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**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)

## 1. INTRODUCTION

Fixed-term work is increasing in Europe. During the 1990s, the share of employed people with contracts of limited duration rose in almost all Member States. In 2004 the average EU share rose to 13.7 % (from 13 % in the previous three years). However, the proportion of fixed-term workers in individual Member States varies widely, as it ranges from a few percent (in Estonia, Malta, Ireland, Luxembourg, Slovakia or the UK) to well above 30 % in Spain and above 20 % in Poland and Portugal. There are also great variations between different groups and sectors on the national labour markets: Fixed-term work is for example heavily concentrated among young people (close to 40 % for individuals aged 15-24). It also appears that the prevalence of fixed-term work is highest for those with the lowest education level and that it is more important in the primary and construction sectors than in manufacturing. While in the majority of the countries covered by this report there is a slightly higher incidence of fixed-term contracts among women, the gender dimension of fixed-term work is weak. [1]

Fixed-term work contributes to making labour markets more flexible. It provides a buffer for cyclical fluctuations of demand, allowing companies to adjust employment levels without incurring into high firing costs. Fixed-term work also allows companies to reap market opportunities by engaging into projects of short duration without bearing disproportionate personnel costs. This is especially important in those labour markets where permanent employment is protected by strict regulations, and flexibilisation has been introduced at the margin. For workers fixed-term work can provide a bridge into employment and an opportunity to gain experience and skills.

However, research has pointed out a number of risks associated with the use of fixed-term work, especially for workers but also for employers. For instance, fixed-term workers are subject to higher turnover, earn lower wages in average and receive less training. This can lead companies which resort systematically to fixed-term contracts to under-invest in human resources and therefore impair their competitiveness over the long-term. Moreover, excessive career instability, especially in the early life of young adults, can be associated at the macro level to the lowering of consumption propensity and of the fertility rate. Available statistical evidence shows that one third of those in temporary employment find a stable job after one year. However, even after six years, the longest time horizon allowed by available data, around 16 % were still in the same situation and, more worryingly, 20 % had moved out of employment.[2]

Setting the right balance between the need to preserve the flexibility and the job creating dynamism generated by fixed-term work and the need to enhance labour market prospects and security for fixed-term workers, has been a matter for continuous debate and policy making at the Community level. In 1991, Directive 91/383/EEC was adopted, in order to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary relationship. Following further initiatives at the Community-level

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1 See 'Employment in Europe 2004. Recent Trends and Prospects. European Commission, 2004', pp. 30-31, 77 and 181 and 'Employment in Europe 2005. Recent Trends and Prospects, European Commission', pp 39-41, 102-106. Both reports are available at the Europa web-site (currently under the address http://europa.eu.int/comm/employment_social/employment analysis/ index en.htm)

2 Ibid.

during the 1990s, the general cross-industry organisations, the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP), concluded on 18 March 1999 a 'framework agreement on fixed-term work'. In the preamble to the agreement the parties recognise that 'contracts of an indefinite duration are, and will continue to be, the general form of employment relationship' but also that 'fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers'. The framework agreement, which applies to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise, has two main purposes: a) to improve the quality of fixed-term work by ensuring the principle of non-discrimination between fixed-term workers and comparable permanent workers, and b) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. Against this background the framework agreement sets out provisions on the principle of non-discrimination between fixed-term workers and comparable permanent workers and on minimum requirements as regards measures to prevent abuse of successive fixed-term contracts, but also on information and consultation and employment opportunities, all of which are quoted and dealt with further in Section 3 of this report. The Social Partners forwarded their agreement to the Commission with the request that it should be made binding under the procedure foreseen in Article 139 (2) of the EC-Treaty.

On 28 June 1999 the Council adopted the Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. According to Article 2 of the Directive the final date for transposition in the Member States was 10 July 2001, with the possibility of an extension under certain conditions until 10 July 2002.

This report gives an overview of the transposition of the Directive in the 15 States who were members of the European Union before 1 May 2004. It was initiated by the commissioning of a series of six studies and one synthesis report by independent experts. The synthesis report was finalised in October 2004. On the basis of these studies and other available information the services prepared a draft report during 2005, which received comments from Member States and the Social Partners. The draft report was also presented and discussed at the meeting of the Group of Directors General for Industrial Relations that was held in Vienna on 25 November 2005. The consultation process was closed on 10 February 2006.

The implementation of the Directive in EU-10 will be dealt with in another document, to be released in 2007. Finally, it should be underlined that what is said in this Commission services report does not prejudge what position the Commission will take in verifying the compatibility of legislation and practice in individual Member States with respect to Directive 1999/70/EC.

## 2. NATIONAL LEGISLATION TRANSPOSING DIRECTIVE 1999/70/EC ON FIXED-TERM WORK

In most Member States more or less detailed legal provisions on fixed-term work were already in place, but practically all Member States adopted new legislation in order to transpose the Directive, notably the principle of non-discrimination.

The process of transposition however seems to have caused more difficulties than foreseen; only a minority of the Member States implemented the Directive before 10 July 2001, and some did not transpose the Directive until after the final deadline on 10 July 2002.

**Belgium**

In order to transpose the principle of non-discrimination Belgium adopted new legislation in June 2002 *(Loi du 5 Juin 2002 sur le principe de non-discrimination en faveur des travailleurs avec un contrat de travail à durée déterminée/Wet betreffende het non-discriminatiebeginsel ten voordele van werknemers met een arbeidsovereenkomst voor bepaalde tijd).* Other provisions on fixed-term contracts were already in place, notably in Employment Contract Act of 3 July 1978 and the Temporary Work and Agency Act of 24 July 1987.

**Denmark**

In order to transpose the Directive (fill the gaps not covered by collective agreements) Denmark adopted in May 2003 a new Act on Employment of Limited Duration *(Lov nr. 370 af 28. maj 2003 om tidsbegrænset ansættelse).* Amendments were also made to the Act on White-Collar Workers from 1938 (*Funktionærsloven).*

**Germany**

In order to transpose the Directive new legislation was introduced on 21 December 2000 *(Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen, TzBfG).* Amendments to this legislation have been made by the so called Hartz Laws, notably the legislation adopted on 23 December 2002.

**Greece**

Greece adopted Presidential Decree 81/2003 of 2 April 2003, which later was amended by the Presidential Decree 180/2004 of 23 August 2004 (for the private sector). Greece also adopted Presidential Decree 164/2004 of 19 July 2004 (for the public sector).

**Spain**

Spain amended the Workers' Statute *(Estatuto de los Trabajadores, ET)* by Royal Legislative Decrees 5/2001 and 12/2001. There are also several other provisions relating to fixed-term work.

**France**

In order to transpose Clause 6 of the Framework Agreement (information on vacant posts) France introduced legislation on 17 January 2002 (*Loi de modernisation sociale*). Other

provisions on fixed-term work were already in place, notably in the Labour Code (*code du travail*).

**Ireland**

Ireland adopted new legislation, the Protection of Employees (Fixed-Term Work) Act 2003.

**Italy**

Italy adopted a Legislative Decree in September 2001 concerning the implementation of the Directive (*Decreto Legislativo 6 settembre 2001 n. 368. Attuazione della direttiva 1999/70CE relativa all'accordo quadro sul lavoro determinato concluso dall'UNICE dal CEEP e dal CES*).

**Luxembourg**

Luxembourg did not adopt new legislation to transpose the Directive. Provisions on fixed-term work were already in place, notably in the Act on Contracts of Employment of 24 May 1989 (*Loi sur le contrat de travail*). This legislation has later been amended in certain respects as regards teachers, but this legislation has not yet been notified to the Commission.

**Netherlands**

In order to transpose the provisions in the Directive on non-discrimination and on information and employment opportunities the Netherlands adopted an Act in November 2002 (*Wet van 7 november 2002 tot uitvoering van de richtlijn 1999/70/EG van de Raad van de Europese Unie van 28 juni 1999 betreffende de door het EVV, de UNICE en het CEEP gesloten raamovereenkomst inzake arbeidsovereenkomsten voor bepaalde tijd*). Other rules on fixed-term work were already in place, notably in the Civil Code (*Burgerlijk Wetboek, BW)*.

**Austria**

In order to transpose the principle of non-discrimination amendments were made to the Act on Employment Contracts *(Arbeitsvertragsrechts-Anpassungsgestz, AVRAG)*. Other provisions on fixed-term work were already in place, i.a. in the Civil Code (*Allgemeines bürgerliches Gesetzbuch, ABGB*).

**Portugal**

The provisions transposing the Directive are found mainly in the new Labour Code *(Código do Trabalho)* adopted on 27 August 2003.

**Finland**

The provisions transposing the Directive are found mainly in the Employment Contracts Act, adopted on 26 January 2001 *(Työsopimuslaki/Arbetsavtalslag)*.

**Sweden**

In order to transpose the principle of non-discrimination Sweden adopted new legislation in July 2002 *(lagen om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning)*. Other provisions on fixed-term contracts were

already in place in other labour law legislation, notably the Employment Protection Act of 1982 (*lagen om anställningsskydd, LAS*).

**United Kingdom**

The UK adopted the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (two separate instruments in Great Britain and Northern Ireland both adopted in 2002 and one instrument in Gibraltar adopted in 2003).

## 3. ANALYSIS OF THE TRANSPOSITION MEASURES

### 3.1. Clause 1: Purpose

**The purpose of this framework agreement is to:**

**(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;**

**(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.**

With few exceptions the Member States do not refer in their transposition instruments to the purpose of the Framework Agreement. These objectives are however often treated in the preparatory works or other similar documents.

