

Successful Rules on Successive Fixed-Term Contracts?

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In 1999 the European social partners negotiated the framework agreement on fixed-term work which was then put into effect by Council Directive 1999/70/EC. It contains, inter alia, measures designed to prevent abuse of successive fixed-term contracts. As the relevant clause of the agreement is rather loosely framed, its effect on legislative approximation in the EU is debatable. However, a study of the law on successive fixed-term employment contracts of fifteen EU Member States showed that legislative approximation in this field of law has largely been achieved.

1 INTRODUCTION

Council Directive 1999/70/EC concerning the framework agreement on fixed-term work aims, among others things, to prevent the abuse of successive fixed-term contracts. The relevant provision is clause 5 of the ETUC-UNICE-CEEP framework agreement on fixed-term work, which is put into effect by the said Directive. As the term ‘framework agreement’ suggests, the European requirements are formulated rather broadly, leaving a wide margin for national regulations. Opinions on this technique vary. While some authors welcome the framework agreement as a prudent and wise provision that focuses on the main issues and refrains from overly rigid regulations,¹ others emphasize that it falls far short of the aims set out in the Commission initiative of 1996² and of earlier attempts to regulate fixed-term working.³ Lorber has pointed out that the social partners had the difficult task of striking the right balance between flexibility and

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¹ Yasuo Suwa, *How to Regulate the Fixed-Term Work: A Trade-off Relationship in Employment*, 15 Int'l J. Comp. Lab. L. Indus. Rel. 175, 177 (1999).

² Rapporteur Karin Jöns, *Report on the Commission Proposal for a Council Directive Concerning the Framework Agreement on Fixed-Term Work Concluded by UNICE, CEEP and the ETUC*, 30.4.1999, A4/1999/261, 15 Int'l J. Comp. Lab. L. Indus. Rel. 197, 203 (1999).

³ Jill Murray, *Normalising Temporary Work – The Proposed Directive on Fixed-Term Work*, 28 ILJ 269, 271–273 (1999) (pointing out the corresponding change of employment policies); Aileen McColgan, *The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002: Fiddling While Rome Burns?*, 32 ILJ 197, 206, 207 (2003).

security. She is not convinced that they fulfilled this task and rightly considers the loosely framed clause 5 to be a result of controversial negotiations and necessary concessions.⁴ The term ‘formulaic compromise’ certainly springs to mind when comparing clause 5 to the preamble and the general considerations of the framework agreement. Additionally, it should be noted that clause 5 reflects the measures already adopted in Member States when the agreement was concluded.⁵ Against this background, it may well have been impossible to achieve a greater degree of harmonization.

However, since the purpose of Directives is to bring about legislative approximation, the question arises as to whether or not Council Directive 1999/70/EC ensures such an approximation of the law on successive fixed-term employment contracts.⁶ This is particularly relevant since there are several rulings of the European Court of Justice regarding clause 5 of the framework agreement, showing that the implementation of the Directive in the Member States has not run entirely smoothly. There are already numerous works on (successive) fixed-term contracts, some of them with comparative aspects.⁷ There has been, nevertheless, no scientific analysis of the legislative approximation brought about by Council Directive 1999/70/EC. To fill this gap, the law on successive fixed-term contracts of fifteen EU Member States was analysed by means of a two-year project. This study, published as a book,⁸ consists of three parts. First of all it outlines the European legal framework for successive fixed-term contracts, taking account of the ECJ’s rulings. Second, it contains detailed country reports on the law of successive fixed-term contracts in fifteen EU Member States. Last but not least, it thoroughly analyses and compares the level of protection in the Member States covered by the project. This essay summarizes the results of the project.

The Member States included in the study are: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Spain, Sweden and the United Kingdom. Apart from Poland, these Member States all belong to the EU 15. Newer Member States were not included

⁴ Pascale Lorber, *Regulating Fixed Term Work in the United Kingdom: A Step Towards Workers’ Protection?*, 15 Int’l J. Comp. Lab. L. Indus. Rel. 121, 124, 126 (1999).

⁵ See Rapporteur Karin Jöns, *supra* n. 2, at 197, 206.

⁶ See the critical comments of Rapporteur Karin Jöns, *supra* n. 2, at 197, 206, 207.

⁷ Among the latter ones are for instance *Fixed-Term Employment Contracts* (Roger Blanpain & Claire Grant eds, Vanden Broele Publishers 2009); *Regulation of Fixed-Term Employment Contracts* (Roger Blanpain ed., Kluwer Law International 2010); Markus Sädevirta, *A Comparative Study of the Regulation Governing the Use of Fixed-Term Contracts in Three EU Member States* (2013), accessible at <http://urn.fi/URN:ISBN:978-952-10-9285-5> (accessed 14 Feb. 2017); Markus Sädevirta, *Regulation of Fixed-Term Employment Contracts in the EU, France, Finland and the United Kingdom: A Comparative Analysis*, 31 Int’l J. Comp. Lab. L. Indus. Rel. 207 (2015).

⁸ *Rechtsangleichung im Recht der Kettenbefristung in der EU* (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

for lack of the necessary language skills of the participants as well as for lack of (access to) court judgments and literature. However, evidence from the International Labour Organization employment protection legislation database shows that the restriction to EU 15 Member States – apart from Poland – does not result in a distorted picture of the rules on successive fixed-term contracts in the EU.⁹ The inclusion of newer Member States would have led to repetitions rather than to different insights. For example, with regard to the regulatory models developed below,¹⁰ Estonia adopts model 1,¹¹ the Czech Republic adopts model 5,¹² and Slovenia adopts models 2 and 4.¹³

2 CLAUSE 5 OF THE FRAMEWORK AGREEMENT ON FIXED-TERM WORK

With regard to successive fixed-term contracts, the framework agreement attempts to square the circle by aiming at both flexibility and security. Its compromise nature is evident in the loosely framed clause 5 of the agreement. According to this provision Member States are required to introduce one or more of the following measures:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) limits on the maximum total duration of successive fixed-term employment contracts or relationships;
- (c) limits on the number of renewals of such contracts or relationships.¹⁴

Member States are free to adopt just one of the measures or a combination of them. They may also define the conditions for classifying fixed-term contracts as successive.

