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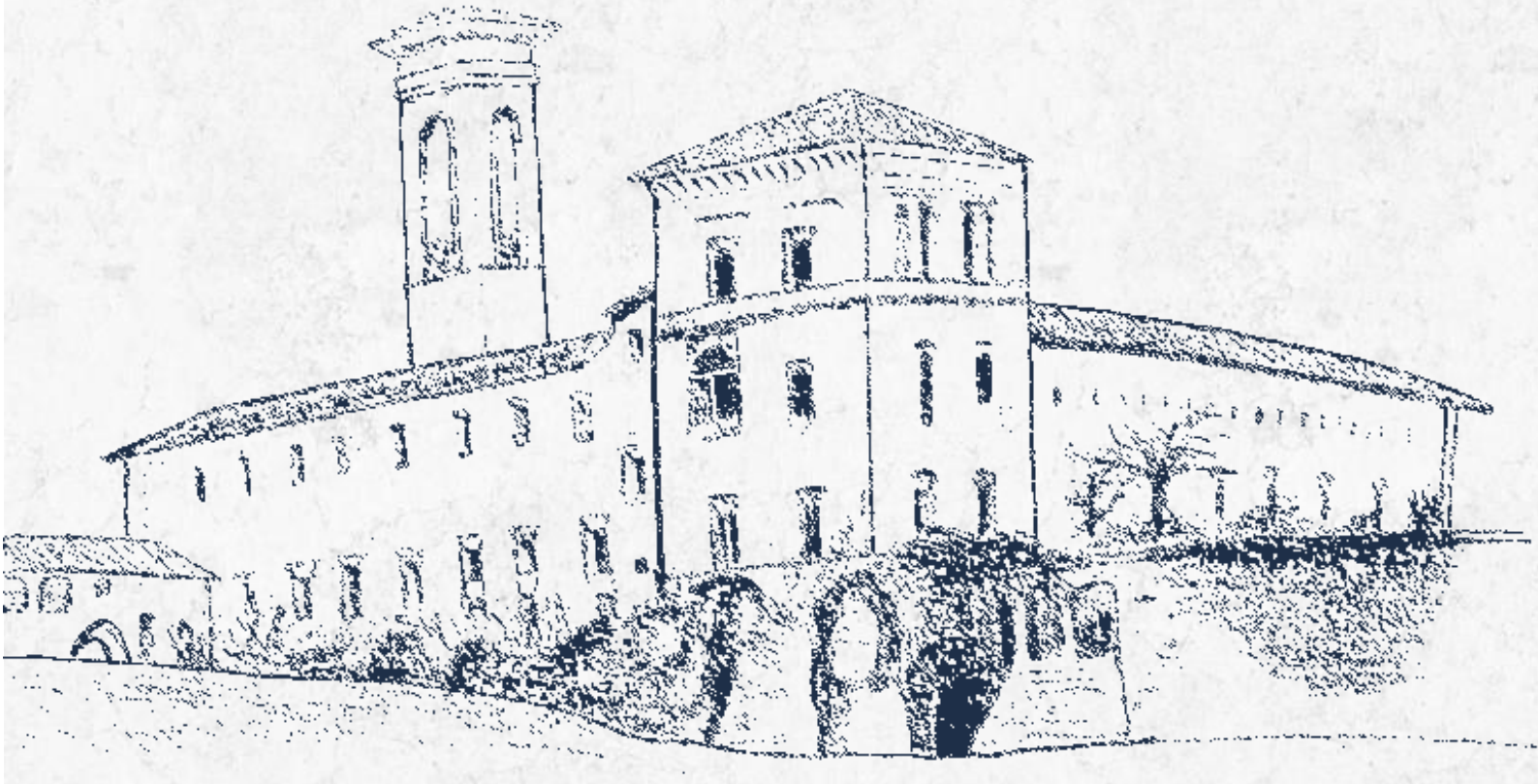

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The Transposition of Council Directive 99/70/EC of 28 June 1999 on Fixed-term Work into Spanish Labour Law: Some Critical Aspects following the 2011 and 2012 Reforms

