FACULTY OF LAW
Lund University

Beatrice Anna Klingener

Sport, pregnancy, and fixed-term contracts: *Is sports a blanket exception in labour law?*

JAEM03 Master Thesis

European Business Law

30 higher education credits

Supervisor: Marja-Liisa Öberg

Term: Spring 2022

Table of content

Summary

This thesis concerns the successive use of fixed-term contracts under Clause 5 of the Framework Agreement in the sector of sports and whether such usage provides protection from dismissal for pregnant workers. This was done by using a legal dogmatic method in the field of EU law.

The paper starts with identifying the role of sports in EU labour law. It was held that sports have a special standing in EU law and have the ability to derogate from the scope of EU law if the activities are purely sports activities and not economic in nature which has been referred to as 'the specificity of sports' by scholars and the Court itself.

In this regard, the paper provided an overview of the nature of sports work and the need for atypical contracts in the sector of sports. The thesis suggests that athletes are fixed-term workers, and that Member States have the ability to justify the use of successive fixed-term contracts under Clause 5 of the Framework Agreement. Considering that Clause 5 of the Framework Agreement leaves a lot of flexibility for the Member States, they nevertheless have a margin of discretion which *may* result in an unlimited use of successive fixed-term contracts. As such, there is a risk to circumvent fundamental labour rights which became even more complex in relation to the special protection for pregnant workers to not be dismissed from the start of the pregnancy until the end of maternity leave.

The analysis shows that sports are indeed a unique industry that needs contracts that are atypical. This is because the employment conditions require flexibility. However, the successive use of fixed-term contracts in the specific sector of sport does not provide sufficient and effective protection of pregnant workers under EU law. In this regard, the thesis suggests strengthening the protection for workers by adopting a special protection approach for pregnant workers in line with the Pregnancy Directive.

Sammanfattning

Förevarande uppsats berör sambandet mellan visstidskontrakt i sportsektorn och hur sådana kontrakt förhåller sig till skyddet från avsked för gravida arbetstagare inom EU rätten. Detta görs genom att använda en rättsdogmatisk metod.

I uppsatsen framhölls att sport har en speciell roll i EU-rätten som dessutom kan undantas från EU-rättens tillämpningsområde. Det förutsätts dock att medlemsstaten eller sport organisationen i fråga visar att aktiviteten inte är ekonomisk utan är 'sportslig' i sin natur. Utifrån det, gavs en överblick över hur arbetsvillkoren kan se ut i inom sportsektorn. Mot bakgrund av den speciella karaktär som sportsektorn besitter så gav uppsatsen förslaget att idrottsmän och idrottskvinnor bör anses som visstidsanställda och att medlemsstaterna har en stor möjlighet att använda visstidsanställningar följt på varandra. Dock har EU-domstolen fastställt att den medlemsstaten måste visa att det finns ett temporärt behov i användandet och att dessa kontrakt inte används på ett sätt som egentligen är ämnat för ett tillsvidarekontrakt. Det finns emellertid en risk att visstidsanställnings kontrakt av dessa slag används obegränsat vilket skulle kunna resultera i att medlemsstaten kringgår fundamentala arbetsrättsliga principer, något som blir ännu mer problematiskt i relation till sportsektorn och gravida kvinnors rättigheter.

Uppsatsens analys framhöll att sport är i behov av arbetsavtal som är flexibla då arbetsvillkoren är flexibla inom sportsektorn. Det som däremot kan bli problematiskt är att dessa typ av kontrakt inom sportsektorn förser inte gravida kvinnor med ett tillräckligt skydd från avsked från början av graviditeten till slutet av föräldraledigheten. Därav föreslås att kvinnans arbetsrättsliga skydd bör stärkas inom sportsektorn.

Acknowledgements

I want to give a special thanks to my supervisor, Marja-Liisa Öberg, for her assistance. Without her guidance, her insightful and valuable remarks, this thesis would not be possible.

I would also like to dedicate my gratitude to all the professors within the Master Programme of European Business Law, especially Xavier Groussot, Agné Oseckyté and Anna Tzanaki.

Lastly, I would like to thank my dear husband Eric for his endless patience and support.

Lund, 2022
Beatrice Anna Klingener

Abbreviations

AG	Advocate General
CFI	Court of First Instance (now General Court)
CFR or the Charter	Charter of the Fundamental Rights of the European Union
CJEU or the Court	Court of Justice of the European Union
EMoS	European Model of Sports
Equality Treatment Directive	Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
EU	European Union
Framework Agreement	Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of the European Union
The Commission	European Commission
Pregnancy Directive	Council Directive 92/85/EEC of 19 October 1992 on the

	introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
White Paper on Sports	European Commission White Paper on Sport

1. Introduction

1.1 Background

The Framework Agreement[1] aims to create a legal framework for the usage of fixed-term employment contracts and relations.[2] The usage of fixed-term contracts has been – and still are – of high relevance both for an employer but also for an employee.[3] The usage allows for an employer to cover a temporary need, such as sick or parental leave, and creates opportunities for employees to work.[4] Given that contracts of indefinite duration is to be considered as the general form of employment within the EU,[5] the Framework Agreement regulates when and how fixed-term contracts may be used. As such, fixed-term contracts apply only to a fixed-term worker that is terminated on the end of a specific date or when a specific event ends.[6]

In the field of sports, fixed-term contracts are commonly used,[7] and employment in sports is atypical.[8] Sports has been and remains an integral part within the EU, not only in relation to the commercial and social importance, but is a crucial part in creating employment opportunities.[9] Sports and labour law is an interesting combination that can create legal issues relating to rules on anti-doping,[10] players' right to enjoy the free movement of workers,[11] and athletes' selection.[12] The combination also regards issues such as contract law, the sports labour market, and fundamental employment rights,[13] such as the right to not be dismissed.

---

[1] Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43 ('Framework Agreement').
[2] Clause 1 of the Framework Agreement (n1).
[3] Recital 6 of the Framework Agreement (n1).
[4] M. Matuszak 'Work-life balance among athletes' (2020) No. 4 (Vol. 32), 21–31.
[5] See the preamble of the Framework Agreement (n1). See also Article 3(3) TEU where it is held that the goal of the Union is to strive towards a social market economy which includes aiming at full employment.
[6] See Clause 2(1) and 3(1) of the Framework Agreement (n1).
[7] M. Matuszak (2020) (n4) 27.
[8] Ibid., (n4) 1.
[9] Commission 'The European Model of Sport' Consultation Document of Director-General X (1999) 21.
[10] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* (2006) ECLI:EU:C:2006:492.
[11] See the case Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463.
[12] See to this effect the case of Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [1999] ECLI:EU:C:1999:147 and Case C-22/18 *TopFit e.V. Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019] ECLI:EU:C:2019:497.
[13] F. Hendrickx, 'What if sport and labour law have become interlocked?' Paper submitted for the "Sport and labour law' (2017) panel of the ISLSSL European Regional Conference.

In this regard, it could be argued that fixed-term contracts are inherent to the specific sector of sports including both team and individual sports. Sports work is a special type of employment aiming to increase the performance of athletes on a commercial nature and usually for a profit. As such, sports work differs from other sectors such as industrial and office employment.[14] Sports has also a special standing in the EU[15] where sports have a level of immunity from the scope of EU law[16] but is also held to be of social importance per the case of *Bosman* (1995).[17] Nevertheless, employees or workers having a contract concluded under the Framework Agreement are vulnerable and general labour law may be circumvented.[18] This is especially crucial and complex in relation to workers who become pregnant.[19] Under EU law, pregnant workers have been defined as a vulnerable group of workers that are in need of special protection for their safety and health at work.[20] This special protection aims to prevent mental, economic and physical risks from the start of the pregnancy until the end of maternity leave where Member States and employers have an obligation to take necessary measures to safeguard the fundamental rights for pregnant women.[21]

Taken all above into consideration, this segment of pregnant employees' risk being discriminated against,[22] and need to be provided with sufficient and effective protection from dismissal from the start of pregnancy until the end of maternity leave.

[14] M. Matuszak (2020) (n4) 1.
[15] See Article 165 TFEU.
[16] Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECLI:EU:C:1974:140.
[17] Case C-415/93 *Bosman* [1995] (n11).
[18] Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECLI:EU:C:2007:509, para 37.
[19] See Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348/01 ('Pregnancy Directive'). See also Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECLI:EU:C:2001:513 para 26.
[20] Article 1 of the Pregnancy Directive (n19).
[21] Ibid (n19).
[22] To refuse to employ a pregnant women or to dismiss a pregant worker amounts to a direct discrimination per the Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECLI:EU:C:1990:383 and; Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECLI:EU:C:1994:300.

1.2 Aim and research question

1.2.1 Aim

The aim of the thesis is to analyse the scope of the protection of pregnant athletes in EU law in the context of the use of the fixed-term contracts.

1.2.2 Research question

The main question that this thesis aims to investigate is to what extent does Clause 5 of Framework Agreement provide protection to pregnant athletes from dismissal.

To answer the main research question, the following sub-questions will be explored:

- How does EU labour law accommodate the specificity of sports?
- What is the aim of the Framework Agreement and what is prescribed by Clause 5 thereof?
- How are pregnant workers protected under EU law from dismissal?

1.3 Delimitation

To meet the aim of this thesis, the following limitation will be made:

Firstly, under the Framework Agreement, there are several clauses which could influence pregnant athletes. However, the direct relevance of the thesis is only Clause 5 of the Framework Agreement.

Secondly, the thesis will place an emphasis on the protection from dismissal of pregnant athletes. Hence, related protection, such as the right to maternity leave and sick leave, will only be mentioned in the context of case law on pregnancy discrimination without deeper analysis.

1.4 Method and material

To be able to answer the research question, the thesis will use a legal doctrinal method. The doctrinal research method interprets and systematises existing legal sources to clarify *de lege lata.* This is done by investigating legislation, case law, preparatory work, and legal doctrine, but

also to analyse the relationship between such.[23] By using the legal doctrinal method, it would enable the author to identify the uncertainties and gaps of existing law.[24]

According to Smith (2017)[25] the doctrinal method includes three different goals i.e., description, prescription, and justification.[26] By using these goals, the method would enable the author to describe the existing law (the descriptive approach) and to search for practical solutions when reviewing the law (the prescription approach). The approach may also be used as a justification of existing law that would offer an objective account on law.[27] The thesis has a descriptive function. It is used by describing the relevant material, the context and the legal development in sports, fixed-term contracts, and the protection from dismissal for pregnant workers.

Additionally, regards must be had that the doctrinal method tends to implement normative elements which may undermine objectivity and as a result weaken transparency.[28] Nevertheless, the method as such, does not include external points of views such as economics or historical aspects. According to Smith (2017), this is crucial for the method as external elements in the method could not be considered legal.[29] As such, the thesis will stay true to the relevant legal sources and not apply political, economic, and historical elements.

When applying the doctrinal method, the relevant legal sources are written and unwritten sources of law. These relevant sources include national, European and international law but also general principles of law, doctrine, case law and legal concepts.[30] In EU law, the ruling made by the Court holds an important role, thus, case law from the Court will be used extensively throughout this thesis.[31] As the aim and purpose of this thesis includes the fixed-term contract,

---

[23] J. Kleineman, 'Rättsdogmatisk metod' in Nääv & Zamboni (eds.), *Juridisk Metodlära*, (2nd Edition, Lund: Studentlitteratur, p. 21 – 46, 2018) 21.

[24] Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 210.

[25] J. M. Smits, (2017) (n24).

[26] Ibid., (n24) 213.

[27] ibid., (n24) 213, 217, 219.

[28] J. Kleineman (2018) (n23) 24; 37f. and 44f.

[29] J.M Smits (2017) (n24) 211.

[30] Jan Vranken, 'Exciting Times for Legal Scholarship' (2012) 2(2) LaM 42 https://www.lawandmethod.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf accessed 17 May 2022 43.

[31] J. Hettne and I. Otken Eriksson (ed), *EU-rättslig metod Teori och Genomslag i Svensk Rättstillämpning* (2nd edn., Norstedts juridik 2011) 49; J. Reichel, 'EU-rättslig metod' in Nääv & Zamboni (eds.), *Juridisk Metodlära*, (2nd Edition, Lund: Studentlitteratur, p. 109 – 142, 2018) 115.

sports law, and protection of pregnant athletes the case law provided for within the thesis will mainly focus on these particular fields of law. Nevertheless, aspects of EU Competition Law and EU internal market law will briefly be touched upon in the context of sports.

EU law is divided into different sources of law i.e., EU primary law, EU secondary law but also soft law and supplementary sources.[32] The thesis will use the primary source of law as a starting point. Primary law is legally binding and has the highest authority within EU law.[33] For the purpose of this thesis, the TEU, TFEU and the Charter of Fundamental Rights will be used as the primary sources. Notably, Article 165 TFEU and Article 153 TFEU. EU general principles of law will be used as a tool to interpret primary and secondary EU law.[34]

EU secondary law includes directive, regulations, and decisions.[35] For the purpose of this thesis, the Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, and Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding will be of high importance.

Moreover, the thesis will also use soft law. This includes guidelines, communications, notices, and recommendations.[36] Special consideration will be put on recommendations in relation to sports such as *White Paper on Sports,*[37] *Commission Staff Working Papers,*[38] and *the European Model of Sports*.[39] These sources will be used to provide relevant context of the role sports has in the EU.

Furthermore, opinions from AGs, legal literature and doctrine will be used. Similarly, to soft law, they do not have a legally binding effect.[40] Nevertheless, these sources provide arguments and point of views that will facilitate the understanding of EU law. As such, the doctrine in sports law, labour law and discrimination of pregnancy will strengthen the analysis

[32] J. Hettne and I. Eriksson (2011) (n31) 42f; Eur-lex, 'The non-written sources of European law: supplementary law' (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14533> accessed 18 May 2022; Article 19 TEU.
[33] See Paul Craig and Gráinne De Burca, *EU law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 141f.; J. Hettne & I. Eriksson (2011) (n31) 42f.
[34] See P. Craig & G. De Burca (2020) (n33) 142f.; J. Hettne & I. Eriksson (2011) (n31) 73.
[35] J. Hettne & I. Eriksson (2011) (n31) 42f. See also Article 288 TFEU.
[36] Article 288 TFEU.
[37] Commission 'White Paper, White Paper on Sport' COM (2007) 391 final.
[38] Commission Staff Working Document, 'the EU and Sport: Background and Context, Accompanying document to the White Paper on Sport', SEC/2007/0935 final.
[39] EMoS (1999) (n9).
[40] J. Hettne & I. Eriksson (2011) (n31) 46; 117.

further and is especially crucial for the thesis as there is a lack of case law in relation to fixed-term contracts within the sports sector,[41] and sports and labour law.[42] Moreover, the thesis will also use doctrine in relation to fixed-term contracts,[43] the protection of workers,[44] and the area of discrimination of pregnancy.[45]

1.5 Previous research

The thesis will focus on the area of the specificity of sport, fixed-term contracts, and protection from dismissal for pregnant workers. In this regard, there are contributions in the field of sports and EU free movement law;[46] EU Competition law and sport;[47] labour law and sports.[48] Moreover, there is also research concerning the concept of flexicurity;[49] fixed-term contracts;[50] the protection of workers;[51] and the area of discrimination of pregnancy.[52]

Nevertheless, the relationship between the areas of sports, fixed-term contract, and protection from dismissal for a pregnant worker has not received a lot of attention within the research field. Therefore, the thesis will provide an in-depth analysis of the issue at hand and fill a research gap thereof.

