and to the security agenda, providing workers with stable work and employment conditions. It followed the successful adoption of the Part Time Workers Directive\textsuperscript{12} which was also giving legal effect to an agreement reached by the European social partners. The aim of the Fixed-Term Work Directive was to improve the quality of fixed term working by warranting equality of treatment between fixed term and permanent workers. The second and equally important goal was to prevent abusive recourse to successive fixed term contracts. On the one hand, the Directive inserted in European law the principle that the contract of an indefinite duration remains the norm. This is expressly stated in the preamble of the Directive\textsuperscript{13}. It has helped the European Court of Justice to interpret the Directive purposively\textsuperscript{14} and to ascertain the need to protect this type of precarious workers. For example in *Adelener v Ellikinos Organismos Galactos*\textsuperscript{15}, the Court stressed that the aim of the Directive is to protect against instability of employment. This is significant because it regards stability as part of the protection for employees\textsuperscript{16}. On the other hand, the flexibility agenda is found in the wide discretion left to Member States to implement the two main rights given to fixed term workers.

**Read Document 1**

The implementation of the European instrument in the different legal orders led to paradoxical results. In some countries, some of the measures that protected fixed term workers had already been relaxed and therefore did not need alterations after the publication of the Directive. In France for example, the circumstances in which

\textsuperscript{10} See N Countouris *The Changing Law of the Employment Relations – Comparative Analyses in the European Context* (Ashgate, 2007) 89-92 and for an overview of the national law in Belgium, Italy, Germany and the United Kingdom in 1999, see the special edition of the International Journal of Comparative Labour Law and Industrial Relations 1999 volume 2 which considered the potential impact of the European Directive on a number of selected countries.

\textsuperscript{11} N Countouris, 105 (above n 9)


\textsuperscript{13} See document 1.

\textsuperscript{14} See the next sections for more details.

\textsuperscript{15} C-212/04 [2006] IRLR 716

\textsuperscript{16} ibid para 62 (see document 3)
fixed term contracts could be used had been increased\textsuperscript{17}. In other countries, such as the United Kingdom, the European law led to regulation of the use of fixed term contracts when, prior to the new law, they could be used without justification and renewed at will\textsuperscript{18}.

3. The principle of equal treatment between fixed term workers and permanent workers

The principle of equal treatment is a legal device which bridges the gap between standard employees and fixed term workers to ensure that the differences between the contracts have little impact on the working relationship\textsuperscript{19}. The aspiration is that parity will improve the quality of fixed term working. In this respect, research had shown that fixed term workers suffer from discrimination in comparison with permanent workers, in particular in relation to pay, pension and access to training\textsuperscript{20}. The European initiative has the principle of equality at its heart\textsuperscript{21}. However, such principle is not easily universal. It is confined by a number of factors within the Directive and in some Member States legislation (as will be seen in the United Kingdom). The two aspects that have raised questions of interpretation are the material scope of the equal treatment and the definition and extent of objective reasons which can justify unequal treatment.

Read Document 1 - clause 4 of the agreement

The Directive prohibits fixed term and permanent employees to have different employment conditions. The scope of ‘employment conditions’ was disputed in the European Court of Justice and in the United Kingdom tribunals. It was argued in both cases that pay was not part of ‘employment conditions’. This was a technical and legal point put to the European Court of Justice. As pay is not a matter for European legislation, as clearly stated in Article 137(5) of the EC Treaty, pay could not be included in employment conditions. This argument was used by the Spanish government and supported by the UK and Ireland in the case of Del Cerro Alonso v Osakidetza-Servicio Vasco de Calud\textsuperscript{22} and found echo in the opinion of the Advocate General\textsuperscript{23}. However, the European Court of Justice took a purposive approach to the

\begin{itemize}
\item \textsuperscript{17} N Countouris, 111 (above n 9).
\item \textsuperscript{18} P Lorber ‘Regulating Fixed-Term Work in the United Kingdom: a Positive Step towards Protection?’ (1999) 15 International Journal of Comparative Labour Law and Industrial Relations 121
\item \textsuperscript{19} N Countouris, 89 (above n 9).
\item \textsuperscript{20} European Trade Union Institute, \textit{Legal Analysis of the Implementation of the Fixed Term Work Directive} (ETUI, 2003) 14.
\item \textsuperscript{21} See Clause 4 (annex 1) and the preamble of the Directive (14) which states that the social partners have the desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination
\item \textsuperscript{22} C-307/05 [2007] 3 CMLR 54
\item \textsuperscript{23} Para 22
\end{itemize}
interpretation of the Directive. Pay is the most important employment condition and excluding it from the scope of the equal treatment principle would seriously undermine the aim of the Directive.

In the United Kingdom, the research that has had shown that fixed term workers were discriminated on pay and pension on grounds of working under a fixed term contract was illustrated in court. In Coutts and Co plc and anor v Cure and anor, the Employment Appeal Tribunal found that excluding fixed term employee from accessing bonus payment available to permanent employees was directly in breach of regulation 3 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Read Document 2 – regulation 3

Discrimination between fixed term and permanent employees can be justified on objective grounds. The European Court of Justice was asked to define such terms in the case of Del Cerro Alonso. Spanish law allowed permanent and fixed term workers to be paid differently. The rule was found in law and collective agreement. The question for the court was whether the inclusion of the different treatment in law or collective agreement constituted objective justification. In its ruling, the ECJ relied on its previous case-law where a similar question was asked about justifying the renewal of fixed term contracts. A discriminatory practice cannot be justified in an abstract manner. The fact that it is written in a norm, such as a collective agreement or a statute, cannot excuse the unequal treatment. The Court went on to give precise criteria to determine what would constitute objective grounds:

... that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

Similarly, a general exclusion of fixed term contracts that last less than six months from the principle of equal treatment cannot be justified by budgetary

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24 Para 37
25 produced by the Trade Unions Congress and used in Department of Trade and Industry, Government response to the public consultation on the fixed term work Directive (2002) at 4
26 [2005] ICR 1098
27 Clause 4
28 C-307/05 [2007] 3 CMLR 54
29 Adelener v Ellikinos Organismos Galaktos C-212/04 [2006] IRLR 716 and see further developments on this question in the next section.
30 Del Cerro Para 58.
considerations. In *Zentralbetriebsrat der Landeskrankenhauser Tirols v Land Tirol*\(^{31}\), the European Court of Justice rejected the argument that rigorous personnel management constituted objective grounds. The difficulty to implement the non-discrimination for this category of shorter contracts because it was onerous from an administrative point of view could not justify the non application of the equality principle\(^{32}\). The European Court of Justice has therefore indicated that the scope of the equality principle should be wide and that the exceptions should be interpreted narrowly in line with the aim of protecting fixed term employees. The message is clear for national legislators and local courts. The stance adopted for the non-discrimination clause has been repeated in relation to the second aim of the Directive.

