

Labour Policy and Fixed-Term Employment Contracts in Germany

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I. General overview of fixed term employment in the German labour market

A recent survey by an important German think-tank shed light upon the fact that at present only about 60 per cent of the workforce enjoy full-time employment on the basis of an indefinite term contract. The study was fittingly titled “Traditional Employment Relationships in Flux – Normal Employment Relationships in Retreat”.¹ The authors of the study state that there has been a considerable decline of indefinite term and full-time contracts in the German labour market for a couple of years. This is essentially due to the fact that part-time employment has become increasingly widespread. It is also due to ever-increasing fixed term employment however. According to the study 74.4 per cent of the working population worked full-time compared to 25.6 per cent that held part-time jobs in 2008. As regards fixed-term employment it was found by the authors of the study that 85.4 per cent of persons enjoyed an indefinite term contract while 14.6 per cent were in fixed-term employment in the same year. Compared to other European countries the number of fixed-term workers is still fairly modest. In Spain, Poland and Portugal persons having a fixed-term contract represent 29.4 per cent, 27.0 per cent and 23.3 per cent of the working population respectively. It is also slightly below the OECD-average which is at 15.4 per cent.² On the other hand fixed-term contracts are far more common in Germany than, for instance, in Great Britain (5.3 per cent) or the US (4.2 per cent). What is more, there seems to have been an accelerated growth of “atypical” employment over the last couple of years. According to the study the fraction of “traditional employment” was 60.1 per cent in 2008 as compared to 64.7 per cent in 2001. According to another recent study which was prepared by the Institute for Employment Research (*Institut für Arbeitsmarkt- und Berufsforschung*), the research institute of the Federal Employment Agency (*Bundesagentur für Arbeit*), the fraction of fixed-term workers increased from 4 per cent in 1996 to more than 6 per cent in 2006. While in 2001 only 32 per cent of new employment contracts represented fixed-term contracts, the according number jumped to 43

¹ Eichhorst/Kuhn/Thode/Zenker for Bertelsmann Stiftung, Traditionelle Beschäftigungsverhältnisse im Wandel – Benchmarking Deutschland: Normalarbeitsverhältnis auf dem Rückzug, 2010.

² As regards the European Union about 12 per cent of workers work under fixed-term contracts; see *European Foundation for the Improvement of Living and Working Conditions*, Fourth European Working Conditions Survey, 2007, p. 8.

per cent in 2006.³ According to the Federal Statistical Bureau almost 9 per cent of the workforce at present is employed under fixed-term contracts.⁴

Fixed-term employment is regarded as one form of “atypical employment”⁵ in Germany.⁶ The other forms are part-time employment and temporary agency work. In an individual case there may – and there will often – be a combination of these different forms. For instance, it is possible that an agency worker holds a fixed-term contract with the agency. It is equally possible that a fixed-term worker works part-time only. As a matter of fact, part-time work owed under a fixed-term contract seems to be almost the standard rule in practice. On the other hand, full time work regularly goes with open-ended contracts.⁷

II. Historic development of the regulation of fixed-term contracts

Until the year 2000 the fixing of the term of an employment contract was ruled by section 620 of the Civil Code (*Bürgerliches Gesetzbuch*), according to which an employment contract ends when the period of time prescribed by the parties to the contract has come to its end. Though the wording of this provision suggests no restriction of the power of the parties to fix the term of the contract, the courts quickly started developing according limitations. In the year 1932, the Reich Labour Court (*Reichsarbeitsgericht*) had already ruled that a chaining of employment contracts was invalid if the employer, by choosing this particular contractual arrangement, tried to evade legal restrictions existing under dismissal law.⁸ Accordingly, when the Act on Dismissal Protection was enacted in 1952, the legislator realised that the Act was not – or at least not directly – applicable on fixed-term contracts because such contracts reach their end automatically and as a consequence do not require the employer to give notice. At that time a deliberate decision was taken, however, by the legislator to leave the task of closing that possible loophole in the legal protection of workers to the courts.⁹ This solution was found in the year 1960 with a ground-breaking ruling of the Great Senate of the Federal Labour Court (*Bundesarbeitsgericht*).¹⁰ According to this judgment a fixed-term contract can only be legally valid if the fixing of the term does not amount to what is called in German legal methodology an “objective evasion” of the law (“*objektive Gesetzesumgehung*”). Under the doctrine of “objective evasion” a legal arrangement is ineffective if it confounds the purpose of a statutory provision and must be

³ *Institut für Arbeitsmarkt- und Berufsforschung*, *Spurwechsel – In neuen Erwerbsformen unterwegs durch die Arbeitswelt*, 2008.

⁴ Statistisches Bundesamt 18.03.2010 (www.destatis.de). The rise of fixed-term contracts was immediately criticised by the head of the Federal Employment Agency on the ground that workers should be able “to plan their lives” and companies should “try to hold qualified workers”.

⁵ As to “very atypical” employment (very short fixed-term contracts among them) see, most recently, *European Foundation for the Improvement of Living and Working Conditions*, *Flexible forms of work: ‘very atypical’ contractual arrangements*, Dublin, 2010.

⁶ By the Federal Statistical Bureau in particular. This qualification is strongly opposed by temporary agencies however claiming that the relationship between agency and temp forms a “regular” employment relationship. As a matter of fact agency work in Germany is regularly performed under indefinite term contracts; see also *Wank* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, Introduction to AÜG no 6.

⁷ *Eichhorst/Kuhn/Thode/Zenker for Bertelsmann Stiftung*, *Traditionelle Beschäftigungsverhältnisse im Wandel – Benchmarking Deutschland: Normalarbeitsverhältnis auf dem Rückzug*, 2010, p. 4.

⁸ Reichsarbeitsgericht of 02.07.1932, ARS 16, 66.

⁹ See Federal Parliament, Printing Matter 1951, p. 2090.

¹⁰ Großer Senat of 12.10.1960 – Gr. Senat 1/59 (3 AZR 65/56), in: *Arbeitsrechtliche Praxis § 620 BGB Befristeter Arbeitsvertrag* no 16.

assessed as an abuse of rights. Because the legal evaluation is an “objective” one, the animus of the parties is of no importance whatsoever. From the perspective of the court the provisions which had to be guarded against possible evasion are the statutory provisions of dismissal law and, in particular, the provisions that are enshrined in the Act on Dismissal Protection (*Kündigungsschutzgesetz*). According to the Federal Labour Court the fixing of the term of an employment contract amounts to an “objective abuse” of the freedom of contract if no objective ground for this particular contractual arrangement existed. On the basis of what was regarded as an “intrinsic enhancement of law” (*gesetzesimmanente Rechtsfortbildung*) possible objective grounds were eventually carved out by the court. The consolidation of the according judgments and their underlying rationale later prompted the legislator to simply accept the according list by transposing it in the according statute.¹¹

In the year 1985 the so-called Act on Advancing Employment (*Beschäftigungsförderungsgesetz*) came into force. Against the background of high unemployment the aim of this law was to induce employers to offer more employment opportunities.¹² Part of the legal package was a provision that intended to make the fixing of terms easier. At the time of passing law the Act was intended to expire after five years but instead was extended twice for five years each. With the second amendment of the Act – by the so-called Employment Law Act on Advancing Employment (*Arbeitsrechtliches Beschäftigungsförderungsgesetz*) of 1996 – admissibility of fixing the term of an employment contract without the need of an objective ground even became the basic rule. According to section 1(1) of that Act it was allowed to fix the term of a contract without objective grounds for a period of up to two years with at most three extensions possible within this period of time. The need to implement Council Directive 1999/70/EC of 28.06.1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP¹³ led to legislation on fixed-term employment existing at that time being substituted by the Act which is in force at present, the so-called Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*). This Act enshrines the principle that a fixing of terms requires an objective ground but fixes some exceptions that resemble the provisions formerly fixed in the Acts of 1985 and 1996.