---

[41] See among other journals E. Szyszczak, 'Competition and Sport: No Longer So Special?' (2018) Vol. 9, No. 3, Journal of European Competition Law & Practice; R. Siekmann, 'Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football In Europe' (2006) Entertainment and Sports Law Journal; P. Drabik, 'Compatibility of fixed-term contracts in football with Directive 1999/70/EC on fixed-term work: the general framework and the Heinz Müller case' (2015) 5:149–158, International Sports Law Journal.
[42] F. Hendrickx (2017) (n13).
[43] See A. Pieter Van der Mei, 'Fixed-Term work: Recent developments in the case law of the Court of Justice of the European Union' (2020) Vol 11 European Labour Law Journal; De la Porte, C & Emmenegger P 'The Court of Justice of the European Union and fixed-term workers: still fixed, but at least equal' (2016) Working Paper 2016.01.
[44] See J. Adams-Prassl, 'Article 47 CFR and the effective enforcement of EU Labour Law: Teeth for paper tigers?' (2020) European Labour Law Journal; M. Van Schadewijk, 'The notion of 'employer': Towards a uniform European concept?' (2021) Vol. 12(3) 363–386, European Labour Law Journal.
[45] J. Maliszewska-Nienartowicz, 'Pregnancy Discrimination in the European Union Law Its Legal Character and the Scope of Pregnant Women Protection' (2013) Vol 4 No 9, Mediterranean Journal of Social Sciences.
[46] Case C-325/08 *Olympique Lyonnais SASP v Olivier Barnard and Newcastle UFC* [2010] ECLI:EU:C:2010:143.
[47] E. Szyszczak (2018) (n41); R. Siekmann (2006) (n41); P. Drabik (2015) (n41) 150.
[48] F. Hendrickx (2017) (n13)
[49] M. Rönnmar 'Flexicurity, Labour Law and the Notion of Equal Treatment' in M. Rönnmar *Labour Law, Fundamental Rights and Social Europe: Swedish Studies in European Law,* vol 4. Ed. (London: Hart Publishing 157–186, 2011).
[50] See A. Van der Mei (2020) (n43); C. De la Porte, P. Emmenegger (2016) (n43).
[51] See J. Adams-Prassl (2020) (n44); M. Van Schadewijk (2021) (n44).
[52] J. Maliszewska-Nienartowicz (2013) (n45).

1.6 Disposition

The thesis will be structured as follows:

The second chapter of this thesis will put emphasis on the correlation between sports law and EU labour law. Within this section the aim is to answer the first sub-question by introducing the increasing development of sports law in the EU, explaining the specificity of sports and lastly, ending with an in-depth analysis of how the specific sports work relates to EU labour law.

The third chapter of the thesis will address the second sub-question concerning what the aim of the Framework Agreement is and how the Court implements Clause 5 of the Framework Agreement. To do so, the purpose and scope of the Framework Agreement will be presented following an in-depth analysis of Clause 5 of the Framework Agreement.

The fourth chapter of this paper concerns the protection from dismissal of pregnant workers under EU law. To answer the third sub-question, the section will firstly address the development of case law concerning pregnancy protections followed by a section of the Pregnancy Directive. In this section, the purpose, the rights enshrined within the Pregnancy Directive and relevant case law will be discussed.

Chapter five aims to analyse the relationship between the specific nature of sports, the successive usage of fixed-term contracts (Clause 5 of the Framework Agreement) and if there is sufficient protection from dismissal for pregnant athletes. As such, within this chapter, an in-depth analysis will be provided.

Lastly, the sixth chapter provides concluding remarks and recommendations for further research.

2. Sports in EU labour law

2.1 Introduction

The European Commission recognises sports as a socially important and fast-growing industry which creates employment opportunities for many.[53] As such, the concept of sports and labour law is an interesting combination which has created legal issues, not only in terms of the contractual relationship between the clubs and the athletes, but also if athletes are considered as an employee or a service provider.[54]

The Union has limited competence and powers when it comes to both the field of labour law and sports.[55] The Treaties were adopted for the purpose of creating a common market with an internal market, peace, and political stability. Thus, they were not intended to provide the Union with a broad competence to legislate in the field of labour law and policy.[56] Creating a common market free from obstacles would in turn provide for economic growth that would have a positive impact on full employment and a high standard of living.[57] Nevertheless, social policy has been recognised as of special importance on an EU level over time (by the Member States) and thus, Member States have provided the EU with expanded competence including the mandate to legislate and regulate.[58]

Establishing a social market economy is now confirmed in Article 3(3) TEU aiming at full employment and social progress.[59] The legal base of the area of labour law is stipulated in Article 153 TFEU, where it is stated that the EU only has a supportive competence and when such competence may be used. For instance, the Union uses its labour law 'power' to adopt

[53] White Paper on Sport (2007) (n37) 1; 10.
[54] F. Hendrickx (2017) (n13) 1.
[55] See Articles 6; 153 and 165 TFEU which holds that the Union has a supportive competence in certain areas, including sport and labour law.
[56] L. O'Leary, 'Professional team sports and collective labour law in the European Union' in Jack Anderson, Richard Parrish, Borja García, *Research handbook on EU sports law and policy*, (Edward Elgar Publishing Limited, Ch 19, 2018) 412.
[57] Article 3(3) TEU.
[58] L. O'Leary (2018) (n56) 214.
[59] See also Article 9 TFEU: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'

mostly Directives in labour law where the Cinderella Directive,[60] Directive on Equal Payment,[61] The Pregnancy Directive,[62] and Framework Agreement[63] are examples of such.

Furthermore, another area of law where the Union is given this supported competence is in the field of sports.[64] However, the first time the Court addressed with a sport-related issue was in the case of *Walrave and Koch* (1974)[65] where it was held that 'sports is a subject to EU law as long as it constitutes an economic activity.'[66] Having this specific nature of sports in mind, the importance to uphold the values and objectives of the Union, and the supportive competence of the Union in these fields, it is for the Member States to decide – in general – what athlete's employment contract usually should be defined and thus, it is the national law that determined the status of a worker.[67] No EU law that directly legislates the rights and working conditions for an athlete.[68]

To meet the aim of this paper and answer the research question, the following section will address the first sub-question i.e., how does EU labour law accommodate the specificity of sport?

2.2 The specificity of sports

2.2.1 The European Model of Sports

The EMoS is a model adopted and created by the European Commission in 1999 and is essential to the organisation of sports within the EU.[69] It was identified that sports have five important functions which are a function of public health, social, cultural, recreational and educational functions in need of common ground.[70] As such, the aim and objectives of the EMoS are to organise sports in the EU. The most important key feature of the EMoS is to have a pyramid

[60] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] PE/43/2019/REV/1 ('Cinderella Directive').
[61] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45, 19.02.1975, p. 19-20.
[62] Pregnancy Directive (n19).
[63] Framework Agreement (n1).
[64] Article 165 TFEU. See also Article 6(e) TFEU.
[65] Case C-36/74 *Walrave and Koch* [1974] (n16).
[66] Ibid., (n16) para 4.
[67] L. O'Leary (2018) (n56) 414.
[68] Ibid., (n56) 415
[69] Council of Europe, 'Further developing the European Sports Model' <https://rm.coe.int/further-developing-the-european-sports-model-european-sport-charter-pa/1680a1b1cf> [21-05-2022]
[70] EMoS (1999) (n9) 1.

structure,[71] have a valued based model,[72] have a financial solidarity mechanism,[73] have a hierarchical structure,[74] open competitions,[75] based on voluntary activities,[76] and the legitimate autonomy of sport.[77] As such, the EMoS creates a common ground in sports in the EU from a grassroots level to an elite level including organisation of the national competitions, the organisation of open competitions, the ensuring of solidarity mechanisms, and upholding the principle of relegation and promotion.[78]

The character of sports law is an autonomous concept that is often combined with sport's governing bodies having a regulatory, supervisory and controlling function.[79] Having a hierarchical nature of sports with a sports governing body at the top organising the sport at hand is to be considered the most efficient way to organise sports and becomes crucial considering that sports have been highly commercialised.[80] To have a common and unified level both on a national level and a Union level, the regulations often stemming from a Sports Charter adopted by the sports organising body includes not only the rules of the sport at hand but also social, commercial, cultural, and economic aspects of sports.[81]

2.2.2 The role of sports in EU law

The CJEU has played a determinantal role in deciding on what the role of sports should have at an EU level and what role general EU law should play in the field of sports. The first time the field of sports was addressed to the Court was in the case of *Walrave and Koch* (1974).[82] The

[71] EMoS (1999) (n9) 2 – 4; The pyramid structure consists of a pyramid with the European Sports Federation on top, followed by national sports federation, regional sports federation and at the bottom the Clubs or grassroots federation.
[72] EMoS (1999) (n9) 18; Based on the specific nature of sports based on the fundamental social, educational, and cultural values in sport.
[73] EMoS (1999) (n9) 9; Includes having a system where the revenue and founding of elite clubs gets reimbursed to the lower levels.
[74] Includes one federation per sport: per multisport sectoral activity and/or per the national federations. The structure is aiming at regulating, establishing rules, ensuring the promotion and relegation of young players etc. See 'Further developing the European Sports Model' (n69) 2.
[75] EMoS (1999) (n9) 4: Relates to sports having open competitions in order to promote and relegate new players.
[76] See Commission Staff Working Document (2007) (n38) 15ff.; See also 'Further developing the European Sports Model' (n69) 2.
[77] Recognises the need for sport's governing bodies being able to take decisions that pursue the aim of sports. See 'Further developing the European Sports Model' (n69) 2.
[78] Ibid., (n69) 1.
[79] F. Hendrickx (2017) (n13) 2.
[80] EMoS (1999) (n9) 8. See also See Commission Staff Working Document (2007) ANNEX I: Sport and EU Competition Rules, 1.
[81] F. Hendrickx (2017) (n13) 2.
[82] Case C-36/74 *Walrave and Koch* [1974] (n16).

case concerned two Dutch athletes providing the service of 'peacemakers' in motorcycling races. According to the rules of the Union Cycliste Internationale, the peacemakers had to be of the same nationality as the 'stayer' to participate in the Championship. The applicant raised the question of whether such a rule was discriminatory.[83] The Court came to the conclusion that sports are only subject to EU law insofar as it constitutes an economic activity.[84] Accordingly, the rule relating to a prohibition of discrimination based on nationality was purely sporting interest and should not be considered an economic activity thereof.[85] The most important takeaway from this case law, is that sports should be a subject to EU law only if it constitutes an economic activity and as such, it was not automatically excluded from the application of Treaty rules. Nevertheless, the case law also held that even if there is an economic dimension, the sporting issue at hand could still fall outside the scope of the EU law insofar as it was considered as a 'purely sporting interest' as there was – according to the Court – no economic concern and no public policy interest.[86] Therefore, the field of sports had the ability to derogate from the traditional EU 'market' model.[87]

The approach taken in the case of *Walrave and Koch* was later confirmed in the case of *Dona* (1976)[88] where the Court stated 'reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'.[89] As a result, the ruling allowed for the Court to determine and exclude certain areas of sports from the scope of EU law. The so-called sports exception approach has a connection with the concept of the specificity of sport.[90] This created a level of legal dilemma between the relationship of law and sports as the sports-exception implied that certain aspects of sports could be exempted from the scope of EU law as long as the measure at issue was considered as justified and necessary.[91]

---

[83] Ibid., (n16) para 3.
[84] Ibid., (n16) para 4.
[85] Ibid., (n16) para 8.
[86] Ibid., (n16) para 8; 13.
[87] F. Hendrickx (2017) (n13) 4.
[88] Case C-13/76 *Gaetano Donà v Mario Mantero*[1976] ECLI:EU:C:1976:115.
[89] Ipid., (n88) para 14.
[90] R. Parrish & S. Miettinen, *The Sporting Exception in European Union Law* (The Hague, Asser Press, 2008) 295; R. Siekmann, 'Is Sport Special in EU Law and Policy?', in R. Blanpain, M. Colucci & F. Hendrickx (eds), *The Future of Sports Law in the European Union. Beyond the EU Reform Treaty and the White Paper* (Bulletin of Comparative Labour Relations, 66, The Hague, Kluwer Law International, 37 – 49, 2008); R. Siekmann, 'The Specificity of Sport: Sporting Exceptions in EU Law' (2011) International Sports Law Journal, nr. 3 – 4, 75 – 85.
[91] See Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECLI:EU:C:2002:98, para 97. The test following the case of *Wouters* entails to take into account the legal context of the measure taken, to evaluate whether the measure has a negative effect on competition and whether the

According to Zylberstein (2008),[92] this was defined as 'the sum of the unique and inherent aspects of sport which distinguish it fundamentally from all other areas of activity and service'[93]

Later, the CJEU held, in the case of *Bosman* (1995),[94] that sports are of particular social importance.[95] The case of *Bosman* concerned transfer rules adopted by the football association. The rules regulating the transfers of players between clubs stated that an international transfer could not take place if a certificate confirming the financial commitments, such as transfer fees, had been provided.[96] Mr. Bosman was put on a transfer list without any transfer certificate as Bosman refused to stay with his team until the end of his contract. As such, Mr. Bosman was suspended from playing football.[97] Considering this, he challenged the rule which obliged clubs to pay a transfer fee on the grounds that the rule was a restriction of free movement of workers.[98] As a starting point, the Court found that there was an obstacle to the free movement of workers.[99] Nevertheless, and more importantly for the development of the specificity of sport, the Court also stated that sports have social importance. This meant that it was to be seen as a legitimate aim to maintain a balance between clubs, ensuring the uncertain outcome and encouraging the recruitment and training of young players.[100] The *Bosman* case changed the reasoning made by the Court in relation to sports. From the 'purely sporting interest' to the principle of proportionality when assessing the 'public policy' justification aimed by sports associations. According to the AG Lenz,[101] in the very same case, there is a special responsibility that the sports organisations hold, such as the rights and the duties to control, set up rules and organise the sport at issue. For these reasons AG Lenz stressed that this autonomy is protected as a

action at issue is proportional. This test was later applied in the case law of C-519/04 P *Meca-Medina* [2006] (n10) para 42; and Case T-93/18 *International Skating Union v European Commission (ISU) v. European Commission* [2020] ECLI:EU:T:2020:610.

[92] J. Zylberstein, 'The specificity of Sport: A concept under Threat' in Blanpain R, Colucci M, Hendrickx F (eds) *The future of sports law in the European Union. Beyond the EU reform treaty and the white paper* (Kluwer Law International, The Hague, pp 95–106, 2008).

[93] Ibid., (n92) 95f.

[94] Case C-415/93 *Bosman* [1995] (n11).

[95] Ibid., (n11) para 106.

[96] Ibid., (n11) paras 6 – 10; 13.

[97] Ibid., (n11) para 29.

[98] Ibid., (n11) para 44.

[99] Ibid., (n11) paras 94 – 95; 99. See also a similar kind of reasoning in Joined Cases C-51/96 and C-191/97 *Deliège* [1999] (n12) para 43.

[100] Case C-415/04 *Bosman* [1995] (n11) para 106. This has further been emphasised by the European Commission in EMoS Chapter Three: Sports and Social Policy, (n9) 18.