### 3.2. Clause 2: Scope

**1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.**

**2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:**

**(a) initial vocational training and apprenticeship schemes;**

**(b) employment contracts and working relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.**

The scope of national labour law as well as the status of those who work in the public service varies considerably between the Member States. Some Member States have given the instruments of transposition a wide scope of application whereas others have chosen to limit the personal scope in accordance with the concepts used in national law. Some Member States have covered or have the intention to cover also workers in the public service even if they are not considered as employees for other purposes.

Many Member States have special regulations as regards the working and employment relationships referred to in Clause 2.2. In some Member States there are also special regulations pertaining to other special types of contracts.

The Framework Agreement does not cover fixed-term workers placed by a temporary work agency at the disposition of a user enterprise. Accordingly, most Member States have excluded temporary agency workers from the scope of the implementing legislation.

#### *3.2.1. Belgium*

The Belgian legislation on fixed-term work applies to workers in the private as well as in the public sector.

Certain types of contracts referred to in Clause 2.2 have been excluded from the scope of the Act of 5 June 2002 introducing the principle of non-discrimination.

*3.2.2. Denmark*

The new Act of 2003 applies to workers who do not already benefit from rights in collective agreements that correspond with the minimum requirements laid down in the Directive. The concept of worker is defined in Section 3 of the new Act according to the generally applied concept in Danish labour law.

The types of work referred to in Clause 2.2 of the Framework Agreement are explicitly excluded from the scope of the Act. It is also possible for the Minister of Defence, after consultation with the social partners, to exclude military personnel in active duty.

*3.2.3. Germany*

The German legislation (*TzBfG*) applies to working relationships of private law as well as public law, except for statutory personnel (civil servants).

Specific legal provisions govern the employment relationships aimed at in Clause 2.2 of the Framework Agreement.

*3.2.4. Greece*

The Greek Presidential Decrees (for the private and the public sectors) cover contracts of employment and working relationships, based on the concept of 'master and servant'.

Greece has used the possibility to exclude vocational training relationships and apprenticeship contracts or relationships, and employment contracts or relationships concluded as part of a special programme of training, integration and vocational retraining.

*3.2.5. Spain*

Article 15 of the Workers' Statute (*ET*) applies to fixed-term contracts directly concluded between an employer and a worker and covers contracts in the private as well as the public sector. Certain labour relationships are covered by special legal schemes, such as contracts for professional sportsmen, top executives, family home services, artists in public shows, commercial mediators and convicts in penitentiary institutions. There are also other labour relationships, subject to different rules, such as teachers of religion, junior house doctors and university teachers. According to case law the principle of non-discrimination applies also to other contracts than those identified in Article 15 *ET*.

The Spanish legislation does not contain any explicit references to the working relationships referred to in Clause 2.2.

*3.2.6. France*

Fixed-term workers are covered by the protective provisions of the Labour Code, in so far as they have an employment contract.

Contractual staff in the public service in France has a hybrid status. Specific regulatory provisions, the general statute of the public service and the general principles of law are

applied, but not the Labour Code. However, protection has been extended by case law. Furthermore, France has recently adopted legislation which introduces limits on the duration and numbers of fixed-term contracts in the public sector (*la loi n° 2005-843 du 26 juillet 2005 portant diverses mesures de transposition du droit communautaire à la function publique*).

France did not make explicit use of the option to exclude the working relationships mentioned in Clause 2.2 of the Framework Agreement, although there are numerous types of fixed-term contracts designed to promote training and employment (contracts of qualification, contracts of adaptation to employment, youth-contracts, contracts with foreigners who come to France with a view to acquire a additional vocational training etc.).

*3.2.7. Ireland*

The Irish Act transposing the Directive applies to fixed-term 'employees', which for the purposes of the Act include various public service officials, including civil servants, but not members of the Defence Forces.

Ireland made use of the option provided for in Clause 2.2 to exclude people in training or apprenticeship.

*3.2.8. Italy*

The Legislative Decree 368/2001 refers to contracts for subordinate work. Certain types of contracts are not covered by the Decree (contracts in the agricultural sector and contracts with companies involved in certain trade of fruit and vegetables, certain short term contracts in tourism and catering and, as regards certain matters, contracts with managerial staff). Employees in the public sector are covered by special rules in Legislative Decree 165/2001 which excludes the conversion of fixed-term contracts into permanent contracts, without prejudice to other sanctions.

Italy has used the option in Clause 2.2 of the Framework Agreement and excluded work/training contracts and apprenticeship contracts and relationships.

*3.2.9. Luxembourg*

The fixed-term contract is regarded as a hire of service and work within the meaning of Article 1779 of the Civil Code and is governed by the provisions of the Act on Contracts of Employment of 24 May 1989.

The scope of the Act of 1989 covers also fixed-term workers in the public service, excluding civil servants. Thus, fixed-term contracts concluded with the state or a local authority are not excluded from the scope of the Act. The principle of equal treatment applies generally to all fixed-term contracts.

The Act of 1989 does not directly exclude the types of contracts mentioned in Clause 2.2, but there are specific provisions on such contracts.

*3.2.10. Netherlands*

The Act of 2002 applies to any private law working relationship, which excludes workers under public law contracts, but covers private law working relationships also beyond the scope of employment contracts, such as home-work or self-employed persons.

Specific rules have been adopted as regards workers under public law contracts, which entered into force on 1 October 2004.

The Netherlands did not make use of the faculty provided for in Clause 2.2.

*3.2.11. Austria*

The scope of the *AVRAG* is limited to private law contracts. Provisions on fixed-term contracts for officials are laid down in the Act on Contractual Public Servants of 1948 *(Vertragsbedienstetengesetzes, VBG)*, amended by the Act No 130/2003.

*AVRAG* covers training contracts or apprenticeship systems in as far as they are based on private law working relationships. Austria therefore did not use the possibility provided for in Clause 2.2. For apprentices there are special provisions laid down in the Vocational Training Act (*Berufsausbildungsgesetz, BAG*).

*3.2.12. Portugal*

The Portuguese Labour Code covers all private law employment relationships. Certain contracts under special schemes, such as work in households, in agriculture, in ports or onboard ships and work in public law entities, are not covered by the Labour Code.

Certain provisions of the Code such as the provisions on non-discrimination are also applicable to civil servants and other workers with public law contracts.

*3.2.13. Finland*

The Employment Contracts Act of 2001 applies to contracts between employers and employees as defined in the legislation (a broad definition that covers most working relationships), but not to public servants in the state or in the municipalities who are not considered as employees. Most situations are however covered by specific regulations such as the legislation on servants in the municipalities *(Lagen om kommunala tjänsteinnehavare 2003/304)*.

As regards Clause 2.2 there are several Acts regarding training and apprenticeship that fall outside the scope of the Employment Contracts Act.

*3.2.14. Sweden*

The Swedish legislation applies to employment contracts, a broad concept that covers employees in both the private and the public sectors (civil servants are considered as employees and are covered by the labour law although there are some specific regulations that apply). The Swedish legislation applies also to temporary agency workers.

The Employment Act of 1982 excludes from its application those holding a managerial or similar position, members of the employer's family, those who work in the employer's household and employees who are employed for work with special employment support or in sheltered employment. There are also other legal provisions on fixed-term work (for example in the public sector and in particular in the higher education sector).

No explicit exemptions with regard to Clause 2.2 have been made.

*3.2.15. United Kingdom*

The UK Regulations are applicable to fixed-term 'employees', and applies to the public service with the exception of the armed forces (members of the naval, military or air forces of the Crown).

The UK used the option in Clause 2.2 of the Framework Agreement to exclude persons undergoing training or apprenticeship from the scope of the instruments of transposition.

## 3.3. Clause 3: Definitions

**1. For the purpose of this agreement the term 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.**

**2. For the purpose of this agreement, the term 'comparable permanent worker' means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.**

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

All Member States have regulations or practices concerning the concept of 'fixed-term worker' that seem to cover the elements in the definition in the Directive. Some Member States have clarified that the concept does not cover contracts that end at retirement age.

As regards the concept 'comparable permanent worker' many Member States have introduced explicit definitions that generally reflect the wordings of the definition in the Directive. When there is no comparable permanent worker in the same establishment many Member States have opted for a solution that the comparison shall be made with the relevant collective agreements or the national legislation. In other Member States there are no explicit definitions of the concept of 'comparable permanent worker', but in these cases the concept seems to be dealt with in the preparatory works or in the context of the rules on non-discrimination.

*3.3.1. Belgium*

The Belgian legislation contains provisions similar to those contained in Clause 3 of the Framework Agreement.

Article 2 of the Act of 5 June 2002 defines a fixed-term contract as a contract concluded with a worker where the end of the contract is determined by objective conditions such as reaching a precise date or the completion of a clearly defined task.

Article 2 of the Act of 5 June 2002 also contains a definition of 'comparable permanent worker' similar to that of the Framework Agreement. When there is no comparable worker in

the same establishment the comparison shall be made with a worker in the same enterprise or the same sector.

*3.3.2. Denmark*

The new Act of 2003 defines the objective conditions determining the end of a fixed-term contract in similar terms as in the Directive, but with the exclusion of contracts that end at retirement age.

The Act also contains a definition of a 'comparable permanent worker', similar to the one contained in Clause 3 of the Framework Agreement. If there is no comparable worker in the same establishment and no applicable collective agreement the comparison shall be made with the most relevant collective agreement.