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Introduction

In this introductory section, an outline is provided on the manner in which employment contracts are governed within Spanish labour legislation. In this respect, one should note that:
- the most widespread contractual schemes in Spain are open-ended and fixed-term contracts, which are regulated by Art. 15.1, par. 1 of the Workers' Statute (hereafter simply as ET). The legislator shows a preference for permanent contracts, as the employment relationship is established upon intention of the parties on an exclusive basis. The same cannot be said of fixed-term work, as here it is the fulfilment of one of the objective reasons stated in the contract that justifies its temporary nature. This usually concerns workers in standard employment relationships that are regulated by the ET, yet some exceptions can be observed concerning workers in special working arrangements that, since 1985, have been governed by specific provisions (e.g. Royal Decrees). This is the case, for instance, of temporary employment contracts concluded by professional sportsmen;

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- such preference for fixed-term work arrangements on the part of the Spanish legislator is also apparent if one takes account of several aspects, such as:
a) the countless provisions laid down to allow the conversion of a fixed-term contract into a permanent one, which is usually accompanied by economic incentives, pursuant to Art. 8, 11.3, 15.7, and 17.3 of the ET. One should note that this conversion would be null and void once a waiver of a right is assumed which is unavailable to the worker, that acts as stability of employment (Art. 3.5 of the ET);
b) the *iuris tantum* presumption—that is the rebuttable presumption —that the employment contract has been performed for an indefinite period. This is the case of contracts not concluded in a written form (Art. 8.2 of the ET), or those that do not envisage enrolment to social security upon completion of the probationary period (Art. 15.2 of the ET);
c) in the event of an illicit takeover of the business, workers have the right to gain the status of permanent workers (Art. 43.4 of the ET);
d) the scope for agency workers to be hired permanently by the user company they work for, provided that they continue to work also after expiration of the contract between the user company and the temporary work agency;
e) the rules contained in par. 3 and 5 of Art. 15 of the ET, which will be discussed below;
- with regard to the employment relationship for an indefinite period, until February 2012, there were two types of contracts that could be implemented: the traditional open-ended contract, and the one aimed at the promotion of permanent employment. The former, which is regulated by the ET, refers to the standard relationship between a worker who provides a service and an employer who receives and remunerates these services. The other contractual scheme was implemented in 1997 to help certain categories of workers to find stable employment, also by means of some incentives granted to the employers. Among others, these incentives included a reduction of workers' social contributions to be paid by the employer, the amount of which depended on the professional category the workers belong to. In addition, monetary compensation should be paid to employees in the event of a dismissal for objective reasons or in an unfair dismissal. Such compensation benefitting workers was usually higher in the event of the former. Accordingly, the employer had to pay a sum of money corresponding to 33 days of wages for each year during which workers have provided services to the employer of up to a maximum of 24 months. This type of contract, which should be

concluded in writing, was regulated by the first Additional Provision of Act No. 12 of 9 July 2001 on urgent measures to reform the labour market and improve the quality of employment, subsequently amended by Art. 10 of Act No. 43 of 29 December 2006 for higher growth and employment. Royal Decree Law No. 3 of 10 February 2012 now in force provides some urgent measures to reform the labour market and replaces the foregoing open-ended contract with a "permanent employment contract to support entrepreneurs" (Art. 4), granting certain benefits to entrepreneurs and small businesses that hire a worker with an open-ended contract;

- since services can be provided either on business days or only intermittently, Art. 12.3 and 15.8 of the ET make provision for two additional contractual schemes which are regarded as being of a permanent nature, viz. "stable and regular" contracts and "fixed-discontinuous" contracts. In the first case, workers need to perform their tasks according to a fixed schedule. In the other, if a fixed-discontinuous contract is concluded, work is carried out intermittently;

- Spanish labour legislation provides a wide range of fixed-term contracts, among which are the training and apprenticeship contracts regulated by Art. 11.1 and 2 of the ET. Training contracts cater for theoretical and practical learning which is necessary to carry out a task properly, thus affording the worker the opportunity to gain adequate work-related qualifications. Those in apprenticeship contracts already have sufficient theoretical learning, thus they only need vocational training in line with their educational attainment. There are also some other work arrangements which are regulated by par. a, b, and c of Art. 15.1. of the ET, namely project contracts—that is employment contracts for a specific project or service—casual contracts—due to production overload or backlog—and substitution contracts, that are traditionally used for temporary hiring. More specifically, project contracts are concluded for specific tasks that, although limited in time, might be of uncertain duration. As for casual contracts, they might be used to hire workers in the event of increasing and unexpected business activity, whereas the substitution contracts might be performed if a need arises to replace another worker who is temporarily absent but whose right to return to work is laid down in national legislation, collective agreements, or his/her individual employment contract.