[101] C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:293, Opinion of AG Lenz.

fundamental right.[102] However, to restrict the fundamental freedom of movement would still be subject to the principle of proportionality and could thus only be justified insofar as the interest is of particular importance.[103]

With the development of sports in the EU in mind, it became unclear where the line between 'purely sports interest' and 'economic activity' were. Considering this, the CJEU has – in general – adopted a broad interpretation of what constitute an economic activity as every activity consisting of goods and services on a given market is an economic activity.[104] Following the reasoning made by the Court in *Meca Medina* (2006),[105] concerning if anti-doping rules were considered as economic activities, the Court found that 'it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.[106] For that reason, it was concluded that rules that are in nature only 'purely sporting interest' could not, therefore, be relied upon to exclude sporting activities from the scope of the Treaty. Hence, the case of *Mecca-Medina* clarified the significant aspect of *lex sportiva* as the Court provided a legal framework of the understanding between free movement law and EU competition law in relation to sports,[107] as well as implementing the principle of proportionality in cases of sports and EU competition law.[108] According to Siekmann (2008),[109] the Court expanded its interpretation of the sporting concept and created a leeway for EU law intervention in areas which 'only had an interest of sporting in nature'.[110]

2.2.3 The specificity of sports

The specificity of sports has been recognised and acknowledged in the EU in different legal documents such as the *White Paper on Sports*[111] or by the Court itself within its settled case law.

---

[102] Ibid., (n101) para 216.
[103] Ibid. See also the case of Case C‑205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* [2022] ECLI:EU:C:2022:168, para 31, where the Court held that the principle of proportionality is a general principle of EU law.
[104] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376, para 22.
[105] Case C-519/04 P *Meca-Medina* [2006] (n10).
[106] Ibid., (n10) para 27.
[107] Ibid., (n10) paras 22 – 27.
[108] Ibid., (n10) para 42.
[109] Siekmann, R. (2008) (n26)
[110] Ibid. (n26).
[111] White Paper on Sport (2007) (n37) para. 4.1.

What 'the specificity of sport' is, is best explained in the case law of *Deliège* (1999).[112] The so-called '*Deliège* exception' refers to rules that are inherent to the conduct of sports and which may therefore not be regarded to breach EU law, and in this specific case restriction on the freedom to provide services.[113] As a result, the specificity of sports implies that sports, with its unique character and nature, may be exempted from legal mechanisms if they are to be considered justified and necessary.[114] This exemption has been interpreted narrowly and is often referred to situations such as selection of national sporting teams, how many hours a game should have or how many participants the team constitutes of.[115]

The specification of sports has also been recognised within the Commission Staff Working Papers,[116] the European Council in Nice Declaration of Sport,[117] and in the EMoS.[118] For instance, it has been stated that the specificity of sports should be considered by the Court and by the European Commission. This includes taking account of the social, the educational and the cultural functions inherent in sports to acknowledge the special nature behind the social role that sports have.[119]

According to Szyszczak (2018),[120] the concept of 'specific nature of sports' or the 'specificity of sports' has long been argued by the sport's governing bodies claiming that hierarchical nature can be excluded from the application of EU law.[121] The author further explained that because of this, there has been an increasing number of sport-related issues before not only the national authorities, but also the national courts and the Commission itself.[122] One of the latest case laws in this regard is the case of *ISU* (2020).[123] The case concerns a decision adopted by the European Commission against the rules made by the International Skating Union (ISU). In this case, ISU was responsible for the regulation and administration of speed skating

[112] Joined Cases C-51/96 and C-191/97 *Deliège* [1999] (n12).
[113] Joined Cases C-51/96 and C-191/97 *Deliège* [1999] (n12) para 64. Subsequently applied in Case C-22/18 *TopFit Biffi* [2019] (n12) para 60.
[114] F. Hendrickx (2017) (n13) 4.
[115] Commission Staff Working Document on White Paper on Sport (2007) (n38) 39.
[116]Ibid (n16).
[117] European Parliament, 'European Council in Nice Declaration of Sport' [2000], ANNEX IV: Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies.
[118] EMoS (1999) (n9) para 3.2.
[119] European Council in Nice Declaration of Sport (2000) (n117) para 1.
[120] E. Szyszczak (2018) (n41).
[121] Ibid (n41).
[122] Ibid (n41).
[123] Case T-93/18 *ISU* [2020] (n91).

and figure skating on ice, on a worldwide level.[124] ISU initiated rules on prohibition against betting but also a pre-authorisation system to determine who would be able to participate in the competition made by ISU themselves.[125] Two skaters were rejected to participate in a competition in the Dubai Grand Prix. As such, they made a complaint to the European Commission, claiming that the rules issued by the sport's governing body were incompatible with EU law, namely Article 101 TFEU and Article 102 TFEU.[126] The General Court found that even though sports may have a legitimate interest in having such rules, the rules were a restriction by object. It was held that to ban athletes from participating in competitions was not proportionate and had a deterrent effect on athletes wanting to participate and other actors wanting to organise competitions. Consequently, the rules were a restriction by object under Article 101 TFEU.[127]

2.2.4 Article 165 TFEU

Having the development of sports in the EU in mind, the drafters of the Functioning Treaty codified the specific nature of sports within the Treaty. As for today, the specificity of sport has a legal basis in Article 165 TFEU[128] where the social importance and educational function is emphasised and could even be argued to be an integration clause.[129] Article 165 TFEU provide the Union with a supportive competence and was first mentioned in the case of *Barnard* (2010),[130] in the context of free movement. In that case, the CJEU established that the specific characteristics of sports can be considered when justifying a breach of both free movement law and EU competition law.[131] The specificity of sports applies to both amateur sports as well as sports performed at a professional level.[132] This interpretation has also been used in later case laws of the CJEU. Notably in the case of *ISU* (2020) where the CJEU applied Article 165 TFEU

[124] Ibid., (n91) para 1.
[125] Ibid., (n91) paras 6; 15.
[126] Ibid., (n91) para 20.
[127] Ibid., (n91) paras 91 – 95.
[128] Article 165 TFEU holds: 'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.'
[129] M. Bartoloni, *The EU Social Integration Clause in a Legal Perspective* (10 Italian J Pub L 97, 2018).
[130] Case C-325/08 *Barnard* [2010] (n46) para 40; Joint case C‑403/08 and C‑429/08 *Football Association Premier League Ltd and others v QC Leisure and others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)* [2011] ECLI:EU:C:2011:631, paras 101 – 104.
[131] Case T‑93/18 *ISU* [2020] (n91) paras 78 –79.
[132] Case C-22/18 *TopFit Biffi* [2019] (n12) para 33; Case T‑162/13 *Magic Mountain Kletterhallen* [2016] ECLI:EU:T:2016:341, para 79.

in the field of EU competition law.[133] Yet, the sporting exception has never constituted a blanket exemption,[134] and the Court has never held that Article 165 TFEU has direct effect, meaning that the article is not sufficiently clear, precise, and unconditional resulting in individuals not being able to rely on the article directly before the national court. Nevertheless, the article influences legal development as regards to the specific nature of sports.[135] An example of such legal development is the case of *Topfit Biffi* (2019).[136] The most interesting aspect of this case is that the Court found that the free movement of Mr. Biffie, as an EU citizen, was breached in relation to Article 18 TFEU and Article 21 TFEU.[137] As such, the CJEU showed its willingness to interpret sports issues in horizontal relations.[138]

2.3 The specific nature of sports in EU labour law

2.3.1 The nature of sports work

Sports are and have become an important element for employment within the EU.[139] According to the EMoS, it was held that sports originally was performed on an unpaid amateur level, but have developed to become a crucial source of income and employment opportunities.[140] This work and the specific nature of being involved in sports work often includes a specific type of performance, in order to fulfil a particular need that includes the achievement in sports but also a long term ability to compete in the sport.[141] The nature of the tasks within sports are flexible including a high level of fitness resulting in training, workouts and games several times a week. It also includes other areas such as being involved in social media and related marketing activities, participating in meetings related to marketing and promotion, and having compulsory and fixed schedules.[142] Athletes also have a higher risk of injuries and a lack of education where athletes start at an early age. Furthermore, the career of professional athletes generally ends by

[133] Case T-93/18 *ISU* [2020] (n91) paras 78 –79.
[134] Commission Staff Working Document on White Paper on Sport (2007) (n38) para 4.1.
[135] See to this effect Case C-22/18 *TopFit Biffi* [2019] (n12) para 33.
[136] Ibid., (n12).
[137] Ibid., (n12) para 47.
[138] Ibid., (n12) para 37.
[139] EMoS (1999) (n9) 21.
[140] Ibid., (n9).
[141] As defined by M. Matuszak (2020) (n4) 22; 25.
[142] Ibid., (n4) 22 – 25.

the age of 30. The main reason is a physical limit where the body cannot push itself longer in combination with young, up and coming, generations of athletes.[143]

According to Matuszak (2020),[144] the specific work in sports could be divided into three different stages in the professional sports career. These are crucial and explain the very essence of the nature of sports work.[145] The first level in the career of a professional athlete is compulsory training, where the athlete at hand often relies on extra work to have an income. During this stage, the athlete often has an obligation to reconcile his or her school with the sport. The second step regards athletes playing on a professional level in specific competition events. Usually, this step includes championship ranks and is the peak of the career in which the player earns the most income. During the last and third step, also called the retirement, the athlete is not in the sport any longer and needs to find additional work.[146] Having the specific nature of sports work and the flexibility that is necessary within the field of sports work, it would first be difficult to find a contract that fits all stages, and secondly, it would also be hard to find and use legal tools to ensure that athletes have effective and sufficient working conditions even though there are several working conditions that ought to be respected and protected under EU law.

2.3.2 Athletes as workers under EU law

To fall within the protection of employment rights under EU law, the person at hand needs to fall within the definition of an 'employee' or a 'worker' as defined by the Court in the case of *Lawrie-Blum* (1986).[147] In the case, the CJEU identified three different criteria for a worker i.e., a person who, 'for a certain period of time *performs services* for and *under the direction of another* person in return for which he or she *receives remuneration*'.[148] Thus, there needs to be a service[149] in an employment relationship and where there is income for the service provided. However, it has also been argued that athletes do not have an employment contract, rather a service contract and as a result, cannot enjoy the status and the protection of being an employee

[143] EMoS (1999) (n9) 21.
[144] M. Matuszak (2020) (n4) 21–31.
[145] Ibid., (n4) 25 – 27.
[146] Ibid., (n4).
[147] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECLI:EU:C:1986:284. Subsequently applied in Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECLI:EU:C:2010:674, para 39; Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECLI:EU:C:2007:536, para 25.
[148] Case C-66/85 *Lawrie-Blum* [1986] (n147) para 17 (emphasis added).
[149] See Article 57 TFEU where a service must be provided for remuneration to constitute a service.

under EU law.[150] According to O'Larey (2018),[151] a key feature of what constitutes a worker or an employee is subordination.[152] This element of subordination or 'authority' should according to Van Schadewijk (2021),[153] be interpreted broadly and include exercising the power of direction but also stem from anyone who can 'use' a worker, for example a recruiter, a person having the power to dismiss an employee or pay wages to an employee.[154] As such, and even if a professional athlete provides a service and may be considered as a self-employed person, the athlete would still be considered as a worker or an employee under EU law as long as there is a relationship of subordination. This is also supported by the Court in the case of *Allonby* (2006).[155]

Furthermore, the Court has already established that several athletes are workers or employers within the meaning of EU law. For instance, handball players;[156] football players;[157] and basketball players.[158] With that in mind, and by applying this criterion held in the case of *Lawrie-Blum*, athletes may fall within the concept of a worker or an employee, if the athlete can demonstrate that there is a relationship of subordination. This would in turn result in athletes strengthening their legal position and as such secure a better financial protection thereof.[159]

Nevertheless, the EU has a supportive competence in both the area of labour law and in the area of sports.[160] By having this supportive competence, the Union could only support, coordinate and supplement actions made by the Member State.[161] Hence, it is for the Member States to adopt acts and legislation in these fields, and therefore, the conditions of the contracts

[150] R. Siekmann (2006) (n41). See also P. Drabik (2015) (n41) 150.
[151] L. O'Leary (2018) (n56).
[152] L. O'Leary (2018) (n56) 416. This is also supported by M. Van Schadewijk (2021) (n44) 369.
[153] M. Van Schadewijk (2021) (n44) 369.
[154] ibid., (n44).
[155] Case C-256/01 *Allonby v Accrington and Rossendale College and others* [2006] ECLI:EU:C:2004:18, paras 69 – 72. See also case C-268/99 *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie* [2001] ECLI:EU:C:2001:616, paras 32 – 34 where the Court found that there was no relationship of subordination and hence, the athlete at hand could not be considered as a worker or an employee under EU law.
[156] Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECLI:EU:C:2003:255.
[157] See the case of C-415/93 *Bosman* [1995] (n11); Case C-325/08 *Barnard* [2010] (n46) and; Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECLI:EU:C:2005:213.
[158] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECLI:EU:C:2000:201.
[159] See to this effect R. Siekmann (2006) (n41) 4.
[160] See Article 6 TFEU; Article 153 TFEU and Article 165(1) TFEU.
[161] See Article 153 TFEU which holds that the Union has the competence to support Member State in activities relating to working conditions, protection of workers and improvement of working environment.

of athletes fall, in general terms, within the national legislation.[162] Nevertheless, both employment law and sports have been subject to EU law.[163] As such, sports are of significant social importance under EU law that should be promoted under Article 165 TFEU. Yet, this significance of sports does not exclude itself from the scope of EU law.

[162] P. Drabik (2015) (n41) 150.
[163] To this effect, see Case C-415/93 *Bosman* [1995] (n11) paras 74, 87, 90. The Court found that Bosman was a worker and as such subject rules on the free movement of workers.

3. The Framework Agreement on fixed-term contracts

3.1 Introduction

Atypical contracts are important in the labour market as they contribute to both a secure and flexible employment relationship including both the employer and the employee. Nevertheless, the contracts are also the most precarious forms of employment contracts.[164] For this reason, several actions have been adopted on a Union level in order to ensure the living and working conditions for workers having contracts that are to be considered as atypical.[165] On 18th of March 1999, the Directive for fixed-term workers was adopted by the Council thereof.[166] The intention was to improve the quality for the workers having a contract concluded on the premises of being a fixed-term relationship by ensuring the application of the principle of non-discrimination and to establish a system to prevent the misuse of successive fixed-term contracts.[167] Nevertheless, workers are the weaker party in an employment relationship and are more susceptible to abuse.[168] To protect employees, permanent contracts constitute the general employment form within the EU and because of this, atypical contracts, such as fixed-term contracts, must only be used exceptionally.[169]

The following section has the purpose to answer the second sub-question concerning what the Framework Agreement is and what Clause 5 of the Framework Agreement entails. To

[164] C. De la Porte, P. Emmenegger (2016) (n43) 426.
[165] Examples of such actions are European Union 'Community Charter of Fundamental Social Rights of Workers' (1989) LEGISSUM : c10107 <https://op.europa.eu/en/publication-detail/-/publication/51be16f6-e91d-439d-b4d9-6be041c28122>[13-04-2022]; Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L 206, 29.7.1991, p. 19–21; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1997] OJ L 14, 20.1.1998, p. 9–14 and; European Parliament, Council of the European Union and the European Commission 'European Pillar of Social Rights' (2017) ISBN 978-92-79-74092-3 <https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet_en.pdf > [13-04-2022].
[166] The Framework Agreement (n1). This minimum directive allows Member States being able to adopt more stringent protection, see Clause 8(1) of the Framework Agreement. The same clause also has a non-regression clause resulting in that the Framework Agreement cannot be used as a valid ground to reduce the rights given to the workers under the Framework Agreement, see Clause 8(3) of the Framework Agreement.
[167] Clause 1 of the Framework Agreement (n1).
[168] J. Adams-Prassl (2020) (n44) 394.
[169] Section 2 of the Preamble of the Framework Agreement (n1).

do so the purpose of the Framework Agreement will firstly be presented, followed by a section concerning the material and personal scope of the Framework Agreement. Finally, a critical analysis of Clause 5 of the Framework Agreement will be done by reviewing and analysing settled and relevant case-law from the Court.