The rulings of the European Court of Justice concerning clause 5 of the framework agreement relate to the first of the three measures, the objective reasons

⁹ Data can be accessed at http://www.ilo.org/dyn/eplex/termdisplay.empContracts?p_lang=en (accessed 14 Feb. 2017).

¹⁰ See *infra* s. 5.

¹¹ See Paloma Kreet Tupay, *Das befristete Arbeitsverhältnis als Ausdruck der Flexicurity nach estnischem Modell*, EuZA 468 (2014).

¹² According to the information given by Hurka in July 2013 at http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_legislation/legislative_developments/prm/109/v__detail/id_3178/category__8/index.html (accessed 14 Feb. 2017), the differing ILO data is from 2011.

¹³ Arts 52 and 53 of the Slovenian Employment Relations Act, unofficial consolidated text accessible via <http://www.mddsz.gov.si/en/legislation/> (accessed 14 Feb. 2017).

¹⁴ According to clause 5 of the framework agreement, Member States may instead use equivalent legal measures to prevent abuse, but this option has not become important in the practice of implementation.

justifying the renewal of fixed-term contracts. No rulings on the other two measures have been handed down yet. This is probably due to the fact that the term 'objective reasons' is open to interpretation while numerical limits as provided in clause 5 (1) (b) and (c) are not. Clause 5 (1) (a) leaves more room for questionable reasoning than (b) and (c), thus giving rise to preliminary rulings by the European Court of Justice. This may be illustrated by some examples. In *Adeneler* the ECJ was asked whether it would constitute an objective reason if a provision of a Member State required the conclusion of a fixed-term contract. The European Court of Justice answered in the negative.¹⁵ In *Küçük* it dealt with the question of successive fixed-term contracts to replace temporarily absent employees. While the repeated use of fixed-term contracts in such cases is not an abuse in itself, it is the responsibility of the Member State's authorities to ensure that the contracts are actually intended to cover temporary needs.¹⁶ This last point was taken up again in *Márquez Samohano* and *Mascolo* but not in connection with temporary replacements.¹⁷ Admittedly, in some cases the problem was not so much one of interpretation but rather one of the public administration being bound by budgetary rules to use fixed-term contracts, no matter how permanent the need for the services.¹⁸

According to the European Court of Justice, the concept of objective reasons is to be understood as referring to precise and concrete circumstances which characterize a given activity and justify the use of successive fixed-term employment contracts in that particular context. Such circumstances may arise from the specific nature of the task to be performed by the temporarily employed person. A legitimate social-policy objective of a Member State may also provide justification for a fixed-term contract.¹⁹ The national provision allowing recourse to fixed-term contracts has to offer objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need, whether it is capable of achieving the objective pursued, and whether it is necessary for that purpose.²⁰ Apart from those requirements, the European Court of Justice ruled that clause 5 (1) (a) of the framework agreement does not justify the renewal of

¹⁵ Case C-212/04, *Adeneler*, ECR 2006, I-6057, paras 58–75.

¹⁶ Case C-586/10, *Küçük*, NZA 2012, 135, para. 39.

¹⁷ Case C-190/13, *Márquez Samohano*, NZA 2014, 475, para. 59; Case C-22/13, *Mascolo*, NZA 2015, 153, para. 101.

¹⁸ See Case C-16/15, *Pérez López*, NZA 2016, 1265 and Case C-22/13, *Mascolo*, NZA 2015, 153.

¹⁹ Case C-238/14, *Commission/Luxembourg*, NZA 2015, 424, para. 44; Case C-22/13, *Mascolo*, NZA 2015, 153, para. 87; Case C-378/07, *Angelidaki*, ECR 2009, I-3071, para. 96; Case C-212/04, *Adeneler*, ECR 2006, I-6057, paras 69–70.

²⁰ Case C-22/13, *Mascolo*, NZA 2015, 153, para. 88; Case C-378/07, *Angelidaki*, ECR 2009, I-3071, para. 100; Case C-212/04, *Adeneler*, ECR 2006, I-6057, para. 74.

fixed-term contracts used to cover permanent needs.²¹ For example, if fixed-term contracts are repeatedly used to replace temporarily absent employees, all circumstances have to be taken into account to prevent the abuse of fixed-term employment contracts. Such circumstances include the number of successive contracts concluded with the same person or for the purposes of performing the same work.²²

As regards interruptions between successive fixed-term contracts, the European Court of Justice held that Member States may not use their margin of appreciation to compromise the objective or the practical effect of the framework agreement.²³

All in all, the European level of protection against the abuse of successive fixed-term contracts is rather low. Clause 5 of the framework agreement lists measures without setting specific limits. There is no list of objective reasons, binding or not. There is no effective limit for the maximum duration or the maximum number of successive fixed-term contracts. Member States are free to combine the measures alternatively or cumulatively. Thus, the framework agreement leaves room for national provisions with generous terms for successive fixed-term contracts. Since it was a compromise achieved through European social dialogue, as stated above in the introductory remarks, it may safely be assumed that stricter measures were not negotiable. This rather low level of protection has to be taken as the basis for the analysis of the legislative approximation in the EU Member States in this study. Against this backdrop, the extent of the legislative approximation in the Member States is of particular interest.