4. The prohibition of abusive use of successive fixed term contracts

Protecting fixed term workers from insecurity and uncertainty is potentially achieved by limiting the number of occasions they can work under this arrangement or by limiting the length of the contracts, ensuring that the recourse to such contracts is justified. The European Directive focussed on avoiding the abusive use of such contracts to prevent workers from staying at the fringe of protective employment law. It is assumed that the intention was to permit fixed term workers to become permanent where the post filled was not temporary in nature.

In order to reflect various pre-existing national practices in the Member States, the Directive gave national government a choice of formula to apply to prevent abusive recourse to successive fixed term contracts. According to clause 5, national law could require objective reasons justifying the renewal of fixed term contracts; it could put a cap on the maximum total duration of successive fixed-term contracts; or it could limit the number of renewals of the contracts.

**Read Document 1 – clause 5 of the agreement**

As indicated earlier, the impact of the Directive’s principle was quite significant in the United Kingdom. Prior to 2002, employers could use fixed term contracts without justification and could renew them freely and indefinitely. The transposition of the Directive required, for the first time, the regulation of the use of fixed term contracts. The government of the time opted for a combination of two formulas suggested by the Directive: maximum total duration and objective reasons. Regulation 8 of the Fixed Term Employee Regulations state that when employees have been working under renewed fixed term contracts for four years, the contract cannot be renewed further as fixed term contract, unless the further renewal is justified by objective reasons.

**Read Document 2 – Regulation 8**

\(^{31}\) C-486/08 [2010] IRLR 631  
\(^{32}\) ibid para 42
An additional noticeable novelty was the sanction applicable for unlawful extension of a fixed term contract. The employee could insist on the requalification of the fixed-term contract into a permanent one. This was not required by the Directive which typically leaves the sanction of Community law to Member States and simply states that Member States shall ensure that the necessary measures are in place to guarantee the results imposed by this Directive. The protection afforded potentially helps numerous workers who could have been trapped in years of renewed fixed term contracts.

By contrast, in other European countries, the use of fixed term contracts was already heavily regulated and the European Directive did not alter national law as it was already compliant with the European obligation. In France for example, the general rule is that fixed term contracts cannot last more than 18 months. They can be renewed but only once and provided and they do exceed the 18 months.

The Directive does not cover a number of aspects concerning the use of fixed-term contracts and therefore leaves flexibility to Member States. First, the Directive does not go as far as imposing any rule on the use of the first contract. Therefore employers are not required to justify or limit the duration of the first fixed-term contracts. Abuse of such form of contracts could come from permitting the existing of long first fixed-term contracts (more than five years for example). Second, the instrument leaves a considerable amount of flexibility to Member States when it comes to choosing how to avoid abuse. This is specifically true when it allows Member States to justify successive contracts by objective reasons. The use of such defence could be wide ranging. The European Court of Justice was quickly asked to interpret the nature and extent of the exemption. In Adelener v Ellikinos Organismos Galaktos and Marrousu and another v Azienda Ospedaliera Ospendale San Martino Di Genova e Cliniche Universitarie Convenzionate the Greek and Italian governments tried to justify the indefinite renewal of fixed term contracts in the

33 Art 2. This point was also re-iterated by the European Court of Justice in Adelener v Ellikinos Organismos Galaktos C-212/04 [2006] IRLR 716, from para 91 (see Annex 3) and in Marrousu and another v Azienda Ospedaliera Ospedale San Martino Di Genova e Cliniche Universitarie Convenzionate C-53/04 [2006] All ER (D) 36, para 57.
34 Article L1242-8 Code du travail
35 Article L1243-13 Code du travail
38 C-212/04 [2006] IRLR 716.
public sector by arguing that the legislation imposed such rule. The objective reason was therefore the law. In the case of Marrousu, the public authorities could not conclude contracts of indefinite duration. The European Court of Justice found this abstract and general justification incompatible with clause 5 of the Directive. It defined objective reasons as ‘precise and concrete circumstances characterizing a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts.

Read Document 3 – Adelener v Ellikinos Organismos Galaktos C-212/04 [2006] IRLR 716

- Consider the reasoning of the European Court of Justice when reaching its conclusion on the breach of the European Directive – see paragraphs 58-75 in particular.

In the United Kingdom, the defence of ‘objective reasons’ was also tested in the Higher Education sector. The practice of using fixed term contracts to employ researchers for externally funded projects is widespread. Staff employed for more than four years on successive contracts could not become permanent employees. It was argued that the dependence on external funding constituted objective grounds. Although this was only a first instance decision, the Employment Tribunal ruled that such blanket justification was not acceptable. Each scenario would have to be considered individually.

A further issue of interpretation on the scope of the protection was raised with the need to define ‘successive fixed term contracts’. By having a break between fixed term contracts, it could be argued that they would not be successive. This would clearly deprive workers from the essential protection of the Directive. The definition of ‘successive’ is left to the Member States. The European Court of Justice was specifically asked whether Greek law that stipulated that after 20 days between contracts, they are not considered as successive, was in breach of the Directive.

Read Document 3 – Adelener v Ellikinos Organismos Galaktos C-212/04 [2006] IRLR 716

- How did the Court rule in relation to the definition of ‘successive’ in Greek law? See specifically para 76-89

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40 C-53/04 [2006] All ER (D) 36, para 22
41 Para 69
42 Ball v Aberdeen University 101486/08, 23 May 2008 and for analysis of the case, see A Koukiadaki ‘Case-law developments in the area of fixed-term work’ (2009) Industrial Law Journal 89, at 96.
43 Clause 5(2)(a)
5. Conclusion
While at the ILO level there is currently no instrument concerning fixed-term workers, at European Union level, the combination of a Directive and a purposive interpretation of it by the European Court of Justice have contributed to an increased protection of this category of workers, even in countries where legislation pre-dated the Directive. Marrying flexibility and security is an arduous task, but there seems to be a tipping of the balance towards security. Even when measuring the need to create new jobs against the protection of fixed-term workers, the European Court of justice favoured the latter. In Mangold, German measures allowing employees above a certain age (52) to have their contracts indefinitely renewed were deemed in breach of the Directive even when the aim of the instruments was the stimulation of the labour market44. There is therefore a strong message that fixed-term contracts cannot be used in general terms without specific and well-argued justifications.

44 C-144/04 Mangold v Rudiger Helm [2005] ECR I- 9981
Annex


Article 1
The purpose of the Directive is to put into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto.