- Art. 15.3 of the ET leaves no doubts whatsoever about the unlawful nature of fixed-term contracts for an indefinite period, that is those

concluded for a specific period of time within a longer reference period. The Decisions on the 20 and 21 February of 1997[1] of the Supreme Court (hereafter simply as TS) ruled that the repetitive use of fixed-term work arrangements would result in this contract to becoming open-ended, and so will the recourse to temporary contracts in cases in which a violation of relevant legislation is reported (e.g. lack of a reason justifying the time limit or a misuse in terms of duration and contents). Thus, according to the TS, a contract for a definite term will be transformed into a contract for an indefinite term once the unlawful nature of the former has been certified, yet fixed-term employment is permitted provided it will not result in a "chain" of fixed-term contracts. Therefore, the permanent character of the contract represents an inalienable right for the workers (Art. 3.5 ET), and this is also safeguarded in cases of an alternation of permanent and temporary contracts, or when some other circumstances have occurred: severance payment in a settlement, compensation for termination of a fixed-term contract, and unemployment benefits, to name a few. Accordingly, at the time of looking at the chain of contracts and understanding at which point one has acquired the status of "permanent" worker, one should take into account possible breaks in the string. If there has been no break of continuity in the series of contracts, all of them should be examined. Conversely, when a period of inactivity has elapsed between two contracts which amounts to more than 20 working days—including the dismissal procedures—the previous contracts are not taken into consideration, since it is assumed that the employee has had enough time to challenge the expiration of the last one or, alternatively, he/she has given his/her consent to the termination of the employment relationship, irrespective of the fact that a new contract might have been concluded with the same employer. Consequently, one should consider whether the interruption mentioned above has been the result of employers' misconduct acting *contra legem* or of the particular nature of the employment relationship (e.g. the number and type of contracts, the duration of the contractual chain, and activities carried out). In this connection, it seems worth pointing out the peculiar case of illegal recruitment in the Public Sector. Before 1996, the misuse of fixed-term contracts had the same legal effects in both the private and the public sector, viz. conversion into permanent employment contracts. However,

[1] Art. 1457 and 1572, respectively, as well as some subsequent rulings of the same Court of April 22, 2002 (Art. 7796), November 7 and December 5, 2005 (Art. 1691 and 1316).

the TS ruling of 7 October 1996[2] drew a distinction between the notion of "permanent" and "definite" employment relationships. This wording should be examined with some qualifications. More specifically, the service provided under a fixed-term contract the conclusion of which does not comply with the law may be transformed into a contract of an indefinite period. This means that this is the way the contract would be considered until its expiration, even though the worker would not be entitled to permanently work in the company. Clearly, if the latter were the case, especially in the Public Sector, this would make the contract null and void, as a merit-based selection procedure needs to take place to gain such a position, in accordance with the principles of equality, merit, ability and advertising laid down by Art. 23.2 and 103.3 of the 1978 Spanish Constitution. In the private sector the terms "permanent" and "definite" may be regarded as equivalent, which cannot be said of the Public Sector. Here, even though fixed-term contracts illegally concluded will be transformed into open-ended contracts, their holders will not be regarded as holding a permanent position. Evidently, the fact that a post in the Public Service is subject to statutory procedures suggests that the position in question is for a definite term and subject to termination. Recently, Act No. 7 of 12 April 2007—Basic Statute of Public Employee—has made express provision for this type of contract, stating that, depending on its duration, this contract might be regarded as a temporary or a permanent one (Art. 11.1).

- Aside from these fraudulent practices, the repetition of fixed-term contracts with the same employers used to be the norm in Spain, as it was neither prohibited by the legislator nor questioned by doctrine. In this sense, the prerequisite to conclude permanent contracts was an objective reason justifying their use, as well their conformity with relevant legislation in terms of duration and content. However, the scope for repeating fixed-term contracts has changed significantly since 2006, mostly because the influence of Community law.