3 IMPLEMENTATION OF CLAUSE 5 OF THE FRAMEWORK AGREEMENT IN DIFFERENT MEMBER STATES

It comes as no surprise that implementation of clause 5 of the framework agreement in the Member States covered by the study has turned out differently. Details are to be found in the aforementioned book.²⁴ Nevertheless, the different kinds of regulations are outlined under point 5.

The legislative activity in the Member States after the enactment of the Directive differed.²⁵ In Denmark, Ireland, Spain and the United Kingdom,

²¹ Case C-190/13, *Márquez Samohano*, NZA 2014, 475, para. 55; Case C-22/13, *Mascolo*, NZA 2015, 153, para. 88; Case C-586/10, *Kücük*, NZA 2012, 135, para. 36.

²² Case C-586/10, *Kücük*, NZA 2012, 135, para. 40.

²³ Case C-378/07, *Angelidaki*, ECR 2009, I-3071, para. 155; Case C-212/04, *Adeneler*, ECR 2006, I-6057, para. 82.

²⁴ Sudabeh Kamanabrou, *supra* n. 8, Part 1 § 3 of this book summarizes the country reports, showing patterns, common features and differences. Part 2 contains the country reports.

²⁵ Sudabeh Kamanabrou, *supra* n. 8, at 29-31.

legislative measures were necessary as in these Member States successive fixed-term contracts had not been limited before implementation of the Directive. On the other hand, Austria, Belgium, Finland, France, the Netherlands and Sweden had already taken measures against excessive use of successive fixed-term contracts. These Member States did not have to change their law to implement clause 5 of the framework agreement. In Germany, Italy, Malta and Poland, legislative measures were taken which, on the whole, did not change the hitherto applicable law. In five of the Member States in the study the law on successive fixed-term contracts was amended after the end of the transposition period, including Italy, the Netherlands and Poland (in the period 2014–2016).

The percentage of fixed-term contracts in the Member States also varies widely. The rates in 2014 ranged from 7.7 % in Malta to 28.3 % in Poland.²⁶ In the same year, the EU average was 13.9 %.²⁷ It must be borne in mind, though, that direct conclusions about the successive use of fixed-term contracts cannot be drawn from this data as it includes all fixed-term contracts, successive contracts as well as first and isolated fixed-term contracts.

In aiming to restrict successive fixed-term contracts, the fundamental point is which measure to choose and how to implement it in national law. The three measures of clause 5 of the framework agreement are used individually as well as in combination. Cumulative combinations are used as well as alternative combinations. Compared with regulations based on only one measure, cumulative combinations enhance the level of protection, whereas alternative combinations allow a wider margin for successive fixed-term contracts. Insofar as objective reasons are part of the national regulation, general clauses are used as well as lists.²⁸ These are either exhaustive rules or merely lists of examples. The replacement of temporarily absent employees and a temporary increase in demand for labour are generally accepted as objective reasons justifying the use of (successive) fixed-term contracts.²⁹ In Member States that do not (exclusively) adopt objective reasons, the maximum permissible total duration of successive fixed-term employment contracts ranges from two to four years. In some cases this maximum duration is absolute. In other cases the employer may again conclude fixed-term contracts with the same employee after a suspension or waiting period.³⁰ Not all the

²⁶ http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_etpga&lang=de (accessed 14 Feb. 2017).

²⁷ *Ibid.*

²⁸ Sudabeh Kamanabrou, *supra* n. 8, at 44–45.

²⁹ *Ibid.*, at 45.

³⁰ *Ibid.*, at 35–39, 42–45. Absolute limits are laid down by Italian and Polish law. It must, however, be kept in mind that the law in both countries changed fairly recently (2014 in Italy, 2016 in Poland). It remains to be seen how the courts will apply the new regulations.

Member States adopt rules specifying the conditions under which fixed-term contracts are to be considered successive.³¹

In all of the Member States in the study, with the exception of Denmark, an infringement of the law on successive fixed-term contracts leads to an open-ended contract.³²

4 JOB PROTECTION FOR EMPLOYEES ON OPEN-ENDED CONTRACTS

The employer's need for fixed-term contracts depends among other things on the level of job protection for employees on open-ended contracts. As a result, the study deals with the circumstances under which the employer may terminate the contract if the demand for labour diminishes, and the costs associated with a dismissal. In all the Member States in the study, operational reasons constitute grounds for dismissal. In essence, the definitions for operational reasons are similar, but there is a variety of requirements for the right to continued employment in the same business and the selection among workers potentially affected by a fall in the demand for labour.³³ The same goes for the legal consequences of dismissals on operational grounds.

A distinction is to be made between lawful and unlawful termination. In the case of lawful termination the employee loses his or her job. In more than half of the Member States covered by the study he or she receives monetary compensation, for which a certain minimum period of employment is usually an eligibility requirement.³⁴ In the case of unlawful termination the employment relationship may be continued, or it may be terminated with a severance payment. These options are used in a pure form in some Member States while others combine different options. For example, in France, Ireland and the United Kingdom continuity of the employment relationship is possible, but it tends to be the exception.³⁵ In Italy, Spain and Sweden it depends on the employer whether or not employment is terminated with a severance payment.³⁶ In those Member States opting for a severance payment, eligibility requirements vary, particularly

³¹ Sudabeh Kamanabrou, *supra* n. 8, at 46–51.

³² *Ibid.*, at 54–55.

³³ *Ibid.*, at 66–68.

³⁴ *Ibid.*, at 68–70. Monetary compensation is provided by law in the following countries: Austria, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom. It is common also in Germany and Poland, even though there is no corresponding regulation.