*3.3.3. Germany*

According to Article 3(1) *TzBfG*, a fixed-term worker is employed under a fixed-term contract, i.e. a contract whose duration is limited either by a specific date or by the type, purpose or nature of the work performed. Article 14 (1) *TzBfG* lists some types of such fixed-termed contracts.

Article 3(2) *TzBfG* copies the words of the Framework Agreement as regards the definition of a 'comparable permanent worker'. If there is no such worker in the same establishment the comparable permanent worker shall be determined on the basis of the applicable collective agreement; in all other cases the permanent worker normally considered to be comparable in the sector of economy concerned shall be taken as a basis.

*3.3.4. Greece*

The Presidential Decree 81/2003 specifies in an indicative way the objective conditions that determine the end of a fixed-term contract in the private sector: 'reaching a precise date, the completion of a given task or the occurrence of a specific event'.

With regard to the definition of a 'comparable permanent worker', the Decree contains almost word for word the provisions of Clause 3.2 of the Framework Agreement. If there is no comparable worker the comparison shall be made with the applicable collective agreement or, if there is no such agreement, with the relevant national collective agreement.

The Presidential Decree 164/2004 (public sector) contains similar definitions.

*3.3.5. Spain*

There is no general definition of a fixed-term worker in the Workers' Statute but there is a list of permissible contracts (Article 15) and also definitions of the ways in which fixed-term contracts can be terminated (Article 49).

The concept of a 'comparable permanent worker' is specified by case law.

### *3.3.6. France*

The French law does not contain any definition of the concept 'fixed-term worker'. A fixed-term contract is however defined by legislation. The fixed-term contract has an exceptional character and is subject to objective and precise conditions laid down in the Labour Code.

There is reference to what is meant by a 'comparable permanent worker'.

### *3.3.7. Ireland*

The Irish Act defines a 'fixed-term worker' as a person having a contract of 'employment' entered into directly with an employer where the end of the contract is determined by objective conditions listed as in Clause 3.1 of the Framework Agreement.

As regards the definition of a 'comparable permanent worker' the Act gives a definition which covers the elements in Clause 3.2 of the Framework Agreement. The comparison is made at first hand with a permanent employee with similar work employed by the same employer or an associated one. If there is no such employee, the comparison is made with a permanent employee specified in a relevant collective agreement. In case there is no such person either, it is an employee in the same industry or sector of employment which should serve as comparison.

### *3.3.8. Italy*

The Legislative Decree 368/2001 does not define 'fixed-term worker' but provides that a term may be set to the duration of the contract for 'technical reasons or reasons connected with production, organisation and replacement'.

Article 6 of the Decree concerning the principle of non-discrimination defines 'comparable permanent workers', as being 'those (in the company) classified at the same level under classification criteria laid down in collective agreements'.

### *3.3.9. Luxembourg*

A fixed-term worker is employed under a fixed-term contract as specified in the Act of 24 May 1989.

### *3.3.10. Netherlands*

Article 7:667 *BW* provides that an employment contract shall end when the time indicated by the contract, by law or by practice has expired. According to the interpretation provided by the Dutch government authorities, the duration of the contract or of the working relationship can also be made conditional upon the completion of a specific task or the occurrence of an event (the return of an absent worker that has been replaced, for example).

The Netherlands did not consider it necessary to define the concept of 'comparable permanent worker' in the new Act of 2002.

*3.3.11. Austria*

There is no definition of the concept of 'fixed-term worker'. Article 1158 (1) *ABGB* provides however that 'the working relationship expires in accordance with the duration for which it was concluded'.

The Austrian legislation does not contain any specific definition of the concept of 'comparable permanent worker'.

*3.3.12. Portugal*

The Portuguese Labour Code makes a distinction between contracts with a specified expiry date and contracts for the period needed to perform the activity concerned. The Code lists a number of contracts of limited duration, such as contracts for specific works or services, occasional work and occasional needs of the company, replacements and contracts containing its own terms or whose term is determined by external factors.

The Labour Code does not define what is to be understood by 'comparable permanent worker'.

*3.3.13. Finland*

The concepts used in Finland cover the elements in the definition in Clause 3.1 of the Framework Agreement.

It has been not seen as necessary to define in the legislation the notion of 'comparable permanent worker' since this has been deemed to be covered by the rules on non-discrimination (see section 3.4.13.). In this context it is also worth mentioning the possibility of having collective agreements declared generally applicable.

*3.3.14. Sweden*

The Act of 2002 uses the concept 'employment of limited duration' which according to the Employment Protection Act of 1982 covers i.a. work for a fixed term, specific season or specific task as well as replacements or substitutes. The legal definition also covers workers during a trial period (on open-ended contracts). As regards current proposals for a reform of the rules on fixed-term work including the definitions of various forms of fixed-term contracts, see section 3.5.14.

The Act of 2002 does not contain the same concept of 'comparable permanent worker' as in Clause 3.2 of the Framework Agreement. Instead the Swedish legislator has copied other Swedish regulations on non-discrimination largely based on Community concepts, which cover i.a. hypothetical comparisons. In the preparatory works it is specified that the comparison in these cases shall be based on applicable collective agreements, practices in the sector or on legislation.

*3.3.15. United Kingdom*

A 'fixed-term worker' is an 'employee' hired under a fixed-term contract, which is a contract that in the normal course will terminate on the expiry of a specific term, on the completion of a particular task, or on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.

A permanent employee is a comparable in relation to a fixed-term employee if both are employed by the same employer, and engaged in the same or broadly similar work, having regard to qualifications and skills. The permanent employee should also work or be based at the same establishment as the fixed-term employee. If there is no such person in the same establishment, the comparison can be made with an employee in another establishment if that person has the same employer and is engaged in the same or broadly similar work as the fixed-term employee. An employee is not a comparable permanent employee if the employment has ceased.

## 3.4. Clause 4: Principle of non-discrimination

**1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.**

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

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

**4. Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds.**

All Member States now have rules in legislation or case law of more or less general application on the principle of non-discrimination as regards employment conditions between fixed-term workers and comparable permanent workers.

The provisions laid down in the legislation generally seem to cover the elements in the Directive, although there are not always specific references to the principle of *pro rata temporis* and the equality of seniority criteria.

The national regulations also display other variations as regards both the technical solutions and the substance, for example if the comparisons shall be made on the basis of the employment conditions taken as a whole or not.

Most Member States appear to have made clear that the principle of non-discrimination covers pay.

### *3.4.1. Belgium*

Article 4 of the Act of 5 June 2002 copies the relevant wordings of Clause 4 of the Framework Agreement.

The principle of *pro rata temporis* has been interpreted as: 'when it is suitable the rights can be determined in proportion of the duration of the work'.

*3.4.2. Denmark*

Section 4 of new Act of 2003 contains the relevant parts of Clause 4. The principle of non-discrimination applies to pay.

The principle of *pro rata temporis* applies as well as the equality of the seniority criteria.

*3.4.3. Germany*

Article 4(2) *TzBfG* introduces the principle of non-discrimination between fixed-term workers and permanent workers with the same wording as in the Framework Agreement.

The principle of *pro rata temporis* and equal treatment of period-of-service qualifications have been incorporated into the legislation: A fixed-term employee shall receive at least that amount of remuneration or other divisible equivalent payment, payable over a particular reference period which corresponds to his or her period of employment as a proportion of the reference period. Where certain employment conditions depend on the duration of the employment relationship in the same establishment or undertaking, the same times shall be taken into account for fixed-term employees as for permanent employees, unless different treatment is justified on objective grounds.

*3.4.4. Greece*

The Greek Presidential Decrees 81/2003 and 164/2004 replicate the wordings of Clause 4.1 and 4.4 of the Framework Agreement. There is no explicit reference to the principle of *pro rata temporis*.

*3.4.5. Spain*

Article 15.6 of the Workers' Statute recognises in general terms the principle of non-discrimination between fixed-term workers and permanent workers as regard their rights. According to case law sufficiently justified objective reasons can call into question the application of this principle.

The provisions of the Workers' Statute also make references to the principle of *pro rata temporis* and the seniority criteria mentioned in Clauses 4.2 and 4.4 of the Framework Agreement.

*3.4.6. France*

The Labour Code (Article L.122-3-3 subparagraph 1) establishes the equal treatment between employees under a fixed-term contract and employees who have an open-ended contract.

It is specified that equal treatment is imposed whatever the legal nature of the granted advantages (law, regulation, collective agreements, practice).

The equal treatment applies in various fields: health and safety, duration and organisation of working time, paid leave and public holidays, vocational training, social benefits (such as meal tickets), application of the rules of procedure, information on available vacant posts and remuneration. On the latter point, the compensation at the end of the contract does not have to be taken into account in the comparison of remunerations between fixed-term workers and

workers under open-ended contracts. However, the rules which govern the rupture of the contract are without exception not applicable to fixed-term workers.

In addition, an employee who has become permanent because of a transformation of the contract of limited duration benefits from the advantages in terms of seniority acquired under that contract.

*3.4.7. Ireland*

The principle of non-discrimination is laid down in Section 6 of the new Act of 2003. Section 7 (1) specifies the 'objective reasons' justifying different treatment: A ground will not be regarded as an objective ground unless it is based on considerations other than the status of the employee concerned as a fixed-term employee, and the less favourable treatment which it involves for that employee is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose. A difference in treatment as regards any terms of the contract shall be regarded as justified on objective grounds, if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.