3.2 The aim and scope of the Framework Agreement

3.2.1 Purpose of the Framework Agreement

The Framework Agreement has a twofold purpose i.e., to ensure the application of the principle of non-discrimination to fixed-term workers and to prevent the misuse of successive fixed-term contracts.[170] This twofold purpose has been codified in Clause 4 of the Framework Agreement[171] (non-discrimination clause) and in Clause 5 of the Framework Agreement (the prevention of the use of successive fixed-term contracts).[172] According to the case of *Impact* (2008)[173] Clause 4 (1) of the Framework Agreement has direct effect,[174] and is a principle of EU social law which cannot be interpreted restrictively.[175] Where Clause 5 of the Framework Agreement sets forth rules aiming to prevent an abuse of the use of fixed-term contracts from arising.[176] However, Clause 5 of the Framework Agreement does not have direct effect.[177]

Having this in mind, it is clear to state that the intention and aim of the Framework Agreement is to have a strong protection for workers having a contract concluded as a fixed-term contract.[178] This has been emphasised by the Court in cases such as *Adeneler and others* (2006)[179] where it was established that stable employment was a major part of the protection of

[170] Clause 1 of the Framework Agreement (n1).
[171] Clause 4(1) of the Framework Agreement (n1) states: '[in] respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'
[172] Clause 5 of the Framework Agreement (n1).
[173] Case C-268/06 *Impact v Minister for Agriculture and Food and others* [2008] ECLI:EU:C:2008:223, para 68.
[174] See P. Craig & G. De Burca (2020) (n33) 220: The principle of Direct effect was first established in the case of Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1. The Court held that a right must be *clear*, *precise* and *unconditional* to have direct effect. Therefore, individuals may rely upon the right concerned before the national Court.
[175] See to this effect joined cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECLI:EU:C:2010:819, para 49; Case C-38/13 *Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr Stanisława Deresza w Choroszczy* [2014] ECLI:EU:C:2014:152 para 24.
[176] See Clause 5 of the Framework Agreement (n1).
[177] Case C-268/06 *Impact* [2008] (n173) para 23.
[178] C. Barnard, *EU Employment Law* (4th Edition, Oxford University Press, 2012) 438f.
[179] Case C-212/04 *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECLI:EU:C:2006:443.

workers and that it is only in special circumstances that the fixed-term contract should be used.[180] This kind of reasoning was further developed by the Court in the case of *Kumpan* (2011)[181] where the CJEU held that 'the use of fixed-term contracts as opposed to contracts of indefinite duration is therefore exceptional'.[182] As such, the Framework Agreement refers to the need to ensure a better balance between security for the workers and flexibility in the working time,[183] but also prevent employers' risk of circumvention of the legal obligation for its employees.[184]

In that regard, the Framework Agreement holds that fixed-term contracts enable flexibility for the employers where the usage of fixed-term contracts is necessary.[185] This concept also referred to as Flexicurity,[186] seeks to have a fair balance of benefits between the employer and employee.[187] Among other things, the usage of fixed-term contracts or employment would allow for employers to complete certain projects, replace sickness or workers on leave as well as cover temporary needs without incurring the costs of a permanent worker.[188] As a result, a contract concluded as a fixed-term contract may enable an employer to employ workers and is an important tool in relation to labour market policy that creates more employment opportunities.[189]

However, the creators of the Framework Agreement did not limit the flexibility for employers to use the fixed-term contract unlimited when in need of a worker employed for a temporary need. The Framework Agreement rather deems the employers – who use the fixed-term contract – to offer the same kind of working conditions as the permanent (indefinite duration) employees do.

3.2.2 Personal scope of the Framework Agreement

To fall within the scope of the Framework Agreement, the worker in question must have a fixed-term contract but also be defined as a fixed-term worker under the Framework

[180] Ibid., (n179) para 62. In this specific paragraph the Court applied the reasoning of the case of Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:709, para 64.
[181] Case C-109/09 *Deutsche Lufthansa AG v Gertraud Kumpan* [2011] ECLI:EU:C:2011:129.
[182] Ibid., (n181) para 30.
[183] C. Barnard (2012) (n178) 439.
[184] Case C-307/05 *Del Cerro Alonso* [2007] (n18) para 37.
[185] Recital 8 of the general consideration of the Framework Agreement (n1).
[186] A. Van der Mei (2020) (n43) 67. The author explains that there are three pillars within the Framework Agreement that are the so-called 'products of flexicurity'. These are firstly that it concerns workers who, unlike 'typical' (or standard or classic) workers, secondly do not work on a full-time basis for an indefinite period of time at the employer's and thirdly, premises with guaranteed working hours and pay.
[187] A. Van der Mei (2020) (n43) 67; M. Rönnmar (2011) (n49).
[188] A. Van der Mei (2020) (n43) 68.
[189] Ibid (n43).

Agreement.[190] According to Clause 2(1) of the Framework Agreement, the Agreement only applies to *workers* 'who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'[191] This includes workers in both the private or in the public sector.[192] Nevertheless, 'initial vocational training relationships and apprenticeship schemes',[193] and contracts that have been concluded of a 'specific public or publicly-supported training, integration and vocational retraining program'[194] are excluded from the scope of the Framework Agreement. According to AG Maduro (2007),[195] the meaning of fixed-term worker must be interpreted to adhere to the objectives of the Framework Agreement.[196] As such, he concludes that Member States cannot depend on specific natures of an employment to exclude them from the Framework Agreement.[197]

Furthermore, Clause 3(1) of the Framework Agreement defines what constitutes a fixed-term worker.[198] It defines a fixed-term worker as 'a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.'[199] According to the reasoning of the CJEU, the concept of what constitutes a 'fixed-term' should not be interpreted restrictive per the case of *MV and others* (2021).[200] In this specific case, the Court held that if the notion of what constitutes a 'fixed-term worker' would not be interpreted restrictively, a larger group of fixed-term workers would not be able to enjoy the protection set forth in the Framework Agreement.[201] For this reason, it was further held that even if a fixed-term contract is extended by law, it was still a fixed-term contract.[202] Member States have

[190] See Clause 2(1) and Clause 3(1) of the Framework Agreement (n1).
[191] Clause 2(1) of the Framework Agreement (n1).
[192] Case of C-212/04 *Adeneler and others* [2006] (n179) para 55.
[193] Clause 2(2)(a) of the Framework Agreement (n1).
[194] Clause 2(2)(b) of the Framework Agreement (n1).
[195] Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECLI:EU:C:2007:3, Opinion of AG Poiares Maduro.
[196] Ibid., (n195) para 14.
[197] Ibid., (n195) para 15.
[198] Clause 3(1) of the Framework Agreement (n1).
[199] Clause 3(1) of the Framework Agreement (n1).
[200] Case C-760/18 *M.V. and others v Organismos Topikis Aftodioikisis (O.T.A.) «Dimos Agiou Nikolaou»* [2021] ECLI:EU:C:2021:113, paras 44 – 46.
[201] Ibid., (n200) paras 44 – 46.
[202] Ibid., (n200) para 44.

no obligations as regards converting a fixed-term contract into a contract of indefinite duration as long as the contract at issue has the same contractual terms and circumstances.[203]

By applying this to the field of sports, Clause 2 of the Framework Agreement does not define a worker which leaves it up for the Member States to exclude specific groups of workers from the application of the Framework Agreement. This flexibility is, nevertheless, limited as Member States need to secure the effective implementation of the rights conferred under EU law.[204] As such, when determining whether a worker falls within the scope of the Framework Agreement, the Member States may not arbitrarily exclude certain groups of workers. In this regard, Drabik (2015)[205] explains the crucial elements in an athlete's career and argues that fixed-term contracts would be beneficial for both the clubs and the players.[206] It was explained that the nature of a fixed-term contract is well suited in respect of the uncertainty of an athlete's performance. This is especially so in relation to older players.[207] Hence, even if a permanent contract could be beneficial as the athletes may rely on general provisions of terminations.[208] Such contracts could have a negative impact on the promotion and relegation of young players which would compromise with the social importance of sports.[209]

3.3 Clause 5 of the Framework Agreement

3.3.1 The use of successive fixed-term contracts

Under Clause 5 of the Framework Agreement, it is provided that the Member States should take the necessary measures to prevent abuse from arising from the usage of successive fixed-term contracts.[210] To prevent such abuse from arising, Clause 5 of the Framework Agreement states that 'Member States [...] shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term

[203] Case C-251/11 *Martial Huet v Université de Bretagne occidentale* [2012] ECLI:EU:C:2012:133, para 38
[204] Case C-307/05 *Del Cerro Alonso* [2007] (n18) para 29.
[205] P. Drabik (2015) (n41).
[206] Ibid., (n41) 153.
[207] Ibid., (n41) 152.
[208] ibid., (n41) 153.
[209] Case C-415/93 *Bosman* [1995] (n11) para 106.
[210] Clause 5 of the Framework Agreement (n1).

employment contracts or relationships; (c) the number of renewals of such contracts or relationships.'[211] Hence, Member States need to implement one of the following options under Clause 5 (1) (b)-(c) of the Framework Agreement to not abuse the successive usage of fixed-term contracts. However, Clause 5.1(a) – (c) are not cumulative per the case of *Mascolo and others* (2014)[212] nor does the clause have direct effect.[213]

This would indicate that Member States have a considerable margin of appreciation when both implementing and interpreting Clause 5 of the Framework Agreement.[214] This is because the clause does not provide any guidance for the Member States, such as what kind of legal consequences there should be in case of an abuse or an obligation for Member State to convert a fixed-term contract into a contract of indefinite duration if the fixed-term contract has been used for several years or reached a maximum renewals.[215] Hence, the Framework Agreement leaves it up to the Member State to prevent the abuse in relation to what is best suited in the Member State.[216]

It could in this regard be argued that this flexibility makes the effects of the Framework Agreement ineffective, however, such discretion is limited. This is because Member States must ensure the effectiveness of EU law, especially in relation to the general principles of EU law. The Member State should also not compromise with the objective of the Framework Agreement or accommodate with the practical effects of the Framework Agreement.[217] If there were no limitation to this wide discretion, Member States would have the power to adopt *any* measure that may circumvent general labour law rights and offer less security for the workers that have contracts concluded under the Framework Agreement. Moreover, the distinction between what constitutes an abuse or a use of fixed-term contracts as well as the limitation between what a permanent contract is or what a fixed-term contract is, would be blurred. This would go against

---

[211] Ibid., (n1).
[212] Joined cases C-22/13, C 61/13 to C 63/13 and C 418/13 *Raffaella Mascolo and others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli* [2014] ECLI:EU:C:2014:2401, para 75.
[213] Case C-268/06 *Impact* [2008] (n173) para 68.
[214] Case of C-212/04 *Adeneler and others* [2006] (n179) para 68.
[215] Case C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECLI:EU:C:2006:517, para 47.
[216] Clause 5 of the Framework Agreement (n1); see also A. Van der Mei (2020) (n43) 68. Rapporteur K. Jöns, Report on the Commission Proposal for a Council Directive Concerning the Framework Agreement on Fixed-Term Work Concluded by UNICE, CEEP and the ETUC, 30.4.1999, A4/1999/261, 15 Int'l J. Comp. Lab. L. Indus. Rel. 197, 203 (1999).
[217] Case C-109/09 *Kumpan* [2011] (n181) para 37; Joined cases C-22/13, C 61/13 to C 63/13 and C 418/13 *Mascolo and others* [2014] (n212) para 76, see also C. Barnard (2012) (n178) 442.

the very purpose of adopting the Framework Agreement. As a result, workers *may* risk getting their legal protection circumvented. This would be compromised with the effects of the Framework Agreement.[218] Nevertheless, Member States are only obliged to Clause 5 of the Framework Agreement where there are 'no equivalent measures to prevent abuse'.[219]

3.3.2 Equivalent legal measures

According to Clause 5 of the Framework Agreement, Member States may implement an equivalent legal measure that aims to prevent abuse arising from the use of successive fixed-term contracts.[220] According to the Court in the case of *Angelidaki and others* (2009),[221] the Court held that an equivalent legal is *'any* national legal measure whose purpose, like that of the measures laid down by that clause, is to prevent effectively the misuse of successive fixed-term employment contracts or relationships'.[222] To follow this reasoning made by the Court, Member States have a lot of discretion to define what an equivalent legal measure is. This results in that it is irrelevant whether it was enacted specifically to protect workers from abuse in relation to successive fixed-term contracts, or that its scope is not limited to those contracts alone.[223] When applying this, Member States may furthermore, take into account the needs of specific sectors when relying on an equivalent legal measure to ensure the effective prevention of abuse against successive fixed-term contracts such as the sector of sports.[224]

3.3.3 Justify on objective reasons

One of the reasons provided for in Clause 5 of the Framework Agreement is that Member States may justify unlimited renewals if there is an objective reason that may justify the usage of the successive fixed-term contracts.[225] So, what constitutes these objective reasons? According to settled case law, such as the case of *Adeneler and others* (2006),[226] the concept of objective

[218] See to this effect, Case C-307/05 *Del Cerro Alonso* [2007] (n18) para 37.
[219] Clause 5 of the Framework Agreement (n1).
[220] Clause 5 of the Framework Agreement (n1).
[221] Joined cases C-378/07 to C-380/07 *Kiriaki Angelidaki and others v Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07), Charikleia Giannoudi v Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07)* [2009] ECLI:EU:C:2009:250.
[222] Ibid., (n221) para 76 (emphasis added).
[223] Ibid., (n221) paras 77; 80.
[224] Ibid., (n221) para 81. See also the case of C-268/06 *Impact* [2008] (n173) para 71.
[225] Clause 5(1)(a) of the Framework Agreement (n1).
[226] Case of C-212/04 *Adeneler and others* [2006] (n179).

reasons regards 'precise and concrete circumstances characterising a given activity'.[227] This concept has further been developed by the Court in the case of *Angelidaki and others* (2009),[228] where the Court held that these objective reasons are 'therefore capable of justifying, in their context, the use of successive fixed-term employment contracts'.[229] Moreover, such circumstances may also result from 'from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State'.[230] As such, if a Member State wants to rely on Clause 5(1)(a) of the Framework Agreement, the Member State cannot relate to a general provision but must provide for a particular type of employment relationship, and identify the specific factors regarding the specific activity and the conditions at issue which stems from the CJEU the case of *Adeneler and others* (2006).[231]

