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IN SEARCH OF A "EUROPEAN MODEL" FOR FIXED-TERM WORK IN THE NAME OF THE PRINCIPLE OF EFFECTIVENESS

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Introduction: is the EU position on atypical work unambiguous?

One of the purposes of Directive 1999/70 on Fixed-Term Work is to place limits on successive recourse to fixed-term employment contracts or relationships, «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»¹. These words, taken from the well-known *Adeneler* case of 2006, have been repeated by the Court of Justice on a number of occasions, together with its emphasis on the indication that «the benefit of stable employment is viewed as a major element in the protection of workers»². In the opinion of the Court, "insecure employment" appears to be something to avoid.

Some preliminary questions immediately arise: what is meant by "insecure employment"? Does the above really reflect the European Union position on this matter?

We have to take into account the fact that the issue of precariousness in work relations is a «multifaceted phenomenon, which while inherently linked to particular sectors of the labour market and particular forms of non-standard work, spans beyond [this] and increasingly affects what have been long considered mainstream, secure, and typical work relations»³; besides, the atypical or non-standard work is a broad category that presents a difficulty in its definition and reveals a dichotomy between - forgive the play upon words - the "typical" atypical forms of work (part-time work, fixed-

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¹ Case C-212/04, *Adeneler*, para. 63; see also Cases C-378/07-C-380/07, *Angelidaki*, para. 73; Case C-109/09, *Deutsche Lufthansa*, para. 31; Case C-586/10, *Küçük*, para. 25; Case C-362/13, *Fiamingo*, para. 54.

² *Adeneler*, para. 62; see also Case C-251/11, *Huet*, para. 35; *Fiamingo*, para. 54; Cases C-22/13, C-61/13-C-63/13 e C-418/13, *Mascolo*, para. 72; see also the judgments given before the adoption of the Directive with which the Court had expressed, incidentally, its distrust of precarious work: Cases C-259/91, C-331/91, C-332/91, *Allué*, para. 19; Case C-173/99, *Bectu*, para. 63.

³ Countouris N., *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, *CLLPJ*, Volume 34, Issue 1, 2012, p. 21. Not only is precarious employment construed in the acceptance fully shared in Europe as non-standard work - whether due to its limited duration, seasonal character, or nature of a relationship "bordering on subordination" - but also in its variants as work of an indefinite duration with elements of precariousness, which may consist of low salary levels, working modalities, context where the employment relationship takes place, impossibility of withdrawing freely from the job, lack of appropriate protection against occupational diseases and injuries in the workplace, as well as deficiencies in the social security area. See also Laulom S., Teissier C., *Which Securities for Workers in Times of Crisis? An Introduction*, *ELLJ*, Volume 5, Issue 3-4, 2014, p. 206; Aimo M., Izzi D., *Labour law beyond national borders: the current debate*, *RDCTSS*, English electronic edition, Issue 3, 2013, p. 185.

term work and agency work) and those which are "very atypical" (e.g. very short part-time or fixed-term contracts, zero hours or on-call work)⁴. The European protective core of rights for the "typical" non-standard workers - the only one in force by virtue of the 1998 Part-Time Work Directive, the 1999 Fixed-Term Work Directive and the 2008 Agency Work Directive - is definitely useful and valuable nowadays, in times of crisis and of increasing use of such atypical forms of work, but the EU position on this point appears ambiguous, caught between a still prevailing labour market regulation rationale and an emerging rights-based approach endorsed by the Court of Justice⁵.

For many years EU employment policy has been allowing contractual flexibility as a method for expanding the overall supply of jobs: the "postulate" on which the consequent process of deregulating national labour laws has been based until now is - to put it very simply - that a more flexible labour market is a precondition for economic growth. Actually, evidence in support of this assumption, which is inspired by a neoclassical/laissez-faire approach, is lacking; on the contrary, several empirical studies have shown that the rise of flexible work is not linked to a growth in productivity⁶.

It is precisely from such argument in favour of "flexibility for growth" that - along with the "security" corrective - the well-known flexicurity paradigm has developed in the past years. This central but quite indeterminate concept, which seeks, as its name suggests, to combine flexibility and security (in their respective and various forms), has been adopted as the guiding labour market policy for the European Union at least since the 2006 Green Paper of the European Commission⁷, although it was already present in the previous guidelines for the employment policies of the Member States after the launch of the European Employment Strategy in 1997⁸. As we know, even during the global economic crisis both the Commission and the Council of the EU have confirmed their commitment to flexicurity, maintaining the position that such a formula should be the basis for EU employment policy, although European policy-makers have interpreted it differently over the years⁹. Nevertheless, many have asked whether this difficult balance between flexibility and

⁴ See European Foundation for the Improvement of Living and Working Conditions, *Very atypical work*, 2010, <http://www.eurofound.europa.eu/publications>.

⁵ Bell M., Between Flexicurity and Fundamental Social Rights: the EU Directives on Atypical Work, *ELR*, Volume 37, Issue 1, 2012, p. 31; see also Corazza L., Il lavoro a termine nel diritto dell'Unione Europea. In: Del Punta R., Romei R. (eds.), *I rapporti di lavoro a termine*, Giuffrè, Milano, 2014.

⁶ See Schmid G., Il lavoro non standard: riflessioni nell'ottica dei mercati transizionali del lavoro, *DRI*, 2011, p. 11; Realfonzo R., Deregolamentare per crescere?, *RGL*, 2013, I, p. 491; Roccella M., Izzi D., *Lavoro e diritto nell'Unione europea*, Cedam, Padova, 2010, p. 65.

⁷ EU Commission, *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708, examining the role that labour law might play in advancing a flexicurity agenda; followed by Council, *Common Principles of Flexicurity*, 16201/07, SOC 523.

⁸ See Zappalà L., Flexicurity e valorizzazione delle capability, WP C.S.D.L.E. "Massimo D'Antona".INT-97, 2012.

⁹ For instance, various recent EU documents «refer to the importance of internal flexibility, whereas arguably the emphasis before the crisis, at least by the Commission, was on external flexibility»: Sanders A., The changing face of

security can in actual fact be disproportionate, always emphasizing the former over the latter: some have even given voice to a kind of «*requiem* for flexicurity»¹⁰, referring to the premature "aging" and decay of that paradigm. To simply state that more forms of non-standard work equal more and better jobs and greater social cohesion is doubtless wrong and can foster a bad enterprise attitude which seeks margins of competitiveness betting especially on work devaluation. Such doubts and objections, however, have had no effect on the dogmas of the European employment policies, which, in essence, have not changed¹¹.

Furthermore these flexicurity policies have not sufficiently engaged with the European social integration process "through law", and in particular through the rights to which non-standard workers are entitled by means of the atypical work directives as interpreted by the EUCJ. On this point it should be noted that atypical work falls within the competence (or better the interest) either of TFEU Title IX on Employment policies or of TFEU Title X on Social policy, so that that same issue can be the subject-matter for both an Open Method of Coordination procedure and a harmonization directive, albeit in the "soft" version - as in the case of fixed-term work - of a Framework Agreement. This could produce an overlap between these two different instruments of regulation and governance, thereby entailing a compound of the traditional purposes of social policy measures (granting minimum standard rights to workers) and rationales for employment policy (promoting job creation).

In this respect, reading the texts of the atypical work directives, one can say that they all follow the aim of flexicurity, expressly acknowledging the purpose of achieving the required balance between flexibility and security. Despite this there are some differences between them: while both the Part-Time Work Directive and the Agency Work Directive contain a provision requiring state or social partners to review prohibitions or restrictions to these forms of work, there is nothing equivalent in the Fixed-Term Work Directive which refrains from promoting fixed-term work and, on the contrary, states that «contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers»¹².

Regardless of this last affirmation, the Fixed-Term Work Directive has been considered - both just after its adoption and later - as «latently permissive», having the effect of «normalising»¹³ this form of atypical work and tacitly encouraging deregulation in the Member States or anyway as

‘flexicurity’ in times of austerity? In: Contouris N., Freedland M. (eds.), *Resocializing Europe in a Time of Crisis*, Cambridge University Press, 2013, p. 330: see the EU documents cited. See also Bell 2012, p. 31.

¹⁰ See Escudero Rodriguez R., *Un Requiem per la flessicurezza*, *RGL*, I, 2013. See additionally Treu T., *Le istituzioni del lavoro nell'Europa della crisi*, *DLRI*, 2013, p. 610, and the articles of the special issue 'Which securities for workers in times of crisis?', *ELLJ*, Volume 5, Issue 3-4, 2014.

¹¹ See Countouris N. 2012, p. 41.

¹² See Preamble and General Considerations no. 6.

¹³ Murray J., *Normalising temporary work*, *ILJ*, Volume 28, Issue 3, 1999, p. 273.

being incapable of preventing it¹⁴. This Directive however - in the extremely deregulated labour markets resulting from the national structural reforms adopted all over Europe in response to the economic crisis (and on the pretext thereof) - could prove to be a quite valuable protective instrument against further deregulation.

1. The EUCJ's guardian function in the name of the principle of effectiveness

Focusing on the primary source of regulation of fixed-term work, i.e. Directive 1999/70, we should start from its double purpose, that is, as stated in Clause 1 of the Framework Agreement, to «improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination» and to «establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships». It is in the light of those purposes that the clauses of the Agreement have to be interpreted, and this is particularly true in the case of two fundamental provisions which are closely interrelated and implement together the abovementioned balance: these are Clause 4, which requires that, «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», and Clause 5, which requires that Member States and/or social partners establish some general limits to the use of fixed-term work, made up both of measures to prevent abuse and measures to penalise it.