The Irish legislation envisages the application of the principle of *pro rata temporis*. Equal treatment with regard to pension schemes or arrangement does not apply to fixed-term employees whose normal work hours constitute less than 20 percent of the normal hours of work of a comparable permanent employee.

The Irish Act also stipulates provisions similar to those contained in Clause 4.4.

*3.4.8. Italy*

The principle of non-discrimination is contained in Article 6 of the Legislative Decree 368/ 2001, which states that those employed under a fixed-term contract shall be entitled to leave and remuneration (Christmas bonuses, thirteenth months, severance pay and all other payments) made by the undertaking to comparable workers with open-ended contracts in proportion to the length of time worked provided that this is not objectively incompatible with the nature of the fixed-term contract.

Clause 4.4 concerning period-of-service qualifications has not been explicitly transposed in the Italian legislation.

*3.4.9. Luxembourg*

Article 14 of the Act of 24 May 1989 establishes the principle of equal treatment between fixed-term workers and permanent workers as regards working conditions, social benefits, discipline (rules of procedure), remuneration and bonuses.

*3.4.10. Netherlands*

The principle of non-discrimination was introduced into Dutch law by a specific legal provision (Section 4 of the Title 10 of the Book 7 *BW)* even though general provisions aiming at having the employer act as a good employer exist which also cover the prohibition of discrimination.

The provisions refer to equality as regards working conditions between fixed-term workers and permanent workers unless a distinction is objectively justified.

The rule of *pro rata temporis* shall apply according to the government's explanatory text, as well as the principle of equality regarding the criteria of period of seniority.

*3.4.11. Austria*

The transposition of Clause 4.1 required the introduction of a new article in the *AVRAG*, which reproduces the wording of the Framework Agreement. On the other hand, no indication is made of the provisions contained in the other paragraphs of Clause 4 of the Framework Agreement (although the period-of-service qualifications are generally dealt with in collective agreements).

An equivalent provision is found in Article 4(6) *VBG* concerning officials.

*3.4.12. Portugal*

Article 136 of the Portuguese Labour Code lays down that 'a worker contracted for a period has the same rights and is bound by the same obligations as a permanent worker in a comparable situation'. A difference in treatment can take place on the basis of objective reasons.

The principle covers all working conditions in a broad sense including wages and other advantages connected with the employment contract.

*3.4.13. Finland*

The Employment Contracts Act of 2001 contains a general provision on prohibition of discrimination and on impartial treatment (*opartiskt bemötande*), and provides that in fixed-term employment relationships there must not be any less favourable working conditions as compared to other employment relationships solely on the ground of the limited duration of the contract unless justified by objective reasons (Chapter 2 Section 2). It is not necessary to compare with another worker at the same workplace; the comparison can refer to general conditions of work. In case these provisions are not respected by the employer, the reversal of the burden of proof applies.

Chapter 1 Section 5 of the Employment Contracts Act stipulates that in respect of employment benefits calculated in relation to the length of employment, successive fixed-term contracts - also where there are short interruptions between the contracts – are to be considered as one continuous employment. Annual holidays and benefits related to the duration of the contract, for example, are determined in the same way for fixed-term workers and workers on open-ended contracts.

*3.4.14. Sweden*

The Act of 2002 copies provisions contained in the Swedish legislation on non-discrimination and those coming from Directive 97/80/EC on the burden of proof. The Act covers situations of direct or indirect discrimination and lays down a system of reversion of the burden of proof. The principle of equal treatment applies to all employment and working conditions.

*3.4.15. United Kingdom*

According to the UK Regulations a fixed-term employee may not be treated less favourably than a permanent employee as regards the terms of the contract, or by being subjected to any other detriment by any act or deliberate failure to act. This covers in particular qualifying periods of service, receiving training and the opportunity to secure a permanent position in the establishment.

The right not to be treated less favourably applies only if the treatment is on the ground that the employee has a fixed-term contract and is not justified on objective grounds. According to the Regulations this is the case 'if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment'. Non-binding guidelines on the interpretation of 'objective grounds' have been issued by the Department of Trade and Industry.

The *pro rata* principle applies, if it is not inappropriate.

## 3.5. Clause 5: Measures to prevent abuse

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

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

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

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

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

**(a) shall be regarded as 'successive'**

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

Most Member States already had provisions in place as regards fixed-term work containing various measures to prevent abuse arising from the use of successive fixed-term contracts. The regulations in the Member States display a wide range of solutions: In a number of Member States all fixed-term contracts, including the first fixed-term contract as well as successive contracts, require *objective reasons* which are specified technically in various ways ranging from a more general requirement to be filled out by the courts to more or less detailed lists in the legislation indicating the range and types of permissible fixed-term contracts. *Limitations on the duration and/or the numbers* of fixed-term contracts are also common. Some Member States in this context make a distinction between the renewal and the succession of fixed-term contracts and apply different rules for these situations. The extension of the same contract however normally entails the application of the rules applicable to open-

ended contracts, but in some Member States the continuation of work under the same contract beyond its term is possible during a certain period sometimes with an increase of pay. The elements in the national regulations include also *other measures*, such as: requirements that the fixed-term contract shall be made in writing, requirements of prior authorization, limitations on the number of fixed-term workers, limitations on the proportion of fixed term-workers, right to notice before the fixed-term contract ends, right to re-employment after the contract ends as well as various economic disincentives for the use of fixed-term contracts, for example applying varying rates of social contributions for open-ended and fixed-term workers or special payments when a fixed-term contract comes to an end. In addition there is also in many Member States extensive regulations in *collective agreements* which may contain other elements designed to prevent abuse of successive contracts. Also as regards the legal *consequences of breach of the rules* the national systems display great variations: 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 (economic and sometimes also punitive) and also, in some Member States, administrative and/or penal sanctions. As the following analysis will show all Member States dealt with in this report have now adopted legal frameworks with more or less extensive rules with the intention to prevent abuse of successive fixed-term contracts that include at least one or more of the measures foreseen in the framework agreement.

### *3.5.1. Belgium*

Under Belgian labour legislation the main rule is that successive fixed-term contracts are presumed to have been concluded for an indefinite period. In case of disagreement the employer must show that the successive contracts are justified by objective reasons, such as the nature of the work. However, reforms during the 1990's have made recourse to successive fixed-term contracts (for a fixed-period or for a specific task) possible also under the following conditions:

Four successive fixed-term contracts, each of which must be of at least three months duration, can be concluded during a maximum period of two years.

Six successive fixed-term contracts, each of at least six months duration, can be concluded during a maximum period of three years, provided that the employer has obtained prior authorization from the Labour Inspectorate.

Non-observance by the employer leads to the transformation of the contract into an open-ended contract. The fixed-term contract comes to an end automatically by the arrival of the term envisaged; no warning or notice is necessary. If the parties, after the deadline of the term, continue the contract, it will be subject to the same rules as for open-ended contracts.

A contract of replacement of a permanent worker is under Belgian legislation in theory an open-ended contract; the parties can envisage that this contract will be broken by means of a period of notice or not. The term of a replacement contract is subject to a two-year maximum duration (without exception) applicable also in the event of succession of successive replacements contracts.

### *3.5.2. Denmark*

Rules on fixed-term contracts are mainly found in collective agreements and breach of these rules give rise to claim for damages. There is also case law on abuse of successive contracts

(circumvention of rules on notice etc.) that can entail the conversion of the contract into an open-ended contract.

According to the new Act of 2003 fixed-term contracts can be renewed only if there are objective reasons, for example unpredictable circumstances relating to another employee such as illness, pregnancy, parental leave or leave-of-duty for other reasons, expiry of a piece-rate contract as well as needs to complete the originally agreed fixed-term task. As regards contracts for teachers and researchers at universities and other state-funded institutions for higher education the Act provides that fixed-term contracts can be renewed only twice.

The concept of 'successive' fixed-term contracts is not defined in the Act. The preparatory works show that an assessment shall be made case by case: as regards seasonal employment, for example, a repetition of the fixed-term contracts during several seasons is in theory not regarded as successive fixed-term contracts within the meaning of the law.

Violations of the Act of 2003 give rise to claim for damages.

Similar rules but other sanctions are provided for in the 1938 Act on White-Collar Workers.

*3.5.3. Germany*

The principle that a fixed-term contract requires an objective reason has been established by the Federal Labour Court in order to prevent circumvention of the employment protection applicable to open-ended employment contracts. On the basis of case law the new German legislation gives a non-exhaustive list of objective reasons justifying fixed-term contracts, for example where the work is operationally required only temporarily, the employee substitutes another employee, the particular nature of the work justifies the limitation of the duration, the limitation is for a trial period, the limitation is justified by reasons connected with the person of the employee and where the employee is remunerated from budgetary funds set aside for fixed-term work and he or she is correspondingly employed (Article 14 (1) *TzBfG*).

According to Article 14 (2) *TzBfG* fixed-term contracts can also be concluded without any particular objective reason justifying the fixed-term contract but in these cases the contract can be renewed only three times during a period of two years.

Recently it has been added a new rule in Article 14 (2a) *TzBfG* on the possibility for newly founded companies to conclude fixed-term contracts without a specific reason during a maximum period of four years. During that period the contract can be renewed several times.

However, neither of these options is available when the worker previously has had an open-ended or fixed-term contract of employment with the same employer. Derogations can be made by collective agreements.