Furthermore, the Framework Agreement recognises that fixed-term relationships can be a characteristic of employment in certain industries or certain professions and activities, which has also been supported by the Court.[232] When doing so, the Court has also held that there is an obligation on Member State authorities to take account of *all relevant circumstances* when making an assessment of whether there is an abuse of successive fixed-term contracts at hand.[233] Such circumstances may include the number of fixed-term contracts, the duration of such contacts and other context surrounding the employment contract or relationship.[234] Thus, if there is a temporary need for the usage of successive fixed-term contracts, it could, in principle, be justified on the grounds of objective reasons. This is so, especially if the issue at hand regards

---

[227] Case of C-212/04 *Adeneler and others* [2006] (n179) paras 69 – 70. This ruling by the Court has also been used in later case laws. See to this effect, C-22/13, C-61/13, C-63/13 and C-418/13 *Mascolo and others* [2014] (n212) para 87.
[228] Joined cases C-378/07 to C-380/07 *Angelidaki and others* [2009] (n221).
[229] Joined cases C-378/07 to C-380/07 *Angelidaki and others* [2009] (n221) para 96. See also C-586/10 *Bianca Kücük v Land Nordrhein-Westfalen* [2012] ECLI:EU:C:2012:39, para 27; C-22/13, C 61/13 to C 63/13 and C 418/13 *Mascolo and others* [2014] (n212) para 87; C-238/14 *European Commission v Grand Duchy of Luxembourg* [2015] ECLI:EU:C:2015:128, para 44.
[230] Joined cases C-378/07 to C-380/07 *Angelidaki and others* [2009] (n221) para 96. See also Case C-212/04 *Adeneler and others* [2006] (n179) paras 69 – 70; Case C-307/05 *Del Cerro Alonso* [2007] (n18) para 53; and Case C-364/07 *Spyridon Vassilakis e altri contro Dimos Kerkyraion* [2008] ECLI:EU:C:2008:346, paras 88 – 89.
[231] Case C-212/04 *Adeneler and others* [2006] (n179) paras 71; 75.
[232] See Section 2 and 3 of the Preamble and no. 8 and no. 9 of the General Considerations in the Framework Agreement (n1). See C-268/06 *Impact* [2008] (n173) para 71; C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* [2013] ECLI:EU:C:2013:755, para 35; C-362/13 *Maurizio Fiamingo (C-362/13 REC), Leonardo Zappalà (C-363/13 REC) and Francesco Rotondo and others (C-407/13 REC) v Rete Ferroviaria Italiana SpA* [2014] ECLI:EU:C:2014:2238, para 59.
[233] Case C-586/10 *Kücük* [2012] (n229).
[234] Ibid., (n229) paras 40 – 50.

replacement of workers taking maternity leave or parental leave. However, such a right should not be used to meet a permanent need.[235]

A case that becomes relevant in this regard is the case of *Müller* (2018).[236] The case of *Müller* concerns whether the sector of football justified the use of successive fixed-term contracts on objective reasons. In the case Müller had a contract that was, in the beginning, concluded for three years but was further extended without the conversion to a permanent contract. Because of this, Müller brought a claim before the national Court.[237] For this reason, the German Federal Labour Court started to address the question whether football falls within the scope of the Framework Agreement, followed by an analysis concerning if football could justify the use of successive fixed-term contracts on objective reasons.[238]

It was, among other things argued that football players cannot perform at the required level until the retirement age, that sporting success requires a tactical concept in which an employer needs to have the freedom to choose his players and that the termination of fixed-term contracts in the sports sector may opt for employment opportunities. Which would also be beneficial to the athlete.[239] However, there are certain limits to the discretion given to the Member States when using unlimited fixed-term contracts.[240] This limitation set forth in the case of Case of *Luxemburg v Commission* (2015)[241] was further developed by the Court in the case of *Sciotto* (2018).[242]

The case of *Sciotto* (2018)[243] concerns Ms. Sciotto who was employed as a ballet dancer within the art and entertainment sector under several fixed-term contracts. The contracts at hand were renewed for four years but concerned the same tasks and role as employees employed under a contract of indefinite duration. Because of this, Ms. Sciotto appealed before the Court claiming that her contract should be converted into a contract of indefinite duration and that the Italian legislation excluded employees, such as Ms. Sciotto, from the rules preventing the misuse of successive fixed-term contracts.[244] In this case, the Member State argued that the use of the

[235] C. Barnard (2012) (n178) 442. See also the case of C-586/10 *Kücük* [2012] (n229) para 39.
[236] BAG 7 AZR 312/16 *Müller* [2018] ECLI:DE:BAG:2018:160118.U.7AZR312.16.0.
[237] P. Drabik (2015) (n41) 154.
[238] Ibid., (n41) 154f.
[239] Ibid., (n41) 149; 152f.; 155.
[240] C. De la Porte, P. Emmenegger (2017) (n43) 3.
[241] Case C-238/14 *Commission v Luxembourg* [2015] (n229) para 51.
[242] Case C-331/17 *Martina Sciotto v Fondazione Teatro dell'Opera di Roma* [2018] ECLI:EU:C:2018:859.
[243] Ibid., (n242).
[244] Ibid., (n242) paras 17 – 19.

successive fixed-term contract responded to safeguard cultural heritage,[245] and that the sector of art and entertainment had specific staffing requirements.[246] Even if the temporary need for staff *may* be considered as an objective reason that could justify the usage of the successive fixed-term contracts, the CJEU nevertheless concluded that the Member State failed to explain how the unlimited usage of successive fixed-term contracts responded to the objective reason and how the usage responded to a temporary need which was not permanent in nature.[247] This kind of reasoning has also been applied in later case laws, for example the case of *MIUR* (2022),[248] concerning that a requirement to hold a suitability certificate could not justify the adoption of successive fixed-term contracts for teachers of religious education in Italy.[249]

[245] Ibid., (n242) paras 42; 45.
[246] Ibid., (n242) para 47.
[247] Ibid., (n242) paras 48 – 54.
[248] Case C-282/19 *MIUR and Ufficio Scolastico Regionale per la Campania* [2022] ECLI:EU:C:2022:3.
[249] Ibid., (n248).

4. Protection from dismissal of pregnant workers

4.1 Introduction

Within the EU there are several legal provisions that aim to protect pregnant women. For instance, Article 157 TFEU holds that each Member State shall ensure equality between men and women, and Article 33(2) of the Charter of Fundamental Rights aims to protect the pregnant worker against unjust dismissal on the grounds of pregnancy. Furthermore, there are various directives concerning equality between men and women such as the Directive on the principle of equal payment between men and women;[250] the Directive on the principle of equality between men and women in relation to employment;[251] and more importantly for this thesis is the Pregnancy Directive.[252] The Pregnancy Directive was adopted to strengthen the protection of pregnant workers and workers who have recently been given birth or workers who are still breastfeeding as they are a vulnerable group that need extra protection for their safety and health at work.[253]

The aim of the following chapter is to answer the third sub-question regarding what kind of protection from the dismissal there is for pregnant workers under EU law. To evaluate whether the protection of pregnant women in the sector of sports has sufficient protection under EU law, the following section would need to analyse both the provision enshrined within the Pregnancy Directive and relevant case law from the Court.

4.2 Pregnancy as discrimination on the ground of sex

Before entering into the Pregnancy Directive and the relevant case law that ought to be investigated throughout this thesis, it is important to understand the context and development of the protection of women and protection against discrimination in a work-related context. Therefore, the following section will investigate the jurisprudence on pregnancy discrimination.

[250] Directive 75/117/EEC (n61).
[251] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204, 26.7.2006, p. 23–36 ('Equal Treatment Directive').
[252] Pregnancy Directive (n19).
[253] Preamble of the Pregnancy Directive (n19).

The Equality Treatment Directive 2006/54 replaced the first version of the Equal Treatment Directive[254] which did not include protection for women being pregnant but allowed derogations from the general principles of equality.[255] The derogation could only be made if a pregnant woman was granted *special protection.* An example that is given in the Directive was the prohibition for pregnant workers to work during night shifts.[256] This view was upheld by the CJEU at the time in the case of *Johnston* (1986).[257] It was emphasised that the special protection is needed because there is a 'special relationship which exists between a woman and her child'.[258]

One of the leading cases from the Court in that regard is the Case of *Dekker* (1990).[259] The case concerned Ms. Dekker who applied for work – which she was a suitable candidate for – but was rejected on the grounds of her being pregnant.[260] The questions referred was simply whether this measure amounted to a discrimination against pregnancy on the grounds of sex and whether the discrimination was direct or indirect?[261] The CJEU held that when deciding on whether there is a discrimination on the grounds of sex, consideration must be taken on what kind of reason there was for the refusal and if such measure applies without distinction of sex or applies to one sex exclusively.[262] In the present case, the Court concluded that there indeed was a connection between the refusal of employment and the pregnancy and thus, a direct discrimination on the grounds of sex. Therefore, there was no need to make an assessment on whether the refusal applied without distinction.[263] Consequently, to refuse a woman suited for employment was against Article 14 of the Equality Treatment Directive. Such refusal could not be justified on the grounds of financial loss.[264]

[254] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39, 14.2.1976, p. 40–42.
[255] C. Barnard (2012) (n178) 403.
[256] Article 2(3) Directive 76/207/EEC (n254).
[257] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206.
[258] Ibid., (n257) para 44.
[259] Case C-177/88 *Dekker* [1990] (n22).
[260] Ibid., (n22) paras 2 – 3.
[261] Ibid., (n22) para 17.
[262] Ibid., (n22) para 10.
[263] Ibid., (n22) para 13.
[264] This kind of reasoning was also applied by the Court in the case of Case C-109/00 *Tele Danmark* [2001] (n19) para 23.

Later, in the case of *Hertz* (1990)[265] it was however, found that the direct discrimination on the grounds of sex was not absolute.[266] Ms. Hertz, she was suffering from complications during her pregnancy, this led to her being sick and had to take time off from work. As the employer found Hertz was missing work for a longer period, the employer decided to dismiss her.[267]

What is interesting about this case, is that the CJEU distinguishes between two different methods of assessing whether a dismissal of a pregnant woman, being on sick leave because of pregnancy complications, constituted a discrimination on the grounds of sex. The first one referred to the period of maternity leave, whereas the second leave referred to the period after maternity leave. The former fell under the direct discrimination approach while the latter did not. As such, the latter had to be compared with a man to find a discrimination on the grounds of sex.[268] This ruling was further confirmed and developed in the case of *Larsson* (1997)[269] by stating that the Equality Treatment Directive did not preclude dismissal of women due to sickness in relation to *during* and *after* maternity.[270] This view was, however, reconsidered in the case of *Brown* (1998).[271]

The reasoning in the case of *Dekker* has further been developed in cases such as *Webb* (1994),[272] and the case of *Brown* (1998),[273] where it was emphasised that pregnancy cannot be compared with a pathological condition,[274] and that pregnant women need protection from dismissal during pregnancy. In the case of *Webb* (1994),[275] Ms. Webb was appointed to replace another employee enjoying her maternity leave. At a point, Ms. Webb became pregnant and was not able to perform the acquired work thereof. The employer dismissed her on the grounds of

[265] Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark, agissant en tant que mandataire pour Birthe Vibeke Hertz, contre Dansk Arbejdsgiverforening, agissant en tant que mandataire pour Aldi Marked K/S.* [1990] ECLI:EU:C:1990:384.
[266] Ibid., (n265) para 14. See also C. Barnard (2012) (n178) 404; 406f.
[267] Case C-179/88 *Hertz* [1990] (n265) paras 2 – 4.
[268] Ibid., (n265) paras 15 – 18. See also C. Barnard (2012) (n178) 407.
[269] Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, agissant pour Helle Elisabeth Larsson contre Dansk Handel & Service, agissant pour Føtex Supermarked A/S* [1997] ECLI:EU:C:1997:259. See also E. Ellis & P. Watson (2012) 'Discrimination on the grounds of pregnancy and maternity' in E. Ellis and P. Watson *EU Anti-Discrimination Law*. Second Edition, Oxford University Press , p. 328 – 360, 334.
[270] Ibid., (n269) para 13.
[271] Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECLI:EU:C:1998:331.
[272] Case C-32/93 *Webb* [1994] (n22).
[273] Case C-394/96 *Brown* [1998] (n271).
[274] Ibid., (n271) para 25.
[275] Case C-32/93 *Webb* [1994] (n22).

Ms. Webb not being able to work as required and not on the fact of her being pregnant.[276] The Court held that such an argument constitutes a discrimination on the grounds of sex.[277]

The case of *Brown* (1998)[278] concerns Ms. Brown who was dismissed on the grounds of a policy made by the company. The policy held that an employee could only take 26 weeks sick leave which Ms. Brown exceeded because of sickness that had a connection with the pregnancy.[279] The Court concluded that the dismissal constitute a discrimination as it prohibited women from undergoing medical care needed during pregnancy.[280] As such, a dismissal 'would be liable to entail not only administrative difficulties and unfair consequences for employers but also repercussions on the employment of women'.[281] Consequently, to dismiss a pregnant woman during an absence from work that has a connection to her being pregnant amounts to a direct discrimination as this could only affect women.[282] Nevertheless, the fact that the Court held that 'dismissal of a pregnant woman recruited for an indefinite period *cannot be justified* on grounds relating to her inability to fulfil a fundamental condition of her employment contract'[283] indicates that there are some situations that could possibly be justified from the principle of non-discrimination. For instance, when there is a fixed-term contract.[284]

The latest addition to the saga of pregnancy discrimination was held in the case of *Tele Danmark* (2001).[285] Here the CJEU further developed the case of *Webb* as the Court held that the nature of the contract is irrelevant. As such, to have a fixed-term contract could not be justified on the grounds of pregnancy discrimination.[286] This was even if the women did not inform the employer of her pregnancy during the interview.[287]

---

[276] Ibid., (n22) paras 3 – 4.
[277] Ibid., (n22) para 29.
[278] Case C-394/96 *Brown* [1998] (n271).
[279] Ibid., (n271) paras 4 – 8.
[280] Ibid., (n271) paras 22; 32. See also C. Barnard (2012) (n178) 407.
[281] Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECLI:EU:C:1998:44, Opinion of AG Ruiz-Jarabo Colomer, para 33.
[282] Case C-32/93 *Webb* [1994] (n22) para 29; Case C-394/96 *Brown* [1998] (n271) para 32.
[283] Case C-32/93 *Webb* [1994] (n22) para 28 (emphasis added).
[284] C. Barnard (2012) (n178) 404.
[285] Case C-109/00 *Tele Danmark* [2001] (n19).
[286] Ibid., (n19) para 30.
[287] Ibid., (n19) paras 17 – 18.