In compliance with art. 2.1. of the Directive, that requests the Member States «to take any necessary measures to enable them at any time to be in a position to guarantee the results» imposed, Clause 4 and Clause 5 have been given a functional interpretation by the EUCJ¹⁵. Whatever the clause at issue, the adequacy of its regulative strength must be teleologically estimated¹⁶. Regarding Clause 5, for instance, what really matters is the practical ability of the adopted measure to prevent or punish abuse, as Member States enjoy a broad discretion with regard to how they implement the general purposes of the Agreement provided that they do not compromise their objective and practical effect. More and more frequently the EUCJ has reminded the Member States of the need to comply to the general interpretative principle of effectiveness, in order to safeguard the best usefulness to the enforceable EU provisions, and given to the national Courts in question a key

¹⁴ Bell M. 2012, p. 36.

¹⁵ Pesce C., Il principio dell'effetto utile e la tutela dei diritti nella giurisprudenza dell'Unione, *SIE*, 2014, p. 360.

¹⁶ Bellavista A., La Direttiva sul lavoro a tempo determinato. In: Garilli A., Napoli M. (eds.), *Il lavoro a termine in Italia e in Europa*, Giappichelli, Torino, 2003, p. 24. See also Vigneau C., Le régime des contrats à durée déterminée en droit communautaire, *DS*, 2007, p. 94; Saracini P., *Contratto a termine e stabilità del lavoro*, Editoriale Scientifica, Napoli, 2013, p. 86.

position in this process of interpreting the law in action. Nevertheless we should remember that the inevitable return made by the Court of Justice to the referring domestic judges, charged to find the adequate solution assuring a complete obedience to EU obligations, poses the delicate issue of establishing how the EUCJ can preserve its useful "watchdog" function without drifting towards an unacceptable interference in the competence of Member States¹⁷.

2. The judicial construction of a "European model" for fixed-term work in the light of the value of employment stability

Before examining in detail the basic elements of a possible "European model" for fixed-term work proposed and protected at the European level - by following the combined and mandatory instructions coming from the EUCJ's case-law in the name of the principle of effectiveness -, it is certainly helpful to repeat and mark how the value of employment stability is underpinned in the Directive¹⁸.

By stressing the importance of the Preamble and of the General Considerations of the Agreement, the EUCJ has repeatedly held that the Agreement «proceeds on the premise that employment contracts of indefinite duration are the general form of employment relationship», since they contribute to the quality of life of the workers concerned and improve their performance, highlighting its aim of protecting workers «against instability of employment»¹⁹. Still recently, in March 2015, in *European Commission v. Grand Duchy of Luxembourg* (regarding the Luxembourg legislation about occasional workers in the entertainment arts), the Court of Justice asserted that the objective of providing these precarious workers with a measure of flexibility and social benefits by facilitating their recruitment on the basis of recurring fixed-term contracts cannot bring the legislation at issue into conformity with the Framework Agreement. The Court once again confirmed that the benefit of stable employment is held to be a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts are liable

¹⁷ See Sciarra S., *Il lavoro a tempo determinato nella giurisprudenza della Corte di giustizia europea. Un tassello nella 'modernizzazione' del diritto del lavoro*, WP C.S.D.L.E. "Massimo D'Antona".INT-52, 2007, p. 25. From this dialogue between the EUCJ and the national judges, fixed-term work has emerged as an increasingly important subject, reflected in the numerous references to the Court for a preliminary ruling: during the 15 year life of Directive 1999/70, more than 40 judgments and orders have been made, following references from 10 different Member States (with the "predominance" of two of them, Italy and Spain). Even if the first judgment interpreting that Directive was given in the well-known *Mangold* judgment of 2005 (Case C-144/04), the "mother" of all these decisions is certainly *Adeneler*, with which the Court of Justice held for the first time in 2006 that a national law conflicted with Directive 1999/70.

¹⁸ See Blanpain R., *European Labour Law*, Wolters Kluwer, Deventer-Boston, 2012, p. 496; De Simone G., *L'effettività del diritto come obiettivo e come argomento*, *LD*, 2014, p. 489; Saracini 2013, p. 75.

¹⁹ *Adeneler*, para. 61, 73.

to respond to the needs of both employers and workers²⁰. Another good example of this approach is *Huet*, where the Court of Justice - in response to the case of a French lecturer whose fixed-term contract was converted to a permanent contract after a certain period of time - ruled that, if a Member State were to permit the conversion to be accompanied by material amendments to the principal clauses of the previous contract in a way that was fundamentally unfavourable to the employee, with the employee's tasks and the nature of his functions remaining unchanged, «it is not inconceivable that that employee might be deterred from entering into the new contract offered to him, thereby losing the benefit of stable employment, viewed as a major element in the protection of workers»²¹.

The Court thus emphasized, by speaking the language of social policy, that «the aim of the Agreement is that of avoiding, or at least reducing, the risks related to the instability of employment and that of protecting job security *tout court*»²²: to put it briefly, the Luxembourg judges wanted to promote «the Community legislature's intention to make stable employment a prime objective as regards labour relations within the European Union»²³.

Without in any way underestimating the importance of these affirmations, one should be aware that the strength of this prime objective yields to the scope *ratione personae* of the Directive, as the judgment *Poclava* has well illustrated. In that case the Court of Justice rejected the submission of the referring court which represented the *contrato de trabajo indefinido de apoyo a los emprendedores* - an open-ended contract, adopted in Spain in 2012, that may be freely rescinded during the first mandatory probation period of one year - as «a new virtually fixed-term contract», or, in other words, «an atypical contract with a fixed term of one year, which may be converted into a contract of indefinite duration once that period has elapsed». Despite the serious risks of abuse that such a "permanent" contract might pose, being in actual fact unable to create stable employment (above all for unskilled and marginal workers), the Court simply affirmed that «the employment contract of indefinite duration to support entrepreneurs is not a fixed-term contract that falls within the scope of Directive 1999/70»²⁴.

3. A broad interpretation of the personal scope of the Directive, yet without rushes of creativity

²⁰ Case C-238/14, *Commission v. Luxembourg*, para. 36, 50-51. See also note 2.

²¹ *Huet*, para. 44.

²² Zappalà L., Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence, *ILJ*, Volume 35, Issue 4, 2006, p. 441.

²³ EU Civil Service Tribunal, Case F-65/07, *Aayhan*, para.119.

²⁴ Case C-117/14, *Poclava*, para. 20, 24, 38.

A preliminary and significant issue to face is the scope *ratione personae* of Directive 1999/70; on this point it can be argued that a first component of the "model" for fixed-term work is the guarantee of a wide and basically growing area of application of the protective rules, despite the recent *Poclava* judgment, with which the Court of Justice probably missed a good opportunity for a more inventive form of jurisprudence.

It should be recalled that the Court has already ruled on several occasions that the Agreement, under Clause 2.1, has a personal scope that is to be conceived «in broad terms, as it covers generally "fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State"»²⁵. While it is true that the term "worker" is not a EU-law concept for the purposes of this Agreement and depends on the Member States, the fact remains that the Court did hold on to this notion with its case-law.

The personal scope of the Agreement has been clarified by the Luxembourg judges, stressing in particular that the reference to national law for defining the category of workers subject to the Agreement is not unlimited, but is rather constrained by the general principle of effectiveness, in accordance with which «Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness»²⁶.

The EUCJ's rulings have so far broadened the categories of persons to which the Agreement applies: the Court, more specifically, held that the personal scope includes both private-sector and public-sector employers²⁷ (the latter being the area from which the majority of the references arose), and that it applies to «all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer»²⁸, adding significantly that the underlying principle of the EU law on equal treatment and non-discrimination imposes that the provisions of the Agreement which seek to ensure that fixed-term workers enjoy the same benefits as comparable permanent workers «must be deemed to be of general application since they are rules of EU social law of particular importance»²⁹.

The Court also highlighted that Member States cannot remove certain categories of persons from its protection at will, as to do so would be in violation of the effectiveness of the directive³⁰

²⁵ See, in particular, *Adeneler*, para. 56; Case C-290/12, *Della Rocca*, para. 34; Case C-190/13, *Márquez Samohano*, para. 38.

²⁶ Case C-393/10, *O'Brien*, para. 35.

²⁷ See *Adeneler*, para. 56; *Della Rocca*, para. 34; *Márquez Samohano*, para. 38.

²⁸ See Case C-307/05, *Del Cerro Alonso*, para. 28; Cases C-444/09, C-456/09, *Gavieiro*, para. 42; *Fiamingo*, para. 27-38.

²⁹ *Del Cerro Alonso*, para. 27.

³⁰ *O'Brien*, para. 36; *Del Cerro Alonso*, para. 29.

(except for the categories of fixed-term workers who may be excluded by national law from the scope of the Directive³¹ and who are not covered by the Directive, i.e. the temporary workers placed by a temporary work agency at the disposition of a user enterprise³²).

In this respect, three judgments given by the Court between 2011 and 2012 could be helpful to understand these important submissions, which in actual fact limited the discretion granted to Member States in order to define the notion of worker, thus affecting - and in this case broadening - this concept.