[2] Art. 7492 and subsequent judgements, namely the TS rulings of January 20 and January 21, 1998 (Art. 1000 and 1138), January 19 and January 26, 1999 (Art. 810 and 1105), February 3 and October 13, 1999 (Art. 1152 and 7493).

1. Council Directive 99/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work

1.1. Contents

Council Directive 99/70/CE intends to implement the Framework Agreement on working conditions for fixed-term employees, passed on 18 March 1999 by the Union of Industry and Employers of Europe (UNICE), the European Centre for Public Enterprises (CEEP), and the European Trade Union Confederation (ETUC). The Preamble of the Agreement states that, although the contract of indefinite duration is the most widespread form of employment relationship between employers and workers, it should be acknowledged that the fixed-term contract also responds to certain real needs of the labour market. Thus, the framework agreement sets out general principles and minimum requirements relating to fixed-term work, taking into account specific national, regional, professional, and seasonal conditions. The main idea is to establish a reference framework to ensure equal treatment and non-discrimination of fixed-term workers with regard to permanent workers. In doing so, the directive intends to improve the quality of employment for fixed-term workers and to stem the increasing practice of successive contracts or fixed-term employment (Clause 1 of the Agreement).
The Framework Agreement also defines "the worker with fixed-term work" as one "who has an employment contract or employment relationship consented directly between an employer and a worker where the termination of the contract of employment or the relationship is determined by objective conditions, such as a specific date, the completion of work or service or the occurrence of a specific fact or event". Non-discrimination of workers and the establishment of measures to prevent the abuse of fixed-term contracts in relation to permanent workers represent two main points of the agreement. Concerning the first aspect, fixed-term workers are expected to have less favourable working conditions than permanent workers within the company. A fixed-term relationship does not justify any type of discrimination, as workers in these employment contracts can only be treated differently on objective grounds (Clause 4). Moreover, the principle of equal treatment also covers aspects such as access to vacancies in the company and adequate training to improve their professional qualifications, for which fixed-term workers should be provided with necessary information. As for limitations to the use of fixed-term contracts to prevent the abuse of this contractual

scheme, Clause 5 of the Agreement provides that the Member States should introduce one of the following measures, after consultation with the parties concerned (social partners, lawmakers, actors of collective bargaining and so forth) and taking account of the specific needs of workers and sectors:
a) objective reasons justifying the renewal of such contracts or fixed-term employment relationships;
b) the maximum total duration of successive fixed-term employment contracts or relationships;
c) the number of renewals.
National legislation and social partners are left with the responsibility of determining whether the fixed-term employment relationship might be renewed or converted into a contract of indefinite duration.

1.2. The Transposition of Council Directive 99/70/CE into Spanish Labour Law

Art. 2 of Directive 99/70/CE provides that the Member States should act in keeping with the Directive "no later than July 10, 2001" or—when justified on objective grounds—within a year. In Spain, the directive was transposed into national law through Act No. 12 of 9 July 2001, which however did not make any special provision for succession of fixed-term contracts, an aspect that was subsequently dealt with in the 2006 Labour Reform (Royal Decree-Law 5/2006).
More specifically, Art. 12.2 of the provision—which was later converted into Act No. 43 of 29 December 2006—provides a new reading of paragraph 5 of Art. 15 of the ET: "Notwithstanding what is set forth in paragraphs 2 and 3 of this article, the workers who, within a time-period of thirty months, have been contracted for more than twenty-four months for the same job and by the same employer by means of two or more fixed-term contracts with the same or different contractual schemes of a specific duration, with or without resolved continuity, either directly or through the temporary work agency, shall acquire the status of permanent workers. In consideration of the peculiar nature of each activity and the characteristics of the post, it is up to collective bargaining to lay down measures aimed at preventing the abuse of contracts of a specific duration to employ different workers to fill the same position for which short-term contracts have been used, with or without resolved continuity, including those concluded with temporary work agencies. What is provided for in this section shall not be applicable to the training, replacement or substitution contracts". The purpose of this reform is therefore to prevent

the excessive use of successive fixed-term contracts, that is, to stem precarious employment resulting from high rotation in the Spanish labour market, and promote stable employment of high quality. At present, the statutory limit on successive fixed-term contracts somehow hinders the fraudulent nature of this contractual relationship imposed by employers for regular working activities. In so doing, the shift from precarious to stable employment is achieved without amending the rules of the contractual relationship. Employers still have scope for resorting to (precarious) fixed-term employment, yet limited in time. As a result, the transposition of the EU Directive 1999/70 has made it possible to amend national legislation, which however makes little to no reference to restrictions in the abuse of successive short-term contracts.
Act No. 35 of 17 September 2010 containing urgent measures to reform the labour market makes some major amendments to the original text of paragraph 5 of Art. 15 of the ET.