According to Article 14 (3) *TzBfG* an objective reason is not required for fixed-term contracts when the worker has reached the age of 58 at the inception of the contract. Such a fixed-term contract may however not be concluded if there is a close objective link between a preceding open-ended contract and the fixed-term contract, in particular when the period ranging between these two contracts is shorter than six months. This age limit has later been

temporarily lowered to 52 years (by a rule in the legislation adopted on 23 December 2002); subsequently this rule has been deemed incompatible with Community law.[3]

Breach of these rules by the employer gives the employee the possibility to request that the fixed-term contract is converted into an open-ended contract.

*3.5.4. Greece*

The Decree 180/2004 contains measures aiming to prevent abuse of successive fixed-term contracts in the private sector:

- Unrestricted renewals of fixed-term contracts is permissible if it can be justified for *objective reasons,* such as the nature or form of activity of the employer or undertaking or by special reasons or needs (for example temporary replacements, temporary burden of work, temporary training or for facilitating the transfer of the employee or specific projects or programmes or specific events) or in respect of undertakings involved in the air transport and airport services sector.

- Where the *duration* of successive fixed-term employment contracts or relationships exceeds a total of two years, or the *number of contracts* exceeds three, it is presumed that the aim is to meet ongoing needs and accordingly that the contracts will be become open-ended. In each instance it is up to employer to provide evidence to the contrary.

- Fixed-term contracts are considered 'successive' if they are concluded between the same employer (including other employers in the same group of businesses) and the same employee for the same or related employment terms and conditions and the intervening period does not exceed 45 days, including non-working days.

- The objective reasons justifying the renewal of the fixed-term contract have to be established in *writing*. A copy of the contract has to be left at the worker's disposal (except when the renewal of the contract of fixed-term works is planned for a period which is not higher than 10 days).

The Decree 164/2004 contains measures aiming to prevent abuse of successive fixed-term contracts in the public sector:

- Successive fixed-term contracts between the same worker and the same employer relating to the same or similar post are not permitted if the *period in between the contracts* is less than three months, unless justified in exceptional circumstances by an objective reason, which is the case if the contracts that follow the original one are concluded so as to respond to the same type of special needs related directly and immediately to the type or kind or activity of the undertaking.

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[3] The European Court of Justice has ruled that 'Community law and, more particularly, Article 6(1) of CouncDirective 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of domestic law … which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52', see the Judgement of 22 November 2005 in case C-144/04 *Mangold* (not yet published).

- There may be *no more than three contracts*, unless the successive contracts in exceptional circumstances are justified by an objective reason (see above).

- The total duration of the contracts may *not exceed 24 months*, unless permitted in special regulations for categories of workers which are particular in terms of the nature and type of work they perform, such as managerial staff, workers hired under a specific research project or any kind of subsidised or funded programme, or workers hired to perform work relating to the fulfilment of obligations arising from contracts with international organisations.

- The contracts shall be *concluded in writing and the objective reasons shall be stated* unless they appear in an obvious way. This obligation of writing can be disregarded if the contract is renewed, because of the occasional nature of employment, for a period which is not longer than a month. The copy of the contract has to be handed to the workers within five days following the recruiting.

- A contract concluded in violation of these rules is automatically null and void but monies owed for performed work shall be paid and monies already paid cannot be claimed back. Sanctions include compensation to the worker and penal measures for the employer. There are transitional provisions that provide for conversion of contracts into open-ended contracts under certain conditions.

#### *3.5.5. Spain*

The Workers' Statute (*ET*) lists a number of objective conditions for concluding fixed-term contracts, such as contracts for specific tasks, contracts for casual work when it is required by market conditions, a backlog of work or orders requests (for a period of maximum six months during a reference period of 12 months, or longer if established by collective agreement) and contracts for replacements of workers.

Article 15.3 *ET* provides that fixed-term contracts concluded in contravention of the law are considered open-ended. According to case law the regularity of each fixed-term contract must be examined, unless there has been an interruption of more than 20 days in between two contracts, in which case only the subsequent contracts are examined. Nevertheless, legal control over the entire chain of contracts is exercised if it is believed that the employer acted in a fraudulent way and the contractual link is essentially unbroken.

According to Article 15.5 *ET* collective agreements can establish further requisites aimed at preventing abuse from the successive use of fixed-term contracts, in practice this involves limits on the duration.

#### *3.5.6. France*

The fixed-term contract has an exceptional character and is subject to objective and precise conditions laid down in the Labour Code, such as the replacement of an absent employee, temporary increase in the activity of the company, work which is temporary by nature, such as seasonal jobs. There are also rules on fixed-term contracts intended to facilitate the occupational integration of certain categories of unemployed persons. It is not possible to conclude a fixed-term contract in certain circumstances, for example to replace employees absent due to a collective work conflict.

A fixed-term contract can be renewed only once and the total duration cannot exceed the legal maximum duration anticipated for the various possibilities of fixed-term contracts: 9 months, 18 months or 24 months. The parties must agree on the renewal before the end of the fixed-term contract.

In the case of successive contracts there must be a waiting period of specified length depending on the duration of the contract period (at least one third of the duration of the original contract, including renewals, if the contract period was 14 days or longer, or a waiting period of half the contract period, including renewals, if the contract period was less than 14 days). These waiting periods between contracts aim to avoid abuses which would consist in resorting to successive fixed-term contracts for a permanent post. An Act from 2002 has specified that this safety period has to be determined with reference to the days the company has been open. The obligation of the waiting period can be ruled out in exceptional cases (such as urgent work for safety reasons).

For certain successive fixed-term contracts, such as the seasonal contracts, there is no fixed limit, though in certain cases these contracts are likely to be transformed into open-ended contracts.

With regard to certain contracts concluded within the framework of the employment policy the contract term can attain 5 years (for example young–contracts on employment).

A violation of these limits gives rise to an upgrading of the contract to an open-ended contract and to penal sanctions. Generally, the work's council has the possibility of seizing the labour inspection if there seems to be an abuse of fixed-term contracts.

*3.5.7. Ireland*

The Section 9 of the Act of 2003 contains measures intended to prevent abuse of fixed-term contracts. These measures result in the introduction of a double limit that apply unless there are objective reasons justifying a renewal of the contract:

- the fixed-term contracts can have a total maximum duration of four years,
- the fixed-term contract can be renewed only once after three years of continuous employment.

The Act stipulates that there is succession of contracts in two situations:

- Where on or after the passing of the Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion, and any such renewal shall be for a fixed-term of no longer than a year. All or any of the three year's service may have occurred prior to, as well as after, the passing of the Act.
- Where after the passing of the Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-tem contracts and the date of the first such contract is after 14 July 2003 (the date on which the Act was passed) the aggregate duration of such contracts cannot exceed four years.

The concept of 'continuous employment' is governed by a number of legal provisions adopted between 1973 and 2001. The service is considered continuous unless it comes to an end because of the worker's resignation or because the worker has been made redundant, unless the worker is re-employed within a certain time. The worker can also be absent during a certain period of time for certain reasons, for example illness.

The Act compels the employer who proposes the renewal of a contract of fixed-term work, to inform the employee of the objective reasons which justified the renewal. This information has to take place at the latest at the time of the renewal of the fixed-term contract.

If the event of violation of these provisions the employment contract is deemed to be an employment contract of indefinite duration.

*3.5.8. Italy*

The Legislative Decree 368/2001 provides that a term may be set to the duration of the contract for 'technical reasons or reasons connected with production, organisation and replacement'. Fixed-term contracts for certain reasons are prohibited, such as contracts for replacements of workers on strike.

A fixed-term contract can be extended only once for the same work on the conditions that there is objective reason for the renewal and that the initial duration of the contract is less than three years and that the total duration of the contracts does not exceed three years; the employer must prove the existence of objective reasons.

Where the employment relationship continues after the expiry of the term initially set or subsequently extended the employer shall pay increased remuneration equivalent to 20 percent up to the 10th subsequent day and 40 percent for each further day. If the employment relationship continues beyond the 20th day for contracts shorter than six months, or beyond the 30th day in other cases, the contract shall be deemed to be open-ended.

Where the worker is recruited again for a fixed term, within 10 days of expiry of a contract of up to six months duration, or 20 days of expiry of a contract of more than six months duration, the second contract shall be deemed open-ended.

In the event of two successive fixed-term recruitments without discontinuity, the employment relationship shall be deemed open-ended from the date the first contract was entered into.

There are special rules for the air transport and harbour service sectors that allow for fixed-term contracts during certain specified time-limits for a number of workers not exceeding 15 percent of the manpower in the undertakings.

While in principle entrusting national collective agreements of work concluded by the most representative trade unions to determine quantitative limits for the use of fixed-term contracts (limitations on the proportion of fixed-term workers), the Decree mentions a long list of exemptions from this possibility: in business start-ups for periods to be defined in the national collective labour agreements also in non-uniform fashion with reference to geographical areas and/or categories of goods, for reasons connected with replacement or seasonal work, for increased work at certain times of the year and for certain performances or certain radio or television programmes, for contracts after traineeship in order to facilitate young people’s entry into the world of work, for contracts entered into with workers aged over 55, or

concluded where the recruitment is for the performance of work or a service of a special or occasional nature defined or arranged for in advance. The exemptions also applies to contracts no longer than seven months, or of a duration defined in collective agreements in respect of difficult employment situations in specific geographical areas, unless they are individual contracts entered into for the performance of work identical to work forming the object of another fixed-term contract having the same characteristics which expired less than six months previously.