4.3 Pregnancy Directive

4.3.1 Introduction

The increasing developments of pregnancy-related issues and non-discrimination under the Directive of Equal Treatment led to the adoption of the Pregnancy Directive aiming to create a legal framework for especially workers that are pregnant.[288] It was argued by pregnant women that 'they wanted to be treated in the *same way* as their (non-pregnant) colleagues.'[289] Hence, it was at this point it became clear that the traditional discrimination model, which has been relied upon by the Court, had limitations as pregnancy is a unique condition that could not be compared with a man in an equivalent position.[290] For this reason the CJEU have been stated that a discrimination of being pregnant is per se unlawful by obviating the criteria of 'comparable man'.[291] Nevertheless, to analyse pregnancy and maternity leave by using a traditional non-discrimination model have not always been simple and for that reason the Pregnancy Directive, with its special protection approach adopted in the Directive, has been well welcomed.[292]

The Directive on Pregnancy was adopted in 1992 and has as its objective to protect the pregnant workers,[293] workers taking care of their children or being on maternity leave,[294] and workers that recently gave birth or are breastfeeding.[295] It was considered that workers that fall within these groups are more vulnerable and may address several risks at the workplace.[296] The Pregnancy Directive is a minimum requirement for the protection of pregnancy under Article 1(3) of the Pregnancy Directive. As such, the Pregnancy Directive provides several rights conferred to both the condition of being pregnant such as rights relating to the health and the safety at work, but also to rights related to pregnancy, such as the right to maternity leave or

[288] C. Barnard (2012) (n178) 410.
[289] Ibid., (n178) 403.
[290] Ibid., (n178).
[291] Ibid., (n178).
[292] Ibid., (n178); E. Ellis & P. Watson (2012) (n269) 338; J. Maliszewska-Nienartowicz (2013) (n45) 442.
[293] See Section 2.3.1 'Athletes as workers under EU law'. See also case of Case C-232/09 *Dita Danosa* [2010] (n147) para 67, where the Court held that even a board member could be seen as a worker as she had remuneration and responded to a procedure of rules by the company in the main proceeding.
[294] Case C-116/06 *Kiiski* [2007] (n147) para 33.
[295] Article 2 of the Pregnancy Directive (n19).
[296] Preamble of the Pregnancy Directive (n19). See also E. Ellis & P. Watson (2012) (n269) 339.

parental leave. Furthermore, the Pregnancy Directive provides that all Member States should assess the risk for the health and safety at work for pregnant women.[297]

4.3.2 Health and safety protection

Under Article 1 of the Pregnancy Directive, it is held that the purpose of the Directive is 'to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding'.[298] Hence, the main objective of the Pregnancy Directive is to protect the safety and health of the women before birth but also after birth from a mental, physical and a postured state of mind.[299] As such, Article 1 of the Pregnancy Directive provides for a special protection for pregnant workers and are emphasised in relation to both pregnancy but also maternity and this obligation applies to both the Member States and the employer.[300] It is also held in settled case law, that there also is an obligation for Member States to take necessary measures to ensure that the national authorities fulfil the obligation arising from a Directive. This is so even if they are adopted in a general or in a particular manner.[301]

4.3.3 Personal scope of the Pregnancy Directive

To fall within the scope of the Pregnancy Directive, the worker *must* be pregnant and in addition, inform her employer about her condition.[302] Notably, Article 2(a) of the Pregnancy Directive holds that a '*pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and / or national practice'.[303]

In case law of *Tele Danmark* (2001),[304] the CJEU came to the conclusion that it is irrelevant at what *time* the announcement of the pregnancy occurred as long as the pregnant

---

[297] Commission, 'Report on the implementation of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding', COM(1999)100 final.
[298] Article 1 of the Pregnancy Directive (n19).
[299] Commission Report on Pregnancy Directive (1999) (n297) 26.
[300] J. Maliszewska-Nienartowicz (2013) (n45) 445.
[301] See to this effect, Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECLI:EU:C:1994:292, para 26; Case C-258/97 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECLI:EU:C:1999:118, para 25; Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECLI:EU:C:2001:509, para 32.
[302] Article 2 of the Pregnancy Directive (n19).
[303] Article 2(a) of the Pregnancy Directive (n19).
[304] Case C-109/00 *Tele Danmark* [2001] (n19).

woman informs the employer about the pregnancy.[305] Furthermore, Member States need to ensure that the rights set forth in the Pregnancy Directive are fulfilled and are applicable for workers in both the public sector and the private sector.[306] Member States are given certain flexibility as to the definition of what constitutes a breastfeeding woman, how information should be provided, and workers who have recently given birth. Given this, the protection of pregnant workers might differ depending on the Member State.[307]

4.3.4 Employment rights under the Pregnancy Directive

Under the Pregnancy Directive, there are three different pillars of protection that can be identified.[308] These three pillars of employment rights are first, rights conferred to pregnant workers and the workers that enjoy the right to maternity leave to not have a financial loss when enjoying the rights conferred to them under the Pregnancy Directive.[309]

Secondly, pregnant workers also have the right to enjoy 14 weeks of maternity leave in accordance with Article 8 of the Pregnancy Directive.[310] A prerequisite is that the maternity leave should be taken before or after giving birth.[311] The aim behind this is to protect the 'biological condition and the special relationship between the woman and her child'[312] as was held by the Court in *Commission v Luxembourg* (2005).[313] This has further been supported as a particular important mechanism for the protection of pregnant workers.[314]

Last but not least, the third employment right under the Pregnancy Directive refers to the special protection of not being dismissed from the start of the pregnancy until the end of maternity leave under Article 10 of the Pregnancy Directive.[315] This right is to be considered an

[305] Ibid., (n19) para 18.
[306] Commission Report on Pregnancy Directive (1999) (n297).
[307] Ibid. (n297) 7.
[308] The Pregnancy Directive (n19) has its legal base and is adopted on the grounds of Article 153 TFEU relating to health and safety at work.
[309] See Article 9 of the Pregnancy Directive (n19). This is also emphasised in Article 157 TFEU.
[310] Article 8 of the Pregnancy Directive (n19).
[311] European Agency for Safety and Health at Work 'Directive 92/85/EEC - pregnant workers'. <https://osha.europa.eu/en/legislation/directives/10> [13-04-2022]
[312] Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005] ECLI:EU:C:2005:234, para 32.
[313] Ibid., (n312).
[314] See the case of C-116/06 *Kiiski* [2007] (n147) para 49 where the CJEU also referred to the European Social Charter 1961 to support its conclusion.
[315] Article 10(1) of the Pregnancy Directive (n19). See also Case C-109/00 *Tele Danmark* [2001] (n19) para 26.

absolute prohibition,[316] and does not only refer to the notification of dismissal but also provides an obligation to take any preparatory measures as was held by the Court in the case of *Paquay* (2007).[317] Furthermore, there is an obligation to provide written reasons for a dismissal of a pregnant worker,[318] and in addition an obligation for the Member States to provide pregnant workers with a remedy in cases of dismissal.[319] The obligation set forth in Article 10 of the Pregnancy Directive has been declared to be clear, precise and unconditional which results in the article having direct effect as established by the Court in the case of *Melgar* (2001).[320] Article 10 of the Pregnancy Directive also holds that there cannot be any exception or derogation from the prohibition, but could be saved in exceptional cases.[321] According to Ruiz-Jarabo Colomer (2001),[322] such exceptional circumstances is 'a force majeure situation which permanently prevented a person from working, or a collective dismissal for financial, technical, organizational or production reasons'.[323] This protection applies to both contracts concluded for an indefinite duration or if the contract at issue is concluded as a fixed-term contract.[324]

Two leading and important case, delivered on the same day, is the case of *Melgar* (2001),[325] and the case of *Tele Danmark* (2001).[326] In the of *Melgar,* the Court had to address the question of whether a non-renewal of several fixed-term contracts, within the same company but with different working assignments, constitutes discrimination on the grounds of sex *if* the worker at issue was pregnant? It was also asked whether it is relevant that Mrs. Melgar was employed on the grounds of being a fixed-term worker or a permanent worker?

Mrs. Melgar was employed on several employment contracts concluded under the Framework Agreement for several years.[327] In 1999, Mrs. Melgar became pregnant and gave birth. The employee offered a new contract to Mrs. Melgar, however, Mrs. Melgar refused the

---

[316] The GC nevertheless denied that there is an absolute fundamental principle of prohibiting the dismissal of a pregnant woman in the Case T-45/90 *Alicia Speybrouck v European Parliament* [1992] ECLI:EU:T:1992:7.
[317] Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECLI:EU:C:2007:601.
[318] Commission Report on Pregnancy Directive (1999) (n297) 13f.
[319] Article 10(3) of the Pregnancy Directive (n19).
[320] Case C-438/99 *Melgar* [2001] (n301) para 34.
[321] Article 10 of the Pregnancy Directive (n19). This is also confirmed by the CJEU in case C-32/93 *Webb* [1994] (n22) para 22.
[322] Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECLI:EU:C:2001:267, Opinion of AG Ruiz-Jarabo Colomer.
[323] Ibid., (n322) para 44.
[324] Case C-32/93 *Webb* [1994] (n22) para 44.
[325] Case C-438/99 *Melgar* [2001] (n301).
[326] Case C-109/00 *Tele Danmark* [2001] (n19).
[327] Case C-438/99 *Melgar* [2001] (n301) paras 15 – 18.

new offer and argued that there was a direct discrimination on the grounds of sex as the employer dismissed her during her pregnancy.[328] The Court firstly held that it is not an important factor what type of employment contract there is.[329] Furthermore, the Court applied the same kind of reasoning as they did in the earlier case law of *Dekker* (see section 4.2) i.e., a dismissal of a pregnant worker constitutes a direct discrimination.[330] It was also concluded that where a fixed-term contract has come to an end, and not been renewed, such contract should not be regarded as dismissal.[331] As such, Mrs. Melgars was pregnant at the time of the non-renewal of her contract, but could not enjoy her rights under Article 10 of the Pregnancy Directive as the article requires a dismissal.

As for the second case law, the case of *Tele Danmark* (2001),[332] also regarding the interpretation of the Pregnancy Directive, the CJEU was asked whether a pregnant woman fell within the scope of the Pregnancy Directive if she failed to inform the employer about her pregnancy.[333] The case concerned Ms. Brandt-Nielsen who was employed in June for a period of six months, on a fixed-term contract. In August, Ms. Brandt-Nielsen, informed the employer of her pregnancy. The next day, Ms. Brandt-Nielsen, was dismissed on the ground that she had failed to inform the employer about the pregnancy during the recruitment interview and as such, unable to work.[334]

The Court came to the conclusion that a dismissal of a pregnant worker is precluded.[335] The CJEU even held that a possible dismissal may pose a risk to the physical and mental state of pregnant workers and that the only derogation that can be justified in exceptional circumstances is when the dismissal is not connected with their condition of being pregnant and provided that the employer justifies the dismissal in writing.[336] Furthermore, it was stressed that a derogation *could not* be justified on the grounds of economic reasoning such as financial loss of the employer. A dismissal would leave the provisions provided within the Pregnancy Directive

[328] Ibid., (n301) paras 20 – 22.
[329] Ibid., (n301) para 43.
[330] Ibid., (n301) para 41.
[331] Ibid., (n301) para 45.
[332] Case C-109/00 *Tele Danmark* [2001] (n19).
[333] Ibid., (n19) para 19.
[334] Ibid., (n19) paras 11 – 12.
[335] Ibid., (n19) para 34.
[336] Ibid., (n19) para 26 – 27.

ineffective. In this regard, the Court held that it is irrelevant whether the contract at issue is concluded as a fixed-term contract or a contract concluded under indefinite duration.[337]

The Court applied the non-discrimination model in both the case of *Melgar* (2001) and *Tele Danmark* (2001) instead of the special approach for protecting the pregnant workers in relation to Article 1 of the Pregnancy Directive.[338] Maliszewska-Nienartowicz (2013),[339] stands critical to the approach taken by the Court in relation to pregnancy discrimination and stresses that pregnancy should not be regarded and dealt with from the traditional non-discrimination on the ground of sex model.[340] Even if the special protection approach, that was introduced within the Pregnancy Directive, has been well welcomed, she still puts emphasis on the issues of the adoption and interpretation made by the Court in the context of the Pregnancy Directive. Notably, that the Pregnancy Directive does not include and regulate *all* issues connected with pregnancy and maternity.[341] In this regard, Maliszewska-Nienartowicz argues that the Court should reconsider its position. The main reason is that the Court held that discrimination against pregnancy-related issues is discrimination on the grounds of sex which, according to the author, is problematic as the Pregnancy Directive is a special protection approach which should not be compared with a man.[342]

Having regard to the above-mentioned, pregnancy indeed is a unique condition that needs to be protected to a greater extent. By having in mind both the development of the case law made by the Court and the legislation that has been improving the rights and protection for pregnancy at work. The CJEU tends to use the traditional model of discrimination and not the special approach. In this regard, it must be noted that the traditional approach excludes certain categories from the protection as provided for under the Pregnancy Directive which among other things, could be emphasised in relation to that non-renewal of a fixed-term contract does not amount to a dismissal which would, within a contract of indefinite duration amount to a direct discrimination. Are pregnant women under the Framework Agreement excluded from the protection against discrimination on the grounds of sex? And more importantly, should this approach be reconsidered and overruled?

---

[337] Ibid., (n19).
[338] Ibid., (n19) para 25.
[339] J. Maliszewska-Nienartowicz (2013) (n45).
[340] Ibid., (n45) 443 – 445.
[341] Ibid., (n45) 444.
[342] Ibid., (n45) 443.

4.4 The Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union was implemented in 2009 aiming at introducing social integration in EU law.[343] The creation was not intended to expand the power of the Union and is only applicable insofar EU law is implemented.[344] Furthermore, the Charter has the same legal value as the Treaties under Article 6 TEU and as such is a part of primary EU law.

As regards the rights specifically related to the protection against discrimination and the protection of women, Article 21 of the Charter holds the general principle of non-discrimination: 'Any discrimination based on the grounds of sex, race, colour, ethnic or social origin [...] shall be prohibited'.[345] Furthermore, under Article 30 of the Charter, every worker should have a protection from an unjust dismissal.[346] Moreover, under Article 33(2) CFR every woman should have protection from dismissal that has a connection with, not only maternity, but also protection against dismissal during maternity or parental leave. According to settled case law, this right should not be interpreted restrictively.[347]

[343] P. Craig & G. De Burca (2020) (n33) 428.
[344] See Article 51(1) of the Chatrer. See also the case of C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:280, and Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107 where the Court implemented the notion of implementing the scope of EU law.
[345] Article 21 CFR.
[346] Article 30 CFR.
[347] See to this effect Case C-129/20 *XI v Caisse pour l'avenir des enfants* [2021] ECLI:EU:C:2021:140, para 44; Case C-588/12 *Lyreco Belgium NV v Sophie Rogiers* [2014] EU:C:2014:99, para 36.

5. Sports, pregnancy, and fixed-term contracts

5.1 Introduction

From the above-mentioned sections, it has been addressed how the specific nature of sports relates to EU labour law. Further, the purpose of the Framework Agreement and what Clause 5 entails has been explained. Lastly, concerning what kind of protection against dismissal of pregnant workers EU law provides.

In this regard, three different dilemmas are identified in relation to protection from dismissal of pregnant athletes. Firstly, sports and labour law have a level of immunity from the application of EU law. Secondly, Member States have a margin of discretion when implementing Clause 5 of the Framework Agreement. Thirdly, pregnant workers have a special protection to not be dismissed, however, a non-renewal of a fixed-term contract does not amount to a dismissal.

5.2 The first issue: *Sports a blanket exemption in EU labour law?*

As regards the first dilemma it was held that there is a special nature of sports that has been developed over time form the very early case law of *Walrave and Koch* (1974) until the most recent case of *ISU* (2020). Thus, sports have been integrated in EU law and today, the specific nature of sports is codified in primary law Article 165 TFEU. As such, sports have a special standing in EU law that also has been argued to serve as an integration clause that ought to be considered when assessing sports related issues. Furthermore, it was also held that sports are an industry that needs contracts that are atypical considering the variety and nature of the work.

There is a level of immunity from the application of EU law, but the concept of 'specify of sports' has never been formally recognised as a legal concept under EU law by the EU Courts.[348] Hendrickx (2017) has also argued that the concept of specificity of sports is a dynamic concept that has been improved and developed over the years as seen by the ruling of the

[348] F. Hendrickx (2017) (n13) 4.