1.2.1. Statutory Restrictions on Successive Fixed-Term Contracts

The use of successive fixed-term contracts with the same worker is subject to a temporal limit imposed by law, at the end of which the employment contract is converted into an open-ended one, provided that certain requirements are met. The conversion results in a contractual *novatio ex lege*, in the sense that the last fixed-term contract becomes open-ended and the parties cannot decide otherwise. Pursuant to Art. 15.5 of the ET, a short-time working arrangement is not presumed, but it is imposed by law. This aspect is relevant as providing that, under certain conditions, fixed-term employment has to be limited in time to safeguard employment stability. Therefore, the employer cannot justify the unlimited use of fixed-term contracts with the fact that the assignment is of a temporary nature. It might also be the case that the employer anticipates the automatic conversion of the employment relationship, and he/she can choose to do so through a "permanent employment contract to support entrepreneurs" (Art. 4 of Royal Decree Law No. 3 of 10 February 2012). The employer might opt for this solution as being more beneficial in monetary terms, especially with regard to reductions in social security contributions, also considering that it does not oblige him/her to compensate the worker in the event of dismissals taking place during the probationary periods (12 months). If the conversion takes places automatically, that is upon expiration of the last fixed-term contract, none of these benefits are entitled to the employer. In the event of a temporary

contract concluded with an employment agency, the agency worker will be hired by the user company on a permanent basis whereas its renewal exceeds the statutory time-limit of two years. Consequently, there is no contractual innovation, because no contractual relationship existed between the worker and the user company, and a new open-ended contract is concluded by law. When the employer does not comply with the new rules and proceeds to the termination of the last fixed-term contract, the worker can claim an unfair dismissal or null and void dismissal if he/she has worked for the same employer for at least two years. In this sense, some reservation might arise as to the type of dismissal. Indeed, the dismissal may be regarded as null and void as an infringement of Art. 15.5 of the ET. On the other hand, in going through case law and courts decisions, it appears that non-compliance with Art. 15.3 of the ET takes place, with the dismissal that would be declared unfair. Evidently, the legal limit is not intended to encourage fraudulent practices on the part of employers, but to reduce the widespread use of successive fixed-term contracts, even though this is permitted by law. Accordingly, and as also evidenced by the courts, Art. 15.5 is by all means in line with Art. 15.3, because it does not pursue the fraudulency of the contractual relationship, but the direct transformation of fixed-term contracts into permanent ones when the statutory requirements are fulfilled.[3] In this respect, the following requirements need to be met in order to be legally authorised to transform a short-term contract into an open-ended one:

a) identity of the holder: the contracts are to be concluded with the same worker. If different workers are employed to carry out the same job, the conventional limit will apply, but not the statutory one. We shall return to this point later.

b) Use of two or more fixed-term contracts. Only the employment contracts of fixed duration concluded subsequent to the enforcement of Art. 15.5 of the ET would be subject to the statutory limit imposed on the first of successive fixed-time contracts. The time-limit does not apply for a single contract of a given duration, even in cases where they exceed the time-limit laid down in Art. 15.5 of the ET. In the name of job stability, however, workers would also welcome the extension of this time requirement to individual employment contracts.