The *O'Brien* case, firstly, concerned the question of the scope *ratione personae* of the Framework Agreement on part-time work, whose Clause 2 contains a definition of its scope which is identical to the Agreement on fixed-term work and whose procedure, structure and regulatory context are also very similar, so that the Court's reasoning could be shifted from the former context to the latter. In that case the Court of Justice held that an exclusion from the personal scope of the Directive may be permitted «only if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of ‘workers’ under national law»³³. The Court then, in order to mitigate the effect of an excessive interference in the competence of Member States, made a necessary reference to the national court for the evaluation of the nature - whether «substantially different» or otherwise in this case - of a professional judge's employment relationship in comparison to that of an employee according to domestic law. The Court of Justice finally added a number of principles and criteria which the referring court must take into account in the course of its examination, which must be undertaken in particular in the light of the differentiation with self-employed persons: «the rules for appointing and removing judges must be considered, and also the way in which their work is organised»³⁴, as well as the entitlement to sick pay, maternity or paternity pay, and similar benefits. In this way the Court, without explicitly defining a EU-law concept of worker, did not nonetheless ultimately refrain from defining the relevant indicators of that notion³⁵ and, in the case in point, suggested to the referring court that a judge has to be regarded as a worker. So we deal with a "partial europeanization" of the concept: partial but not actually ineffective³⁶.

³¹ Under Clause 2.2., «vocational training relationships and apprenticeship schemes» and employment contracts «concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining program».

³² See the fourth paragraph of the Preamble to the Agreement, according to which the Agreement does not apply to temporary workers (see *Della Rocca*, para. 36, 45).

³³ *O'Brien*, para. 42. See Robin-Olivier S., La protection des travailleurs "atypiques" est-elle en régression? Le contexte européen, *RDT*, 2012, p. 648.

³⁴ *O'Brien*, para. 45-46.

³⁵ Laulom S., *La notion de travailleur*, *SSL*, no. 1582, 2013, p. 12.

³⁶ Robin-Olivier S., Politique sociale de l'Union Européenne, *RTDE*, 2012, p. 477. See also Alessi C., *Il lavoro a termine nella giurisprudenza della Corte di giustizia*, WP C.S.D.L.E. "Massimo D'Antona".INT-93, 2012, p. 15.

In *Sibilio*, secondly, the Court's reasoning started from *O'Brien* and reasserted that the national concept of worker cannot lead to the arbitrary exclusion of a category of persons from the protection offered by the Directive: in this case - regarding the Italian workers of social utility, known as "socially useful workers" - the fact that the domestic law did not acknowledge the legal status of an employment contract or an employment relationship for this type of work should not prevent the referring judge from assigning such a *status* to a relationship which is, objectively, of such a nature³⁷. The Court's openness to an essentially non formalistic control of the personal scope of the Agreement, however, was followed by a consideration of the possibility of excluding "socially useful workers" by virtue of Clause 2.2., which gives the Member States and/or the social partners the option of making the Agreement inapplicable to «employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme». Here the Court, dealing with a clause that - as in the case of any exception - must be interpreted restrictively, confined itself to stating generically that the discretion of Member States on this matter must be applied in a transparent manner and must be open to review in order to prevent workers engaged in programmes which do not fall within the categories listed in Clause 2.2. from being deprived of the benefit of the protection offered by Directive 99/70³⁸.

A more protective approach can be read in the EUCJ's rulings regarding persons who have ceased to be fixed-term workers and have become members of the permanent workforce: thanks to the Court's extensive interpretation, the Agreement applies also when workers have seen their *interim* contracts transformed into permanent contracts and have been integrated - with regard to the public sector employment - into the civil service. This clearly emerges from the *Santana* case, which was ruled in 2011³⁹ and followed by other similar, although not identical, cases like *Valenza* and *Huet* of 2012 and *Bertazzi I* and *Bertazzi II* of 2013 and 2014⁴⁰.

Focusing on the leading-case *Santana*, the claim laid in the main proceedings was to the right to have periods of time spent as a fixed-term worker taken into account when calculating the eligibility for promotion in the same way as for a comparable permanent worker of the same employer. It must be noted that the outcome of *Santana* was not as obvious as it might seem. The Court - contrary to the line of arguing of the Commission - adopted a position that, according to the Advocate general, «is not merely a permissible interpretation, [but] the only interpretation which satisfies the requirement that [Clause 4 of the Agreement] be interpreted in a manner which is not

³⁷ Case C-157/11, *Sibilio*, para. 42, 48-49, 51.

³⁸ *Sibilio*, para. 56.

³⁹ Case C-177/10, *Santana*.

⁴⁰ Case C-393/11, *Bertazzi I*; Case C-152/14, *Bertazzi II*. See Mazuyer 2014.

restrictive»⁴¹. More specifically, the EUCJ held that to exclude automatically the application of the Agreement in a situation such as that in the case in point «would, in disregard of the objective attributed to clause 4, effectively reduce the scope of the protection against discrimination for the workers concerned and would give rise to an unduly restrictive interpretation»⁴² of the principle of non-discrimination, in contrast with its settled case-law. From *Santana* forward, the fact that a fixed-term worker becomes a permanent worker is thus considered irrelevant, provided that the alleged discrimination concerns periods of service completed as an *interim* worker, as well as «the conversion of a fixed-term contract into a contract of indefinite duration cannot be regarded as outside the scope of the Agreement»⁴³.

4. The core of the model: the principle of equal treatment taken seriously

That the Agreement should have a broad scope *ratione personae*, as discussed above, is functional to the broadest possible application of the general EU law principle of equal treatment and non-discrimination⁴⁴: a principle which is, indeed, considered as the most crucial objective of the Agreement and the ordering criterion of the entire discipline⁴⁵. The progressive strength acknowledged by the Court to the principle under Clause 4 - providing, as mentioned above, that, «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»⁴⁶ - entailed a broadening of the range of the Agreement as a whole.

⁴¹ Opinion in *Santana*, para. 49.

⁴² *Santana*, para. 44.

⁴³ *Huet*, para. 37. See Laulom S. 2013, p. 19.

⁴⁴ In *O'Brien* (para. 38) the Court underlined that the definition of "worker" has «an effect on the scope and effectiveness of the principle of equal treatment enshrined in that Agreement». See Robin-Olivier S., *Politique sociale de l'Union Européenne*, RTDE, 2012, p. 485.

⁴⁵ Sciarra S. 2007, p. 12; for an argument to this effect, see also Zappalà L., *I lavori flessibili*. In: Caruso B., Sciarra S. (eds.), *Il lavoro subordinato, Trattato di Diritto Privato dell'Unione*, Volume V, Giappichelli, Torino, 2008; Bell M. 2012; Peers S., *Equal Treatment of Atypical Workers: A New Frontier for EU Law?*, YEL, Volume 32, Issue 1, 2013; Petterson H., *Discrimination against Part-Time and Fixed-Term Workers*, IJCLIR, Volume 31, Issue 1, 2015, p. 47.

⁴⁶ Adding that the principle of *pro rata temporis* shall apply only «where appropriate». We must underline that Clause 4 does not refer to the concepts of direct or indirect discrimination and has a rather «unusual construction» if compared to the concept of discrimination within EU anti-discrimination legislation: the first part of the clause, with the wording about discrimination depending solely on fixed-term work, «brings direct discrimination to mind, while the second part, introducing the possibility of justifying different treatment with reference to objective grounds, is similar to the regulation of indirect discrimination» (Petterson H. 2015, p. 55-56); see also Peers S. 2013, p. 37, and Bell M., *The principle of non discrimination within the Fixed-term Work Directive*. In: Moreau M. A. (eds.), *Before and After the Economic Crisis*, Edward Elgar, Cheltenham, 2011, p. 162.

The pathway that led to this not yet dormant development of the non-discrimination rule began with two important judgments that continue to be the basis of the settled line of reasoning of the Court.

Starting with *Del Cerro Alonso* - regarding fixed-term workers in the Spanish health service who were not considered eligible for salary allowances linked to length of service, reserved under national law solely to permanent staff -, the Court took a first important step and affirmed that the principle of equal treatment is a rule of EU social law of particular importance and cannot be interpreted restrictively; the concept of «employment conditions» referred to in Clause 4 should therefore also include remuneration of fixed-term workers⁴⁷.

Once again it was a not completely obvious outcome, as illustrated by the fact that Advocate General had suggested a far more restricted concept of «employment conditions», which did not extend to pay, interpreting the absence of any reference to remuneration in Directive 1999/70 «as an express intention to exclude it from its scope» and arguing that another interpretation would have been liable to render meaningless Article 137.5 EC (now 153.5 TFEU), which does not authorize the Council to adopt measures relating to pay⁴⁸. The Advocate's Opinion was firmly rejected by the Court, which has considered pay as the first and most important condition of employment.

Such a broad interpretation of the material scope of the prohibition of discrimination was developed further in *Impact*⁴⁹, which held - taking into account the case-law with regard to the principle of equal treatment of men and women in relation to pay - that it covers also occupational pensions, depending «on an employment relationship between worker and employer, excluding statutory social-security pensions, which are determined less by that relationship than by considerations of social policy»⁵⁰. During the following years, the Court has therefore continued to expand the concept of «employment conditions», in accordance with the decisive "criterion of employment" (meaning the employment relationship between a worker and his employer) and once again in the light of the principle of effectiveness: stating that the non-discrimination rule also applies to conditions of promotion⁵¹, remuneration, classification in salary group, recognition of previous periods of service, entitlement to leave, additional payments and overtime supplements⁵²,

⁴⁷ *Del Cerro Alonso*, para. 27, 38, 48. See also Bercusson B., Bruun N., The Agreement on Fixed-term Work. In: Vigneau C., Ahlberg K., Bercusson B., Bruun N. (eds.), *Fixed-Term Work in the EU: a European Agreement Against Discrimination and Abuse*, National Institut for Working Life, Stockholm, 1999, p. 52-53.