Whether and to which extent the legislator reached the goal of creating more job opportunities by making it easier to conclude fixed-term contracts has become one of the most hotly-debated issues of employment policy in Germany. The according discussion seems to have grown almost into a religious war. Both parties claim that there is clear evidence. In fact there may be very little.¹⁴

III. Present regulation of fixed-term contracts

1. General Remarks

a) Legal Aim

¹¹ See III. 3a aa) *infra*.

¹² Federal Parliament Second Chamber, Printing Matter 393/84, p. 15.

¹³ Official Journal of the European Communities of 10.07.1999, L 175, p. 43. The Directive is based on the so-called social dialogue and puts into effect the framework agreement on fixed-term contracts concluded on 18.03.1999 between the general cross-industry organisations (ETUC, UNICE and CEEP).

¹⁴ See *Jahn*, Zur ökonomischen Theorie des Kündigungsschutzes – Volatilität der Arbeitsnachfrage und duale Arbeitsmärkte, 2002.

Fixed-term employment at present is essentially regulated by the Part-Time and Fixed-Term Employment Act¹⁵ which came into force on 01.01.2001.¹⁶ As the title indicates, the Act is concerned with both part-time and fixed-term employment. According to section 1 the main purposes of the Act are, first, to encourage part-time employment (which is essentially done by establishing a claim of employees to reduce their working time),¹⁷ second, to lay down the prerequisites of fixing the term of an employment contract (section 14) and, third, to foreclose discrimination of part-timers and persons working on the basis of a fixed-term contract (section 4(1) and (2) respectively). Regarding fixed-term employment it is noteworthy that the legislator adhered to the assessment that a fixed-term contract of employment should be an exception rather than the normal case.¹⁸ This is in line with European law and the according appraisal by the partners to the framework agreement.¹⁹

b) Legal Definitions

Section 3(1) contains a legal definition of fixed-term employment. According to section 3(1) sentence 1 a person works under a fixed-term contract if the duration of the contract is limited. According to section 3(1) sentence 2 the duration of the contract is limited if either the term is fixed according to the calendar (employment contract with a term fixed according to the calendar) or the duration is dependant on the nature, purpose or quality of the work to be provided (employment contract with a term limited by purpose).²⁰ In addition to that, section 21 states that an employment contract can be concluded under a condition subsequent (if the contract is dependant on an *uncertain* event)²¹ in which case the restrictions on fixed-term employment essentially have to be applied however.²²

c) “Undocking” of the Fixing of Terms from Dismissal Protection

As has been explained earlier the original rationale of restricting the use of fixed-term contracts was to ensure that dismissal protection could not be evaded by simply fixing the term of a contract. This implied that the restrictive rules on fixed-term contracts were applicable if but only if the concerned worker enjoyed dismissal protection. The Act on Dismissal Protection (*Kündigungsschutzgesetz*), however, is applicable only to workers who have been employed for at least half a year (section 1(1) sentence 1) in establishments with a regular workforce of more than 10 persons (section 23(1) sentences 2–5).²³ As a consequence,

¹⁵ The most recent review of court rulings with regard to the Act is provided by *Kossens*, Aktuelle Rechtsprechung zum Befristungsrecht nach dem TzBfG, in: Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht (NZA-RR) 2009, p. 233.

¹⁶ For some areas specific rules exist, however, which according to section 23 remain unaffected by the Part-Time and Fixed-Term Employment Act. The most important, next to section 21 of the Federal Act on Family Allowances and Parental Leave (*Bundeseltern- und Elternzeitgesetz*), might be the ones contained in the Act on Fixed-Term Contracts in Higher Education and Research (*Wissenschaftszeitvertragsgesetz*).

¹⁷ Section 8 of the Act.

¹⁸ German Parliament, Printing Matter 14/4374, p. 1 and p. 12; see also Federal Labour Court of 08.08.2007 – 7 AZR 855/06, in: Arbeitsrechtliche Praxis § 14 TzBfG no 41.

¹⁹ In the Preamble to the agreement the social partners recognise that contracts of an indefinite duration “are and will continue to be, the general form of employment relationship between employers and workers”. They also recognise, however, “that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers”.

²⁰ Seasonal workers fall into this category; see Federal Labour Court of 20.10.1967 – 3 AZR 467/66, in: Arbeitsrechtliche Praxis § 620 BGB Befristeter Arbeitsvertrag no 30.

²¹ See see *Müller-Glöge* in: Erfurter Kommentar zum Arbeitsrecht, 10th ed. 2010, § 3 TzBfG no 12.

²² According to section 21 of the Act the provisions of sections 4(2), 5, 14(1) and (4), 15(2), (3) and (5) as well as sections 16 – 20 are applicable.

²³ If the employment relationship started after 31.12.2003.

the parties to an employment contract were free to fix the term of the contract if one of these conditions was not met. In such case there was *a priori* no danger of evading dismissal protection. This legal situation changed when Council Directive 1999/70/EC of 28.06.1999 came into force and eventually had to be transposed into German law. This Directive, which covers all workers independent of their length of service and whose application is equally independent of the size of the establishment or company employing them, does not contain any rules on the single fixing of the term of a contract; the only concern of the Directive in this regard is so-called “chain employment” (by succeeding fixed term contracts).²⁴ When enacting the Part-Time and Fixed-Term Employment Act, the German legislator used the opportunity, however, to make judicial control of fixed-term contracts independent of the requirements of dismissal protection. Since then the restrictions on the fixing of terms apply irrespective of whether or not a worker falls within the area of application of the Act on Dismissal Protection. The according “undocking” of the regulation on fixing of terms from dismissal protection was not less than a “paradigm shift”.²⁵

2. Prohibition of Discrimination

In transposing Clause 5 of the framework agreement a fixed-term worker may according to section 4(2) sentence 1 not be treated worse than a respective person working under an unlimited term contract, provided that no sound reason exists to do so.²⁶ In particular, according to section 4(2) sentence 2 a fixed-term worker has a claim to pay (and other claims of cash value that are divisible)²⁷ for a given assessment period in accordance to the fraction of work provided by him during that period (so-called *pro-rata-principle*). Fixed-term workers may, however, be not able to claim a certain allowance if the duration of their contract is very short and a partial grant would result in an entitlement to a minor amount of money which must be regarded as being out of proportion when held against the purpose of the allowance.²⁸ Finally, if certain employment conditions are dependant on the existence of an employment relationship no different periods can be applied to fixed-term and full-time workers without good reasons (section 4(2) sentence 3).

The prohibition of discrimination is particularly relevant in the area of yearly allowances. Specific problems arise in this regard if such allowance serves the double purpose of not only being part of remuneration but also aiming at rewarding loyalty. As a rule of thumb it can be said that, if the second element features strongly, a differentiation between fixed-term and unlimited term workers is likely to be lawful.²⁹

3. Lawful Fixing of Terms

²⁴ Clause 5 of the framework agreement states that in order “to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States ... shall, where there are no equivalent legal measures to prevent abuse, introduce ... , one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships”.

²⁵ Federal Labour Court of 06.11.2003 – 2 AZR 21/03, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 9.

²⁶ This provision aims equally at employers and partners to collective agreements; see most recently Federal Labour Court of 27. 11. 2008 – 6 AZR 632/08, in: *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht (NZA-RR)* 2009, p. 490.

²⁷ Allowances or holidays, for instance.