Article 2
Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 July 1999, or shall ensure that, by that date at the latest, management and labour have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

Member States may have a maximum of one more year, if necessary, and following consultation with management and labour, to take account of special difficulties or implementation by a collective agreement. They shall inform the Commission forthwith in such circumstances.

When Member States adopt the provisions referred to in the first paragraph, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by the Member States.

Article 3
This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 4
This Directive is addressed to the Member States.

ANNEX
ETUC-UNICE-CEEP framework agreement on fixed-term work

Preamble
This framework agreement illustrates the role that the social partners can play in the European employment strategy agreed at the 1997 Luxembourg extra-ordinary summit and, following the framework agreement on part-time
work, represents a further contribution towards achieving a better balance between "flexibility in working time and security for workers".

The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers.

This agreement sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations. It illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on a basis acceptable to employers and workers.

This agreement applies to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise. It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work.

This agreement relates to the employment conditions of fixed-term workers, recognising that matters relating to statutory social security are for decision by the Member States. In this respect the Social Partners note the Employment Declaration of the Dublin European Council in 1996 which emphasised inter alia, the need to develop more employment-friendly social security systems by "developing social protection systems capable of adapting to new patterns of work and providing appropriate protection to those engaged in such work". The parties to this agreement reiterate the view expressed in the 1997 part-time agreement that Member States should give effect to this Declaration without delay.

In addition, it is also recognised that innovations in occupational social protection systems are necessary in order to adapt them to current conditions, and in particular to provide for the transferability of rights.

The ETUC, UNICE and CEEP request the Commission to submit this framework agreement to the Council for a decision making these requirements binding in the Member States which are party to the Agreement on social policy annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community.

The parties to this agreement ask the Commission, in its proposal to implement the agreement, to request Member States to adopt the laws, regulations and administrative provisions necessary to comply with the Council Decision within two years from its adoption or ensure(1) that the social partners establish the necessary measures by way of agreement by the end of this period. Member States may, if necessary and following consultation with the social partners, and in order to take account of particular difficulties or implementation by collective agreement have up to a maximum of one additional year to comply with this provision.

The parties to this agreement request that the social partners are consulted
prior to any legislative, regulatory or administrative initiative taken by a Member State to conform to the present agreement.

Without prejudice to the role of national courts and the Court of Justice, the parties to this agreement request that any matter relating to the interpretation of this agreement at European level should in the first instance be referred by the Commission to them for an opinion.

General considerations

1. Having regard to the Agreement on social policy annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community, and in particular Article 3.4 and 4.2 thereof;

2. Whereas Article 4.2 of the Agreement on social policy provides that agreements concluded at Community level may be implemented, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission;

3. Whereas, in its second consultation document on flexibility in working time and security for workers, the Commission announced its intention to propose a legally-binding Community measure;

4. Whereas in its opinion on the proposal for a Directive on part-time work, the European Parliament invited the Commission to submit immediately proposals for directives on other forms of flexible work, such as fixed-term work and temporary agency work;

5. Whereas in the conclusions of the extraordinary summit on employment adopted in Luxembourg, the European Council invited the social partners to negotiate agreements to "modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security";

6. Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance;

7. Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;

8. Whereas fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers;

9. Whereas more than half of fixed-term workers in the European Union are women and this agreement can therefore contribute to improving equality of opportunities between women and men;

10. Whereas this agreement refers back to Member States and social partners for the arrangements for the application of its general principles, minimum requirements and provisions, in order to take account of the situation in each Member State and the circumstances of particular sectors and occupations, including the activities of a seasonal nature;

11. Whereas this agreement takes into consideration the need to improve
social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings;

12. Whereas the social partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore be given a special role in the implementation and application of this agreement.

THE SIGNATORY PARTIES HAVE AGREED THE FOLLOWING

Purpose (clause 1)
The purpose of this framework agreement is to:
(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

Scope (clause 2)
1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.
2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:
(a) initial vocational training relationships and apprenticeship schemes;
(b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.

Definitions (clause 3)
1. For the purpose of this agreement the term "fixed-term worker" means 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.
2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

Principle of non-discrimination (clause 4)
1. In respect of employment conditions, 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 different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.

4. 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.

Measures to prevent abuse (clause 5)

1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

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

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

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

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as "successive"

(b) shall be deemed to be contracts or relationships of indefinite duration.

Information and employment opportunities (clause 6)

1. Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment.

2. As far as possible, employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility.

Information and consultation (clause 7)

1. Fixed-term workers shall be taken into consideration in calculating the threshold above which workers' representative bodies provided for in national and Community law may be constituted in the undertaking as required by national provisions.
2. The arrangements for the application of clause 7.1 shall be defined by Member States after consultation with the social partners and/or the social partners in accordance with national law, collective agreements or practice and having regard to clause 4.1.

3. As far as possible, employers should give consideration to the provision of appropriate information to existing workers’ representative bodies about fixed-term work in the undertaking.

Provisions on implementation (clause 8)

1. Member States and/or the social partners can maintain or introduce more favourable provisions for workers than set out in this agreement.

2. This agreement shall be without prejudice to any more specific Community provisions, and in particular Community provisions concerning equal treatment or opportunities for men and women.

3. Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.

4. The present agreement does not prejudice the right of the social partners to conclude at the appropriate level, including European level, agreements adapting and/or complementing the provisions of this agreement in a manner which will take note of the specific needs of the social partners concerned.

5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practice.

6. The signatory parties shall review the application of this agreement five years after the date of the Council decision if requested by one of the parties to this agreement.

(1) Within the meaning of Article 2.4 of the Agreement on social policy annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community.


PART 2
RIGHTS AND REMEDIES

Less favourable treatment of fixed-term employees

3.—(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—
(a) as regards the terms of his contract; or
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1)
includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—
(a) any period of service qualification relating to any particular condition of service,
(b) the opportunity to receive training, or
(c) the opportunity to secure any permanent position in the establishment.
(3) The right conferred by paragraph (1) applies only if—
(a) the treatment is on the ground that the employee is a fixed-term employee, and
(b) the treatment is not justified on objective grounds.
(4) Paragraph (3)(b) is subject to regulation 4.
(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.
(6) In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)(c) the employee has the right to be informed by his employer of available vacancies in the establishment.
(7) For the purposes of paragraph (6) an employee is “informed by his employer” only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

Objective justification
4.—(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee’s contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee’s contract of employment.
(2) Paragraph (1) is without prejudice to the generality of regulation 3(3)(b).