⁴⁸ Opinion in *Del Cerro Alonso*, para. 22.

⁴⁹ Case C-268/06, *Impact*. See Bell M. 2012, p. 39.

⁵⁰ *Impact*, para. 134. See also Cases C-395/08, C-396/08, *Bruno*, where the Court argued that the non discrimination rule also applies to retirement pension scheme for Alitalia cabin crew administered by a public body such as INPS (National institution for social welfare).

⁵¹ See *Santana*.

⁵² Case C-486/08, *Zentralbetriebsrat*; in the same sense see Case C-556/11, *Lorenzo Martinez*, regarding a six-yearly continuing professional education increment denied to teachers employed as temporary officials; and Case C-177/14,

conditions relating to dismissal⁵³, conditions under a stabilisation procedure⁵⁴, length of the notice period for the termination of fixed-term employment contracts⁵⁵ etc.

Impact, however, is to be viewed as a fundamental "second step" of the Court because it marked another major strength of this key principle, namely its capacity to be directly effective within national courts⁵⁶: the Court definitely affirmed that Clause 4 appears to be unconditional and sufficiently precise for individuals to be able to rely upon it against the State, particularly in its capacity as an employer, before a national court⁵⁷, which must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by persons within the other category. With regard to this power of the national court - even though this is clearly too complex an issue for us to address here - it remains to be seen whether, although the EUCJ has so far addressed only cases of unequal treatment of non-standard workers in the public sector in which the direct vertical effect of the equality clause may be deployed, the national court can set aside the domestic law even if the employer involved is a private-sector employer. It could be argued that the domestic judge may be entitled to do so, inasmuch as (s)he thereby transfers, so to speak, the results of the pathway taken by the Court with respect to the principle of non-discrimination on grounds of age⁵⁸ and exploits the horizontal direct effect (i.e. among private parties) recognized by the Court to the general principle of equality, «as given expression»⁵⁹, in this case, by Directive 99/70⁶⁰. We are, in actual fact, faced with a multifaceted issue about which the EUCJ's case-law is raising many further questions, which the Court will certainly be invited to answer in future.

One more point to highlight has to do with the relatively strict interpretation that the Court has offered of the concept of «objective grounds» which, according to Clause 4.1. of the Agreement, can justify different treatment for fixed-term workers as compared to permanent workers. The Court aimed at minimizing the permissibility of differences, in order not to render

Regojo Dans, regarding a three-yearly length of service increment granted to career civil servants and denied to a category of staff appointed on a non-permanent basis.

⁵³ Case C-361/12, *Carratù*; more specifically the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract.

⁵⁴ See *Bertazzi I* and *Bertazzi II*.

⁵⁵ Case C-38/13, *Nierodzik*.

⁵⁶ *Impact*, para. 134.

⁵⁷ *Gaiviero*, para. 76

⁵⁸ See *Mangold*; Case C-555/07, *Küçükdeveci*; on the stages of this route see Izzi D., *La Corte di Giustizia e le discriminazioni per età: scelte di metodo e di merito*, *RGL*, I, 2012, p. 125.

⁵⁹ See *Küçükdeveci*, at 43.

⁶⁰ We deal - since the prohibitions of discrimination related to atypical contracts are different from those established by the anti-discrimination directives regarding personal factors which expose workers to penalties contrary to the primary EU law (Article 19 TFEU and Article 21 of the Charter of Nice) - with a result which certainly is not obvious, but maybe possible (and desirable), in view of the fact that the Court has repeatedly brought back the principle of equal treatment between standard and non-standard workers to the fundamental principle of equality.

meaningless the equal treatment principle. In *Del Cerro Alonso* the Court submitted - relying on the case-law interpreting the concept of «objective reasons» which, according to clause 5.1.a of the Agreement, justify the renewal of fixed-term contracts - that this concept must be understood as not permitting a difference in treatment to be justified «on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement». More precisely the Court required that the unequal treatment is 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 to ensure - in accordance with the test laid down in discrimination law - that «the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose»⁶¹.

It is thus impossible to objectively justify a difference in treatment either purely because a national law or a collective agreement says so or - as the Court ruled in *Gavieiro* and repeated on several occasions - merely because of the temporary nature of an employment relationship, taking into consideration that the reliance on such a criterion would render meaningless the objectives of Directive 1999/70 and would amount to «perpetuating a situation that is disadvantageous to fixed-term workers»⁶². The EUCJ has also pointed out, in the *Valenza* case, that the objective of preventing reverse discrimination against career civil servants who had joined the civil service by means of the required competitive entrance exam could not constitute an «objective grounds» for a difference in treatment if the national provision at issue totally excluded any possibility of taking into account the period worked as employees on fixed-term contracts when calculating their length of service and, thus, their level of remuneration⁶³. Here the Court admitted the possibility of justifying a different treatment by the objective of avoiding reverse discrimination towards career civil servants, but required compliance with the principle of proportionality, thereby only partially recognizing the significance of access to the civil service through a competitive examination⁶⁴.

⁶¹ *Del Cerro Alonso*, para. 57-58. See *Zentralbetriebsrat*, para. 44, where the Court added that «those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or from pursuit of a legitimate social policy objective of a Member State».

⁶² *Gavieiro*, para. 57. See also, to that effect, *Santana*, para.72-77; Cases C-302/11-C-305/11, *Valenza*, para. 52; *Lorenzo Martínez*, para. 50; *Nierodzik*, para. 36-40.

⁶³ *Valenza*, at 62, 71; *Bertazzi I*, at 47, 55; *Bertazzi II*, at 17.

⁶⁴ See Mazuyer E., Critical Analysis of ECJ Case-law on Fixed-Term Contracts in the Public Sector, *ELLJ*, Volume 5, Issue 3-4, 2014, p. 340, who pointed out that the EUCJ's extensive interpretation of equality of treatment denies the particular status of civil servants, and Laulom 2013, p. 20. The Court also insisted on the need to take into account the continuity of functions before and after appointment to the civil service, affirming that, if it were established that the duties performed by the applicants as career civil servants are identical to the duties they were previously performing under fixed-term contracts, this «could suggest that disregard for periods of service completed by fixed-term workers is, in fact, justified by the length of their employment contracts alone» (*Valenza*, at 67).

It has been also well clarified by the Court that a purely budgetary argument cannot justify unequal treatment: in *Zentralbetriebsrat* the Court - expressly citing sex discrimination case-law⁶⁵ - firmly rejected the argument of the employer according to which the less favourable treatment in remuneration and conditions of the workers employed under a less than six month long fixed-term contract or on a casual basis was justified on objective grounds connected to the implementation of the requirement for rigorous personnel management⁶⁶. This reasoning - confirmed in the abovementioned *O'Brien* case⁶⁷ - «is particularly telling in revealing the outlook of the Court», because its rejection of economic justification for unequal treatment «strongly suggests that the Court has moved away from an interpretation of the Directive guided by a flexicurity approach»⁶⁸, that on the contrary would have accepted competitiveness as a legitimate reason for limiting employment protection legislation.

A broad material scope of Clause 4 - deriving, as discussed above, from a settled case-law giving a very extensive interpretation of the «employment conditions» concept and a correspondingly restrictive interpretation of the «objective reasons» of the justification concept - together with the key remedy of the direct effect of the clause would certainly serve to render the principle of non-discrimination the core of the European model for fixed-term work: it is pivotal in supporting the effective exercise of fixed-term workers' rights, thus improving the quality of their work, and still capable of progressively expanding its potential for protection. To this end the Court expressly linked this principle to the general principle of equality, namely «one of the fundamental principles of European Union law»⁶⁹, and underlined that the Agreement follows an aim which is akin to the fundamental objectives enshrined in the 1961 European Social Charter, in the 1989 Community Charter of the Fundamental Social Rights of Workers, in the preamble to the TFEU and in its Article 151⁷⁰: all of which implies that it must be placed in a broader social rights context⁷¹.

4.1. Who is the comparable worker?

Taking a further step back, the most critical point of this pivotal case-law lies, in actual fact, in the difficulty of interpreting the requirement to identify a comparable permanent worker in order to decide whether discrimination has occurred. On this point the Fixed-Term Work Agreement - like that on Part-Time Work - departs from the model common to anti-discrimination legislation,

⁶⁵ Cases C-4/02 et C-5/02, *Schönheit and Becker*, para. 85.

⁶⁶ *Zentralbetriebsrat*, para. 46.

⁶⁷ *O'Brien*, at 66.

⁶⁸ Bell M. 2012, p. 40.

⁶⁹ *Bruno*, at 58. See also Case C-313/02, *Wippel*, para. 56.

⁷⁰ *Impact*, at 112-113.

⁷¹ Bell M., 2011, p. 161. See also Opinion in *Angelidaki*, at 63.

which leaves considerable flexibility in the identification of the appropriate comparator. Clause 4.1., instead, requires less favourable treatment to be measured in relation to a «comparable permanent worker», defined, by virtue of Clause 3.2., as «a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills»: there is thus imposed «a rather stringent test of locating another worker in a similar situation in the same establishment»⁷².