²⁸ See Federal Parliament, Printing Matter 14/4374, p. 16.

²⁹ With regard to the issue of discrimination see also Federal Labour Court of 15.09.2009 – 3 AZR 37/08 (not yet published): Partners to collective agreements must not discriminate fixed-term workers because they are bound to the principle of non-discrimination as laid down in Article 3(1) of the German Constitution.

a) Section 14(1): Requirement of Objective Grounds

aa) Statutory Examples

Under Germany law the term of a contract of employment in principle can be fixed only if such fixing is justified on objective grounds. This is laid down in section 14(1) sentence 1 of the Part-Time and Fixed-Term Employment Act.³⁰ According to section 14(1) sentence 2 an objective ground exists “in particular” if

- the need for certain manpower is only temporary (no 1),
- the term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment (no 2),
- a worker is employed in order to substitute for another worker (no 3),
- the nature of work justifies the fixing of the term (no 4),
- the fixing of the term serves the purpose of testing the worker (no 5),
- grounds which are related to the person of the worker justify the fixing of the term (no 6),
- the worker is remunerated from budget funds, these funds are earmarked for fixed-term employment only under the according budget rules and the worker is employed accordingly (no 7),
- the fixing of the term is based on an amicable settlement before a court (no 8).

Section 14(1) sentence 2 is meant to give examples. It is not an exhaustive list of possible objective grounds. However, it is difficult to figure out additional grounds which could also justify the fixing of a term of an employment contract. In any event, such grounds would have to carry the same weight as the grounds expressly mentioned in the Act.³¹

bb) General Rules

The requirement of an objective ground applies to employment contracts fixed according to the calendar as well as to employment contracts with a term limited by purpose. As to the former the duration of the contract does not play any role. Even if a contract of employment is concluded for a single day only, an objective ground must exist.³² Apart from that it should be noted that the requirement of an objective ground applies to every type of employment contract. In particular, the fixing of the term in a contract concluded between an employer and an executive employee (*leitender Angestellter*)³³ requires an objective ground too.

The requirement of an objective ground applies to the fixing of the term “as such” whereas it does not apply to the intended duration of the contract. It is necessary that the

³⁰ Though the wording of section 14(1) may suggest otherwise the provision applies not only to the situation where a contract is fixed from the start but also to the situation where the term of a contract which was originally intended to be of unlimited duration is fixed later on; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 14 TzBfG no 13. Section 14 is applicable to the fixing of the term of the contract; it does not apply to the fixing of terms of single elements of the contract; see most recently Federal Labour Court of 02.09.2009 – 7 AZR 233/08, in *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1318 (with regard to the non-applicability of section 14(4) of the Act).

³¹ See most recently State Labour Court Hannover of 21.09.2009 – 9 Sa 1920/08 (not yet published).

³² Federal Labour Court of 16.04.2003 – 7 AZR 187/02, in: *Arbeitsrechtliche Praxis* § 4 BeschFG 1996 no 1 (regarding contracts concluded for a single day each under a “framework agreement” between the parties).

³³ See section 14(2) of the Act on Dismissal a Protection. In contrast to “normal” staff the legal protection of employees belonging to this category is restricted in the sense that unlawfulness of dismissal in principle leads to it being ineffective whereas in case of an unlawful dismissal of an executive employee only compensation can be claimed (see section 14(2) sentence 2, 9(1) sentence 2 of the Act on Dismissal Protection). Because of the “undocking” of the fixing of terms from dismissal protection this peculiarity, however, is of no relevance any more when it comes to fixed-term contracts.

fixing can be justified by the existence of an objective ground while it is not necessary to examine whether an objective ground, if existing, demands the contract to be of a specific duration.³⁴ Objective ground and duration of the contract in other words have not to be congruent in the sense that the moment when the contract ends must be identical with the point of time when the objective grounds will presumably cease to exist.³⁵

An objective ground within the meaning of the law has to exist at the time of fixing the term. In case that such ground exists at that time it doesn't matter if it ceases to exist thereafter. If, for instance, a worker is hired on the basis of a fixed term contract in order to replace another worker who is on leave (section 14(1) no 1) the fixing is – and remains to be – lawful, if the replaced worker returns sooner than was (and could reasonably be) expected.³⁶

In case of succeeding fixed-term contracts it is in principle the last contract only which forms the subject of the examination by the court as to whether an objective grounds exists or not. This is due to the fact that in concluding a new fixed-term contract without any (tacit or explicit) reservations the parties to the contract make it regularly clear that only the “last contract” should be of relevance henceforth.³⁷

Section 14(1) requires the existence of an objective ground according to the underlying facts. Neither does it require the objective ground forming an explicit part of the contract nor does it require the objective ground having been part of the deliberations of the parties leading to the conclusion of the contract nor does it require the objective ground being (expressly) communicated to the worker by the employer.³⁸ With regard to employment contracts with a term limited by purpose, on the other hand, it is necessary to notify the objective ground to the employee because otherwise the content of the agreement on the fixing of the term would not be certain.³⁹

cc) The Objective Grounds in More Detail

One of the most important possible objective grounds is the need for certain manpower being only temporary (no 1). In this case the existence of the objective ground is dependant on a prognosis decision to be taken by the employer according to which it is sufficiently likely that an existing need for certain manpower will cease to exist in the future.⁴⁰ The employer must be able to show that his prognosis decision is based on facts.⁴¹ It is not sufficient if an employer is uncertain about what future business developments will look like.⁴² In particular,

³⁴ A specific duration may indicate however that an objective ground for fixing the term of the contract did not exist “in truth”; see Federal Labour Court of 26.08.1988 – 7 AZR 101/88, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 124 and – more recently - Federal Labour Court of 29.07.2009 – 7 AZR 907/07 (not yet published).

³⁵ Federal Labour Court of 26.08.1988 – 7 AZR 101/88, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 124; see also – more recently – Federal Labour Court of 21.01.2009 – 7 AZR 630/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 727.

³⁶ See Federal Labour Court of 13.08.2008 – 7 AZR 513/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 27 (regarding section 14(2) of the Act).

³⁷ See most recently Federal Labour Court of 18.06.2008 – 7 AZR 214/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 50.

³⁸ Federal Labour Court of 26.07.2000 – 7 AZR 51/99, in: *Arbeitsrechtliche Praxis* § 1 BeschFG 1996 no 4 and Federal Labour Court of 15.08.2001 – 7 AZR 263/00, in: *Arbeitsrechtliche Praxis* § 21 BErzGG no 5.

³⁹ See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 14 TzBfG no 21.

⁴⁰ Federal Labour Court of 25.08.2004 – 7 AZR 7/04, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005, p. 357.

⁴¹ See most recently Federal Labour Court of 16.10.2008 – 7 AZR 360/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 676.