³⁵ Sudabeh Kamanabrou, *supra* n. 8, at 71–72.

³⁶ *Ibid.*, at 72–73.

with regard to the minimum period of employment required, as well as the amount awarded to the employee.³⁷

The regulations on premature dismissal of a fixed-term employee also vary. In Belgium, Finland, Italy, Luxembourg, Malta and Sweden, fixed-term contracts cannot lawfully be ended ahead of time.³⁸ In Austria, France, Germany, Ireland and the United Kingdom, a premature dismissal is permissible only if an individual agreement lays down the right to early termination.³⁹ The regulations on severance payments on expiration of the fixed-term contract also vary. In some Member States the employee may be eligible for such a severance payment, for which it should be noted that in some cases a considerable minimum period of employment is an eligibility requirement.⁴⁰

Comparing the consequences of dismissal on the one hand and the end of a fixed-term contract on the other, unlawful dismissal turns out to be less favourable for the employer than the end of a fixed-term contract in nearly all the Member States covered by the study.⁴¹ The British and the Irish law show particular characteristics as in both countries the end of a fixed-term contract is treated no differently from a dismissal.⁴² In most Member States the consequences of the end of a fixed-term contract correspond with those of lawful dismissal.⁴³ However, in Denmark, Luxembourg and Spain, lawful dismissal leads to higher-value claims on the part of the employee than the end of a fixed-term contract,⁴⁴ whereas in France the end of a fixed-term contract can cost the employer more than lawful dismissal.⁴⁵

³⁷ *Ibid.*, at 74–75.

³⁸ *Ibid.*, at 80–81.

³⁹ *Ibid.*, at 78–81. In Germany, the agreement may also be concluded at the collective level.

⁴⁰ Sudabeh Kamanabrou, *supra* n. 8, at 81–82. Severance pay is provided by law in Austria, France, Ireland, Italy, the Netherlands, Spain and the United Kingdom. In all these countries except Italy and Spain a waiting period has to be observed.

⁴¹ Sudabeh Kamanabrou, *supra* n. 8, at 83.

⁴² Tobias Möller & Sudabeh Kamanabrou, *Vereinigtes Königreich*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 247 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016); Tobias Möller & Sudabeh Kamanabrou, *Republik Irland*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 284 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

⁴³ Sudabeh Kamanabrou, *supra* n. 8, at 83–84.

⁴⁴ Martina Berenbrinker & Sudabeh Kamanabrou, *Dänemark*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 206, 210 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016); Anja Korth & Sudabeh Kamanabrou, *Luxemburg*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 483–484 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016); Sudabeh Kamanabrou, *Spanien*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 661–663 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

⁴⁵ Johanna Intrup-Dopheide, Anja Korth & Sudabeh Kamanabrou, *Frankreich*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 531, 533–534 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

5 REGULATORY MODELS FOR THE PREVENTION OF ABUSE OF SUCCESSIVE FIXED-TERM CONTRACTS

The regulations mentioned under point 3 have specific national features in the different Member States. The closest resemblances are to be found in the law of France and Luxembourg on the one hand, and the United Kingdom, Ireland and Malta on the other. For the purposes of comparison of the regulations, the details were disregarded. Instead, the regulatory models on which the various regulations are based were examined.⁴⁶ As the three measures mentioned in the framework agreement can be used individually or in a combination, there are a many possible configurations. However, only eight of them are actually adopted by the Member States covered by this study. The number of regulatory models compared with a view to legislative approximation could ultimately be reduced to six, since two of the eight models are used in just one Member State and only in combination with other regulatory models. They could thus be disregarded because of their exceptional nature.⁴⁷ Regulatory models 1–3 adopt two of the measures mentioned in the framework agreement cumulatively. Model 4 adopts only the requirement of objective reasons. Model 5 resorts to all the measures, combining them partly cumulatively, partly alternatively. Model 6 combines two measures alternatively.⁴⁸ Three of the Member States covered by the study adopt more than one regulatory model, the others limit themselves to just one.⁴⁹ In the following description, the models are mentioned in descending order of restrictiveness. As the extent of restrictiveness cannot be determined in the abstract, the actual design of the models in the Member States was taken into account in making this assessment.

5.1 MODEL I

Model 1 combines cumulatively objective reasons and a maximum number of successive fixed-term contracts. Successive fixed-term contracts need to be justified by an objective reason and are at the same time restricted in terms of the number of permissible contract renewals. This model is adopted in France and Luxembourg.⁵⁰ Both countries limit only the number of renewals, not the number of separate contracts that are not a renewal of the original contract. However, they restrict the succession of separate contracts as well, using a measure the framework agreement

⁴⁶ Sudabeh Kamanabrou, *supra* n. 8, at 87–119.

⁴⁷ *Ibid.*, at 88.

⁴⁸ *Ibid.*, at 88–89.

⁴⁹ E.g. for the six models and their variations see Sudabeh Kamanabrou, NZA 2016, 385, 387–388. For details see Sudabeh Kamanabrou, *supra* n. 8, at 88–93.