In order to apply the comparator test, as the EUCJ maintained on several occasions, it should be determined «whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions», fixed-term workers could be regarded as being in a situation comparable to that of permanent workers⁷³. More precisely - in cases regarding stabilisation procedures - the Court ruled that the nature of the duties performed by the fixed-term workers and the quality of the experience acquired «are not merely one of the factors which could objectively justify different treatment», but are «also among the criteria which make it possible to determine whether they are in a comparable situation»⁷⁴. Such a comparison may, however, prove difficult if the identification of an inequality implies a more global comparison between the situations involved. In *Carratù*, for instance, the compensation paid for the unlawful insertion of a fixed-term clause into an employment contract and that applicable to the termination of an employment contract of indefinite duration related - according to a slightly hasty assessment by the EUCJ - to workers who could not be regarded as being in a comparable condition: the situations in which these types of compensation were paid have been considered significantly different, because the former related to workers whose employment contract was concluded unlawfully, whereas the latter related to employees who had been dismissed⁷⁵.

One potential risk of this system is that the Court's use of the comparator test «acts as a filtering mechanism»⁷⁶ against workers whose contractual status is particularly precarious: in *Wippel*, given in 2004 and interpreting the non-discrimination rule of the Part-Time Work Agreement, the Court excluded part-time workers employed on the basis of a “work on demand” contract (a “zero-hours contract”) from the benefit of the principle of equal treatment stating that

⁷² Bell M. 2011, p. 164. A broader (and vague) range of comparators is admitted by the second part of Clause 3.2., under which, «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». See Bercusson B., Bruun N. 1999, p. 110.

⁷³ Case C-273/10, *Montoya Medina*, para. 37; *Santana*, para. 66; *Lorenzo Martínez*, para. 43; *Valenza*, para. 42; *Nierodzik*, para. 31.

⁷⁴ *Santana*, para. 69; *Valenza*, para. 44. See Petterson H. 2015, p. 61.

⁷⁵ *Carratù*, at 44, 47.

⁷⁶ Bell M. 2012, p. 41.

there was no comparability between these workers and those employed full-time⁷⁷. Quite recently, in partial derogation from that judgment, the Court adopted a more substantive approach on this matter: it clarified - in the abovementioned *O'Brien*, regarding the peculiar situation of part-time judges remunerated on a fee-paid basis who, unlike full-time judges and part-time salaried judges, are not entitled to a retirement pension - that the criteria for defining a comparable full-time worker «are based on the content of the activity of the persons concerned» and identified as the «crucial factor» of this check the requirement of investigating into whether they «perform essentially the same activity»⁷⁸.

What the Court avoided doing in *O'Brien* - but might do in the future - is to examine whether the Directive precludes discrimination between different kinds of part-time employment. This was extensively discussed in the Advocate-General's Opinion⁷⁹, but the Court maintained that there was no need to face this issue⁸⁰, reiterating the choice already made two years before in *Bruno*⁸¹. The request that the differences in treatment between different types of non-standard workers should also be assessed in the light of the general principle of equality met with a more open refusal from the Court in orders *Vino I* and *Vino II*⁸², regarding fixed-term workers in the postal sector: there, the Court held that a principle of equal treatment between different categories of fixed-term workers cannot be inferred from the general principle of non-discrimination, since such a principle would need to be specified by an act of EU secondary legislation⁸³. The Court will soon have the opportunity to return to this issue thanks to a Spanish request for a preliminary ruling regarding the exclusion of a category of temporary replacement workers from the entitlement to receive compensation on termination of contract⁸⁴.

It should also be noted that the possible obstacle of the comparator test and the Court's refusal, at present, to make a comparison between different types of non-standard workers might in some cases be overcome by appealing to anti-discrimination law. Regarding this matter we cannot

⁷⁷ Case C-313/02, *Wippel*; the reason given was that the zero-hours contract employment conditions were fundamentally different from those of full-time employees, because the former could refuse the offer of work without having to justify such refusal, while the latter was always obliged to work according to their contract.

⁷⁸ *O'Brien*, at 61-62.

⁷⁹ Opinion in *O'Brien*, at 67-70.

⁸⁰ *O'Brien*, at 59.

⁸¹ *Bruno*, at 82-83.

⁸² Case C-20/10, *Vino I*, Case C-161/11, *Vino II*.

⁸³ *Vino II*, at 39. See also *Vino I*, at 56. On this matter see Aimo M., La Corte di giustizia e il lavoro non standard: vincoli e implicazioni negli ordinamenti nazionali, *RGL*, I, 2012, p. 147: the choice made by the Luxembourg judges in these cases can be read as a will not to go along the request of the referring courts to open the door to a "spread" assessment of reasonableness of the domestic law by national courts, to prevent overriding effects on competences of national constitutional courts.

⁸⁴ Reference for a preliminary ruling from the Tribunal Superior de Justicia de Madrid, *de Diego Porras* (Case C-596/14).

indeed overlook the fact that «inequalities linked to gender and age (in particular) are reflected in the demographic profile of atypical workers»⁸⁵ (see also Conclusions).

5. The second pillar of the protection: the need to introduce measures to prevent and punish abuse

With a view to identifying some other elements of the European model for fixed-term work, we should, at this point, examine how the Court has performed its "watchdog" function in supervising the national implementation of Clause 5 of the Agreement, entitled «Measures to prevent abuse».

It should be noted at the outset, as underlined by Advocate general Mengozzi in his Opinion in *Oberto*, that the Court held that the prohibition of abuse of rights constitutes «a general principle of EU law», because «individuals must not improperly or fraudulently take advantage of provisions of Community law»⁸⁶: Clause 5 could indeed be interpreted as giving specific expression to this general principle⁸⁷.

It must also be underlined that Clauses 4 and 5 of the Agreement have different, but complementary, objectives and that both have been interpreted in a functional light by the EUCJ: in the context of the anti-abuse rule, too, the teleological criterion is placed at the top of the Court's interpretative criteria⁸⁸.

Either the bargaining origin of the Agreement or the difficulties encountered during the negotiations between the European social partners in order to find a mediation between different positions (and different models of regulating fixed-term work in the national legal systems⁸⁹) are

⁸⁵ Bell M. 2012, p. 47. The groups of workers most likely to be offered fixed-term contracts (mainly routine and low-skilled work) are young workers, foreign workers, older workers, female workers, all categories at risk of discrimination and therefore included within the scope of EU discrimination law rules (see McKay S., *Disturbing equilibrium and transferring risk: confronting precarious work*, in Contouris N., Freedland M. (eds.), *Resocializing Europe in a Time of Crisis*, Cambridge University Press, 2013, p. 205): the study on Precarious Work and Social Rights - commissioned by the European Commission and carried out by the Working Lives Research Institute and published on April 2012, whose full report is available at ec.europa.eu/social - identified third country nationals as most likely to be in precarious work, followed by young women and young men, migrants and adult women (see in addition European Foundation for the Improvement of Living and Working Condition, *Young people and temporary employment in Europe*, 2013, <http://www.eurofound.europa.eu/publications>).

⁸⁶ Case C-321/05, *Kofoed*, para. 38.

⁸⁷ Opinion in *Oberto* (Case C-464/13), para. 52.

⁸⁸ Pesce C. 2014.

⁸⁹ See Vigneau C., *Legal Restrictions on Fixed-Term Work in EU Member States*. In: Vigneau C., Ahlberg K., Bercusson B., Bruun N. (eds.), *Fixed-Term Work in the EU: a European Agreement Against Discrimination and Abuse*, National Institut for Working Life, Stockholm, 1999, p. 185. Regarding the negotiations on fixed-term work see Ahlberg K., *The negotiations on Fixed-Term Work*. In: Vigneau C., Ahlberg K., Bercusson B., Bruun N. (eds.), *Fixed-Term Work in the EU: a European Agreement Against Discrimination and Abuse*, National Institut for Working Life, Stockholm, 1999, p. 13.

reflected, as it is well known, in the wording and in the "soft" contents of the Agreement⁹⁰: in particular Clause 5 assigns to the Member States the general objective of preventing and punishing abuse, while leaving open the issue of the means whereby they are to achieve this⁹¹. More precisely, Clause 5 leaves the Member States to decide, although with some limits, whether they should rely on one or more of the measures listed in that clause, or even on existing equivalent legal measures, while taking into account the needs of specific sectors and/or categories of workers, thus favouring the need to adapt the rules to the specific national situations: that choice of means involves that Clause 5 cannot have direct effect, because «it does not appear to be unconditional and sufficiently precise for individuals to be able to rely upon it before a national court»⁹².

One of the controversial features of the Agreement - still linked to its compromise nature - is that it does not contain any explicit provision requiring justification by objective reason for a first use of a fixed-term contract. There have consequently been debates as to whether the Directive imposes to Member States limits in the case of a worker engaged for a single fixed-term contract⁹³ to which an answer can be found in the EUCJ's case-law: its short statement on this matter in *Mangold*⁹⁴ - under which a single fixed-term contract is not within the scope of Clause 5.1., which relates solely to prevention of the misuse of successive fixed-term contracts - has been repeated on several occasions⁹⁵ and then combined with the clarification⁹⁶ that the scope of the Agreement as a whole (except Clause 5) is on the contrary not limited solely to workers who have entered into successive fixed-term contracts, but extended also to workers who have entered into a first or single fixed-term contract⁹⁶.

5.1. How can measures preventing misuse of successive fixed-term contracts be substantially effective and deterrent?

With regard to the abovementioned obligation imposed on Member States by Clause 5.1. in order to prevent abuse arising from the use of successive fixed-term contracts, the Court has repeatedly made clear what Member States are required to do: they have to adopt «one or more of

⁹⁰ See Zappalà L. 2008, p. 316. See also Murray J. 1999, p. 275, according to which in the Agreement there are only «the ghostly remains» of the Commission's earlier attempts to build a regulatory framework of temporary work.