⁴² Federal Labour Court of 12.09.1996 – 7 AZR 790/95, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 182.

it is not sufficient if the employer fixes the term of a contract due to the fact that he is concerned about future economic developments that cannot be influenced by him.⁴³ A clear case of applying section 14(1) sentence 2 no 1, on the other hand, would be if the employer intends to close down an establishment in the future and a worker is needed only temporarily in order to maintain operations until the intended point of closure.⁴⁴

As for the objective ground fixed in section 14(1) sentence 2 no 2 (“term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment”) it may be worth noting that the “subsequent employment” must in principle be one immediately following apprenticeship or graduation. If there is another employment relationship “in between”, that objective ground regularly will not apply.⁴⁵ On the other hand an “easing” of subsequent employment may be affirmed even if there is not more than hope of future employment (which, by the way, must not necessarily be with the employer being the party to the fixed term contract himself).⁴⁶

While section 14(1) sentence 2 no 2 is of limited practical importance only⁴⁷ the objective ground fixed in section 14(1) sentence 2 no 3 (“worker is employed in order to substitute for another worker”) is highly relevant in practice. If a worker because of, for instance, being sick or on holiday, does not perform his work and is substituted by another, the contract of the latter can in principle be fixed in order to “bridge the gap” until the re-entry of the substituted employee. As is the case with a “temporary need for manpower” (no 1) section 14(1) sentence 2 no 3 demands a sound prognosis decision from the employer. This prognosis decision aims at the likely ceasing of the need for a replacement in the future due to the fact that the substituted worker will return. It does, on the other hand, not extend to the exact time of return. Regularly the employer is allowed to assume offhand that a worker who is replaced by another will return to his work (sooner or later).⁴⁸ If however the employer, on the basis of information available to him, must entertain serious doubts in this regard (the worker may have made it clear from the start that he will not return) the fixing of the term of a replacement will be unjustified.⁴⁹ Whether or not it is admissible to apply section 14(1) sentence 2 no 3 to situations where a worker is hired as a “permanent replacement” (for what may be a fluctuating number of other workers) is in doubt. Before the enactment of the Part-Time and Fixed-Term Employment Act the Federal Labour Court was of the opinion that 14(1) sentence 2 no 3 was not applicable to “permanent replacements”.⁵⁰ In recent rulings,

⁴³ Federal Labour Court of 25.11.1992 – 7 AZR 191/92, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 1993, p. 1081.

⁴⁴ Federal Labour Court of 30.10.2008 – 8 AZR 855/07, in: *Arbeitsrechtliche Praxis* § 613a BGB no 359.

⁴⁵ Federal Labour Court of 10.10.2007 – AZR 795/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Verlängerung no 5.

⁴⁶ As a consequence the fixing of a term under section 14(1) sentence 2 no 2 may be legitimate if it improves the general job perspectives of the worker on the labour market; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 14 TzBfG no 33.

⁴⁷ In the view of the (historic) legislator this provision is of minor importance because an apprenticeship does not amount to an employment relationship. As a consequence section 14(2) sentence 2 does not stand in the way of fixing the term of a contract without an objective ground existing (on the basis of section 14(2) sentence 1).

⁴⁸ There is in particular no need for the employer of interrogating the worker to be replaced; see Federal Labour Court of 04.06.2003 – 7 AZR 523/02, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 252.

⁴⁹ Federal Labour Court of 02.07.2003 – 7 AZR 529/02, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 254.

⁵⁰ See for instance Federal Labour Court of 06.06.1984 – 7 AZR 458/82, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 83.

however, the court has hinted to the possibility of applying this provision in such situations.⁵¹ It is sufficient in any event that there is a causal link between the need to hire a replacement and the conclusion of the fixed-term contract. It is not necessary, however that the fixed-term worker exactly performs the work of the worker who is on leave.⁵² Nor is it required that the fixed-term worker directly or indirectly substitutes the worker being on leave.⁵³ The employer is free, in other words, to reorganise the work and to reallocate the according tasks. In court proceedings, however, he has to substantiate how the work load was spread between different workers and, in particular, that the allocation of work to be performed by the fixed-term worker is due to the work tasks redefined.⁵⁴ Section 14(1) sentence 2 no 3 does not only cover short-term contracts. The duration may easily last a couple of years instead.⁵⁵ Apart from that the application of section 14(1) sentence 2 no 3 is not merely called into question because a worker is employed repeatedly on the basis of fixed-term contracts in order to replace another worker who is inhibited from working several times.⁵⁶ Accordingly the employer is in principle free to answer the need of replacing a worker by concluding a series of short-term contracts. The number of fixed-term contracts as such does not result in the courts applying more rigid criteria when assessing the existence of an objective ground (though it may indicate that an objective ground is only feigned by the employer).⁵⁷

The objective ground of “nature of work” (no 4) is not easily to grasp. In essence section 14(1) sentence 2 no 4 covers so-called “issues of attrition” (*Verschleißtatbestände*). “Attrition” within this meaning refers, in particular, to situations, where there is an extraordinary weakening of the capacities of a worker in his job. Employment contracts with artists may be particularly illustrative in this regard: Because there is a certain need of alternation in this area – the audience wants to see “fresh faces” every now and then – and because there is an according need on the side of the employer to enjoy some flexibility, there must be a certain room for fixing of terms with artists. It should be noted however, that the courts are reluctant to apply section 14(1) sentence 2 no 4 outside this area. For instance, it has become highly dubious to which extent section 14(1) sentence 2 no 4 justifies the fixing of terms when it comes to a contract with, for instance, the coach of a professional soccer team. In any event the courts seem to become increasingly hesitant to subscribe to the view that a coach who is longer in his job gradually loses his ability to motivate his team.⁵⁸

According to section 14(1) sentence 2 no 5 a term can be fixed if the fixing serves the purpose of testing the worker. With regard to this objective ground it is important to note that in case of doubt it is assumed that a new employment contract is of unlimited duration (with

⁵¹ Federal Labour Court 25.03.2009 – 7 AZR 59/08, in *Arbeitsrechtliche Praxis* § 14 TzBfG no 58 and Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

⁵² Federal Labour Court of 18.04.2007 – 7 AZR 255/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vertretung no 2.

⁵³ Federal Labour Court of 17.04.2002 – 7 AZR 665/00, in: *Arbeitsrechtliche Praxis* BAT § 2 SR 2 y no 21.

⁵⁴ Federal Labour Court of 15.02.2006 – 7 AZR 232/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vertretung no 2.

⁵⁵ See *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 14 TzBfG no 36.

⁵⁶ Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

⁵⁷ Federal Labour Court 25.03.2009 – 7 AZR 59/08, in *Arbeitsrechtliche Praxis* § 14 TzBfG no 58 and Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

⁵⁸ Federal Labour Court of 15.04.1999 – 7 AZR 437/97, in: *Arbeitsrechtliche Praxis* § 13 AÜG no 1 (where it, however, also played a role that the team – a junior canoe racing squad – was supposed to undergo a complete change during the contract period) and Federal Labour Court of 29.10.1998 – 7 AZR 436/97, in: *Arbeitsrechtliche Praxis* § 611 BGB Berufssport no 14 (with the reasoning of the court also partly based on this fact).

specific periods of notice applying)⁵⁹ whereas a fixing of terms due to the purpose of testing has to be explicitly and clearly agreed upon by both parties.⁶⁰ There is a presumption, in other words, that no fixed-term contract with the purpose of testing the worker exists, if the parties to the contract do not clearly provide otherwise. If a fixed-term contract is concluded, however, the parties are not entirely free to determine the duration of the contract. Regularly the term of the contract may not exceed six months.⁶¹ Apart from that it should be noted that the courts demand the existence of a real need for testing the employee. There is no such need, for instance, if the envisaged fixed-term contract succeeds an employment relationship between the parties during which the employer had ample opportunity to examine whether the worker is fit for the job.⁶²

Section 14(1) sentence 2 no 6 allows for the term of an employment contract being fixed on grounds which are related to the person of the worker.⁶³ It almost goes without saying that, if interpreted extensively, this provision could become “dangerous” from the viewpoint of protecting workers against “illegitimate” fixed-term contracts. Section 14(1) sentence 2 no 6 is in general⁶⁴ narrowly construed by the courts however. One of the most important fields of application are constituted by cases where a contract is to be concluded with a foreign worker and it seems highly likely at the time when the contract is concluded that an existing work permit will not be extended by the competent authorities.⁶⁵ A wish of the worker to get nothing else than a fixed-term contract may also fall within the area of application of section 14(1) sentence 2 no 6.⁶⁶ Such wish may justify a fixing of the term if the facts of the individual case – no generalisations are allowed⁶⁷ – clearly indicate that the worker has an interest in exactly working on the basis of a fixed-term contract. This may, for instance, be the case, if the according viewpoint of the worker is influenced by obligations towards family

⁵⁹ If the contract is of unlimited duration each party can in principle terminate the contract as it thinks fit. According to section 622(3) of the Civil Code the relevant period of notice is two weeks if the probation period does not exceed six months.