⁵⁰ In France the relevant provisions are Art. L.1242-2 and Art. L.1243-13 Code du travail; in Luxembourg Art. L. 122-1, L. 122-5 Abs. 1, L. 122-9 Code du travail.

does not mention: waiting periods to be observed before the job may be given again to a person on a fixed-term contract.⁵¹ Moreover, in France the use of another fixed-term contract with one and the same employee is only allowed after a waiting period.⁵² For the sake of completeness, it should be noted that both countries allow exceptions⁵³ and that they both limit the duration of individual contracts.⁵⁴

5.2 MODEL 2

Model 2, adopted by Spain,⁵⁵ combines the requirement of objective reasons with the maximum duration of successive fixed-term contracts. Only three reasons are accepted as objective reasons for a fixed-term contract, among them a temporary increase in workload and the need to temporarily replace an absent employee.⁵⁶ The maximum duration of successive fixed-term contracts is twenty-four months over a period of thirty months. However, this limit does not apply to cases of temporary replacement.⁵⁷ Model 2 is not adopted exclusively by Spain. Sweden also adopts it, albeit only to limit temporary replacements. In other cases of limitation for objective reasons, Sweden adheres to model 4.⁵⁸

5.3 MODEL 3

Model 3 does not require the employer to cite objective reasons. Instead, it restricts the maximum duration of successive fixed-term contracts, as well as the

⁵¹ France: Art. L.1244-3, L.1244-4 Code du travail; Luxemburg: Art. L. 122-7 Code du travail.

⁵² Art. L.1244-1, L.1244-3 and L.1244-4 Code du travail.

⁵³ Exceptions in France: Art. L.1244-4 Code du travail (exceptions regarding the waiting period for occupation of the same workplace by a fixed-term employee), Art. L.1244-1, L.1244-3 and L.1244-4 Code du travail (exceptions regarding the waiting period for another fixed-term contract with the same employee). Exceptions in Luxemburg: Art. L. 122-7 Code du travail.

⁵⁴ In France Art. L.1242-8 Code du travail sets a limit of eighteen months. In Luxemburg the limit is twenty-four months, Art. L. 122-4 Code du travail.

⁵⁵ Art. 15.1 and 15.5 Estatuto de los Trabajadores.

⁵⁶ Art. 15.1 Estatuto de los Trabajadores.

⁵⁷ Art. 15.5 Estatuto de los Trabajadores. In contrast, Sweden and Belgium, both resorting to more than one model, use model 2 in order to specifically limit fixed-term contracts with one and the same employee for reasons of temporary replacement, otherwise refraining from time limits if the successive fixed-term contracts are justified by objective reasons, Martina Berenbrinker & Sudabeh Kamanabrou, *Schweden, in Rechtsangleichung im Recht der Kettenbefristung in der EU* 158–159 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016); AnjaSudabehKorth & Sudabeh Kamanabrou, *Belgien, in Rechtsangleichung im Recht der Kettenbefristung in der EU* 433–434 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

⁵⁸ § 5 Lag om anställningsskydd, 1982:80. This section offers a third possibility as well: an employer may use fixed-term contracts with one and the same employee for a total duration of two years within a timeframe of five years.

maximum number of renewals of such contracts. This model is adopted in the Netherlands and Italy.⁵⁹ In the Netherlands successive fixed-term contracts may not exceed the number of three, nor a total duration of two years. A waiting period of six months between two contracts breaks the continuity with the result that the parties may once again conclude up to three contracts for a total duration of twenty-four months.⁶⁰ Italy sets a time limit of three years. Up to this duration, the fixed-term contract may be renewed five times. If the parties wish to conclude a new contract that is not a renewal of the original one, they have to comply with a waiting period of ten or twenty days, depending on the duration of the expiring contract.⁶¹

5.4 MODEL 4

Model 4 adopts only the requirement of objective reasons. It is applied in Austria, Denmark and Finland.⁶² In none of these countries is the term 'objective reasons' conclusively regulated by law. Austria does not even provide examples. Finnish law, however, clearly states that fixed-term contracts are to be used for temporary requirements only.⁶³ Model 4 is also adopted in Sweden. However, it is not used exclusively but, as already stated, combined with model 2.⁶⁴ In the Swedish variation, model 4 comes with a closed list of objective reasons.⁶⁵

5.5 MODEL 5

Model 5 lays down a limit on successive fixed-term contracts by restricting the maximum duration as well as the number and renewal of such contracts. These limitations are used cumulatively. Alternatively, the employer may cite objective reasons for using successive fixed-term contracts. By means of this alternative combination, the employer can avoid the need to state objective reasons for a certain amount of time and a certain number of contracts or renewals. This model is adopted in Germany and Poland and is also the standard model in Belgium.⁶⁶

⁵⁹ The Netherlands: Art. 7:668a Burgerlijk Wetboek; Italy: Art. 4 Abs. 1, 5 Abs. 4-bis Decreto Legislativo 368/2001.

⁶⁰ Art. 7:668a Burgerlijk Wetboek.

⁶¹ Art. 4 Abs. 1, 5 Abs. 3 and 5 Abs. 4-bis Decreto Legislativo 368/2001.

⁶² Finland: Ch. 1 § 3 Työsopimuslakia; Denmark: § 5 Lov om tidsbegrænset ansættelse; Austria: case law based on § 879 Allgemeines Bürgerliches Gesetzbuch.

⁶³ Ch. 1 § 3 para. 3 Työsopimuslakia.

⁶⁴ See *supra* s. 5.2.

⁶⁵ § 5 Lag om anställningskydd, 1982:80.

⁶⁶ Germany: § 14 Teilzeit- und Befristungsgesetz; Poland: Art. 25¹ Kodeks pracy; Belgium: Art. 10, 10bis Loi relatives aux contrats de travail.