⁹¹ *Adeneler*, para. 68; *Impact*, para. 70-71.

⁹² *Impact*, para. 79; see also para. 72-78.

⁹³ See e.g. Bercusson B., Bruun N. 1999, p. 92, who argued that Clause 5 supports the view that a requirement of justification is implicit in the Agreement; *contra* see Murray J. 1999. See also, among Italian scholars, Bellavista A. 2003, Zappalà L. 2008, where further citations, and Leccese V., *La compatibilità della nuova disciplina del contratto di lavoro a tempo determinato con la Direttiva n. 99/70, RGL, I, 2014, p. 710.*

⁹⁴ *Mangold*, para. 41-43, where the Court affirmed: «what it is sought to regulate is not therefore the first-time fixed-term contract but rather the repeated use of fixed-term contracts, which is considered open to abuse».

⁹⁵ See for example *Angelidaki*, para. 90; *Vino II*, para. 58-59; *Fiamingo*, para. 57.

⁹⁶ *Angelidaki*, para. 116, 120-121; so that, for instance, Clause 4 on equal treatment applies to all fixed-term workers.

the measures listed» in that clause⁹⁷ (i.e. relating to «objective reasons justifying the renewal of such contracts», «the maximum total duration of successive fixed-term employment contracts» and «the number of renewals of such contracts»), which are unequivocally considered as being «intended to be "equivalent"»⁹⁸, without there existing any suggestion of a hierarchy between them. The margin of appreciation of the Member States, however, «is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the Agreement»⁹⁹.

It is indeed in the name of this principle of effectiveness that the Court has read the key-terms which are used in connection with the anti-abuse clause but not specifically defined (namely «objective reasons», «successive contracts», «equivalent legal measures»), thus managing to impose quite important constraints to the States in the implementation of the Directive.

Beginning with the crucial notion of «objective reasons», it should be noted that the Court, from the leading-case *Adeneler* on, maintained that the need for an objective reason cannot receive a formal meaning¹⁰⁰: referring to the Agreement's aim of protecting workers against instability of employment, the Court held that this concept «must be understood as referring to precise and concrete circumstances characterising a given activity» which may result from «the presence of objective factors relating to the particular features of the activity concerned and to the conditions under which it is carried out» or from the «pursuit of a legitimate social-policy objective of a Member State»¹⁰¹. It also specified - as confirmed further on in the interpretation of the identical concept of «objective grounds» under Clause 4.1. - that the recourse to fixed-term contracts solely on the basis of a general provision of law, «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»¹⁰², thereby implying that there is a real risk that such contracts may be misused. The *Angelidaki* judgment, given 3 years after *Adeneler* (both arising from preliminary rulings regarding the Greek legislation on successive fixed-term contracts in the public sector), marked a step forward¹⁰³: on that occasion the Court clearly required a concrete check on the ability of national measures to prevent abuses. More specifically - in the case of a domestic legislation allowing fixed-term contracts to be concluded for the purposes

⁹⁷ See *Angelidaki*, para. 74, 151; *Kücüük*, para. 26; *Márquez Samohano*, para. 42; and Case C-50/13, *Papalia*, para. 18-19; *Fiamingo*, para. 56.

⁹⁸ *Impact*, at 76; *Angelidaki*, at 75; according to the Court the fact that under paragraph 7 of the General Considerations in the Agreement the signatory parties took the view that «the use of fixed-term employment contracts founded on objective reasons is a way to prevent abuse» is not enough to found such a hierarchy.

⁹⁹ See, e.g., *Adeneler*, para.82; *Angelidaki*, para. 155; *Huet*, para. 43; *Fiamingo*, para. 60.

¹⁰⁰ Vigneau C. 2007, p. 95.

¹⁰¹ *Adeneler*, at 69-73.

¹⁰² *Adeneler*, at 74.

¹⁰³ Corazza L. 2014, p. 14. See also Case C-180/04, *Vassallo*, at 41.

of meeting what are essentially temporary needs which may constitute in abstract terms objective reasons for their renewal - it held that it is down to Member States to ensure that clause 5.1. is complied with, by specifically determining that the national legislation on the renewal of successive fixed-term contracts for temporary needs «is not, in fact, being used to meet fixed and permanent needs»¹⁰⁴.

Again with reference to temporary needs of employers - and in particular to temporary replacements due to employee sick leave, maternity or parental leave at issue in the German case *Kücüik* - the Court of Justice gave a rather contradictory judgment in 2012¹⁰⁵. The EUCJ, on the one hand, argued that «the mere fact that fixed-term employment contracts are concluded in order to cover an employer's permanent or recurring need for replacement staff does not in itself suffice to rule out the possibility that each of those contracts, viewed individually, was concluded in order to ensure a temporary replacement»¹⁰⁶, showing doubtless a certain tolerance towards the repetition of contract renewals for replacement¹⁰⁷; on the other hand, the Court invited the referring judges to assess the circumstances surrounding these renewals, in particular taking into account the number and duration of successive fixed-term contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term contracts are not abused in practice by employers¹⁰⁸.

There exists - and this aspect should not be underestimated - a good margin of action for the national court, as illustrated by the far less tolerant answer of the referring court (in the case in point the *Bundesarbeitsgericht*) once the preliminary ruling ended: the German Supreme Court, in the resumption judgment, identified a contractual abuse as fraud and referred it to the District Court¹⁰⁹.

This quite ambiguous line of reasoning on the part of the EUCJ was better developed in *Mascolo*, which dealt with the compatibility with Directive 1999/70 of the Italian legislation on fixed-term contracts for the teaching and administrative staff of schools. Even there the emphasis was laid on the need to carefully assess the consistency of the actual application of the objective reason envisaged with the purposes of the Agreement and on the requirement that it has practical

¹⁰⁴ *Angelidaki*, para. 106; see Leccese V. 2014, p. 714.

¹⁰⁵ See Laulom S. 2013, p. 16; Mazuyer E. 2014, p. 345; Robin-Olivier S., *Politique sociale de l'Union Européenne, RTDE*, 2012, p. 486.

¹⁰⁶ *Kücüik*, para. 38; the Court added that «the mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of indefinite duration does not mean that an employer who decides to use fixed-term contracts to address temporary staffing shortages, even where those shortages are recurring or even permanent, is acting in an abusive manner, contrary to clause 5.1.» (para. 50).

¹⁰⁷ It should be noted that Ms. Küçük was employed by the Land Nordrhein-Westfalen under a total of 13 fixed-term contracts during a lapse of time 12 years.

¹⁰⁸ CJEU *Kücüik*, at 40.

¹⁰⁹ *Bundesarbeitsgericht*, 18.07.2012, n. 7 AZR 783/10. See Rémy P., *La protection des travailleurs "atypiques" est-elle en régression? Le context national, RDT*, 2012, p. 654.

effect¹¹⁰: and this time the Court commits to make a "prediction" of non-compliance with EU law¹¹¹.

To provide one final example, even though many others are possible, it should be noted that the same stress can be found in *Márquez Samohano*, concerning the Spanish rules on recruiting temporary and part-time associate lecturers by Universities, where the Court held that those rules - subject to the verification which the referring court must carry out - «lay down the precise and concrete circumstances in which fixed-term employment contracts may be concluded or renewed for the purpose of the employment of associate lecturers and that they respond to a genuine need, [...] consisting in enriching university teaching in specific areas by the experience of recognised specialists»¹¹². A focal point of the Court's argument here would be the diversity of tasks performed by fixed-term lecturers compared to those of the ordinary teachers: the Court indeed underlined that temporary contracts «cannot be renewed for the purpose of the performance in a fixed and permanent manner, even on a part-time basis, of teaching tasks which normally come under the activity of the ordinary teaching staff», giving to all the authorities of the Member State concerned the task of ascertaining in actual fact that the renewal of successive fixed-term contracts is intended to cover temporary needs and that the provision at issue is not, in fact, being used to meet fixed and permanent needs of the universities in terms of employment of teaching staff¹¹³.

Despite some examples, like *Küçük*, of a more "sympathetic" attitude of the Court towards a flexible and prolonged use of this kind of contract by Member States, such instances could not suffice to call into question the basically strict standard of judicial scrutiny (albeit certainly improvable) on this central element of the anti-abuse clause, which is accompanied by an interpretation - once again teleologically inspired - of a second key concept of that clause, namely the notion of «successive contracts»¹¹⁴, that is with good reason deemed «decisive for the definition of the very scope of the national provisions intended to implement the Framework Agreement»¹¹⁵.

In *Adeneler* the Court - at the same time as affirming that a national provision under which only fixed-term contracts separated by a period of time shorter than or equal to 20 days are regarded

¹¹⁰ *Mascolo*, para. 99. In this case the renewal of successive fixed-term contracts was permitted, pending the outcome of competitive selection procedures for the recruitment of tenured staff of schools administered by the State, to fill posts, vacant and unfilled, of teachers and administrative, technical and auxiliary staff, without stating a definite period for the completion of these procedures and while excluding any possibility for those teachers and staff of obtaining compensation for any damage suffered on account of such a renewal.

¹¹¹ *Mascolo*, para. 108. Equally clear, if not more, is the position of the Advocate General (para. 72-81). On this judgment see Aimo M., *I precari della scuola tra vincoli europei e mancanze del legislatore domestico*, WP C.S.D.L.E "Massimo D'Antona".IT-240, 2015.

¹¹² *Marqu ez Samohano*, at 49-50.