Right to receive a written statement of reasons for less favourable treatment
5.—(1) If an employee who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 3 requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the employee is entitled to be provided with such a statement within twenty-one days of his request.
(2) A written statement under this regulation is admissible as evidence in any proceedings under these Regulations.
(3) If it appears to the tribunal in any proceedings under these Regulations—
(a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
(b) that the written statement is evasive or equivocal, it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.
(4) This regulation does not apply where the treatment in question consists of
the dismissal of an employee, and the employee is entitled to a written statement of reasons for his dismissal under section 92 of the 1996 Act.

**Unfair dismissal and the right not to be subjected to detriment**

6.—(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

(a) that the employee—

(i) brought proceedings against the employer under these Regulations;

(ii) requested from his employer a written statement under regulation 5 or regulation 9;

(iii) gave evidence or information in connection with such proceedings brought by any employee;

(iv) otherwise did anything under these Regulations in relation to the employer or any other person;

(v) alleged that the employer had infringed these Regulations;

(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;

(vii) declined to sign a workforce agreement for the purposes of these Regulations, or

(viii) being—

(aa) a representative of members of the workforce for the purposes of Schedule 1, or

(bb) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate, or

(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

**Complaints to employment tribunals etc.**

7.—(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3, or (subject to regulation 6(5)), regulation 6(2).

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(a) in the case of an alleged infringement of a right conferred by regulation 3(1)
or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;

(b) in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a)—

(a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;

(b) a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.

(5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act—

(a) when he does an act inconsistent with doing the failed act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

(6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment.

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;

(b) ordering the employer to pay compensation to the complainant;

(c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the infringement.

(9) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the infringement, and

(b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 3 shall not include compensation for injury to feelings.

(11) In ascertaining the loss the tribunal shall apply the same rule concerning
the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(12) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(13) If the employer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (7)(c) the tribunal may, if it thinks it just and equitable to do so—
(a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (7)(b); or
(b) make an order under paragraph (7)(b).

**Successive fixed-term contracts**

8.—(1) This regulation applies where—
(a) an employee is employed under a contract purporting to be a fixed-term contract, and
(b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—
(a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
(b) the employment of the employee under a fixed-term contract was not justified on objective grounds—
(i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
(ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of—
(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and
(b) the date on which the employee acquired four years' continuous employment.

(4) For the purposes of this regulation Chapter 1 of Part 14 of the 1996 Act shall apply in determining whether an employee has been continuously employed, and any period of continuous employment falling before the 10th July 2002 shall be disregarded.

(5) A collective agreement or a workforce agreement may modify the application of paragraphs (1) to (3) of this regulation in relation to any employee or specified description of employees, by substituting for the provisions of paragraph (2) or paragraph (3), or for the provisions of both of those paragraphs, one or more different provisions which, in order to prevent abuse
arising from the use of successive fixed-term contracts, specify one or more of
the following—
(a) the maximum total period for which the employee or employees of that
description may be continuously employed on a fixed-term contract or on
successive fixed-term contracts;
(b) the maximum number of successive fixed-term contracts and renewals of
such contracts under which the employee or employees of that description may
be employed; or
(c) objective grounds justifying the renewal of fixed-term contracts, or the
engagement of the employee or employees of that description under successive
fixed-term contracts,
and those provisions shall have effect in relation to that employee or an
employee of that description as if they were contained in paragraphs (2) and (3).

**Right to receive written statement of variation**

9.—(1) If an employee who considers that, by virtue of regulation 8, he is a
permanent employee requests in writing from his employer a written statement
confirming that his contract is no longer fixed-term or that he is now a
permanent employee, he is entitled to be provided, within twenty-one days of his
request, with either—
(a) such a statement, or
(b) a statement giving reasons why his contract remains fixed-term.
(2) If the reasons stated under paragraph (1)(b) include an assertion that there
were objective grounds for the engagement of the employee under a fixed-term
contract, or the renewal of such a contract, the statement shall include a
statement of those grounds.
(3) A written statement under this regulation is admissible as evidence in any
proceedings before a court, an employment tribunal and the Commissioners of
the Inland Revenue.
(4) If it appears to the court or tribunal in any proceedings—
(a) that the employer deliberately, and without reasonable excuse, omitted to
provide a written statement, or
(b) that the written statement is evasive or equivocal,
it may draw any inference which it considers it just and equitable to draw.
(5) An employee who considers that, by virtue of regulation 8, he is a permanent
employee may present an application to an employment tribunal for a
declaration to that effect.
(6) No application may be made under paragraph (5) unless—
(a) the employee in question has previously requested a statement under
paragraph (1) and the employer has either failed to provide a statement or given
a statement of reasons under paragraph (1)(b), and
(b) the employee is at the time the application is made employed by the
employer.

1 Section 92 was amended by the Unfair Dismissal and Statement of Reasons
for Dismissal (Variation of Qualifying Period) Order 1999 (S.I. 1999/1436),
Article 3 and by the Employment Relations Act 1999 (c. 26), section 9 and
paragraphs 1 and 5 of Part 3 of Schedule 4, and is amended by these Regulations,
Schedule 2.
(2) Part 10 is amended by these Regulations, Schedule 2, to extend the circumstances in which, under section 95, an employee is treated as dismissed for the purposes of that Part.

Annex 3 C-212/04 Adelener v Ellikinos Organismos Galaktos [2006] IRLR 716
This reference for a preliminary ruling concerns the interpretation of clauses 1 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999 (‘the Framework Agreement’), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP and the extent of the obligation on the courts of the Member States to interpret national law in conformity with Community law.

2
The reference was made in proceedings brought by Mr Adeneler and 17 other employees against their employer, Ellinikos Organismos Galaktos (Greek Milk Organisation; 'ELOG'), concerning ELOG’s failure to renew their fixed-term employment contracts.

3
Legal context

Community legislation

[...]

8
Clause 5 of the Framework Agreement states:
‘1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
(a) objective reasons justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships.
2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
(a) shall be regarded as “successive”;
(b) shall be deemed to be contracts or relationships of indefinite duration.’

[...]

12

National legislation

[...]

13
The Directive was transposed into Greek law in April 2003.

14
Presidential Decree No.81/2003 laying down provisions concerning workers employed under fixed-term contracts (FEK A’ 77/2.4.2003), which constitutes the first measure transposing Directive 1999/70, entered into force on 2 April 2003.
Article 2(1) of the decree states that the latter 'applies to workers employed under a fixed-term contract or relationship'.

Subsequently, pursuant to Article 1 of Presidential Decree No.180/2004 (FEK A' 160/23.8.2004), which entered into force on 23 August 2004, Article 2(1) of Presidential Decree No.81/2003 was replaced by the following provision: 'This presidential decree applies to workers employed under a fixed-term contract or relationship in the private sector ...'.