Unless there are objective reasons for the use of successive fixed-term contracts, Polish law permits three fixed-term contracts for a total of thirty-three months.⁶⁷ Belgium and Germany allow four successive fixed-term contracts for a total length of two years.⁶⁸ In Germany, the successive contracts must be renewals of the original contract.⁶⁹ Also, according to the rulings of the German Federal Labour Court a gap of three years disrupts continuity.⁷⁰ In Belgium a minimum contractual period of three months has to be observed.⁷¹

5.6 MODEL 6

Model 6, adopted in the United Kingdom, Ireland and Malta, combines two measures alternatively. It limits the maximum duration of successive fixed-term contracts, and this limit is set at four years in all three Member States. After completion of this period, successive fixed-term contracts may only be concluded if they are justified for objective reasons.⁷²

6 THE BASIC CONCEPTS BEHIND THE REGULATORY MODELS

The regulatory models are based on two basic approaches: either they do not allow successive fixed-term contracts without objective reasons, or they do not apply this limit, but uses other restrictions. Opting for one or the other of these approaches or for a combination is the first and fundamental question in regulating successive fixed-term contracts. If a Member State requires objective reasons, it questions the employer's intention to conclude a limited contract. With this approach, fixed-term contracts are the exception and may only be used 'if necessary'. If, in contrast, objective reasons are not required, the employer does not need to justify the decision. Instead, he has to comply with restrictions concerning the total duration and number of contracts. Neither of these two approaches is necessarily stricter or more lenient than the other. The restrictive effect depends on the design of the regulation in question and the specific needs of the employer.⁷³

⁶⁷ Art. 25¹ § 1 Kodex pracy.

⁶⁸ Belgium: Art. 10bis § 2 Loi relatives aux contrats de travail; Germany: § 14 Abs. 2 S. 1 Teilzeit- und Befristungsgesetz.

⁶⁹ § 14 Abs. 2 S. 1 Teilzeit- und Befristungsgesetz.

⁷⁰ 7 AZR 716/09 – NZA 2011, 905, 906–911.

⁷¹ Art. 10bis § 2 Loi relative aux contrats de travail.

⁷² The United Kingdom: reg. 8 (1) – (3) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002; Ireland: s. 9 Protection of Employees (Fixed-Term Work) Act 2003; Malta: Art. 7 para. 1 Contracts of Service for a Fixed Term Regulations.

⁷³ Sudabeh Kamanabrou, *supra* n. 8, at 94.

7 THE COMPARISON

Clause 5 of the framework agreement on fixed-term work aims to protect employees from the abuse of successive fixed-term contracts. Member States are not obliged to set an absolute time limit. In addition, they are not obliged to limit the use of fixed-term contracts for the same workplace or the same job. The regulatory objective of clause 5 by which success in legislative approximation is to be measured is the protection of the individual employee. Comparing the different regulatory models it is important to bear in mind that the standard of assessment is the minimum standard laid down by the framework agreement. If that standard of protection is achieved by regulation, it does not matter whether another Member State's regulations grant a higher level of protection.⁷⁴

7.1 MODELS COINCIDING WITH A BASIC CONCEPT

The comparative study shows that despite substantial differences in the details, the level of protection in the Member States is essentially comparable. This applies, first of all, to models 3 and 4 which each coincide with one of the basic approaches in pure form. Although the basic approaches (in these two cases regulatory models at the same time) ensure protection against abuse of successive fixed-term contracts in different ways, it is not necessary to make the use of one or the other compulsory to achieve approximation of the law.⁷⁵ If the law demands justification for objective reasons, a worker can only be employed on successive fixed-term contracts for a long period of time, if the employer can repeatedly invoke objective reasons. The framework agreement does not aim to prevent long-term employment relations based on fixed-term contracts if those contracts are justified by objective reasons. In contrast with this mode of protection, a model which does not refer to objective reasons but sets limits on the total duration and the number of contracts does not put the employer under pressure to justify the intention to conclude a temporary employment contract. On the other hand, the employer is bound by rigid limits. If the limit on the total duration of successive fixed-term contracts is absolute, long-term employment relations based on fixed-term contracts cannot lawfully be established. If there is no absolute limit on the maximum duration of successive fixed-term contracts, the interruption periods to be observed provide a certain amount of protection against long-term employment relations based on fixed-term contracts.

⁷⁴ *Ibid.*, at 107.

⁷⁵ *Ibid.*, at 109.

7.2 MODELS WITH STRONGER PROTECTION

Regulatory models 1 and 2 require objective reasons, each adding one of the other two measures of the framework agreement. Model 1 combines objective reasons with a limit on renewals of fixed-term contracts, whereas model 2 combines objective reasons with a limit on the total duration of successive fixed-term contracts. These models provide stronger protection against the abuse of successive fixed-term contracts than model 4, which lays down the requirement of objective reasons only. However, this does not preclude the above-mentioned result of approximation of law in connection with successive fixed-term contracts as for this assessment the yardstick is, as stated above, the minimum standard laid down by the framework agreement. If this minimum standard is ensured by a regulatory model, discrepancies in the level of protection are of no account for the question of approximation of law. This is all the more the case because models 1 and 2 do not grant a significantly higher level of protection than model 4.⁷⁶

7.3 ALTERNATIVE COMBINATIONS OF THE BASIC CONCEPTS

Whilst models 1 and 2 introduce additional measures to the requirement of objective reasons, models 5 and 6 are combination models that allow successive fixed-term contracts with or without objective reasons. Thus the employer can conclude successive fixed-term contracts more freely than under models 3 and 4, which each coincide with one of the basic concepts. This applies even more to the comparison of models 5 and 6 to models 1 and 2, which introduce additional measures to the requirement of objective reasons. The Member States adopting model 5 allow fixed-term contracts without objective reasons for a period of two years, and in one case for thirty-three months. Additionally, they place a limit on the number of contracts or renewals that may be concluded within this period. Further fixed-term contracts between the same parties may be concluded only if justified by objective reasons.⁷⁷ Model 6 allows employers to conclude successive fixed-term contracts for up to four years without justification for objective reasons. The number of contracts or renewals in that period is unlimited. After four years, further fixed-term contracts need to be justified by objective reasons.⁷⁸ Combination models of this kind are not to be rejected from the outset. They are basically compatible with the framework agreement, leaving a wide margin for national regulations. Nevertheless, with view to approximation of law a

⁷⁶ *Ibid.*, at 111.