### *3.5.9. Luxembourg*

The fixed-term contract has an exceptional character and is concluded for the execution of a precise and non-sustainable task, such as the ones listed in Article 5 of the Act of 24 May 1989, for example replacement, employment of a seasonal nature (defined by a regulation), job in certain sectors of activity in which it is of constant use not to resort to open-ended contracts (specified by regulation), the execution of an occasional task, temporary and exceptional work due to an increase in the activity of the company, execution of urgent work, work assigned to a job applicant (integration measure), work intended to encourage the recruiting of certain categories of job applicants (after approval by the Minister of Labour and Employment), work for which the employer engages to ensure additional vocational training for the employee (after approval by the Minister of Labour and Employment). It is not possible to conclude fixed-term contracts in order to replace employees absent due to a collective work conflict or due to lack of work because of economic causes or bad weather.

Article 8 of the Act of 24 May 1989 states that the duration of the fixed-term contract cannot, for the same employee, exceed 24 months, including renewals, but the Minister of Labour and Employment may grant exceptions as regards fixed-term contracts concerning certain highly qualified jobs and contracts connected with employment policy such as the jobs assigned to a job applicant under an integration or reintegration measure, subject to the approval of the Minister of Labour and Employment.

The same law also gives a list of exemptions from the main rule that the fixed-term contract cannot exceed 24 months basically as regards the following:

- Seasonal workers' employment contracts, which enables the parties in the contract to renew the seasonal employment contract from season to season. Seasonal employment contracts cannot however be concluded for a duration longer than 10 months for the same period of 12 successive months including renewal. When the seasonal employment contract comprises a clause of renewal of the contractual relations with the employer beyond two seasons, they are deemed as open-ended contractual relations.

- Fixed-term contracts concluded in the public service of education. The Act of 5 July 1991 (exemption from the Act of 1989) stipulates that these contracts can be renewed more than twice, even for a total duration exceeding 24 months.

- Fixed-term contracts in the public or religious institutions as well as in clubs or sport associations. These contracts are also exempted from the provisions concerning renewal or succession of fixed-term contracts.

Apart from those exceptions fixed-term contracts can only be renewed twice. The possibility of renewal has to be subject to a written clause in the contract or of a later amendment in it. In the absence of a written clause, the renewed contract is considered open-ended.

As regards succession of contracts there must be a safety period between two contracts that at least equals a third of the duration of the fixed-term contract (renewals included). This obligation is however not applicable to certain situations specified by the law (e.g. in the event of urgent work, a new absence of the replaced employee or seasonal work).

In principle, the same post cannot be filled by a succession of fixed-term contracts.

Infringements of the provisions mentioned above involve an upgrading of the contracts to open-ended contracts.

*3.5.10. Netherlands*

Article 7:668(a) *BW* stipulates that the most recent employment contract is considered open-ended when

- the employment contracts have followed each other with intervals no longer than three months and the total duration, including the intervals between the contracts, have exceeded a 36-month period, or
- more than three fixed-term contracts have followed each other with intervals no longer than three months.

The maximum duration and the maximum number of renewals of successive contracts can be modified by collective agreements.

Article 7:668(a) *BW* also makes it possible to determine what can be regarded as successive contracts. It is the case when an employment contract was previously concluded between the same parties in the contract, or with different employers if they can be considered each other's successor with regard to the work performed.

If the limits on successive contracts are exceeded the fixed-term contract is converted into an open-ended contract.

*3.5.11. Austria*

Section 879 *ABGB* specifies that a succession of employment contracts is considered null and void if it is not justified in an objective manner. According to case law, the employment contract is considered open-ended in the absence of objective justification. The courts have only permitted successive fixed-term contracts in cases where such contracts have been justified by economic or social factors.

Section 4(4) *VBG* states that a fixed-term contract may be extended only once for a period not exceeding three months. If this time limit is exceeded, the contract is deemed to be open-ended. A longer extension is allowed for special cases according to Section 4 a *VBG*.

*3.5.12. Portugal*

The Portuguese Labour Code lays down several types of measures aiming to prevent abuse of fixed-term contracts: objective reasons which justify fixed-term contracts, minimum durations of the contracts (normally 6 months), maximum durations (initial contract normally 3 years and successive contracts 6 years) and limits on the number of renewals (normally only 2 renewals).

As regards successive contracts there must normally be a waiting period between the contracts (with the same worker or another worker) equal to at least 1/3 of the duration of the first contract including renewals. A successive contract is also possible when the previous contract has come to an end for reasons relating to the worker, in the event of a prolonged absence of a replaced worker, for an exceptional increase of work following the end of the previous contract, for seasonal work, or when the worker whose previous contract came to an end becomes subject to rules for workers in search of a first job.

Specific rules apply in cases of contracts for new activities or for long-term unemployed; the workers seeking employment and whose work contract came to an end can for example be re-employed by the same employer under a fixed-term contract, without a waiting period between successive contracts.

If none of these conditions apply and insofar as the same worker occupies the same post, the contract is considered open-ended.

Fixed-term workers have a priority to permanent employment. Throughout their contract and during the 30 days which follow the end of the activity, they preserve the right to be admitted, on a permanent basis, to exercise the same functions as those for which they were employed. The violation of this preference gives to the worker the right to receive a compensation equivalent to 3 months of basic wages.

*3.5.13. Finland*

The Employment Contracts Act of 2001 provides in general terms that any fixed-term contract has to be based on objective reasons (justifiable reasons). In the preparatory works several examples are given of situations where there is justifiable reason for fixed-term contracts and it is specified that not only the nature of the work must be taken into account but also the special needs of the employer with regard to the size and organisation of activities, skills among the staff etc. According to the preparatory works, justifiable reasons for fixed-term contracts can relate inter alia to the nature of the work, replacements under certain conditions, reasons related to the work or operation of the enterprise such as specific work that is carried out only once or requires special skills or for the preparation of a specific order or a peak period if the work cannot be carried out by permanent employees. In the end it will be, in the first instance, for the national courts to specify what is to be understood by justifiable reasons. In the event of abuse, fixed-term contracts can be qualified as open-ended contracts, and in the case of successive contracts without justifiable reasons the employment relationship would be considered to be valid for an indefinite period starting from the moment when one of the fixed-term contracts lacks justifiable reasons.

*3.5.14. Sweden*

According to the Employment Protection Act (*LAS)* permanent employment is the main rule. Contracts of limited duration normally require objective reason according to a fixed list which applies also in the case of successive or renewed contracts. Violations of the rules entails the transformation of the contract into an open-ended contract (normally only after a court ruling) and damages (economic loss and punitive damages). It is possible to derogate from the Act by collective agreements.

According to the Employment Protection Act one objective reason for a contract of limited duration (fixed term, specific season or specific work) is the specific and temporary nature of

the work involved. Other objective reasons include the need for replacements or to cover for work loads, in which cases there are also limits on the duration of the contracts (contracts for replacements or substitutes cannot exceed three years during a period of five years and contracts occasioned by a temporary peak of workload cannot exceed six months during a period of two years). There are also other types of permissible fixed-term contracts mentioned in Section 5 and 6 of the *LAS*, such as contracts before obligatory military and similar public service and contracts after retirement age (compulsory retirement or in other cases after the worker has attained the age of 67). In order to promote employment a new form of contract of limited duration was introduced in 1996, 'agreed fixed-term employment', not requiring any particular objective reason, but subject to limits as regards the duration and the number of employees that can be employed under such contracts (maximum 12 months, or 18 months for newly started undertakings, during a reference period of three years and maximum five employees on the one and same date).

There is also a right to notice before the contract ends and a right to re-employment if there are any available posts during nine months after the contract ends on certain conditions, inter alia that the worker has sufficient qualifications for the new job. These rules apply only to long-term fixed-terms employees who have been employed for twelve months during a reference period of three years (or in some cases two).

Reforms of the rules in Sweden have been discussed for some time, and the Swedish Government has recently put forward a proposal according to which fixed-term contracts including probationary periods for workers that have not attained 67 years of age would be possible under the Employment Protection Act as from 1 July 2007 without reference to objective reasons for the fixed-term contract but only for a maximum period of 14 months – or 36 months in case of substitutes - during a reference period of five years and according to which the qualification period for the right to notice and the right to re-employment would be lowered to six months during a reference period of two years. The employer would have to inform the employee in a written statement of the type of contract and upon request furnish the employee with written information of the total period of employment. In case the limits on the total duration of the fixed term contract or contracts are transgressed the employment relationship would ipso iure be transformed into an open-ended contract. In case there is a need for longer fixed-term contracts for projects etc. this would have to be settled in collective agreements entered into at the central level ('*Förstärkning och förenkling - ändringar i anställningsskyddslagen och föräldraledighetslagen' Lagrådsremiss av den 24 februari 2006*).

### *3.5.15. United Kingdom*

A fixed-term contract is deemed to be permanent if the employee has been 'continuously employed' under fixed-term contracts for a period of four years or more, unless objective grounds justified the fixed-term contract at the time it was last renewed or entered into. 'Continuous employment' is defined by reference to the Employment Rights Act 1996 and any period of continuous employment before 10 July 2002 shall be disregarded.

Other limits may be laid down in collective agreements or workforce agreements specifying the maximum period of continuous employment, the maximum number of contracts or renewals or the objective reasons justifying renewals or successive fixed-term contracts. A collective agreement is meant here as a convention concluded between one or more independent trade unions (or for the account of the latter) and one or more associations of employers. A trade union is regarded as independent in particular if it is subject to no control of the employer. Similarly a workforce agreement is regarded as an agreement concluded

between the employer and the employees' representatives or in certain circumstances, the majority of the workers. Such an agreement applies to the employees in as far as they are not already covered by a collective agreement.