Fixed-term contracts may be concluded for a definite or an indefinite period, thus it has been regarded as superfluous to include a clause that

[3] Cantabria STSJ July 13, 2007 (Prov. 307/310).

interrupts the chain of contracts. This also means that the employment relationship might be characterised by interruptions and periods of inactivity, yet within set time-limits. By way of example, the periods of inactivity can last far more than twenty days—with this limit that in some cases has been taken into account by courts to argue that there was a string of fixed-term contracts.[4] The period of inactivity can reach up to 6 months, during which the worker is entitled to unemployment benefits or to work for another employer. Periods of inactivity are not counted as being part of the employment contract, but they can be added up. The judicial review of the contractual chain extends from first to last fixed-term contract in the company, regardless of whether they were intended as linked or not. Successive fixed-term contracts may be directly concluded between employers and employees, or through temporary work agencies. In this latter case, the employment contract finalised is counted as being part of the string of fixed-term contracts, that might consist of varied fixed-term contractual arrangements.

Training contracts, replacement contracts and substitution contracts, however, do not count in the string of fixed-term contracts, and if concluded, their duration should be deducted, because of the lower incidence of abuses that occurs in this form of contracts. The legislator has attempted to strike a balance between the measures preventing a rise in precarious employment and the freedom on the part of employers to job creation. So, employers are unwilling to create jobs that result from substitutions which have been already covered, replacement posts related to existing jobs or training jobs which can have continuity within the company. However, this behaviour has also been criticized, as young workers are those who suffer the most from the precarious situation ensuing from the use of these contractual relationships. After the introduction of Act No. 35 of 17 September 2010, the contracts concluded within the framework of state-run job-training programmes, as well as temporary contracts promoted by certain agencies to help workers re-enter the labour market do not count as fixed-term contracts. Casual contracts and project contracts—also those concluded through the employment agency—are computed as being within the string of fixed-term contracts.

[4]STJCE of 4 July 2006 (Case C-212/04; ILJ 1135): Clause 5 of the Framework Agreement prohibits that national legislation defines as "successive" those "fixed-term contracts that are not separated by an interval exceeding 20 labour days". See STSJ Andalusia November 12, 2007 (ILJ 2315).

It is doubtful whether the statutory limit of fixed-term contracts can be applied to those contracts that do not fall within the scope of the ET. This is the case, for instance, of fixed-term contracts regulating special employment relations as laid down in Art. 2 of the ET, or those contracts addressing some special categories of workers, viz. Religious teachers operating in public bodies that are employed on an annual basis, researchers who have been diagnosed with some form of disability, and researchers who are engaged in contracts of promotion of permanent employment. With regard to contractual schemes entered into in the event of special employment relations, they are governed by special labour laws that are however viewed as subsidiary provisions in that they deal with possible legal loopholes arising from national legislation.

Taking into consideration the string of fixed-term contracts, the Royal Decrees mentioned above do not include any relevant provisions, therefore Art. 15.5 of the ET applies as a subsidiary rule, unless this is incompatible with the work performed. In addition, while Art. 15.5 of the ET also applies to domestic workers and commercial mediators, it is more complex to implement it with regard to artists and ex-offenders, due to their special status. The same can be said of professional athletes, who are only employed under fixed-term contracts, and senior managers, because the ET is not seen as a subsidiary rule in this case. Art. 15.5 of the ET also applies to training contracts such as those entered into by assistant professors, physicians operating locally, and so forth.

c) Recruitment in the same company and in the same job. The fact that, in the light of Art. 15.5 of the ET, recruitment must be performed in the same company and in the same job has produced a problem of interpretation with regard to whether the transformation of fixed-term contracts into permanent ones is also applicable to public servants. Initially, Art. 15.5 of the ET was not applicable for this category of workers, due to the difficulty of transforming fixed-term contracts into open-ended ones in the Public Sector, where recruitment for permanent positions is based on objectively measured competence and merit. To address the issue, Art. 15 was reworded, so that its implementation "shall not preclude the obligation to cover positions through normal procedures, in accordance with applicable laws". Accordingly, fixed-term workers employed in the Public Sector for more than 24 months gain the status of "permanent employees" until it is decided that their situation should be regulated as per law, along the lines of what happens in the event of fixed-term contracts concluded illegally. The different treatment in the private and public sector is consistent with Spanish and EU law. More specifically, it conforms to Directive 1999/70/EC and its Framework