¹¹³ *Marqu ez Samohano*, at 58-59. See *Leccese V.* 2014, p. 713.

¹¹⁴ Under Clause 5.2., «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"».

¹¹⁵ *Adeneler*, at 83.

as "successive" «must be considered to be such as to compromise the object, the aim and the practical effect» of the Agreement - developed the fundamental reasoning according to which an inflexible and restrictive definition of that notion «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»¹¹⁶.

More recently, in 2014, the Court again addressed the same issue in *Fiamingo*: this time dealing with the Italian legislation on workers employed as seafarers, whereby only fixed-term contracts separated by a time lapse of less than or equal to 60 days are considered to be "successive", the Court maintained that «such a lapse of time may generally be considered to be sufficient to interrupt any existing employment relationship and to have the effect that any contract signed after that time is not considered to be successive», adding significantly that «it would seem difficult for an employer, who has permanent and lasting requirements, to circumvent the protection against abuse by allowing a period of about two months to elapse following the end of every fixed-term employment contract»¹¹⁷. The Court then emphasized once more the national judge's task of making sure that «the conditions of application and the effective implementation of that legislation result in a measure that is adequate to prevent and punish the misuse of successive fixed-term employment contracts»¹¹⁸: a task that domestic judges have to perform in accordance with the same tested "indicators" already provided to the referring judges to fulfill their assessment on the existence of objective reasons justifying the renewal of successive contracts¹¹⁹. Even in this case, as in *Küçük*, the referring court (the Italian Corte di Cassazione) responded with quite a strict judgment, submitting that the presence of a legislation in abstract terms capable of preventing abuse does not exclude the fact that, concretely, the exercise of the power to hire fixed-term workers can integrate fraud of the law, and then referring this assessment to the court dealing with the substance of the case¹²⁰.

It should be underlined that an important function in evaluating the actual adequacy of the national legislation implementing the Agreement is acknowledged by the Court in the nature (temporary or permanent) of the needs of the undertaking covered by the fixed-term contracts¹²¹: the impermanent nature of those needs is important not only, more obviously, for assessing the

¹¹⁶ *Adeneler*, at 84-86. See Zappalà L. 2006, p. 442.

¹¹⁷ *Fiamingo*, at 71. The Court had already adopted this line of reasoning in Case C-364/07, *Vassilakis*, para. 115 (in connection of a time lapse of less than or equal to 3 months).

¹¹⁸ *Fiamingo*, at 74.

¹¹⁹ *Fiamingo*, at 72-73.

¹²⁰ Corte di Cassazione, 8.01.2015, n. 62, www.dejure.it. The Court assessing facts has been required to take into account, in particular, the number of fixed-term contracts, the total of the timeframe in which they have followed and any other relevant factual circumstance.

¹²¹ *Leccese V.* 2014, p. 716. See Alessi C., *Flessibilità del lavoro e potere organizzativo*, Giappichelli, Torino, 2012, p. 179.

existence of «objective reasons», but also for the interpretation, as outlined above, of the notion of «successive contracts», where the Court argued that an excessively short break between two fixed-term contracts, like that at issue in *Adeneler*, presumably indicates that there is a lasting and permanent need to cover and this does not justify the choice of the national legislation to establish such a short time lapse to identify the conditions under which fixed-term contracts have to be considered "successive" (as well as a longer break, like the one in *Fiamingo*, indicates the opposite presumption).

To sum up, all these judgments interpreting Clause 5 appear to point to the willingness of the Court, on the whole, to render as effective as possible provisions which are not detailed and on paper leave very broad freedom of choice to Member States¹²²: whatever the measure or the measures to prevent abuse chosen from those three listed in Clause 5.1. or whatever the equivalent legal measure kept at a national level¹²³, what really matters is the actual application of these limits in the Member States and their practical ability to prevent the misuse of successive fixed-term contracts¹²⁴. That is the main reason why the role of national courts' "replies" to the European judgments and orders is becoming more and more central, since they are required to make a case-by-case examination of the effectiveness of EU law, taking as guidance principles and criteria specifically mentioned by the Court.

5.2. The guarantee of effective remedies in case of breach of the rules

The general principle of law *ubi ius ibi remedium*, that in EU terms might be read as meaning that the existence of a right under Union law is linked to the existence of a remedy to ensure its enforcement (as stated, after the Treaty of Lisbon, by Article 19 TEU), has been clarified by the Court of Justice on several occasions. The Court affirmed, at the outset, that the freedom to choose the ways and means of ensuring that a directive is implemented does not affect the obligation imposed on Member States «to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it pursues»¹²⁵ and

¹²² Vigneau C. 2007, p. 97.

¹²³ As outlined by Bercusson B., Bruun N. 1999, p. 117, «the question is not merely whether legal measures exist, but whether they suffice to prevent abuse», specifying significantly that «equivalence sought is not that to specific measures, but to the purpose to be attained»; according to the Court the expression «equivalent legal measures» is intended to cover any national legal measure whose purpose is to prevent effectively the misuse of successive fixed-term employment contracts (*Angelidaki*, at 76).

¹²⁴ *Mascolo*, para. 112; *Fiamingo*, para. 61.

¹²⁵ Case C-14/83, *von Colson*, para. 15; *Adeneler*, para. 93. See Roccella M., *La Corte di giustizia e il diritto del lavoro*, Giappichelli, Torino, 1997, p. 195.

stressed that «the principle of effective legal protection is a general principle of EU law recognised, moreover, in Article 47 of the Charter of Fundamental Rights of the European Union»¹²⁶.

As regards the Fixed-Term Work Agreement, which does not lay down any specific penalties applicable in case of misuse of fixed-term contracts, the adoption of appropriate sanctions is left to the national laws, which have opted for a great variety of solutions: conversion of the contract into an open-ended contract (automatically or after a declaratory statement from a court or other competent body) and/or damages and also, in some Member States, administrative and/or penal sanctions¹²⁷. As the Court has frequently observed, conversion of fixed-term contracts into contracts of indefinite duration is only one of the measures that a Member State could adopt to punish abuse. While it is true that the Agreement does not lay down a general obligation of Member States to establish this exact remedy¹²⁸, it is nonetheless true that the express mention in Clause 5 of the only conversion measure would appear to suggest that this is a remedy to be considered as the standard of protection: a sanction which is not compulsory but which is *per se* effective in punishing abuses.

Nevertheless, this discretion is not unlimited but is firstly subject to the key principle of effectiveness. As explained by the Court of Justice before in *Adeneler* and subsequently in many judgments, sanctions adopted at national level «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»¹²⁹: more specifically, they «must 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)»¹³⁰. Besides, as the Court has repeatedly recalled, where abuse of successive fixed-term contracts has 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»¹³¹ of the breach of law.

Many proceedings that have given the Court the concrete opportunity of making statements on remedies for violation of Union law related to the Italian legislation, which, in the public sector only, prohibits a succession of fixed-term contracts from being converted into an indefinite

¹²⁶ *Gavieiro*, at 75; *Impact*, at 43.

¹²⁷ See Commission Staff Working Document, *Report by the Commission services on the implementation of COUNCIL Directive, 1999/70/EC OF 28 JUNE 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (EU-15) Brussels*, 11.08.2006, SEC(2006) 1074.

¹²⁸ As it is confirmed by the wording of Clause 5.2.b which merely provides that the Member States are, «where appropriate», to determine under what conditions fixed-term employment contracts are to be «deemed to be contracts of indefinite duration»; see *Adeneler*, at 91; *Marrosu*, at 47; *Fiamingo*, at 65; Case C-3/10, *Affatato*, at 38-39.

¹²⁹ *Adeneler*, at 94; *Fiamingo*, at 62; *Mascolo*, at 77.

¹³⁰ *Adeneler*, at 95; *Marrosu*, at 52.

¹³¹ *Adeneler*, at 102; *Marrosu*, at 53; *Angelidaki*, at 160; see also *Affatato*, at 47, *Papalia*, at 22.

employment contract but provides compensation for damage incurred as a result of working in breach of binding provisions: it is worth tracing the path which the Court has taken in this context over the years.

In *Marrosu* and in *Vassallo*, delivered in 2006, the Court held firstly that, in order for a national legislation which only in the public sector prohibits the conversion measure to be regarded as compatible with the Agreement, «the domestic law of the Member State concerned must include, in that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts»¹³². Secondly, the Court argued that national legislation such as that at issue «appears, at first sight, to satisfy the [EU] requirements» in the field of sanctions and remedies, subject to the due practical examination on the adequacy of the penalty by the national courts¹³³. This solution has been viewed as «not satisfactory», because the Court «looked only at the surface of the questions, [...] disregarding the problems connected to the burden of proof of the damage» suffered by the workers in question¹³⁴. Since national judges, in the performance of their assessment, have taken conflicting positions, ambiguous and therefore uncertain about the extent of the compensation for damages in cases of abuse in the public sector, the law in practice has not wholly met the EU requirements, so that the European consistency *prima facie* of the compensation scheme - achieved with *Marrosu* and *Vassallo* and confirmed in order *Affatato*¹³⁵ - left open the delicate issue of its consistency in concrete.