Court.[349] This view is further supported by Parrish (2003),[350] who recalls that sports is included in the EU integration of 'social, cultural, and economic values',[351] and that there is no blanket immunity for sports to fall outside the scope of EU law.[352]

The implementation of the 'sports exception' should also be applied to the field of labour law. While it is true that working conditions in sports is unique in the sense that there is a need for contracts that suit the specific nature of sports work i.e., to maximise physical abilities, compete on a long-term period but only for a limited amount of time, it would also create legal issues and undermine the principle of legal certainty. This is because, if sports were immune, sports would circumvent and disconnect from legal mechanisms and general principles of labour law.

Moreover, it was also held that the competence of the Union is supported in the field of both EU labour law and sports. Nevertheless, athletes and sports are subject to EU law and should enjoy the status of an employee per the case of *Lawrie-Blum*.[353] This is because players and athletes often have an employment contract or employment relationship with a club in which the athlete provides a service of sport in return for remuneration.

As such, there is an indication that there is a relationship of subordination which is one of the key questions according to O'Leary (2018) when determining the status of an employee. As a result, it is irrelevant what contractual circumstances an athlete has under national law, if the criteria in *Lawrie-Blum* – are fulfilled. This kind of reasoning would also apply to athletes *not* being in an employment contract with a club as seen in the case of *Dita Danosa* (2010).[354]

In this regard, it is also worth noting that the CJEU itself has found athletes as workers on several occasions.[355]

[349] F. Hendrickx (2017) (n13) 4.
[350] R. Parrish, *Sports Law and Policy in the European Union* (Manchester University Press, 2003).
[351] Ibid., (n350) 271.
[352] Case C-22/18 *TopFit Biffi* [2019] (n12) para 53; Case C-519/04 P *Meca-Medina* [2006] (n10) para 33.
[353] The three criteria are i) service, ii) for an employer, iii) in return for remuneration.
[354] Case C-232/09 *Dita Danosa* [2010] (n147).
[355] See section '2.3.1 Athletes as workers under EU law'.

5.3 The second issue: *Fixed-term contracts in sports as use or abuse?*

5.3.1 Sports fall within the scope of the Framework Agreement

As regards the second dilemma that was identified, two clauses in the Framework Agreement are of particular importance. Notably, Clause 2 explains the scope of the Framework Agreement and Clause 5 of the Framework Agreement addressing the issue of preventing abuse of the successive use of fixed-term contracts. As such, the following section will discuss the legality of the Framework Agreement in relation to the sector of sport and suggests that athletes are fixed-term workers and that the sector of sports falls within the scope of Framework Agreement.

Under the Framework Agreement, certain categories of workers *may* be excluded from the scope of the Framework Agreement.[356] This provision does *not* exclude athletes from the scope of the Framework Agreement and the Court has also held that Member States cannot exclude a specific sector per the case of *Mascolo and others* (2014).[357] The Framework Agreement, nevertheless, only applies to workers as defined under national law in accordance with Clause 2(1) of the Framework Agreement.[358] This would indicate that Member States *may* exclude athletes from the scope of the Framework Agreement as they hold considerable discretion when implementing the Framework Agreement.

By applying the reasoning made by the CJEU in settled case law, it could, nevertheless, be argued that Member States are not provided with unlimited discretion when interpreting Clause 2(1) of the Framework Agreement. For instance, Member States need to 'take any necessary measures to enable them [...] to guarantee the results imposed by [the] Directive.'.[359] Moreover, Member States do not have the ability to reserve themselves immunity from the Framework Agreement as this would deprive EU law from its effectiveness. This would in return jeopardize a uniform application in and between the Member States which was held by the Court

[356] See Clause 2(2) of the Framework Agreement (n1).
[357] Joined cases C-22/13, C-61/13 to C-63/13 and C-418/13 *Mascolo and others* [2014] (n212) para 69.
[358] See Clause 3(1) of the Framework Agreement (n1): There is a definition of what constitutes a fixed-term employment provided.
[359] Case C-212/04 *Adeneler and others* [2006] (n179) para 86.

in the case of *Del Cerro Alonso* (2007).[360] As such, there is nothing that indicates that athletes *do not* fall within the scope of the Framework Agreement.

The thesis further held that the general form of employment is permanent contracts and that contracts concluded under the Framework Agreement should be used to a limited amount.[361] However, the Framework Agreement recognises that a specific sector can be taken into account,[362] irrespectively of whether the sector is public or private.[363] While it has been argued that employees are not workers,[364] and even if there is flexibility for Member States to define whether an athlete is a service provider or an employee, the specific character of sports would suit the nature of being a fixed-term contract for three reasons. Firstly, professional athletes provide a service for an employer in exchange for remuneration and fulfills the criteria set forth in *Lawrie-Blum.*[365] Secondly, the nature of sports work and a fixed-term contract would be beneficial to both the employer and the employee as both the employer and the employee need flexibility in terms of the working conditions. As was exemplified in this thesis,[366] an athlete needs to perform at a required level during the peak of the athlete's career. If the athlete is too old, a required level would not be possible. As for the employer, they need to have the freedom to create their own tactics while having the best interest for the team and supporters in mind. For this reason, a fixed-term contract, which is determined by objective conditions, concluded for a specific date and for a specific event, such as a sports season, would be beneficial. Thirdly, a fixed-term contract in the field of sports would respond to the specificity of sport. In this regard, attention must be brought to the case of *Bosman* (1995).[367] Here the Court held that promotion and relegation of young players is of social importance. If the contracts within the sport sector were concluded for an indefinite duration, young players would indeed struggle to enter the sports market as the older players are permanently employed. This would, moreover, interfere with the employers, such as a club or a coach, needing to organise the tactic of the sport as older players do not acquire the level of fitness needed. As such, a fixed-term contract would respond to the specificity of sport, the EMoS, Commission White Paper on Sports, Article 165 TFEU but

[360] Case C-307/05 *Del Cerro Alonso* [2007] (n18) para 29.
[361] See section '3.1 Introduction'.
[362] Recital 8 of the Framework Agreement (n1).
[363] Case of C-212/04 *Adeneler and others* [2006] (n179) para 55.
[364] R. Siekmann (2006) (n41). See also P. Drabik (2015) (n41) 150.
[365] The three criteria are i) service, ii) for an employer, iii) in return for remuneration. See section '5.2 The first issue: Sports a blanket exemption in EU labour law?'
[366] See section 2.3 The specific nature of Sports in EU labour law.
[367] Case C-415/93 *Bosman* [1995] (n11) para 106.

also the flexibility advocated for within the preamble of the Framework Agreement. A similar kind of view has also been supported by several scholars.[368]

5.3.2 Clause 5 of the Framework Agreement

Under Clause 5 of the Framework Agreement, Member States should prevent the abuse of successive fixed-term contracts. To do so, Member States could either implement an equivalent legal measure or implement any of the criteria in Clause 5 of the Framework Agreement.[369]

In relation to the possibility for Member States to recall an 'equivalent legal measures' on the use of successive fixed-term contracts, the Court held that this includes *any* measure where the purpose is to effectively prevent the misuse of successive fixed-term contracts per the case of *Angelidaki and others* (2009).[370] This is a broad definition that would allow Member States to easily justify the successive use of fixed-term contracts. It was also held that sports may justify a successive use of fixed-term contracts on objective reasons by applying the reasoning in the case of *Müller* (2018).[371] It was held that the specific nature and characteristics of sports work responds to 'precise and concrete circumstances characterising a given activity'.[372] However, Member States are still obliged to ascertain that the misuse or use of fixed-term contracts responds to the temporary need and must show that the contract is not permanent in nature per the case of *Sciotto* (2018),[373] and *MIUR* (2021).[374]

Having this in mind, a successive use of a fixed-term contract for athletes would benefit both the employee and employer and respond to the flexibility that is advocated for in the Preamble of the Framework Agreement.[375] Nevertheless, it is not without concern to justify the

[368] See among others P. Drabik (2015) (n41) and V. Smokvina, 'New issues in the labour relationships in professional football: social dialogue, implementation of the first autonomous agreement in Croatia and Serbia and the new sports labour law cases.' (2016) Int Sports Law J **15,** 159–171.
[369] These measures under Clause 5 of the Framework Agreement (n1) are: '(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.'
[370] Joined cases C-378/07 to C-380/07 *Angelidaki and others* [2009] (n221).
[371] BAG 7 AZR 312/16 *Müller* [2018] (n236).
[372] Case of C-212/04 *Adeneler and others* [2006] (n179) paras 69-70. This ruling by the Court has also been used in later case laws. See to this effect, C-22/13, C-61/13, C-63/13 and C-418/13 *Mascolo and others* [2014] (n212) para 87.
[373] C-22/13, C-61/13, C-63/13 and C-418/13 *Mascolo and others* [2014] (n212) para 87.
[374] Case C-282/19 *MIUR* [2022] (n248).
[375] Section 2 of the Preamble of the Framework Agreement (n1). See also section '5.3.1 Sports fall within the scope of the Framework Agreement'.

successive use of fixed-term contracts as there is no clear guidance or distinction between what is a temporary or a permanent need as well as what constitutes a successive use or an abuse.

Moreover, the thesis has also held that Member States have flexibility when implementing Clause 5 of the Framework Agreement.[376] This holds true even if the aim of the Framework Agreement seeks to improve the working conditions for fixed-term workers. This wide flexibility would counteract the very purpose of the Framework Agreement and this margin of appreciation would also compromise the objective and the practical effect of the Framework Agreement. A similar kind of reasoning has been held by the CJEU itself in cases such as the case of *Adeneler and others* (2006),[377] and the case *Angelidaki and others* (2009),[378] where it was stated that Member States flexibility is not unlimited.

Consequently, the Union level of protection against the abuse of successive fixed-term contracts is rather low. Clause 5 of the Framework Agreement has no direct effect per the case of *Impact* (2008), and there is also no guidance of what constitutes an objective reason within the Framework Agreement. Member States could also freely choose to combine alternatively or cumulatively actions under Clause 5 of the Framework Agreement and there are no remedies or legal consequences for being subject to an abuse under Clause 5 of the Framework Agreement. As a result, the fixed-term contracts can be used unlimitedly without protection that is sufficiently effective and sufficient deterrent on the abuse of the use of fixed-term contracts.[379] As such, general employment protection may also be circumvented.

5.4 The third issue: The special protection for whom?

Thirdly, pregnant workers are a vulnerable group that was granted special protection under the Pregnancy Directive, the Charter of Fundamental Rights and by the ruling from the Court itself in settled case laws.[380] One of the most important pillars is that pregnant workers have a special protection to not be dismissed under Article 10 of the Pregnancy Directive which was also supported by cases such as *Tele Danmark* (2001).[381] To dismiss a pregnant worker amounts to

[376] Supported by several scholars. See to this effect A. Van der Mei (2020) (n43) 68; P. Drabik (2015) (n41); Rapporteur K. Jöns (1999) (n216).
[377] Case C-212/04 *Adeneler and others* [2006] (n179) para 82.
[378] Case C-378/07 *Angelidaki and others* [2009] (n221) para 155.
[379] See to this effect Case C-238/14 *Commission v Luxembourg* [2015] (n229) para 51; C-331/17 *Sciotto* [2018] (n242) paras 36 – 37.
[380] See to his effect Case C-109/00 *Tele Danmark* [2001] (n19).
[381] Ibid., (n19).

direct discrimination on the grounds of sex,[382] and the protection from being dismissed includes the risk of being dismissed, and include the period for the start of the pregnancy until the end of maternity leave.[383] However, a non-renewal of a fixed-term contract does not amount to a dismissal per the case of *Melgar* (2001).[384] As such, pregnant workers having a contract concluded under the Framework Agreement *may* in certain circumstances not be able to enjoy the rights conferred to them under Article 10 of the Pregnancy Directive. As a result, pregnant workers having an employment contract or employment relationship under the Framework Agreement cannot enjoy sufficient and effective protection. Not in terms of the Pregnancy Directive, settled case law of the Court or primary EU law such as Article 30 and 33(2) CFR in which should be interpreted restrictively.[385]

This becomes even more complex in the sector of sports where there is a risk of several renewal of fixed-term contracts.[386] As a result, athletes may risk having a fixed-term contract for several years, but without enjoying the protection from dismissal. As such, the use of successive fixed-term contracts risks a circumvention of not only general employment rights and the right to stable employment but also the special protection which should be granted to pregnant workers under the Pregnancy Directive. Consequently, this might interfere with the general principle of legal certainty and creates a deterrent effect for women wanting to enter the sector of sports which would also infringe the free movement of workers (Article 45 TFEU) and the right to choose an occupation (Article 15 CFR).

Regard must be had to the special protection approach that could be argued to be beneficial when addressing issues that have a connection with pregnancy. To use the non-discrimination approach, might be problematic as all situations of pregnancy does not fall under such protection, as seen in both the case of *Melgar* (2001)[387] (non-renewal is no dismissal), and in the case of *Brown* (1998)[388] (sick leave due to pregnancy). This, could in turn, be even more troubling in the sector of sports where pregnant workers might not be able to provide the work and respond to the flexibility that the work acquires, for example a high level of fitness

[382] Case C-177/88 *Dekker* [1990] (n22).
[383] See Article 10 of the Pregnancy Directive (n19). See section '4.3 The Directive of Pregnant workers' of this thesis.
[384] Case C-438/99 *Melgar* [2001] (n301).
[385] Case C-129/20 *XI* [2021] (n347) para 44; Case C-588/12 *Lyreco Belgium* [2014] (n347) para 36.
[386] See section '5.3.2 Clause 5 of the Framework Agreement' of this thesis.
[387] Case C-438/99 *Melgar* [2001] (n301).
[388] Case C-394/96 *Brown* [1998] (n271).

including training and competing in the sport several times a week. In such a situation, a fixed-term contract would not be beneficial to the employee and does not respond to neither the purpose of the Pregnancy Directive,[389] nor the purpose of the Framework Agreement.[390] As a result, a worker would not be able to enjoy the protection granted under EU law, such as Article 10 of the Pregnancy Directive in combination with Article 30 and 33(2) CFR. Consequently, this leaves not only the Framework Agreement but also the Pregnancy Directive ineffective in the specific sector of sport.

[389] Article 1 of the Pregnancy Directive (n19).
[390] Clause 1 of the Framework Agreement (n1).

6. Conclusion

The thesis has analysed how the use of fixed-term contracts in the sports sector relates to the protection from dismissal of pregnant athletes.

The thesis firstly found that athletes are workers within the meaning of EU law per the case of *Lawrie-Blum* (1986)[391] but also in relation to the Framework Agreement under Clause 2.[392] Even if sport work needs contracts that are atypical, it was found that sports is not immune to the field of EU labour law if the criteria of *Lawrie-Blum* are fulfilled. The relevant requisite is the relationship of subordination, which has been interpreted broadly by the CJEU.

As regards whether the sector of sports falls within the Framework Agreement and Clause 5 thereof, regards must be had to the nature of the specific work. Thus, even if the general employment form of EU is contracts of indefinite duration, the use of fixed-term contracts in the sector of sports *may* respond to the specificity of sports and benefit both the athlete and the employer. Nevertheless, the usage must respond to a specific activity, a genuine and temporary need, and must provide protection that is considered sufficiently effective and sufficient deterrent on abuse. This showed that there is a limitation to the broad margin of appreciation for Member States when implementing Clause 5 of the Framework Agreement.