As originally enacted, Article 5 of Presidential Decree No.81/2003, which is headed 'Rules to protect workers and to prevent circumvention of the law to their detriment', stated:

'1. Unlimited renewal of fixed-term employment contracts is permitted if justified by an objective reason.
(a) There is an objective reason in particular:
... if the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation ...
(b) Unless the worker proves to the contrary, an objective reason is presumed to exist in sectors of activity where it is justified by reason of their nature and the work in them ...
...
3. Where the duration of successive fixed-term employment contracts or relationships exceeds two years in total, and no reason under paragraph 1 of this article applies, it will be presumed that they are aimed at covering the fixed and permanent needs of the undertaking or operation, and they shall consequently be converted into employment contracts or relationships of indefinite duration. Where there are more than three renewals of successive employment contracts or relationships, as defined in paragraph 4 of this article, within the space of two years, and no reason under paragraph 1 of this article applies, it will be presumed that they are aimed at covering the fixed and permanent needs of the undertaking or operation, and the contracts concerned shall consequently be converted into employment contracts or relationships of indefinite duration. It shall fall to the employer in each case to prove otherwise.
4. Fixed-term employment contracts or relationships shall be regarded as "successive" if they are concluded between the same employer and worker under the same or similar terms of employment and they are not separated by a period of time longer than 20 working days.
5. The provisions of this article shall apply to contracts, renewals of contracts or employment relationships entered into or effected after this decree has come into force.'

Since the entry into force of Presidential Decree No.180/2004, Article 5 has been worded as follows:

'1. Unlimited renewal of fixed-term employment contracts is permitted if justified by an objective reason. There is an objective reason in particular: if the renewal is justified by the form or the type or the activity of the employer or undertaking, or by special reasons or needs, provided that those circumstances are apparent, whether directly or indirectly, from the contract
concerned; such circumstances include the temporary replacement of a worker, the carrying out of transient work, the temporary accumulation of work, or circumstances in which the fixed duration is connected with education or training, or where a contract is renewed with the aim of facilitating a worker's transfer to related employment or carrying out a specific piece of work or programme, or the renewal is connected with a particular event ...

3. Where the duration of successive fixed-term employment contracts or relationships exceeds two years in total, it will be presumed that they are aimed at covering the fixed and permanent needs of the undertaking or operation, and they shall consequently be converted into employment contracts or relationships of indefinite duration. Where there are more than three renewals of successive employment contracts or relationships, as defined in paragraph 4 of this article, within the space of two years, it will be presumed that they are aimed at covering the fixed and permanent needs of the undertaking or operation, and the contracts concerned shall consequently be converted into employment contracts or relationships of indefinite duration.

It shall fall to the employer in each case to prove otherwise.

4. Fixed-term employment contracts or relationships shall be regarded as “successive” if they are concluded between the same employer and worker under the same or similar terms of employment and they are not separated by a period of time longer than 45 days, including non-working days.

In the case of a group of undertakings, the term “the same employer”, for the purposes of the preceding subparagraph, shall include undertakings in the group.

5. The provisions of this article shall apply to contracts, renewals of contracts or employment relationships entered into or effected after this decree has come into force.’

19

Article 21 of Law No.2190/1994 establishing an independent authority for selecting staff and regulating management issues (FEKA’ 28/3.3.1994) provides: ‘1. Public services and legal persons ... may employ staff on fixed-term employment contracts governed by private law in order to cope with seasonal or other periodic or temporary needs, in accordance with the conditions and the procedure laid down in the following paragraphs.

2. The period of employment of staff referred to in paragraph 1 may not exceed eight months in the course of an overall period of 12 months. When staff are taken on temporarily to meet, in accordance with the provisions in force, urgent needs, because of staff absences or vacant posts, the period of employment may not exceed four months for the same person. Extension of a contract, conclusion of a new contract in the same calendar year or conversion into a contract of indefinite duration shall be invalid.’

20


21
Article 2(1) of Presidential Decree No.164/2004 provides:
'The provisions of this decree shall apply to staff in the public sector ... and to the staff of municipal and communal undertakings who work under a fixed-term employment contract or relationship, or under a works contract or other contract or relationship concealing a relationship between employer and employee.'

22 Article 5 of Presidential Decree No.164/2004 includes the following provisions:
'1. Successive contracts concluded between and performed by the same employer and worker in the same or similar professional activity and under the same or similar terms of employment shall be prohibited if the contracts are separated by a period of less than three months.
2. Such contracts may be concluded by way of exception if justified by an objective reason. There is an objective reason if the contracts succeeding the original contract are concluded for the purpose of meeting similar special needs which are directly and immediately related to the form, the type or the activity of the undertaking.
...
4. The number of successive contracts shall not, in any circumstances, be greater than three ...'

23 Article 11 of Presidential Decree No.164/2004 contains the following transitional provisions:
'1. Successive contracts within the meaning of Article 5(1) of this decree which were concluded before, and are still valid at the time of, the entry into force of this decree shall henceforth constitute employment contracts of indefinite duration if each of the following conditions is met:
(a) the total duration of the successive contracts must amount to at least 24 months up to the entry into force of this decree, irrespective of the number of contract renewals, or there must be at least three renewals following the original contract, for the purposes of Article 5(1) of this decree, with a total duration of employment of at least 18 months over a total period of 24 months calculated from the date of the original contract;
(b) the total period of employment under subparagraph (a) must in fact have been completed with the same body, in the same or similar professional activity and under the same or similar terms of employment as specified in the original contract ...;
(c) the contract must relate to activities directly and immediately connected with the body's fixed and permanent needs as defined by the public interest that the body serves;
(d) the total period of employment for the purposes of the preceding subparagraphs must be completed on a full-time or part-time basis and in duties identical or similar to those specified in the original contract ...
4. The provisions of this article shall apply to workers employed in the public sector ... and in municipal ... undertakings ...
5. The provisions of paragraph 1 of this article shall also apply to contracts which expired during the three months immediately preceding the entry into force of this decree; such contracts shall be regarded as successive contracts valid up to its entry into force. The condition set out in paragraph 1(a) of this article must be
met upon expiry of the contract.