Agreement, as has been also shown by the two decisions handed down by the European Court of Justice (ECJ) of 7 September 2006 (*Marrosu-Sardino Affairs* and *Vasallo*),[5] according to which "clause 5 of the Framework Agreement does not entail, as such, that the abuse of successive contracts of fixed-term employment relationships has a different treatment in the Member States, regardless of whether the contractual relationships take place in the private or public sector". In broad terms, the ECJ considers that the Framework Agreement does not preclude Member States from legislating on the issue. Indeed, in cases of abuses of successive contracts or fixed-term employment relationships in Public Sector, temporary employment contracts may not be converted into open-ended ones, provided that national legislation contains alternative measures to prevent wrongdoings. This is not the case of Spain, which also allows for the conversion in the Public Sector.[6] On the other hand, Act No. 35 of 17 September 2010 amends the fifteenth Additional Provision of the ET and specifies that the time-limit provided in Art. 15.5 of the ET only applies "to contracts concluded by the Public Administration on an exclusive basis, without the involvement of other legal entities". Further, Art. 15.5 of the ET does not apply to certain employment contracts for the university staff which are regulated by Act No. 6 of 21 November 2001.

Another issue that is worth mentioning is that the Royal Decree Law 5/2006 has not adopted provisions with regard to groups of companies or subsidiaries controlled by a contractor, and special regulation was necessary to avoid any possible fraud resulting from non-compliance with Art. 15.5 of the ET. A worker might be transferred to another company within the same group or to a subsidiary by concluding short-term contracts with each of them and without reaching the duration set out in Art. 15.5 of the ET. If this was the case, the TS opted for "piercing the corporate veil", that was disclosing its legal personality, so that the "chain of fixed-term contracts" concluded afterwards was disclosed too. In these cases, a number of criteria are evaluated to demonstrate that a company belongs to a group of companies or is a subsidiary (examples include: the same management, the same staff, and so forth). Art. 15.5 of the ET also applies in the event a new employer takes over or succeeds in the business. Act No. 35 of 17 September 2010 modifies the foregoing article and deals with both issues to prevent any possible violation. Of relevance is the fact that the succession of fixed-term contracts can also take place

[5] ECJ 2006, 229 and 224.
[6] See STJCE of April 15, 2008 (ECJ 2008, 82).

within the "same occupation", with this concept that might convey different nuances of meanings. In this case, occupation refers to tasks that:
a) are performed in the same workplace;
b) consist of the same working activity, regardless of the workplace; and
c) are performed in a systematic and teleological sense, pursuant to Art. 22 and 39 of the ET. In this case, the characteristics of the job are shared by those in a category or profession.
This broad interpretation of the notion of job intends to prevent fraud at the time of circulating between jobs, concluding different fixed-term contracts within the same group of companies, or to access equivalent positions. Although this might be a question to be solved in courts, the number of successive fixed-term work arrangements within the same group of companies and in the same job/position must not exceed the statutory limit set in Art. 15.5 of the ET. Whereas "post/job" and "professional category/position" are regarded as being equivalent, workers cannot be transferred among different occupational levels or positions as a way to elude the application of the law with regard to the conversion. The employee may also bring the case before the courts to ascertain the existence of a permanent employment relationship. In order to have a clear interpretation of the law, Act No. 35 of 17 September 2010 modifies the foregoing article, specifying that temporary employment contracts can be converted into open-ended contracts regardless they refer to the same or a "different" position.
d) Statutory limit of successive fixed-term contracts.
Pursuant to Art. 15.5 of the ET, the statutory limit for successive fixed-term contracts applies when employees have provided their services to the same employer for 24 months out of a 30-month period. Upon completion of this time-period, the position covered by the employee is automatically regarded as "permanent", although some causes of seasonality may still be present. If successive fixed-term contracts are entered into for 24 months for a period longer than 30 months, no conversion to permanent contracts would take place. The key issue in this case is to narrow the timeframe of 30 months of uninterrupted employment in the same company to ascertain whether or not there is a string of fixed-term contracts for a period of 24 months from the conclusion of the first employment contract. Art. 15.5 of the ET also applies to existing contracts, not only to new ones. Arguably, a problem might arise when the length of service has not been calculated from the first day of work, thus setting the *dies a quo* of the string of fixed-term contracts which becomes difficult. It is also important to assess whether

the periods of inactivity—temporary sick leave, temporary disability—should be included or not. The legislator does not make any reference to the matter and, because it is complex to understand when recruitment has taken place, there is scope for agreement between the parties. In the event of dismissals without just cause *before* the expiration of a 24-month period, general rules for these contractual arrangements apply, so courts will rule in favour of the employment relationship and the termination as an unfair dismissal.