⁶⁰ Federal Labour Court of 30.09.1981 – 7 AZR 789/78, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 61.

⁶¹ This period is derived from both section 622(3) of the Civil Code and section 1(1) sentence 1 of the Act on Dismissal Protection.

⁶² Federal Labour Court 23.06.2004 – 7 AZR 636/03, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, p. 1333.

⁶³ According to the dominating opinion a contractual age limit may also fall within the area of application of section 14(1) sentence 2 no 6; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 15 TzBfG no 56 ff (with further references); see also Federal Labour Court of 18.06.2008 – 7 AZR 116/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 48 and Federal Labour Court of 17.08.2009 – 7 AZR 112/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1355 (“objective ground” within the meaning of section 14(1) sentence 1).

⁶⁴ See however Federal Labour Court of 21.01.2009 – 7 AZR 630/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 57 where section 14(1) sentence 1 no 6 was applied by the court on the basis of weighing the interests of the parties concerned.

⁶⁵ Federal Labour Court of 12.01.2000 – 7 AZR 863/98, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 217.

⁶⁶ According to recent findings of the Federal Statistical Bureau only 2.5 per cent of workers wished to be employed on a fixed-term basis however; see *Statistisches Bundesamt* 18.03.2010 (www.destatis.de).

⁶⁷ For instance, there is no general rule in the view of the court that moonlighting students would prefer fixed-term contracts over an unlimited term; see Federal Labour Court of 10.08.1994 – 7 AZR 695/93, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 162.

members. The test that has to be applied is whether or not, in case of the job offer comprising both fixed-term and unlimited term, the worker would have freely chosen the former.⁶⁸

If a worker is remunerated from budget funds and these funds are – clearly and recognisably⁶⁹ – earmarked for fixed-term employment only, a fixing of terms may be allowed too.⁷⁰ To be sure the according provision (section 14(1) sentence 2 no 7) clearly leads to a preferential treatment of public employers with regard to concluding fixed-term contracts. In the recent past it has become increasingly doubtful whether section 14(1) sentence 2 no 7 is in line with European law,⁷¹ because the admissibility of concluding a fixed-term contract at the end of the day is determined by the legislator who fixes the according budgetary rules.

Finally, as regards the fixing of the term that is based on an amicable settlement before a court (no 8) it may be sufficient to say that the according provision is interpreted narrowly by the courts in order to counteract misuse of that objective ground.⁷²

b) Section 14(2): Limited Fixing of Terms without Objective Grounds

aa) Short Duration-Contracts

Section 14(2) contains an exception to the principle enshrined in section 14(1) according to which the fixing of a term requires an objective ground. Under section 14(2) sentence 1 the fixing of a term according to the calendar is admissible without objective grounds existing, if the duration of the contract does not exceed two years.⁷³ Within the period of two years such contract may be extended three times at most. Section 14(2) sentence 2 enshrines the so-called “prohibition of follow-up” (*Anschlussverbot*). According to this provision a fixing of the term of a contract without objective grounds is not admissible if sometime in the past an employment contract existed between the parties concerned. This provision requires the partners to the contracts on the side of the employer to be identical. The provision aims at the partner to the contract; it does not aim at the workplace occupied by the employee.⁷⁴ As a consequence section 14(2) sentence 2 is not applicable if a temporary worker is hired-out by a

⁶⁸ Federal Labour Court of 19.01.2005 – 7 AZR 115/04, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 260.

⁶⁹ See in this regard Federal Labour Court of 02.09.2009 – 7 AZR 162/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1257. In a recent ruling the Federal Labour Court (17.03.2010 – 7 AZR 843/08) held that the Federal Employment Agency had breached section 14(1) sentence 1 no 7 when fixing the terms of 5000 of its workers.

⁷⁰ See also Federal Labour Court of 16.10.2008 – 7 AZR 360/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 56 where the court explicitly declared to be inclined to regard a *legislative* dedication of funds being required.

⁷¹ See, for instance, *Löwisch*, Vereinbarkeit der Haushaltsmittelbefristung nach § 14 Absatz 1 Nr. 7 TzBfG mit europäischer Befristungsrichtlinie und grundgesetzlicher Bestandsschutzpflicht, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2006, p. 457.

⁷² In particular, the Federal Labour Court demands that next to an involvement of the court there must have been an open disagreement between the parties with regard to their legal relationship at the time when the settlement is reached; Federal Labour Court of 26.04.2006 – 7 AZR 366/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vergleich no 1. The latter requirement is supposed to ensure that the parties do not abuse the possibility fixed in section 14(1) sentence 1 no 8 by engaging a court in order to having recorded an agreement that was already reached before going to court.

⁷³ According to Federal Labour Court of 13.08.2008 – 7 AZR 513/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 27 section 14(2) protects employers also from claims brought by their fixed-term employees according to which their contracts must be extended due to the general principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) because other fixed-term contracts were extended by the employer; see also *Strecker*, Der arbeitsrechtliche Gleichbehandlungsgrundsatz als Anspruchsgrundlage für die Verlängerung eines befristeten Arbeitsverhältnisses, in: *Recht der Arbeit (RdA)* 2009, p. 381.

⁷⁴ See Federal Labour Court of 16.07.2008 – 7 AZR 278/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 51.

former employer.⁷⁵ According to section 14(2) sentence 3 the number of possible extensions or the maximum duration of the contract may be modified on the basis of a collective agreement.⁷⁶ Employers and employees who are not legally bound to the collective agreement (regarding workers such workers who are not members of the according trade union)⁷⁷ are allowed to agree on applying the according provisions of the agreement to their employment contract (section 14(2) sentence 4).

The fixing of the term of an employment contract is only dependant on the requirements of section 14(2) sentence 1 being fulfilled. There is no additional need for the parties to the contract to expressly agree upon concluding a fixed-term contract that is not based on an objective ground.⁷⁸ As a consequence, section 14(2) sentence 1 may, for instance, apply if the parties in their agreement refer to a reason which forms part of the list provided in section 14(1) sentence 1 but which “upon closer legal examination” does not exist.⁷⁹

Within a period of two years a fixed-term contract may be extended three times at most. It should be noted that an “extension” within this meaning does only exist if the according agreement was reached *before* the end of the original contract. An agreement reached thereafter does not qualify as an “extension” anymore but must be regarded as the conclusion of a new contract instead.⁸⁰ Even if not more than a single day passes between the end of the contract and the subsequent agreement between the parties there is no “extension” within the meaning of section 14(2) sentence 1 anymore.⁸¹ Apart from that it is remarkable that the courts in principle reject the possibility of the existence of a mere “extension” of the fixed-term contract if the parties, apart from fixing the term of the contract, agree upon an amendment of some pre-existing terms and conditions.⁸² In order to qualify as an “extension” the terms and conditions of the contracts may not be touched upon in other words. According to the Federal Labour Court this is even true if the modification of the contract favours the employee.⁸³ If, however, the latter agreement fixes working conditions the employee can legally claim from his employer to adhere to, there may be a mere “extension” of the original

⁷⁵ See Federal Labour Court of 18.10.2006 – 7 AZR 145/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Verlängerung no 4.