24
The main proceedings and the questions referred for a preliminary ruling
It is apparent from the documents in the case which have been forwarded by the referring court that, from May 2001 and before the final date by which Directive 1999/70 should have been transposed into Greek law, that is to say 10 July 2002, the claimants in the main proceedings, who pursue the professions of sampler, secretary, technician or vet, concluded with ELOG, a legal person governed by private law which falls within the public sector and is established in Thessaloniki, a number of successive fixed-term employment contracts the last of which came to an end between June and September 2003 without being renewed (’the contracts at issue’). Each of those contracts, that is to say both the initial contract and the following successive contracts, was concluded for a period of eight months and the various contracts were separated by a period of time ranging from a minimum of 22 days to a maximum of 10 months and 26 days. The claimants in the main proceedings were on each occasion reappointed to the same post as that in respect of which the initial contract had been concluded. All the workers concerned had a fixed-term contract of that kind on the date upon which Presidential Decree No.81/2003 entered into force.

25
Since the failure to renew their employment contracts, the persons concerned have been either unemployed or employed by ELOG on a provisional basis following judicial decisions granting interim relief.

26
The claimants brought proceedings before the Monomeles Protodikio Thessalonikis (Court of First Instance (Single Judge), Thessaloniki) for a declaration that the contracts at issue had to be regarded as employment contracts of indefinite duration, in accordance with the Framework Agreement. To this end, they submitted that they carried out for ELOG regular work corresponding to ’fixed and permanent needs’ within the meaning of the national legislation, so that the conclusion of successive fixed-term employment contracts with their employer was an abuse, and no objective reason justified the prohibition, laid down in Article 21(2) of Law No.2190/1994, on converting the employment relationships at issue into employment contracts of indefinite duration.

27
According to the referring court, such reclassification of the contracts at issue is a necessary prerequisite for other claims made by the claimants in the main proceedings, such as their reinstatement and payment of their outstanding earnings.

28
Taking the view that clause 5 of the Framework Agreement confers on the Member States a wide margin of appreciation as regards its transposition into their domestic law and is not sufficiently precise and unconditional to have direct effect, the referring court is uncertain, first of all, as to the date from which national law must be interpreted in conformity with Directive 1999/70 in the event of its being transposed belatedly. It envisages a number of dates, namely the date on which that Directive was published in the Official Journal of the
European Communities and which corresponds to the date on which it entered into force, the date on which the time limit for transposing the Directive passed and the date on which Presidential Decree No.81/2003 entered into force.

29
It then raises the question of the scope of the concept of 'objective reasons', within the meaning of clause 5(1)(a) of the Framework Agreement, capable of justifying the renewal of fixed-term employment contracts or relationships, in the light of Article 5(1)(a) of Presidential Decree No.81/2003 which permits the unlimited renewal of fixed-term employment contracts inter alia when a fixed-term contract is required by a provision of statute or secondary legislation.

30
The referring court is also uncertain whether the conditions governing the renewal of fixed-term employment contracts, as resulting from Article 5(3), read in conjunction with Article 5(4), of Presidential Decree No.81/2003, are consistent with the principle of proportionality and with the requirement for Directive 1999/70 to have practical effect.

31
Finally, after finding that the recourse in practice to Article 21 of Law No.2190/94 as a basis for the conclusion of fixed-term employment contracts governed by private law, when those contracts are intended to cover 'fixed and permanent needs', constitutes an abuse, the referring court is uncertain whether in such a situation the prohibition, set out in the final sentence of Article 21(2), on converting contracts concluded for a fixed term into contracts of indefinite duration impairs the effectiveness of Community law and whether it is consistent with the objective set out in clause 1(b) of the Framework Agreement of preventing abuse arising from the use of a succession of fixed-term employment contracts.

32
In those circumstances, the Monomeles Protodikio Thessalonikis decided to stay proceedings and to refer the following questions, as rectified by its decision of 5 July 2004, to the Court for a preliminary ruling:
[...]
2. Does clause 5(1)(a) of the Framework Agreement ... mean that, in addition to reasons connected with the nature, type or characteristics of the work performed or other similar reasons, the fact solely and simply that the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation may constitute an objective reason for continually renewing or concluding successive fixed-term employment contracts?
3. (a) Is a national provision, specifically, Article 5(4) of Presidential Decree No.81/2003, which lays down that successive contracts are contracts concluded between the same employer and worker under the same or similar terms of employment, the contracts not being separated by a period of time longer than 20 days, compatible with clause 5(1) and (2) of the Framework Agreement ...?
(b) May clause 5(1) and (2) of the Framework Agreement ... be interpreted as meaning that the employment relationship between the worker and his employer is presumed to be of indefinite duration only when the requirement laid down in national legislation in Article 5(4) of Presidential Decree No.81/2003 is met?
4. Is the prohibition, in Article 21 of Law No.2190/1994, on the conversion of
successive fixed-term employment contracts into a contract of indefinite duration, where those contracts are said to have been concluded for a fixed term to cover the exceptional or seasonal needs of the employer but are aimed at covering its fixed and permanent needs, compatible with the principle of effectiveness of Community law and the purpose of clause 5(1) and (2) in conjunction with clause 1 of the Framework Agreement ...?"

54
**Consideration of the questions**

**Preliminary remarks**

With a view to giving a helpful answer to the questions submitted, it should be made clear at the outset that Directive 1999/70 and the Framework Agreement can apply also to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies.

55

The provisions of those two instruments contain nothing to permit the inference that their scope is limited to fixed-term contracts concluded by workers with employers in the private sector alone.

56

On the contrary, first, as is apparent from the very wording of clause 2(1) of the Framework Agreement, the scope of the Framework Agreement is conceived in broad terms, covering generally 'fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'. In addition, the definition of 'fixed-term workers' for the purposes of the Framework Agreement, set out in clause 3(1), encompasses all workers without drawing a distinction according to whether their employer is in the public, or private, sector.

57

Second, clause 2(2) of the Framework Agreement, far from providing for the exclusion of fixed-term employment contracts or relationships concluded with a public-sector employer, merely gives the Member States and/or the social partners the option of making the Framework Agreement inapplicable to 'initial vocational training relationships and apprentice schemes' and employment contracts and relationships 'which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme'.

58

**Question 2**

This question relates to the interpretation of the concept of 'objective reasons' which, in accordance with clause 5(1)(a) of the Framework Agreement, justify the successive renewal of fixed-term employment contracts or relationships.

59

More specifically, the referring court asks whether, as in the case of a national rule such as that set out in Article 5(1)(a) of Presidential Decree No.81/2003, in its initial version, the mere fact that the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation of a Member State may constitute an objective reason of that kind.

60

As this concept of 'objective reasons' is not defined by the Framework
Agreement, its meaning and scope must be determined on the basis of the objective pursued by the Framework Agreement and of the context of clause 5(1)(a) thereof (see, to this effect, inter alia case C-17/03 VEMW and others [2005] ECR I-4983, paragraph 41, and the case law cited, and case C-323/03 Commission v Spain [2006] ECR I-0000, paragraph 23).