Upon request an employer must furnish an employee within 21 days with a 'written statement of variation' confirming the change of employment-status or setting out the precise details regarding the objective reasons justifying the fixed-term contract. The statement is admissible as evidence. In the event of disagreement the employee can ask the industrial tribunal for a declaration that he or she has a permanent employment, on the condition that the employee at the time of the application is made employed by the employer.

## 3.6. Clause 6: Information and employment opportunities

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

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

Practically all Member States have introduced measures concerning information on vacant posts in accordance with Clause 6.1 of the Framework Agreement.

Many Member States have introduced measures to facilitate access by fixed-term workers to appropriate training opportunities. Some Member States have introduced specific provisions regarding the employers' obligations reflecting the wording of Clause 6.2 of the Framework Agreement. Other Member States treat this obligation in the context of the rules on non-discrimination between fixed-term workers and permanent workers.

### *3.6.1. Belgium*

Clause 6.1 of the Framework Agreement is duplicated almost word by word in Article 5 of the Act of 5 June 2002.

Vocational training falls within the competence of the three linguistic communities (Flemish, French and German-speaking) and not within the national competence. The fixed-term workers can benefit from various programmes of continuous training at the regional levels.

### *3.6.2. Denmark*

Clause 6.1 and 2 of the Framework Agreement are transposed more or less literally in Section 6 of the Act of 2003. In the absence of a specification in the collective agreement, the employer can choose the means of informing the employees on vacant posts. The preparatory works mention a note on a dashboard, on the Web, in a periodic newsletter, etc.

### *3.6.3. Germany*

Clause 6.1 and 2 of the Framework Agreement are transposed almost literally by Articles 18 and 19 *TzBfG*. The employer has to ensure that fixed-term workers can take part in

appropriate initial and further training (…), unless urgent operational reasons or the training wishes of other employees preclude this.

*3.6.4. Greece*

Clause 6 of the Framework Agreement is covered by provisions in the Greek Presidential Decrees (Article 6 of Decree 81/2003 and Article 8 of Decree 164/2004). In the event of breach of the obligation to give information on vacant posts administrative sanctions are foreseen.

*3.6.5. Spain*

Clause 6.1 of the Framework Agreement is repeated almost literally in Article 15.7 *ET*. The information can be transmitted by a public notice at the workplace. The Spanish legislation adds that this information can also be disseminated by other means, negotiated collectively, which ensure the transmission of information.

As regards Clause 6.2 of the Framework Agreement the third paragraph 3 of Article 15.7 *ET* provides that collective agreements shall establish measures to facilitate further training for fixed-term workers. There is thus an obligation to introduce measures, but the choice on how this shall be done is left to the social partners.

*3.6.6. France*

According to Article 122-3-17-1 of the Labour Code, equal access to information on vacant jobs has to be ensured for fixed-term workers. According to a ministerial circular this information can be provided by any means guaranteeing each permanent or precarious employee access to information under identical conditions.

With regard to vocational training, the French law first puts into place a principle of equality for the workers concerning access to vocational training. The employees under fixed-term contracts benefit from the same rights to training as permanent employees (Article L. 122-3-3 of the Labour Code).

*3.6.7. Ireland*

Clause 6.1 and 2 are reflected almost word by word in the Irish legislation. In the event of a violation by the employer of employee's right to information on vacant posts or on access to training the rights commissioner may declare if the complaint is well-founded or not, require that the employer complies with the provision in question and require compensation to be paid not exceeding two years of remuneration.

*3.6.8. Italy*

Article 9 (1) of the Legislative Decree 368/2001 states that the national collective labour agreements by the most representative organisations shall define the procedures for the information to fixed-term workers on vacant posts to ensure they have the same opportunities as other workers to secure permanent positions. In addition, Article 2 of the Decree lays down that employers in the air transport and airport services sector shall communicate recruitment vacancies to the appropriate provincial trade union organisations.

Article 7 (1 and 2) of the Decree provides that fixed-term workers shall be afforded sufficient training appropriate to the features of the tasks covered by the contract on order to preclude risks connected with work and also that national collective labour agreement by the most representative organisations may provide for procedures and measures to facilitate access by fixed-term workers to opportunities for appropriate training to improve their qualifications, promote their careers and increase their occupational mobility.

*3.6.9. Luxembourg*

The Act of 6 May 1974 establishing the joint committees in the companies and organising the employees' representation, compels the head of company to inform and consult the joint committee at least once a year, in particular on the current and foreseeable needs for manpower in the company.

As regards training, the principle of equal treatment laid down in article 14 of the Act of 24 May 1989 also applies to vocational training.

Vocational training in the private sector is supported by the Act of 22 June 1999 concerning development of further training in the private sector; vocational training has to come under a plan or training project, the methods of which can also be laid down by a collective agreement. It aims to level the workers' skills according to the needs of the company, recycle the workers to another activity and promote the workers to more demanding posts (also as regards responsibility).

As regards training in the public service, the Luxembourg government launched in February 2003 a broad reform programme of the public service. Applying to the statuary personnel or not, this programme intends in particular to meet the vocational training needs.

*3.6.10. Netherlands*

According to Article 657 *BW* the employer is obliged to inform, clearly and in good time, fixed-term workers on vacant permanent posts.

Facilitating access to suitable training is according to the preparatory works regarded as forming part of the principles on non-discrimination.

*3.6.11. Austria*

The *AVRAG* contains a provision with an almost identical wording as Clause 6.1 of the Framework Agreement. The preparatory works mention that it is not necessary to inform each employee individually. Similar rules for officials are found in Section 4 (7) *VBG.*

Training possibilities for fixed-term workers are not mentioned explicitly in the *AVRAG*.

*3.6.12. Portugal*

Under Article 133(4) in the Labour Code the workers have a right to information on vacant permanent post available in the company.

Under Article 137 the right to vocational training is foreseen.

*3.6.13. Finland*

According to the Employment Contracts Act the employer shall in accordance with the general practices in the company or the workplace inform generally about vacant posts in order to guarantee that fixed-term workers have the same opportunities of applying for employment as ordinary full-time workers.

The Employment Contracts Act also provides a general duty for employers to endeavour to promote the employee's professional development.

*3.6.14. Sweden*

There is no general duty for the employer to inform the employees on vacant posts. When the Directive was transposed the Swedish Government found that the introduction of a legislative provision on the right to such information required a detailed investigation, particularly concerning the sanctions. Nevertheless, numerous collective agreements contain provisions on the obligation of making public vacant posts, and these provisions also exist in regulations applicable to the public sector. Recently the Government has put forward a proposal with a view to introduce as from 1 July 2006 a provision in the Employment Protection Act with more general application that would oblige employers to inform fixed-term workers of available vacant permanent posts sanctioned by punitive damages. The information can be given in the form of a general announcement at the workplace, but in the case of workers on parental leave the information must be given to the individual worker ('*Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen' Lagrådsremiss av den 24 februari 2006).*

Similarly there is no general duty in legislation for employers to facilitate access to appropriate training opportunities to enhance the skills, career development and occupational mobility of fixed-term workers. Access to training is covered by the rules on non-discrimination between workers with fixed-term contracts and open-ended contracts. In legislation there are also rules on leave for study purposes that applies to permanent and fixed-term workers alike (normally after a qualifying period). There are several collective agreements dealing with the right to vocational training etc.

*3.6.15. United Kingdom*

Clause 6 of the Framework Agreement is transposed in the UK in the context of the rules relating to non-discrimination of fixed-term employees. Thus, there is an obligation for the employer not to treat the fixed-term employee in a less favourable way with regard to the opportunity to receive training and the possibility of reaching a permanent position in the establishment. In order to ensure the exercise the latter right, a fixed-term employee has the right to be informed by the employer of available vacancies. The information should appear in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee should be given reasonable notification of the vacancy in some other way.

## 3.7. Clause 7: Information and consultation

**1. Fixed-term workers shall be taken into consideration in calculating the threshold above which workers' representative bodies provided for in national and Community law may be constituted in the undertaking as required by national provisions.**

**2. The arrangements for the application of clause 7.1 shall be defined by Member States after consultation with the social partners and/or the social partners in accordance with national law, collective agreements or practice and having regard to clause 4.1.**

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

All Member States that have thresholds above which workers' representative bodies may be established seem to ensure that fixed-term workers are taken into consideration in the calculation.

Practically all Member States seem to ensure that employers should give consideration to the provision of appropriate information to existing workers' representative bodies about fixed-term work in the undertaking.

*3.7.1. Belgium*

Fixed-term workers have to be taken into account when calculating the manpower required for the constitution of the representative bodies of the workers, except when they replace an employee who is absent or for whom the work contract is suspended.

The obligation to inform and consult the workers' representatives on the economic, financial and social situation of their company has existed since the beginning of the 1970's. This obligation is however limited to companies where a work's council is established. In smaller enterprises, other forms of information exist.

*3.7.2. Denmark*

Clauses 7.1 and 7.3 of the Framework Agreement are copied more or less literally in Section 7 of the Act of 2003. It is specified that fixed-term workers are taken into consideration in the calculation of the threshold as long as they are employed.

*3.7.3. Germany*

German law does not distinguish between permanent employees and fixed-term employees for calculating the minimum threshold for the constitution of workers' representative bodies.