1.2.2. Conventional Limits and the Role of Collective Agreements

The recourse to successive fixed-term contracts in the same job is subject to a newly-set conventional limit, as collective bargaining lays down "the necessary requirements to prevent the abuse of fixed-term contracts to perform the same job" (Art. 15.5, par. 2 of the ET), on the basis of the content of the working activity. The previous version of Art. 15.5 of the ET stated that "by means of collective agreements concluded at a national or sectoral level—strikingly enough, company-level agreements were excluded—further requirements could be set out to prevent the abuse of successive fixed-term contracts". It is also significant that, in the language of the provision, the use of collective bargaining as an instrument to deal with the issue is only viewed as a remote possibility (*may* provide). In some respects, Art. 15.5 imposes these conventions, and this hints at the importance lawmakers give to this issue. Thus, one might expect a more decisive response by actors of collective bargaining, regardless of the scope of the accord, with collective agreements that, unlike what was provided in the previous wording of Art. 15.5—should include relevant clauses. Yet the existence of the obligation to bargain on such clauses remains to be seen. Likewise doubtful is to understand if their absence entails that the agreement is null and void. Express mention of the "obligation to bargain" would have probably been more useful, as well as the statutory imposition to include such clauses among the minimum terms of the collective agreements (Art. 85.3 ET). Accordingly, many scholars are of the opinion that there is no real obligation in this connection and in some other provisions, the legislator has decided not to include such a requirement. This is the case, for instance, of Art. 36.2 of the ET concerning night work stating that "it is up to collective bargaining to determine a special hourly wage rate".
More generally, these clauses can serve different purposes:

a) determining the maximum number of fixed-term contracts in a given post that can be concluded for a certain period, or from a specific date, to limit the subsequent use of these contractual arrangements;
b) fixing the maximum number of contracts that can be concluded for a given period in a given post in order to limit their use; and
c) defining the position within the company that must be occupied by permanent workers.
There are, then, different formulae. The only statutory requirement is that they have to include those contracts concluded with a temporary employment agency. In a similar vein, it is compulsory that interruptions of "chain of contracts" do not hinder the overall assessment of the string of fixed-term contracts. Although not made explicit in Art. 15.5 of the ET, precarious employment should be dealt with by offering permanent jobs. By means of conventional agreements, the broad and flexible set of temporal causes to hire workers for a definite period tends to be narrowed, even without questioning their relevance. There is nothing wrong in reducing the use of fixed-term contracts through collective bargaining. However, the conventional limits imposed on collective bargaining may also serve to avoid fraud in successive fixed-term illegal contracts. In line with this, Art. 15.3 of the ET states that: "fixed-term contracts concluded illegally should be converted into open-ended employment contracts".

1.3. Art. 15.5 of the ET and the Current Economic Crisis

Art. 5 of Royal Decree Law No. 10 of 26 August 2011 on urgent measures for the promotion of youth employment makes provisions for job stability as well as for vocational retraining for those who are no longer entitled to unemployment benefits. It suspended the application of Art. 15.5 of the ET in the two years following the introduction of the Royal Decree Law, that is, until 31 August 2013. The rule providing for the conversion of fixed-term contracts into open-ended ones was established in 2006 in a time of economic expansion to promote employment stability.
However, due to the current financial situation, this rule, rather than encouraging the recourse to permanent contracts, may have negative effects, leading to the expiration of temporary contracts, thus reducing employment opportunities. For this reason, lawmakers decided for its suspension or "non-implementation".

Art. 17 of the Royal Decree Law No. 3 of 10 February 2012 now in force concerns urgent measures to reform the labour market and reduces the period of suspension laid down by Art. 15.5 of the ET to 31 December 2012. It also introduces significant changes to that, thus limiting workers' rights in some respects (for instance, in terms of internal flexibility, termination of the employment contract, collective bargaining). It is therefore even more surprising that a provision aimed at improving employees' working conditions has been introduced. In its Preamble, the lawmaker sets forth that the aim of the reform is that of "reducing labour market duality as soon as possible". It remains to be seen whether this attempt will be successful or not.

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ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

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