The successive use of fixed-term contracts is however problematic in relation to the absolute protection to not dismiss a pregnant worker under Article 10 of the Pregnancy Directive and in relation to the case law of the Court. This is mainly because a non-renewal of a pregnant worker does not amount to a dismissal per the case of *Melgar* (2001). Considering the specific nature of sports work, the general labour law obligations risk being circumvented.

The analysis has shown that sports is indeed a unique industry that needs contracts that are atypical. This is because the employment conditions require flexibility. However, the successive use of fixed-term contracts in the specific sector of sport does not provide sufficient and effective protection from dismissal of pregnant workers under EU law. As such, it would be interesting to see further research in this specific area. Especially whether pregnancy discrimination should be considered as a discrimination on the grounds of sex or if a special protection approach for pregnant workers in line with the Pregnancy Directive should be adopted?

[391] Case C-66/85 *Lawrie-Blum* [1986] (n147).
[392] See also 3(1) of the Framework Agreement (n1).

7. Bibliography

EU Primary Sources

Consolidated version of the Treaty on European Union [2012] OJ C 326/13

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

EU Secondary Sources

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45, 19.02.1975, p. 19-20

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39, 14.2.1976, p. 40–42

Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L 206, 29.7.1991, p. 19–21

Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348/01 (‘Pregnancy Directive’)

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1997] OJ L 14, 20.1.1998, p. 9–14

Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43 ('Framework Agreement')

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204, 26.7.2006, p. 23–36 ('Equal Treatment Directive')

Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] PE/43/2019/REV/1 ('Cinderella Directive')

Soft law

Commission 'The European Model of Sport' Consultation Document of Director-General X (1999)

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

Commission, 'Report on the implementation of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding', COM(1999)100 final

European Parliament, 'European Council in Nice Declaration of Sport' [2000]

Commission Staff Working Document, 'the EU and Sport: Background and Context, Accompanying document to the White Paper on Sport', SEC/2007/0935 final

Commission 'White Paper, White Paper on Sport' COM (2007) 391 final

Other electronic sources

Council of Europe, 'Further developing the European Sports Model' <https://rm.coe.int/further-developing-the-european-sports-model-european-sport-charter-pa/1680a1b1cf> [21-05-2022]

European Agency for Safety and Health at Work 'Directive 92/85/EEC - pregnant workers'. <https://osha.europa.eu/en/legislation/directives/10> [13-04-2022]

European Union 'Community Charter of Fundamental Social Rights of Workers' (1989) LEGISSUM : c10107 <https://op.europa.eu/en/publication-detail/-/publication/51be16f6-e91d-439d-b4d9-6be041c28122> [13-04-2022]

European Parliament, Council of the European Union and the European Commission 'European Pillar of Social Rights' (2017) ISBN 978-92-79-74092-3 <https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet_en.pdf > [13-04-2022]

Eur-lex, 'The non-written sources of European law: supplementary law' (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14533> [23-05-2022]

Literature

Barnard, Catherine, *EU Employment Law* (4th Edition, Oxford University Press, 2012)

Bartoloni, Maria, *The EU Social Integration Clause in a Legal Perspective* (10 Italian J Pub L 97, 2018)

Craig, Paul & De Burca, Grainne, *EU law: Text, Cases and Materials* (7th edn, Oxford University Press, 2020)

Ellis, Evelyn & Watson, Philippa, 'Discrimination on the grounds of pregnancy and maternity' in E. Ellis and P. Watson, *EU Anti-Discrimination Law*, (2nd eds., Oxford University Press, p. 328 – 360, 2012)

Hettne Jörgen & Otken Eriksson Ida (ed,), *EU-rättslig Metod: Teori och Genomslag i Svensk Rättstillämpning* (2nd eds, Norstedts juridik, 2011)

Kleineman, Jan 'Rättsdogmatisk metod' in Nääv & Zamboni (eds.), *Juridisk Metodlära*, (2nd Edition, Lund: Studentlitteratur, p. 21 – 46, 2018)

O'Leary, Leanne, 'Professional team sports and collective labour law in the European Union' in Jack Anderson, Richard Parrish, Borja García, *Research handbook on EU sports law and policy*, (Edward Elgar Publishing Limited, Ch 19, 2018)

Parrish, Richard, *Sports Law and Policy in the European Union* (Manchester University Press, 2003)

Parrish, Richard & Miettinen, Samuli, *The Sporting Exception in European Union Law* (The Hague, Asser Press, 2008)

Rönnmar, Mia, 'Flexicurity, Labour Law and the Notion of Equal Treatment' in M. Rönnmar *Labour Law, Fundamental Rights and Social Europe: Swedish Studies in European Law,* vol 4. Ed. (London: Hart Publishing 157–186, 2011)

Reichel, Jane ‘EU-rättslig metod’ in Nääv & Zamboni (eds.), *Juridisk Metodlära*, (2nd Edition, Lund: Studentlitteratur, p. 109 – 142, 2018)

Siekmann Robert, ‘Is Sport Special in EU Law and Policy?’, in R. Blanpain, M. Colucci & F. Hendrickx (eds), *The Future of Sports Law in the European Union. Beyond the EU Reform Treaty and the White Paper* (Bulletin of Comparative Labour Relations, 66, The Hague, Kluwer Law International, 37 – 49, 2008)

Smitsm, Jan M., ‘What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research’ in Rob van Gestel, Hans-W. Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017)

Zylberstein, Jean-Claude, ‘The specificity of Sport: A concept under Threat’ in Blanpain R, Colucci M, Hendrickx F (eds) *The future of sports law in the European Union. Beyond the EU reform treaty and the white paper* (Kluwer Law International, The Hague, pp 95–106, 2008)

Journals

Adams-Prassl, Jeremias, ‘Article 47 CFR and the effective enforcement of EU Labour Law: Teeth for paper tigers?’ (2020) European Labour Law Journal <https://deliverypdf.ssrn.com/delivery.php?ID=366007094000024106009111092083017022001059088011053070123107109125090068071069065029003030051022026006053069064010078111026098111026056021027092020004112088005087109020028022105002112025007101065108116008118066094084097081126064073118098112083018026126&EXT=pdf&INDEX=TRUE> [Access 24-05-2022]

De la Porte, Caroline & Emmenegger Patrick, ‘The Court of Justice of the European Union and fixed-term workers: still fixed, but at least equal’ (2016) Working Paper 2016.01 <https://deliverypdf.ssrn.com/delivery.php?ID=092093029105097086007022091124126112020052090029040071000079000029082102124065123094062054007100062009029090066023084013008065020021043003048092015127082015090114027029083035097071107022102068101

093005066122001023120114029096074093005069027118092098017&EXT=pdf&INDEX=TRUE> [Access 24-05-2022]

Drabik, Piotr, 'Compatibility of fixed-term contracts in football with Directive 1999/70/EC on fixed-term work: the general framework and the Heinz Müller case' (2015) 5:149–158, International Sports Law Journal <https://link-springer-com.ludwig.lub.lu.se/content/pdf/10.1007/s40318-015-0085-5.pdf> [Access 24-05-2022]

Hendrickx, Frank 'What if sport and labour law have become interlocked?' Paper submitted for the "Sport and labour law' (2017) panel of the ISLSSL European Regional Conference <https://www.ercprague2017.cz/wp-content/uploads/2017/02/Hendrickx_What-if-sport-and-labour-law-have-become-interlocked.pdf> [Access 24-05-2022]

Maliszewska-Nienartowicz, Justyna, 'Pregnancy Discrimination in the European Union Law Its Legal Character and the Scope of Pregnant Women Protection' (2013) Vol 4 No 9, Mediterranean Journal of Social Sciences <https://www.researchgate.net/profile/Justyna-Nienartowicz/publication/270802745_Pregnancy_Discrimination_in_the_European_Union_Law_Its_Legal_Character_and_the_Scope_of_Pregnant_Women_Protection/links/5bab6708a6fdccd3cb737c54/Pregnancy-Discrimination-in-the-European-Union-Law-Its-Legal-Character-and-the-Scope-of-Pregnant-Women-Protection.pdf?origin=publication_detail> [Access 24-05-2022]

Matuszak, Michał, 'Work-life balance among athletes' (2020) No. 4 (Vol. 32), 21–31 <https://9lib.org/document/9yn9dv1q-work-life-balance-among-athletes.html> [Access 24-05-2022]

Siekmann, Robert, 'Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football In Europe' (2006) Entertainment and Sports Law Journal <http://go.warwick.ac.uk/eslj/issues/volume4/number1/siekmann/> [Access 24-05-2022]

Siekmann, Robert, 'The Specificity of Sport: Sporting Exceptions in EU Law' (2011) International Sports Law Journal, nr. 3 – 4, 75 – 85

Smokvina, Vanja, 'New issues in the labour relationships in professional football: social dialogue, implementation of the first autonomous agreement in Croatia and Serbia and the new sports labour law cases.' (2016) Int Sports Law J **15,** 159–171 <https://doi.org/10.1007/s40318-015-0086-4> [Access 24-05-2022]

Szyszczak, Erika 'Competition and Sport: No Longer So Special?' (2018) Vol. 9, No. 3, Journal of European Competition Law & Practice <https://doi.org/10.1093/jeclap/lpy012> [Access 24-05-2022]

Van der Mei, Anne Pieter 'Fixed-Term work: Recent developments in the case law of the Court of Justice of the European Union' (2020) Vol 11 European Labour Law Journal <https://doi.org/10.1177%2F2031952519883487> [Access 24-05-2022]

Van Schadewijk, Matthjias 'The notion of 'employer': Towards a uniform European concept?' (2021) Vol. 12(3) 363–386, European Labour Law Journal <https://doi.org/10.1177/2031952521991159> [Access 24-05-2022]

Vranken Jan 'Exciting Times for Legal Scholarship' (2012) 2(2) LaM 42 <https://www.lawandmethod.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf> [Access 24-05-2022]

8. Table of Cases

Case law from the European Court of Justice

EU Constitutional law

Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1

Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:709

Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:280

Case C‑399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107

Case C‑205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* [2022] ECLI:EU:C:2022:168

General EU Labour law

Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECLI:EU:C:1986:284

Case C-268/99 *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie* [2001] ECLI:EU:C:2001:616

Case C-256/01 *Allonby v Accrington and Rossendale College and others* [2006] ECLI:EU:C:2004:18

Sports law

Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECLI:EU:C:1974:140

Case C-13/76 *Gaetano Donà v Mario Mantero* [1976] ECLI:EU:C:1976:115

Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463

Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:293, Opinion of AG Lenz

Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [1999] ECLI:EU:C:1999:147

Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECLI:EU:C:2000:201

Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECLI:EU:C:2002:98

Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECLI:EU:C:2003:255

Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECLI:EU:C:2005:213

Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* (2006) ECLI:EU:C:2006:492

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376

Case C-325/08 *Olympique Lyonnais SASP v Olivier Barnard and Newcastle UFC* [2010] ECLI:EU:C:2010:143

Joint case C‑403/08 and C‑429/08 *Football Association Premier League Ltd and others v QC Leisure and others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)* [2011] ECLI:EU:C:2011:631

Case C-22/18 *TopFit e.V. Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019] ECLI:EU:C:2019:497

Framework Agreement on Fixed-term Contracts

Case C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECLI:EU:C:2006:517

Case C‑212/04 *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECLI:EU:C:2006:443

Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECLI:EU:C:2007:509

Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECLI:EU:C:2007:3, Opinion of AG Poiares Maduro

Case C-364/07 *Spyridon Vassilakis e altri contro Dimos Kerkyraion* [2008] ECLI:EU:C:2008:346

Case C-268/06 *Impact v Minister for Agriculture and Food and others* [2008] ECLI:EU:C:2008:223

Joined cases C-378/07 to C-380/07 *Kiriaki Angelidaki and others v Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07), Charikleia Giannoudi v Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07)* [2009] ECLI:EU:C:2009:250

Joined cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECLI:EU:C:2010:819

Case C-109/09 *Deutsche Lufthansa AG v Gertraud Kumpan* [2011] ECLI:EU:C:2011:129

Case C-586/10 *Bianca Kücük v Land Nordrhein-Westfalen* [2012] ECLI:EU:C:2012:39

Case C-251/11 *Martial Huet v Université de Bretagne occidentale* [2012] ECLI:EU:C:2012:133

Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* [2013] ECLI:EU:C:2013:755

Case C-362/13 *Maurizio Fiamingo (C-362/13 REC), Leonardo Zappalà (C-363/13 REC) and Francesco Rotondo and others (C-407/13 REC) v Rete Ferroviaria Italiana SpA* [2014] ECLI:EU:C:2014:2238

Case C-38/13 *Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr Stanisława Deresza w Choroszczy* [2014] ECLI:EU:C:2014:152

Joined cases C-22/13, C 61/13 to C 63/13 and C 418/13 *Raffaella Mascolo and others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli* [2014] ECLI:EU:C:2014:2401

C-238/14 *European Commission v Grand Duchy of Luxembourg* [2015] ECLI:EU:C:2015:128

Case C-331/17 *Martina Sciotto v Fondazione Teatro dell'Opera di Roma* [2018] ECLI:EU:C:2018:859

Case C-760/18 *M.V. and others v Organismos Topikis Aftodioikisis (O.T.A.) «Dimos Agiou Nikolaou»* [2021] ECLI:EU:C:2021:113

Case C-282/19 *MIUR and Ufficio Scolastico Regionale per la Campania* [2022] ECLI:EU:C:2022:3

Protection of Pregnant Women

Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206

Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark, agissant en tant que mandataire pour Birthe Vibeke Hertz, contre Dansk Arbejdsgiverforening, agissant en tant que mandataire pour Aldi Marked K/S.* [1990] ECLI:EU:C:1990:384

Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECLI:EU:C:1990:383

Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECLI:EU:C:1994:300

Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECLI:EU:C:1994:292

Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, agissant pour Helle Elisabeth Larsson contre Dansk Handel & Service, agissant pour Føtex Supermarked A/S* [1997] ECLI:EU:C:1997:259

Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECLI:EU:C:1998:331

Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECLI:EU:C:1998:44, Opinion of AG Ruiz-Jarabo Colomer

Case C-258/97 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECLI:EU:C:1999:118

Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECLI:EU:C:2001:509

Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECLI:EU:C:2001:513

Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECLI:EU:C:2001:267, Opinion of AG Ruiz-Jarabo Colomer

Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005] ECLI:EU:C:2005:234

Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECLI:EU:C:2007:536

Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECLI:EU:C:2007:601

Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECLI:EU:C:2010:674

Case C-588/12 *Lyreco Belgium NV v Sophie Rogiers* [2014] EU:C:2014:99

Case C-129/20 *XI v Caisse pour l'avenir des enfants* [2021] ECLI:EU:C:2021:140

Case law from the European General Court

Case T-45/90 *Alicia Speybrouck v European Parliament* [1992] ECLI:EU:T:1992:7

Case T‑162/13 *Magic Mountain Kletterhallen* [2016] ECLI:EU:T:2016:341

Case T‑93/18 *International Skating Union v European Commission (ISU) v. European Commission* [2020] ECLI:EU:T:2020:610

Case law from national courts

BAG 7 AZR 312/16 *Müller* [2018] ECLI:DE:BAG:2018:160118.U.7AZR312.16.0