According to Article 20 of the *TzBfG* the employer shall inform the body representing the workers with information on number of fixed-term workers and their proportion within the overall workforce of the establishment and the undertaking.

*3.7.4. Greece*

Clause 7.1 and 7.3 of the Framework Agreement are transposed in the Greek Presidential Decrees (Article 7 of Decree 81/2003 and Article 9 of Decree 164/2004).

*3.7.5. Spain*

Spanish legislation takes the fixed-term employees into account when the threshold is calculated.

Workers' committees and the trade union representation in the company have a right to receive each quarter information on the forecasts of the employer concerning the new employment contracts, indicating the number and the type of contract which will be concluded, a basic copy (except intimate information) of written employment contracts with a duration that exceeds four weeks and an indication on the fixed-term contracts in extension and on those in termination, within ten days from these events.

*3.7.6. France*

As regards the threshold required for the election of a representative body, fixed-term workers (except workers under contracts for replacements and contracts connected with employment policy) are taken into account 'in proportion to their presence in the company during the twelve previous months'.

As regards information Article L 432-4-1 of the Labour Code stipulates that the employer of a company of at least 300 employees must inform the work's council on the situation of employment each semester. This information comprises amongst other things the number of fixed-term workers and the number of working days carried out by these workers during a specified period up to six months.

*3.7.7. Ireland*

Rules on workers' representative bodies are laid down in the Act on Information and Consultation of Employees of 1996. The Act provides that fixed-term employees shall be taken into account for the calculation of the threshold above which the workers' representative bodies can be established in accordance with the Act.

The Act of 1996 also lays down that an employer, as far as possible, has to provide the employees' representative body with information on the fixed-term employees.

*3.7.8. Italy*

Article 8 of the Decree of 2001 provides that fixed-term contracts longer than nine months shall be taken into account when calculating the thresholds for the constitution of the workers' representative bodies.

Article 9 (2) of the Decree of 2001 provides that national collective agreements by the most representative organisations shall define the procedures and substance of the information to be provided to the workers' representatives concerning fixed-term work in companies.

*3.7.9. Luxembourg*

According to the Luxembourg legislation fixed-term employees are taken into account in the calculation of the manpower of the company in proportion to their presence during the twelve preceding months, except for fixed-term employees who replace an employee who is absent or for whom the employment contract is suspended.

The head of company has the obligation to inform and consult the joint committee of the company at least once a year, in particular on the current and foreseeable needs for manpower in the company. This applies also in the case of joint committees established in the public sector (hospitals for example).

### *3.7.10. Netherlands*

In the Netherlands provisions as regards the calculation of the thresholds above which workers' representative bodies provided for in national and Community law may be constituted do not distinguish between permanent and fixed-term workers.

According to preparatory works to legislation in this field there is a general obligation to inform amongst other things on fixed-term work in the company.

### *3.7.11. Austria*

Article 36 of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) does not make any distinction between fixed-term workers and permanent workers. They are taken into account in the same way when it involves calculating the threshold above which the workers' representative bodies can be constituted.

The law establishes a general obligation for the employer to provide information to the workers' representatives. This includes amongst other things information on the proportion of the work carried out by fixed-term workers in relation to the overall performance.

### *3.7.12. Portugal*

Fixed-term workers are included in the total number of the workers of the company for the determination of the social obligations of the company (Article 134). This provision can be derogated from by collective agreements.

### *3.7.13. Finland*

In Finland there are no thresholds to form a trade union or to use the union as a legal representative according to national or Community law. Nevertheless, to take advantage of certain rights/obligations, such as the workers' representation within the board of trustees or administration, there must be a certain number of workers normally employed in the company or undertaking.

There is no specific implementation of Clause 7.3. However, the Co-determination within Companies Act contains rules on areas of co-operation and rights to information covering among other things information on employment strategies.

### *3.7.14. Sweden*

In Sweden there are no thresholds to form a representative body for workers or to call for a trade-union organisation representing the workers. Nevertheless, to take advantage of certain rights/obligations, such as board representation by the employees, there must be a minimum number of workers (at least 25).

Under Section 28 of the Employment Protection Act of 1982 employers bound by a collective agreement shall immediately notify the local organisation of fixed-term contracts that have been entered into for work which is governed by the collective agreement except where the duration of the contract is less than one month.

### *3.7.15. United Kingdom*

At present the only mechanism in the UK for constituting workers' representation in a company on a permanent basis is the Transnational Information and Consultation of Employees Regulations 1999. Under these Regulations fixed-term employees are included for the purposes of determining whether an undertaking or group of undertakings is of Community-scale.

UK did not take any particular measures to transpose Clause 7.3 of the Framework Agreement. At present there is no statutory obligation of general application in UK law for employers to inform or consult workers' representative bodies on a permanent basis. The existing requirements are connected with particular contexts, such as collective redundancies, transfers of companies and health and safety.

## 4. CONCLUSIONS

The foregoing analysis indicates that the Member States dealt with in this report have introduced measures at the national level that cover the main elements in the framework agreement annexed to the Directive 1999/70/EC on fixed-term work. The report, however, also identifies a number of questions as regards the process of the transposition as well as the contents of some of the measures that have been adopted.

Many Member States were late with the transposition of the Directive. The Commission started a number of infringement proceedings for non-communication of the national measures, but these cases have now been closed as the national measures have been notified. While issues may still arise in individual cases about the effects of the Directive before the entry into force of the national rules these matters must be settled by the national courts and authorities, if need be after a reference for a preliminary ruling to the European Court of Justice.

The report shows that in some Member States there are exemptions and/or special regulations pertaining to specific groups of workers. A specific issue concerns exemptions relating to Members of the Defence Forces as in Ireland and the UK. When the Directive was adopted the Commission stated, on the basis of information received from the social partners, that the agreement was not intended to cover the personnel of armed forces, in their combatant capacity. However, this should not exclude the entire personnel of armed forces. Other Member States exempt specific categories of workers or allow for special regulations such as Spain, France, Italy and Portugal. The Commission has so far started infringement proceedings against Spain concerning the application of the Directive to teachers of religion. The national rules applied in other cases will be investigated further by the Commission services.

The transposition of the principle of non-discrimination, including the definition of the concept of a 'comparable permanent worker', also merits further attention. Based on the findings in this report the Commission services have identified the following potential problems with the national rules:

The information currently available to the Commission services is not sufficient to determine how some Member States manage the situation dealt with in paragraph 2 of Clause 3.2 of the framework agreement, i.e. in the case where there is no comparable permanent worker in the same establishment (see section 3.3 as regards Spain, France, Italy, Luxembourg, the Netherlands, Austria and Portugal). The Commission services will investigate this further based on a more thorough examination of the national rules.

As regards the application of the principle of non-discrimination in Clause 4.1, the Commission, when the Directive was adopted, stated, on the basis of the information provided by the social partners, 'that fixed-term workers can not be treated in a less favourable manner in respect of the "package" of working conditions'. It added however that 'the question whether working conditions assessed together constitute less favourable treatment will be considered in the light of the individual circumstances and the details of national law and practices'. Against this background it should be justified that national courts make an assessment based on the circumstances of each case. The Commission services will follow the developments in the Member States, notably those in which comparisons between fixed-term

and permanent employees can be made only on the basis of the employment conditions taken as a whole.

Finally, it is not entirely clear how the provision in Clause 4.4 concerning the equality of period of service qualifications relating to particular conditions of employment has been transposed in some Member States. First of all there might be distinctions between fixed-term workers and permanent workers laid down in legislation not covered by this report. Secondly, some Member States opted for a solution where the provision in Clause 4.4 has not been explicitly transposed into the national legislation, which may create problems in relation to distinctions laid down in collective agreements unless the application in individual cases can be addressed in the context of the rules on non-discrimination. Countries which have not transposed explicitly Clause 4.4 include France, Italy, Luxembourg, Austria, Portugal, Finland and Sweden. The Commission services will follow the developments in this area, in order to ensure effective application of the provision in Clause 4.4 of the Directive.

As regards measures to prevent abuse of successive fixed-term contracts there have been many complaints and petitions notably as regards the situation in some Member States where transformation of fixed-term contracts into permanent contracts is not possible in the public sector, for example Greece and Italy. The Commission has taken the position that conversion is not necessary on the condition that there are other effective measures in place to prevent abuse of successive fixed-term contracts. The compatibility of these legal regimes with the Directive is also subject of cases concerning references for preliminary rulings currently pending before the European Court of Justice (C-53/04 and C-180/04 *Marrosu* concerning the Italian legislation and C 212/04 *Adeneler* concerning the Greek legislation). It is not excluded that there may be other problems relating to the practical application of the Clause 5 of the framework agreement annexed to the Directive possibly in combination with other Community law as in case C-144/04 *Mangold*, see Section 3.5.3.

Sweden and Luxembourg have not transposed Clause 6.1 of the framework agreement on the duty of employers to inform fixed-term workers about vacancies. As set out in Section 3.6.14 the Swedish government has recently proposed legislation to remedy this gap. The Commission services will assess the new legislation once it is adopted and notified and as regards Luxembourg the situation will be investigated further.

The Commission services will also investigate further the reasons why only fixed-term contracts longer than nine months are taken into account when calculating the thresholds for workers' representative bodies in Italy (see Section 3.7.8).

In relation to the questions outstanding as regards the transposition of the Directive in some of the Member States, the Commission services will proceed with investigations in cooperation with the national authorities.

In parallel, the Commission services will carry out a study of the state of transposition of the Directive in the EU-10, in view to present a report in 2007.