⁷⁷ *See supra* s. 5.5.

⁷⁸ *See supra* s. 5.6.

combination model granting a significantly lower level of protection than other regulatory models is open to criticism. In this respect, the permissible maximum duration of successive fixed-term contracts as well as the rules on waiting periods between such contracts prove to be a problem.⁷⁹

Models combining the basic concepts alternatively offer less protection against abuse of successive fixed-term contracts than the other models simply because they allow such contracts with and without justification for objective reasons. If such a combination model then allows a generous maximum duration for successive fixed-term contracts without the need for justification for objective reasons, the level of protection is significantly lower than that of other models. The two models with alternative combinations adopted in the Member States covered by the study lay down maximum periods of two to four years. The Member States adopting model 5 lay down a limit of twenty-four months for successive fixed-term contracts without justification for objective reasons, and in one case the limit is thirty-three months.⁸⁰ With these limits, model 5 is not much more liberal than models 1 to 4. The level of protection of the five models is still comparable. Some differences have to be accepted, as the framework agreement allows combination models and does not set specific limits for such combination models.⁸¹

The level of protection is, however, considerably lower with model 6. With this model, the employer may conclude successive fixed-term contracts without justification by objective reasons for a period of four years. Afterwards additional contracts may be concluded if justified by objective reasons. The gap between this model and the other models results from two factors: the combination of fixed-term contracts with and without justification for objective reasons, and the generous legal framework. It is not the possibility to conclude successive fixed-term contracts for a period of four years in itself that is the key difference between model 6 and the other models. It is the combination with the possibility to conclude additional fixed-term contracts citing objective reasons that practically halves the level of protection in comparison with models 3 and 4 which each use only one of the two basic concepts.⁸² Furthermore, one Member State using model 6 is not particularly strict with regard to interruptions: in the United Kingdom – still a member of the EU – an interruption of a week is sufficient to break continuity of employment. The four-year period for successive fixed-term contracts without justification begins anew after such an interruption. While the broad timeframe of model 6 keeps the level of protection low, this is exacerbated

⁷⁹ Sudabeh Kamanabrou, *supra* n. 8, at 111–115.

⁸⁰ *See supra* s. 5.5.

⁸¹ Sudabeh Kamanabrou, *supra* n. 8, at 112–114.

⁸² *Ibid.*, at 113.

by loose rules on interruptions allowing almost unrestricted recourse to successive fixed-term contracts.⁸³

7.4 REASONS FOR THE CHOICE OF A PARTICULAR MODEL

It would be interesting to ascertain why the Member States chose their respective models. However, this information appears to be unobtainable. The Member States' choice of regulatory model was neither commented on in the legislative materials – as far as they exist – nor discussed in the literature. This is particularly evident in cases where the law on successive fixed-term contracts has been substantially amended in recent years. Such a complete change, which includes adopting a different model, has occurred in Italy and Poland. Italy started out with an exhaustive list of objective reasons and then added the possibility of concluding fixed-term contracts without objective reasons.⁸⁴ Finally, Italy set aside the limitation for objective reasons and adopted the current regulation: a total duration of three years combined with a limit on the total number of renewals to five.⁸⁵ In Poland, originally the third fixed-term contract concluded by the same parties was deemed to be a contract for an indefinite period in the case of contracts concluded within a month of each other.⁸⁶ This was amended in 2016, when the current rule based on model 5 was implemented.⁸⁷ In both countries the change of model was not discussed or explained. It may have been due to a desire for a noticeable change or simply due to political compromise: one can only speculate on the reasons. It is known that the change in Poland was motivated by implementation deficits,⁸⁸ whereas Italy took legislative action to reduce unemployment.⁸⁹ However, the intention to introduce stricter or more lenient rules – whatever its motivation – does not explain a change of models, as shown by the example of the Netherlands. With the reform of 2015, the Dutch legislature aimed to tackle unemployment at the same time as the long-term use of flexible working arrangements. Nevertheless, it did not change the regulatory model but made the existing rules stricter instead.⁹⁰ This confirms the above-stated

⁸³ *Ibid.*, at 114–115.

⁸⁴ For the history of the legislation see Lina Franziska Ebeling & Sudabeh Kamanabrou, *Italien*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 597–600 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

⁸⁵ See *supra* s. 5.3.

⁸⁶ For the history of the legislation see Joanna Rupa & Sudabeh Kamanabrou, *Polen*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 341–343 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

⁸⁷ See *supra* s. 5.5.

⁸⁸ Joanna Rupa & Sudabeh Kamanabrou, *supra* n. 86, at 343–344.

⁸⁹ Lina Franziska Ebeling & Sudabeh Kamanabrou, *supra* n. 84, at 600.

⁹⁰ Sandra Wullenkord & Sudabeh Kamanabrou, *Niederlande*, in *Rechtsangleichung im Recht der Kettenbefristung in der EU* 379, 380–382 (Sudabeh Kamanabrou ed., Mohr Siebeck 2016).

claim⁹¹ that the level of protection does not depend on the choice of regulatory model, but rather on the specific design of the chosen model.