⁷⁶ Such collective agreements can dispose of the statutory rules even to the disadvantage of the workers. In all other areas however collective agreements can dispose of the statutory rules only if the workers are benefiting from the provisions of the agreement (section 22(1) of the Act).

⁷⁷ According to section 3(1) of the Act on Collective Agreements (*Tarifvertragsgesetz*) a worker is bound to such agreement if he is a member of the trade union which concluded the agreement. An employer on the other hand is bound to it, if he either belongs to the relevant employers’ association or did conclude the agreement himself.

⁷⁸ See most recently Federal Labour Court of 12.08.2009 – 7 AZR 270/08 (not yet published).

⁷⁹ Federal Labour Court of 15.01.2003 – 7 AZR 534/02, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, p. 400. It may however be that the parties, by mentioning a certain ground, wanted to contractually dispose of the possibility of fixing the term without an objective ground.

⁸⁰ Federal Labour Court of 20.02.2008 – 7 AZR 786/06 in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2008, p. 883.

⁸¹ See *Maschmann*, in: *Annuß/Thüsing* (ed), *Teilzeit- und Befristungsgesetz*, 2nd ed., 2006, § 14 no 71.

⁸² Federal Labour Court of 15.01.2003 – 7 AZR 534/02, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, 400 and – more recently – Federal Labour Court of 20.02.2008 – 7 AZR 786/06 in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2008, p. 883 (abolition of a right to terminate the contract ordinarily that formed part of the original contract).

⁸³ Federal Labour Court of 23.08.2006 – 7 AZR 12/06, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2007, p. 204. It is acknowledged by the court however that a modification of the original contract upon extension is admissible if such modification aims at conditions the parties would have agreed-upon if a contract of unlimited duration had existed. That reasoning of the court is based on the prohibition of discrimination against fixed-term workers as laid down in section 4(2) sentence 1.

fixed-term contract (instead of the conclusion of a new fixed-term contract).⁸⁴ Though the judicial demarcation between a new contract and the extension of the old contract may be plausible, it should be noticed that there are considerable risks involved, in particular for “small” employers: If such employers fail to realise that “in reality” they agreed on a new contract (instead of only extending the old one) they end-up with a contract of unlimited duration, because the fixing of the term without an objective reason is in conflict with the “prohibition of follow-up” as laid down in section 14(2) sentence 2 and, as a consequence, must be regarded as being void.⁸⁵ Prudent (or well-advised) employers, on the other hand, can avoid to “entangle” themselves in fixed-term regulation by, for instance, making sure that an intended modification of terms of the contract takes place *either before or after* the extension and in any event is not agreed-upon as part of the extension.

The “prohibition of follow-up” has been criticised by many from a policy point of view as taking the protection of workers too far. The political parties that form the present government in their “coalition agreement” expressed their willingness to abolish the “prohibition of follow-up” and to replace it with a “waiting period” of one year.⁸⁶ As a matter of fact it is not entirely convincing that the employer should be barred from fixing the term of a contract without an objective reason because 15 or 20 years ago an employment contract existed between the parties. The Federal Labour Court, however, is not impressed and clearly rejected the possibility of arriving at a “purposive reduction” (*teleologische Reduktion*) of section 14(2) sentence 2.⁸⁷

bb) Contracts Concluded by Newly Established Enterprises

Another exception to the principle laid down in section 14(1) applies to newly established companies. According to section 14(2a) sentence 1 it is admissible to fix the term of a contract according to the calendar without objective grounds up to a period of four years from the date when a company was established.⁸⁸ Within the period of four years such contract may be extended as often as the parties to the contract think fit. This, however, does not hold good, if the enterprise was established in connection with a legal restructuring of companies or groups of companies (section 14(2a) sentence 2). If the term of a contract is fixed according to section 14(2a) sentence 1 the rules laid down in section 14(2) sentences 2 – 4 have to be applied accordingly (section 14(2a) sentence 4). In other words, both the so-called “prohibition of follow-up” and the rules on disposing of the statutory provisions by way of collective agreements must be taken into account when fixing the term of an employment contract with a newly established company.⁸⁹

As is the case with section 14(2) the application of section 14(2a) is not dependant on the parties agreeing upon fixing the term of the contract without an objective ground existing.

cc) Contracts Concluded with Older Workers

A couple of years ago, against the backdrop of relatively high unemployment and in an effort to fight it by making it easier to conclude fixed-term contracts, the German legislator

⁸⁴ Federal Labour Court of 16.01.2008 – 7 AZR 603/06, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2008, p. 701.

⁸⁵ The according stance of the courts is criticised as being too “rigid” by some German scholars; see, in particular, *Preis, Flexibilität und Rigorismus im Befristungsrecht*, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2005, 714.

⁸⁶ Koalitionsvertrag zwischen CDU, CSU und FDP, 2009, p. 22.

⁸⁷ Federal Labour Court of 06.11.2003 – 2 AZR 690/02, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2005, p. 218 and – most recently – Federal Labour Court of 29.07.2009 – 7 AZN 368/09 (not yet published).

⁸⁸ Section 14(2a) sentence 3 contains further details with regard to determining the relevant date.

⁸⁹ See for more details III. 3b) aa) *supra*.

changed the rules on fixed-term contracts with older workers. According to section 14(3) as it was brought into force at that time, employers could conclude fixed-term contracts with older workers – defined as workers above the age of 58 or 52, respectively⁹⁰ – without the need for an objective reason.⁹¹ From the start this provision met with serious doubts regarding its conformity with the prohibition of discrimination because of age which is laid down, in particular, in Directive 2000/78/EC. The European Court of Justice in a judgement in the year 2005 ruled that section 14(3) in fact breached the principle of non-discrimination in respect of age, which according to the court even forms part of the so-called primary law of the EU.⁹² This so-called “*Mangold Judgement*” of the ECJ is disputed for various reasons which partly reach far beyond labour law.⁹³ The Federal Labour Court in any event followed suit by holding that section 14(3) could not be applied anymore.⁹⁴ As a result of these judgments section 14(3) was eventually amended. Since then a fixed-term contract can be concluded for five years at most without objective grounds if the worker is, first, older than 52, and, second, has been unemployed⁹⁵ for at least four months immediately before conclusion of the contract (section 14(3) sentence 1). Succeeding fixed-term contracts are admissible as far as the period of five years is not exceeded (section 14(3) sentence 2). According to the dominating opinion this modification brings German law into line with what is required under European law.⁹⁶

4. Agreement on Fixing the Term in Writing

According to section 14(4), which serves the purposes of clarifying the legal situation, making proof of a fixed-term contract easier and caution the parties about the use of fixed-term contracts,⁹⁷ the agreement on the fixing of the term of an employment contract must be in writing. In the original draft of the Act it was foreseen that employers should notify the reason for fixing the contract to their employees. This however was later regarded as possibly asking too much from employers.⁹⁸ That being said, it must be noted that section 14(4) is rigidly applied by the courts. If, for instance, the parties agree on a fixing of the term of the contract orally, the agreement is regarded as null and void even if they put it into writing soon thereafter.⁹⁹ Only the agreement on the fixing of the term and not the contract as such needs to

⁹⁰ In principle the age of 58 was relevant. It was temporarily lowered to 52 however for four years (01.01.2003 – 31.12.2006). Under the original provision regarding fixed-term contracts with older workers (section 1(2) of the Act on Advancing Employment) the fixing of the term of the contract depended on the worker being more than 60 years old.

⁹¹ It should be noted after all that according to former section 14(3) sentence 2 this possibility could not be used if a close factual link existed with a former unlimited contract with the same employer. Such link was legally presumed to exist if there was a gap between the two contracts of less than six months (section 14(3) sentence 3).