A different solution, which appears to be more satisfactory, was provided by the Court in 2013 with the *Papalia* order, concerning the compensation to be acknowledged to a worker recruited by a public body on successive fixed-term contracts for a period of 30 years: here the Court took the domestic dispute seriously and assessed this ruling in the light of the complex interpretation of the national law given by the referring court, according to which for a public sector worker it would be impossible in practice, or excessively difficult, to provide the proof required by the law in order to obtain such compensation for damages, being required to «prove that he was forced to forego better work opportunities»¹³⁶ and to prove the loss of profits. The Court has in essence assessed as conflicting with EU law a burden of proof system that constitutes a concrete obstacle for the workers to the exercise of the rights conferred by that law, in the name of the principle of effectiveness and more specifically in terms of effective judicial protection. We should

¹³² *Marrosu*, at 49; *Adeneler*, at 105.

¹³³ *Marrosu*, at 55-56.

¹³⁴ Zappalà L. 2006, p. 444. See also Roccella M., Treu T., *Diritto del lavoro della Comunità europea*, Cedam, Padova, 2012, p. 264.

¹³⁵ *Affatato*, at 49-50, 60.

¹³⁶ *Papalia*, at 26.

find out in the near future how national judges - again playing a fundamental role in the enforcement of EU law - will react to this order¹³⁷.

Through this jurisprudence, in conclusion, the Court of Justice has progressively shifted the emphasis onto the requirement of effectiveness of remedies, so that the principle of effective judicial protection can be seen as a further relevant component - for present purposes - of the European model for fixed-term work, in defense of the enforcement of EU law¹³⁸.

Conclusions

In the light of what has been argued in this article, it can be maintained that the principle of effectiveness is ubiquitous and transversal, a kind of *fil rouge*, in all the case-law analysed: the Court of Justice has elevated that principle to the extent that it has become an interpretative key to the rights and remedies conferred by the Directive in order to assess the adequacy of its implementation in practice by domestic laws¹³⁹. The elements which form what has been outlined as a European model for fixed-term work have emerged from this already quite large case-law: all these components are first deemed functional to ensure the effectiveness of the Directive and this model may prove useful for evaluating the conformity of national laws to the EU law. Without underestimating the importance of the core of the model - represented by a strong non-discrimination principle - the Court has placed a gradually greater emphasis on the anti-abuse rule of the Agreement, as a specific expression of the general principle of prohibiting abuse of rights. These fundamental protective rules for fixed-term workers, even with the limitations and ambiguities previously discussed, have been linked by the Court, on the one hand, to a broad entitlement of the rights conferred by the Agreement and, on the other hand, from a sanctioning point of view, to a dual requirement (of equivalence and above all of effectiveness) that national remedies must meet in concrete to be consistent with EU law.

¹³⁷ See Corte di Cassazione 30.12.2014, no. 27481, www.dejure.it, where the need to interpret the compensation remedy in accordance with European law - in particular with *Papalia* order - motivated the judge's decision to set up the compensation as a kind of punitive damage, to be paid by the employer using as a general criterion to calculate the compensation amount the one indicated by Article 8 Law no. 604/1966 (i.e. an amount between 2.5 and 6 months actual full pay).

¹³⁸ This essay will not analyse the relevant profile of the so-called Non Regression Clause (Clause 8.3. of the Agreement), on whose protective function the Court has not focused (at least until now); see Aimo M. 2012; Corazza L., Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-regression Clauses in the Era of Flexicurity, *ELJ*, Volume 17, Issue 3, 2011, p. 388.

¹³⁹ See De Simone G. 2014, p. 506, who underlines that the key principle is not always regarded by the Court with the same rigour, making some interesting case-law examples.

With a view to a possible further development of the protective instruments which can be deployed in favour of fixed-term workers, there are two more aspects concerning the non-discrimination principle that are, in conclusion, worth underlining.

Firstly, we must recall that the Court of Justice, while interpreting the equal treatment clause of the Fixed-Term Work Agreement, has borrowed some basic legal concepts from general EU anti-discrimination law and case-law¹⁴⁰, such as the definition of «pay», the test for justifying discrimination etc. On many occasions the Court transferred principles of anti-discrimination law into the interpretation of that Agreement: the connections drawn by the Court between the equal treatment component of the Agreement and the general principle of equality in EU law indicate that the Court viewed this part of the Directive in particular «as demanding stronger orientation towards worker protection, with stricter controls over employer flexibility»¹⁴¹. Focusing on the language used by the Court, as discussed previously, the principle of equal treatment has been described as «a rule of EU social law of particular importance», «a principle of Community social law» and «a fundamental objective»¹⁴². Yet it should be noted that the Court, with some caution, has avoided any explicit reference to equal treatment as a fundamental social right and we must take into account the fact that existing European and international sources did not expressly recognise equality of treatment between standard and atypical workers as a fundamental social right. Despite this ambivalence, and in the light of the important and not obvious results already obtained by the case-law on this matter, which are merging as increasingly aligned to those achieved in the general anti-discrimination field, one might wonder whether (and hope that) a further and more creative evolution of the fixed-term work case-law in the wake of the general anti-discrimination case-law could occur; and it would be certainly useful in improving the practical effectiveness of the protection of non-standard workers¹⁴³.

Secondly, as mentioned above, the possibility to invoke the indirect discrimination argument if a fixed-term worker falls within a disadvantaged group on personal grounds, protected by anti-discrimination rules, should be also assessed in some circumstances: since, for example, young workers are over-represented in temporary employment, the prohibition of age discrimination under the Framework Equality Directive (Directive 2000/78) might also lead to a requirement to provide equal treatment to fixed-term workers, according to the same mechanism used, in the 1980s and 1990s, by a kind of «oblique» EUCJ case-law¹⁴⁴ which, as it is well known, gave significant results

¹⁴⁰ Peers S. 2013, p. 54; Bell M. 2011, p. 161.

¹⁴¹ Bell M. 2012, p. 46.

¹⁴² See note 29.

¹⁴³ Bell M. 2012, p. 47. See also Peers S., 2013, p. 56.

¹⁴⁴ See this definition in Roccella M. 1997, p. 25.

in terms of workers' protection (above all women's protection)¹⁴⁵. This possibility has been recently proposed in a complaint addressed to the European Commission by the Italian General Federation of Labour (CGIL), calling for the initiation of an infringement procedure against Italy for having adopted a reform on fixed-term work (under Law n. 78/2014, called *Jobs Act I*) conflicting, according to the Trade Union, not only with Directive 1999/70, but also with EU gender discrimination legislation and with the prohibition of age discrimination under Directive 2000/78.

It is precisely in connection with the 2014-2015 Italian reform that some final and brief considerations (or better questions) will now be focused: in the light of the model for fixed-term work that can now be put to the test, we might ask whether the new Italian regulation fulfils its commitments to the EU law.

The Italian reform - to put it very simply - has completely abolished, on the one hand, the historical general principle that the legitimate use of a fixed-term contract required an objective reason and, on the other hand, has introduced a new and more flexible regime for contract extensions, as well as limits to the use of successive fixed-term contracts (to the duration and to the proportion of fixed-term workers) which are, however, highly permeable, broadly modifiable and full of exceptions (see Article 19 ff. d.lgs. 81/2015).

Focusing on the domestic measures to prevent the misuse of successive fixed-term contracts, it is more than legitimate to call into question - as many scholars are starting to do at this time - its effectiveness, and consequently its compatibility with the Agreement, especially with regard to the elimination of the objective reasons requirement and in view of the practical application of the new rules through collective bargaining¹⁴⁶. After the reform, the Italian commitment to the Agreement should be fulfilled by means of the provision that fixes an overall maximum period of 36 months (including any extensions and renewals) during which workers can be entered into fixed-term contracts for equivalent tasks; yet this limitation is provided «without prejudice to various provisions of the collective agreements concluded nationally, regionally or by individual undertakings with the most representative national trade union organisations», meaning that collective bargaining could change (increasing or decreasing the duration) or even totally remove the only measure left by the law to prevent abuse.

The exclusion of the need to link fixed-term contracts to an objective reason certainly raises well-founded doubts regarding the practical capacity of the existing "soft" limitation to the maximum total duration of successive fixed-term contracts to prevent their misuse. Some questions indeed arise, including the following: we might wonder if the possibility admitted by the domestic

¹⁴⁵ See Roccella M., Treu T. 2012, p. 248.

¹⁴⁶ See some interesting examples in www.dirittisocialitrentino.it.

legislation to remove this maximum period through collective bargaining could already call into question the compatibility of the new regulatory balance with European Union law. Could we argue that, in the name of the principle of effectiveness, the Agreement may impose an obligation to establish limits to the derogatory power granted to the collective agreements? An answer to this and to other doubts about the compatibility of the new Italian rules with EU law should probably come soon from the Court of Justice, which could either be appointed by the EU Commission to decide upon the infringement procedure following the abovementioned CGIL complaint, or be requested for a preliminary ruling on this matter by a referring judge. The already intense dialogue between Luxembourg and the Italian courts on this matter could be further enriched and the Court of Justice, in compliance with the model outlined above, will certainly be guided by the key-principle of effectiveness, which implies the fundamental national judges' task to always make sure that the conditions of application and the effective implementation of the domestic legislation result in a measure - concluding, as we started, by borrowing the Court's words - «that is adequate to prevent and punish the misuse of successive fixed-term employment contracts»¹⁴⁷.

¹⁴⁷ *Fiamingo*, para. 74. The test to which the Court will probably submit the new Italian legislation on fixed-term work may prove quite difficult to pass: see De Simone G. 2014, p. 502; Leccese V. 2014, p. 718; Pizzoferrato A., *Il contratto a termine dopo il Jobs Act*. In: Carinci F. (eds.), *La politica del lavoro del Governo Renzi*, *Adapt Labour Studies*, e-book series, no. 40, 2015, p. 219.