The Framework Agreement proceeds on the premise that employment contracts of indefinite duration are the general form of employment relationship, while recognising that fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (see paragraphs 6 and 8 of the general considerations in the Framework Agreement).

Consequently, the benefit of stable employment is viewed as a major element in the protection of workers (see Mangold, paragraph 64), whereas it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers (see the second paragraph of the preamble to the Framework Agreement and paragraph 8 of the general considerations).

From this angle, the Framework Agreement seeks to place limits on successive recourse to the latter category of employment relationship, a category regarded as a potential source of abuse to the disadvantage of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure.

Thus, clause 5(1) of the Framework Agreement is intended specifically to 'prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

To this end, clause 5 imposes on Member States the obligation to introduce into domestic law one or more of the measures listed in clause 5(1)(a) to (c) where equivalent legal provisions intended to prevent effectively the misuse of successive fixed-term employment contracts do not already exist in the Member State concerned.

Among those measures, clause 5(1)(a) envisages 'objective reasons justifying the renewal of such contracts or relationships'.

The signatory parties to the Framework Agreement considered that the use of fixed-term employment contracts founded on objective reasons is a way to prevent abuse (see paragraph 7 of the general considerations in the Framework Agreement).

It is true that the Framework Agreement refers back to the Member States and social partners for the detailed arrangements for application of the principles and requirements which it lays down, in order to ensure that they are consistent with national law and/or practice and that due account is taken of the particular features of specific situations (see paragraph 10 of the general considerations in the Framework Agreement). While the Member States thus have a margin of
appreciation in the matter, the fact remains that they are required to guarantee
the result imposed by Community law, as follows not only from the third
paragraph of Article 249 EC, but also from the first paragraph of Article 2 of
Directive 1999/70 read in conjunction with the 17th recital in its preamble.

69
In those circumstances, the concept of 'objective reasons', within the meaning of
clause 5(1)(a) of the Framework Agreement, must be understood as referring to
precise and concrete circumstances characterising a given activity, which are
therefore capable in that particular context of justifying the use of successive
fixed-term employment contracts.

70
Those circumstances may result, in particular, from the specific nature of the
tasks for the performance of which such contracts have been concluded and from
the inherent characteristics of those tasks or, as the case may be, from pursuit of
a legitimate social-policy objective of a Member State.

71
On the other hand, a national provision which merely authorises recourse to
successive fixed-term employment contracts in a general and abstract manner by
a rule of statute or secondary legislation does not accord with the requirements
as stated in the preceding two paragraphs.

72
Such a provision, which is of a purely formal nature and does not justify
specifically the use of successive fixed-term employment contracts by the
presence of objective factors relating to the particular features of the activity
concerned and to the conditions under which it is carried out, carries a real risk
that it will result in misuse of that type of contract and, accordingly, is not
compatible with the objective of the Framework Agreement and the requirement
that it have practical effect.

73
Thus, to admit that a national provision may, automatically and without further
precision, justify successive fixed-term employment contracts would effectively
have no regard to the aim of the Framework Agreement, which is to protect
workers against instability of employment, and render meaningless the principle
that contracts of indefinite duration are the general form of employment
relationship.

74
More specifically, recourse to fixed-term employment contracts solely on the
basis of a general provision of statute or secondary legislation, unlinked to what
the activity in question specifically comprises, does not permit objective and
transparent criteria to be identified in order to verify whether the renewal of
such contracts actually responds to a genuine need, is appropriate for achieving
the objective pursued and is necessary for that purpose.

75
Consequently, the answer to the second question must be that clause 5(1)(a) of
the Framework Agreement is to be interpreted as precluding the use of
successive fixed-term employment contracts where the justification advanced
for their use is solely that it is provided for by a general provision of statute or
secondary legislation of a Member State. On the contrary, the concept of
'objective reasons' within the meaning of that clause requires recourse to this
particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out.

76

**Question 3**

By its third question, which is in two parts that are closely interlinked and should for that reason be considered together, the referring court seeks explanation of the concept of 'successive' fixed-term employment contracts or relationships within the meaning of clause 5 of the Framework Agreement.

77

It is apparent from the grounds of the order for reference that this question essentially concerns the condition, laid down in Article 5(4) of Presidential Decree No.81/2003, in its initial version, that fixed-term employment contracts can be regarded as successive only in so far as they are not separated by a period of time longer than 20 working days.

78

More specifically, the referring court asks whether so restrictive a definition of when employment relationships between the same employer and the same worker, under the same or similar terms of employment, are successive is such as to compromise the objective and the practical effect of the Framework Agreement, especially as fulfillment of the aforementioned condition constitutes a necessary requirement in order for such a worker to benefit from the conversion into a contract of indefinite duration, pursuant to Article 5(3) of that presidential decree, of fixed-term employment relationships exceeding a total of two years which have been renewed more than three times in the course of that period.

79

In order to rule on this question, it should be noted that the Framework Agreement, as stated in clauses 1(b) and 5(1) thereof, has the purpose of establishing a framework intended to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

80

To this end, the Framework Agreement sets out, in particular in clause 5(1)(a) to (c), various measures intended to prevent such abuse, and the Member States are required to introduce at least one of those measures in their national law.

81

As to the remainder, clause 5(2) in principle leaves it to the Member States to determine the conditions under which fixed-term employment contracts or relationships are to be regarded, first, as successive and, second, as contracts or relationships of indefinite duration.

82

While such a reference back to national authorities for the purpose of establishing the specific rules for application of the terms 'successive' and 'of indefinite duration' within the meaning of the Framework Agreement may be explained by the concern to preserve the diversity of the relevant national rules, it is, however, to be remembered that the margin of appreciation thereby left for the Member States is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the Framework Agreement (see paragraph 68 of this judgment). In particular, this discretion must not be
exercised by national authorities in such a way as to lead to a situation liable to give rise to abuse and thus to thwart that objective.

83

Such an interpretation is especially vital in the case of a key concept, like the concept of 'successive' employment relationships, which is decisive for definition of the very scope of the national provisions intended to implement the Framework Agreement.

84

It is clear that a national provision under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive must be considered to be such as to compromise the object, the aim and the practical effect of the Framework Agreement.

85

As observed by the referring court and the Commission, and by the Advocate General in points 67 to 69 of her opinion, so inflexible and restrictive a definition of when a number of subsequent employment contracts are successive would allow insecure employment of a worker for years since, in practice, the worker would as often as not have no choice but to accept breaks in the order of 20 working days in the course of a series of contracts with his employer.