⁹² European Court of Justice of 15.11.2005 – Case 144/04 [2005] ECR I-9981 (ECJ); see for more details *Schmidt*, The Principle of Non-Discrimination in Respect of Age: Dimensions of the EJC’s *Mangold* Judgment, in: German Law Journal 2005, p. 505 (www.germanlawjournal.com).

⁹³ See, for instance, *Riesenhuber*, Case: ECJ – *Mangold*, in: European Review of Contract Law 2007, p. 62.

⁹⁴ Federal Labour Court of 26.04.2006 – 7 AZR 500/04, in: Arbeitsrechtliche Praxis § 14 TzBfG no 23. What is more, the court declined to protect the expectations of employers who when making the offer of fixed-term contracts to older workers might have relied on German legislation being in line with European law.

⁹⁵ Or has been employed but received grants under certain public work schemes.

⁹⁶ See, for instance, *Temming*, Der Fall Palacios: Kehrtwende im Recht der Altersdiskriminierung?, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2007, p. 1193.

⁹⁷ Federal Labour Court of 23.06.2004 – 7 AZR 636/03, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2004, p. 1333.

⁹⁸ See for further details *Maschmann*, in: Annuß/Thüsing (ed.), Teilzeit- und Befristungsgesetz, 2nd ed., 2006, § 14 no 101.

⁹⁹ Federal Labour Court of 16.04.2008 – 7 AZR 1048/06, in: Arbeitsrechtliche Praxis § 14 TzBfG no 46.

be in writing however.¹⁰⁰ In case that the fixing of the term of an employment contract is void because of the according agreement not being in writing, the contract is presumed to be concluded for an indefinite period of time with specific rules applying to termination by the employer.¹⁰¹

5. End of Fixed-Term Contracts

According to section 15(1) a fixed-term contract ends automatically as soon as the end of the period of time agreed-upon by the parties (contract of employment fixed according to the calendar) has been reached. A contract of employment with a term limited by purpose ends as soon as the purpose has been achieved but not sooner than two weeks after the employer has informed the employee about the purpose being achieved (section 15(2) of the Act).

A fixed-term contract can be terminated extraordinarily according to the general rules.¹⁰² According to section 15(3) a fixed-term contract can be terminated ordinarily if the possibility of an ordinary dismissal has been agreed-upon by the parties to the contract or can be derived from an applicable collective agreement (section 15(3) of the Act). If an employment contract has been concluded for the lifetime of the employee – which is an exception by far¹⁰³ – or in any event for more than five years, it can be unilaterally terminated by the employee upon expiry of five years with a period of notice of six months (section 15(4) sentences 1 and 2). This provision serves the purpose of protecting the personal freedom of workers who shall not be contractually bound unreasonably long.¹⁰⁴ If a fixed-term contract is sustained beyond the fixed date¹⁰⁵ or the achievement of the purpose respectively¹⁰⁶ – the employee does not stop working and the employer is taking notice of that¹⁰⁷ – it is according to section 15(5) presumed to have been extended for an indefinite period of time if the employer does not object immediately¹⁰⁸ or does not inform the employee immediately about the achievement of the purpose. This provision serves the purpose of bringing about (much needed) transparency if an employment relationship is continued by the parties without a clear agreement after having expired.¹⁰⁹

6. Legal Consequences End of Invalid Fixing of Terms

In case that the fixing of the term of an employment contract is inadmissible, the contract is presumed to be concluded for an indefinite period of time with all other terms of the contract remaining unaffected.¹¹⁰ The contract may be terminated ordinarily by the employer not before the intended end of the contract unless an ordinary termination is possible at an earlier time under the terms of the contract (section 16 sentence 1).¹¹¹ If the fixing of the term

¹⁰⁰ With regard to the contract as such the provisions of the Act about the Proof of Substantial Conditions Applicable to the Employment Relationship (*Nachweisgesetz*), which requires a written statement, must be obeyed, however.

¹⁰¹ See III. 6. *infra*.

¹⁰² As laid down in section 626 of the Civil Code.

¹⁰³ See *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 15 TzBfG no 18.

¹⁰⁴ See Federal Labour Court of 19.12.1991 – 2 AZR 363/91, in: *Arbeitsrechtliche Praxis* § 624 BGB no 2.

¹⁰⁵ In the case of a contract of employment fixed according to the calendar.

¹⁰⁶ In the case of a contract of employment with a term limited by purpose.

¹⁰⁷ Federal Labour Court of 18.10.2006 – 7 AZR 749/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 28.

¹⁰⁸ In the case of a contract of employment fixed according to the calendar.

¹⁰⁹ Federal Parliament, Printing Matter 14/4374, p. 21.

¹¹⁰ Federal Labour Court of 18.09.2008 – 2 AZR 976/06, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 425.

¹¹¹ See for the latter section 15(3).

is invalid because of the parties falling short of the requirement of the written form, the contract can be terminated even before the agreed-upon term, however (section 16 sentence 2).¹¹²

7. Legal Proceedings

According to section 17 sentence 1, if an employee claims that the fixing of the term of an employment contract is invalid, he must lodge his claim at the competent labour court within three weeks after the agreed-upon expiration date of the fixed-term contract. After the lapse of that period the employee is precluded from filing a claim. In case that a fixed-term contract is sustained by the parties beyond the intended expiration date the period of lodging a claim starts with the employee receiving a notification by the employer of the end of the contract due to the fixing of the term (section 17 sentence 3).

8. Other Provisions of the Part-Time and Fixed-Term Employment Act

According to section 18 which transposes Clause 6.1 of the framework agreement the employer is obliged to inform fixed-term workers about possible opportunities to get employment of unlimited duration. This information must not be communicated individually to the workers concerned however. Irrespective of section 18 collective agreements may exist that contain a right to preferential treatment of fixed-term workers in case of a possible hiring.¹¹³

According to section 19 which implements Clause 6.2 of the framework agreement the employer is obliged to facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility provided that there is no conflict with urgent business reasons or according wishes of other employees. In case of conflicting demands the employer in principle enjoys some discretionary power.¹¹⁴

9. Co-Determination Issues

Fixed-term workers are regarded as workers within the meaning of section 5(1) of the Works Constitution Act (*Betriebsverfassungsgesetz*). As a consequence, they are taken into consideration when calculating the threshold above which works councils may be constituted in the establishment.¹¹⁵ Apart from that they enjoy both the right to elect a work council (section 7) and the according right to be elected (section 8).¹¹⁶

Under section 99 of the Works Constitution Act the works council has to be informed if the employer wants to recruit new staff members; in a limited number of cases the works council even enjoys a certain power of vetoing the decision of the employer (so-called right to deny approval). “Recruiting” within the meaning of section 99 encompasses the hiring of temporary staff on the basis of fixed-term contracts even if it leads to short-term employment only. In addition a person is “recruited” within the meaning of the law if such person is

¹¹² Section 16 sentence 2 is applicable even if the parties stipulated that an ordinary dismissal should be inadmissible; see Federal Labour Court of 23.04.2009 – 6 AZR 533/08, in: *Arbeitsrechtliche Praxis* § 16 TzBfG no 2.

¹¹³ See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 18 TzBfG no 2.

¹¹⁴ See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10th ed. 2010, § 19 TzBfG no 2.

¹¹⁵ See also Clause 7.1 of the framework agreement. According to section 1(1) sentence 1 of the Works Constitution Act a works council may be constituted in establishments that regularly employ five workers among which at least three must enjoy the right to be elected.