One might expect the use of the same model by members of the same legal family, but such an expectation proves to be unfounded. Although it comes as no surprise that France and Luxembourg on the one hand and the United Kingdom and Ireland on the other adopt the same model, since France and Luxembourg belong to the Roman family and the United Kingdom and Ireland to the common law family, corresponding groupings cannot be found among the other Member States. For example, Belgium, Italy and Spain belong to the Roman family as well, but do not adopt the regulatory model adopted by France and Luxembourg. Rather, they each chose a different regulatory model with the result that there are no 'family likenesses' in the Roman family. Austria and Germany, both belonging to the Germanic family, do not share a model either. In the Nordic family Denmark and Finland do, whereas Sweden adopts a mixed model.

With regard to choices it must finally be noted that only four of the Member States included in the study had to take major legislative steps to implement the directive. Most of the Member States drafted their rules before clause 5 of the ETUC-UNICE-CEEP framework agreement entered into force. It may be assumed that their regulations influenced the design of clause 5 rather than the other way round.

7.5 INTERIM CONCLUSION

As an interim conclusion, the level of protection against abuse of successive fixed-term contracts in the Member States included in the study is largely comparable. Only model 6 grants a significantly lower level of protection than the other five models. This is due to the fact that this model not only combines fixed-term contracts with and without justification but sets a generous timeframe for such contracts without setting any limits on the number of contracts during this period. The gap increases in those varieties of model 6 that extend the possibilities of successive fixed-term contracts without justification by generous rules on interruptions.

8 MODIFICATION OF THE FRAMEWORK AGREEMENT

Rules on interruptions compromising the objective of the framework agreement on fixed-term work are not compatible with this framework agreement. Member States must not set rules impairing its practical effect.⁹² With regard to this deficiency of national regulation, an amendment to the legislation in question

⁹¹ See *supra* ss 7.1–7.3.

⁹² Case C-378/07, *Angelidaki*, ECR 2009, I-3071, para. 155; Case C-212/04, *Adeneler*, ECR 2006, I-6057, para. 82.

would suffice.⁹³ As the United Kingdom is the Member State concerned, the problem will most likely be resolved by its decision to leave the EU.

Apart from this point, it is not clear how model 6 should be assessed with regard to the framework agreement on fixed-term work. It may on the one hand be deemed permissible considering the loose specifications of the framework. On the other hand, it can be argued that an alternative combination designed in such a fashion does not achieve the objective of the framework agreement. The question of successful legislative approximation does not, however, depend on whether or not the national law is in accordance with the directive or not. If model 6 with adequate rules on interruptions is not in accordance with the directive, it is a point of criticism that model 6 is in any case covered by the wording of the framework agreement. If model 6 with adequate rules on interruptions is in accordance with the directive, this confirms the impression that the framework agreement led to considerable legislative approximation while there are still notable exceptions.⁹⁴ In order to achieve a more comprehensive effect, the framework agreement should be slightly adjusted so that the maximum duration of successive fixed-term contracts has to be less than four years. By this modification, the level of protection of model 6 would be adjusted to that of the other models. This limitation of the timeframe should be established for all models using alternative combinations, i.e. models 5 and 6. While it is true that model 5 is currently adopted with moderate timeframes only and that the number of contracts permissible within the set period is limited as well, as a model with an alternative combination it still has the potential to undermine the successful legislative approximation of the law on successive fixed-term employment contracts if it is used with a longer timeframe.⁹⁵

Model 5 limits the timeframe as well as the number of contracts. Those limits have to be viewed as a whole. Thus, as a maximum timeframe for model 5, the Polish limit of thirty-three months is appropriate if the number of contracts permissible during this period is limited to three (and the number of renewals to two). If the number of contracts is greater, the timeframe should be shorter.⁹⁶ As model 6 applies only a timeframe to limit successive fixed-term contracts that are not based on objective reasons its timeframe should be shorter than that of model 5. In this case, two years are adequate.⁹⁷ Even with this restriction, model 6 is still more generous than the German and the Belgian variations of model 5, both using this timeframe and additionally limiting the number of contracts or renewals. As a uniform level of protection against abuse of successive fixed-term contracts is not

⁹³ Sudabeh Kamanabrou, *supra* n. 8, at 115.

⁹⁴ *Ibid.*, at 116.

⁹⁵ *Ibid.*, at 116.

⁹⁶ *Ibid.*, at 117.

⁹⁷ *Ibid.*, at 117.

the aim of the framework agreement and the limitation of model 6 is proposed solely to eliminate significant differences in the level of protection, the two-year timeframe for model 6 is sufficient to move towards legislative approximation.

9 CONCLUSION

In order to prevent abuse of successive fixed-term contracts the framework agreement on fixed-term work proposes three types of measures to be used either individually or in combination by the Member States. These provisions have resulted in quite different regulations in the fifteen Member States included in the study on legislative approximation in the EU regarding successive fixed-term contracts.

These Member States adopt eight different regulatory models, six of which were analysed in the study. The remaining two models were negligible as they are each adopted in one Member State only and merely as a complementary measure. In light of the loosely framed framework agreement, this diversity of regulatory measures was to be expected.

By contrast, the results of the comparison are surprising. The study showed that for the Member States under examination, the legislative approximation in the field of successive fixed-term contracts has been largely successful since, in the actual designs adopted by the Member States, five of the six models offer a comparable level of protection. Rather, it was to be expected that the respective regulations would be too diverse to ensure comparable standards in the Member States. This assumption was not confirmed. Admittedly, the level of protection against abuse of successive fixed-term contracts is rather low but that is due to the fact that the framework agreement can offer protection only within the limits of its provisions. Within these limits legislative approximation has been achieved with the exception of those Member States adopting model 6. Three of the fifteen Member States included in the study adopt this model, thus offering a comparatively low level of protection. Nevertheless, legislative approximation has by and large succeeded. The diminished level of protection is limited to one model only: a slight alteration to the framework agreement would eliminate this problem.