86

Furthermore, a national rule of the type at issue in the main proceedings could well have the effect not only of in fact excluding a large number of fixed-term employment relationships from the benefit of the protection of workers sought by Directive 1999/70 and the Framework Agreement, largely negating the objective pursued by them, but also of permitting the misuse of such relationships by employers.

87

In the main proceedings, such a rule is even liable to result in yet more serious consequences for employees, given that it renders practically ineffective the national measure which the Greek authorities chose to adopt in order specifically to implement clause 5 of the Framework Agreement, a measure under which certain fixed-term employment contracts are presumed to have been concluded for an indefinite duration provided, in particular, that they are successive within the meaning of Presidential Decree No.81/2003.

88

It would thus be sufficient for the employer to allow a period of just 21 working days to elapse at the end of each fixed-term employment contract, before concluding another contract of the same nature, in order automatically to thwart the conversion of the successive contracts into a more stable employment relationship, irrespective of both the number of years for which the worker concerned has been taken on for the same job and the fact that those contracts cover needs which are not of limited duration but, on the contrary, 'fixed and permanent'. In those circumstances, the protection of workers against the misuse of fixed-term employment contracts or relationships, which constitutes the aim of clause 5 of the Framework Agreement, is called into question.

89

In light of the foregoing reasoning, the answer to the third question must be that clause 5 of the Framework Agreement is to be interpreted as precluding a national rule, such as that at issue in the main proceedings, under which only
fixed-term employment contracts or relationships that are not separated from
one another by a period of time longer than 20 working days are to be regarded
as 'successive' within the meaning of that clause.

90

Question 4

By its fourth question, the referring court essentially asks whether the
Framework Agreement is to be interpreted as precluding the application of
national legislation which, in the public sector, prohibits a succession of fixed-
term employment contracts that have, in fact, been intended to cover 'fixed and
permanent needs' of the employer from being converted into a contract of
indefinite duration.

91

First, it should be noted that the Framework Agreement neither lays down a
general obligation on the Member States to provide for the conversion of fixed-
term employment contracts into contracts of indefinite duration nor prescribes
the precise conditions under which fixed-term employment contracts may be
used.

92

However, it requires the Member States to adopt at least one of the measures
that are listed in clause 5(1)(a) to (c) of the Framework Agreement, which are
intended to prevent in an effective manner the misuse of successive fixed-term
employment contracts or relationships.

93

Furthermore, the Member States are required, within the bounds of the freedom
left to them by the third paragraph of Article 249 EC, to choose the most
appropriate forms and methods to ensure the effectiveness of Directives, in the
light of their objective (see case 48/75 Royer [1976] ECR 497, paragraph 75, and
joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-
140/95, C-141/95, C-154/95 and C-157/95 Gallotti and others [1996] ECR I-
4345, paragraph 14).

94

Thus, where, as in the present case, Community law does not lay down any
specific sanctions should instances of abuse nevertheless be established, it is
incumbent on the national authorities to adopt appropriate measures to deal
with such a situation. Those measures must be not only proportionate, but also
sufficiently effective and a sufficient deterrent to ensure that the provisions
adopted pursuant to the Framework Agreement are fully effective.

95

While the detailed rules for implementing such provisions fall within the internal
legal order of the Member States by virtue of the principle of procedural
autonomy of the Member States, they must, however, not be less favourable than
those governing similar domestic situations (principle of equivalence) or render
impossible in practice or excessively difficult the exercise of rights conferred by
Community law (principle of effectiveness) (see, inter alia, case C-312/93

96

Second, the following comments should be made regarding, more specifically,
the context in which the fourth question has been asked.
It is apparent from the documents in the case which have been forwarded by the referring court that, while the Greek legislature chose to lay down, as a measure adopted to implement the Framework Agreement, that under certain conditions fixed-term employment contracts are to be converted into contracts of indefinite duration (see Article 5(3) of Presidential Decree No.81/2003), by virtue of Article 1 of Presidential Decree No.180/2004 the scope of that legislation was limited to fixed-term employment contracts of workers employed in the private sector.

98
In the case of the public sector, on the other hand, Article 21(2) of Law No.2190/1994 prohibits, absolutely and on pain of nullity, any reclassification as contracts of indefinite duration of fixed-term employment contracts covered by Article 21(1).

99
Next, it is apparent from the order for reference that, in practice, Article 21 of Law No.2190/1994 may well be used for improper purposes in that, instead of merely serving as a basis for the conclusion of fixed-term contracts intended to meet only temporary needs, it seems that it is used to conclude fixed-term contracts designed in actual fact to cover 'fixed and permanent needs'. The referring court has therefore already found in the grounds of its decision that the recourse, in the main proceedings, to Article 21 to serve as a basis for the conclusion of fixed-term employment contracts which are intended in reality to meet 'fixed and permanent needs' constitutes an abuse within the meaning of the Framework Agreement. It thus merely asks whether, in a situation of that kind, the general prohibition laid down by that provision on converting such fixed-term contracts into contracts of indefinite duration compromises the objective and the practical effect of the Framework Agreement.

100
Finally, it has not been asserted before the Court that, in the public sector, Greek law included, at any rate until Presidential Decree No.164/2004 entered into force, any measure intended to prevent and to punish in an appropriate manner the misuse of successive fixed-term employment contracts.

101
As has already been stated in paragraphs 91 to 95 of this judgment, the Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, but clause 5(1) of the Framework Agreement does require effective and binding adoption of at least one of the measures listed in that provision that are designed to prevent the misuse of successive fixed-term contracts, if national law does not already include equivalent measures.

102
Furthermore, where such misuse has nevertheless taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of Community law. According to the very wording of the first paragraph of Article 2 of Directive 1999/70, the Member States must 'take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [the] Directive'.

103
It is not for the Court to rule on the interpretation of domestic law, since that task falls exclusively to the referring court which must, in the present instance, determine whether the requirements recalled in the previous paragraph are met by the provisions of the relevant national legislation.

104 If that court were to find this not to be the case, it would be appropriate to conclude that the Framework Agreement precludes the application of that national legislation.

105 Accordingly, the answer to the fourth question must be that, in circumstances such as those of the main proceedings, the Framework Agreement is to be interpreted as meaning that, in so far as domestic law of the Member State concerned does not include, in the sector under consideration, any other effective measure to prevent and, where relevant, punish the misuse of successive fixed-term contracts, the Framework Agreement precludes the application of national legislation which, in the public sector alone, prohibits absolutely the conversion into an employment contract of indefinite duration of a succession of fixed-term contracts that, in fact, have been intended to cover ‘fixed and permanent needs’ of the employer and must therefore be regarded as constituting an abuse.

[...]