¹¹⁶ See *Richardi*, in: *Richardi* (ed), *Betriebsverfassungsgesetz*, 10th ed., § 6 no 52.

employed under a fixed-term contract and the contract is later extended.¹¹⁷ Though the works council cannot base a denial of approval on its assessment that the fixing of the contract is not admissible,¹¹⁸ it can deny approval if workers are at risk of facing dismissal or might suffer other disadvantages because of the intended measure without cause (section 99(2) no 3). According to the Act (section 99(2) no 3 at the end) such “disadvantage” exists in particular if an employer plans to hire a job applicant permanently without considering an equally suitable fixed-term employee. According to the language employed by the legislator the provision even applies to workers whose employment is of no more than six months duration and who accordingly do not enjoy dismissal protection yet.¹¹⁹ This is criticised as a “lack in legal system awareness” by some German scholars however.¹²⁰

As regards the case of dismissal – according to section 102 of the Works Constitution Act the works council has to be informed about a decision to dismiss a worker with a limited right of the works council to contradict – there is no co-determination right if a fixed-term contract comes to its end due to expiration of the intended period of time. In particular, the mere notification of the works council by the employer that the contract has ended does not amount to a dismissal. Similarly, there is no dismissal if the employer simply states that a fixed-term contract will not be extended.¹²¹

According to section 20 of the Part-Time and Fixed-Term Employment Act which transposes Clause 7.3 of the framework agreement the employer must inform “employees’ representatives” (in German terms the works council essentially) about the number of fixed term employees and the fixed term/unlimited term-ratio in the establishment as well as in the company.

10. Fixed-Term Contracts and Social Security Law

With regard to social security and unemployment insurance, fixed-term employment is “normal” employment in the sense that there is both compulsory coverage and liability to contribution. Specific rules apply to so-called “short-term” employment however: If an employment relationship is intended from the start to endure two months or 50 working days at most, no social security contributions must be paid by both employer and employee provided that neither professional employment exists nor remuneration exceeds 400 Euro per month (section 8(1) no 2 Social Code IV).¹²² Personal income tax however has to be transferred to the tax authorities (subject to a number of conditions including whether 25 percent flat tax or individual tax rate of employee is payable). Apart from that it should be noted that fixed-term workers may continue to receive social security benefits even beyond the expiration of their contract. For instance, a worker who sustained a work accident resulting in an inability to work can claim benefits until restoration of health even if he recovers only after the contract did reach its end.¹²³

¹¹⁷ Federal Labour Court of 07.08.1990 – 1 ABR 68/89, in: *Arbeitsrechtliche Praxis* § 99 BetrVG 1972 no 82.

¹¹⁸ Federal Labour Court of 20.06.1978 – 1 ABR 65/75, in: *Arbeitsrechtliche Praxis* § 99 BetrVG 1972 no 8 (non-applicability of section 99(2) no 1).

¹¹⁹ According to section 1(1) sentence 1 of the Act on Dismissal Protection the applicability of the Act depends on the worker employed for more than six months.

¹²⁰ See *Thüsing*, in: Richardi (ed), *Betriebsverfassungsgesetz*, 10th ed., § 99 BetrVG no 220.

¹²¹ See *Thüsing*, in: Richardi (ed), *Betriebsverfassungsgesetz*, 10th ed., § 102 BetrVG no 16 ff (with further references).

¹²² Sozialgesetzbuch IV.

¹²³ Federal Social Court of 26.05.1982 – 2 RU 41/81, in: *Entscheidungssammlung zum Sozialrecht* 2200 § 560 no 12.

IV. Evaluation of the present regulation of fixed-term contracts in labour policy and future prospects

The key question of regulating fixed-term contracts is whether and to which extent such contracts should be admissible. The German legislator evidently tried to combine the best of two worlds: On the one hand, the use of fixed-term contracts is restricted by making it in principle dependant on the existence of an objective ground. On the other hand, for reasons of employment policy, the use of fixed-term contracts is somewhat facilitated. As is always the case with a combination of elements, the solution chosen by the German legislator can easily be criticised. In the view of many, trade union representatives in particular, the present regulation of fixed-term contracts is dangerous, because it leaves too much room for employers to employ workers only temporarily.¹²⁴ In the eye of many others there is far too less flexibility.

If the issue is flexibility it may be asked however whether it would not be preferable to tackle the according problems in the area of dismissal protection. The rules on fixing terms of employment contracts are based on the idea, developed by the courts, that dismissal protection should not be evaded. Against this background the loosening of the strict rules on fixed-term contracts may be regarded as a rather circumlocutory way of trying to bring about more flexibility.¹²⁵ As an alternative it could be considered, for instance, to make application of the Act on Dismissal Protection dependant on two years continuous service with the employer.¹²⁶ It seems however that politicians are more inclined to fiddle about the rules on fixed-term contracts rather than trying to tackle the “hot potato” of dismissal protection directly.

Apart from such fundamental issues the present regulation is characterised by a number of pitfalls from the perspective of employers in particular: Whether an objective ground will be acknowledged by a court is often very difficult to anticipate. The “prohibition of follow-up” prompts problems for employers because, for instance, even a short interval between two fixed-term contracts destroys the legal privilege of fixing the term of a contract without an objective ground. It should be borne in mind in this regard that the courts are not prepared to accept a mere “extension” of an existing fixed-term contract having taken place if the agreement between the parties was reached (a little) after the expiration of the contract. It must also be borne in mind that the courts apply the requirement of the written form rigidly. If, for instance, an employer puts an oral “extension agreement” with the employee in writing after expiration of the fixed-term contract (and may it be a single day after only), the fixing of the term is regarded as null and void and the employer ends up with a contract of unlimited duration. This is particularly hard for “small employers”, who are often not fit to fully

¹²⁴ It may be interesting to note in this context that the executive committee of the Social Democratic Party recently put forward a comprehensive package of proposals aiming at amending existing labour law one of the major demands being abolishing the possibility to conclude fixed-term contracts without an objective ground.

¹²⁵ For more details see *Waas*, Kündigungsschutz und Befristungskontrolle: Optionen für eine Flexibilisierung des Arbeitsrechts, in: *Zeitschrift für Arbeitsmarktforschung (ZAF)* 2007, p. 99.

¹²⁶ This is proposed by *Preis*, Flexibilität und Rigorismus im Befristungsrecht, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005, 714; see also Koalitionsvertrag zwischen CDU, CSU und SPD, 2005, p. 39. In their “founding agreement” the parties to the former government, the so-called “grand coalition”, considered the idea of abolishing the possibility of fixing the term of a contract without objective ground altogether and replacing it by the possibility of an agreement between the parties to make application of statutory dismissal protection dependant on a waiting period of two years. This idea was not put into practice however.

comprehend the “niceties” of the law on fixed-term contracts. It is all the harder because even a very short-term contract may be converted into an open-ended one if the employer for instance “overlooks” the interplay between the “prohibition of follow-up” and the requirements of an “extension” of a fixed-term contract as developed by the courts. In this context it is important to stress that the Part-Time and Fixed-Term Employment Act does neither contain an exception for “small” employers nor an exemption of “short-term contracts” from its area of application. Finally, it should be noted that the danger of a disharmony between the regulation on fixed-term contracts and dismissal protection looms: A short-term contract may have to be converted into an open-ended one if the employer fails to meet the requirement of a mere “extension” of the contract and falls foul of the “prohibition of follow-up”. If, on the other hand, the employer had chosen to offer an indefinite term contract from the start he would have faced if anything reasonably short periods of notice.¹²⁷

¹²⁷ According to section 622(5) no 1 of the Civil Code the parties to an employment contract can dispose of the statutory period of notice altogether if a worker is employed with the purpose of merely helping-out temporarily and the relationship is not continued for more than three months.