How to fix equality of academics employed with fixed-term contracts?

The Aberration of the Belgium Council of State with Fixed-Term Employment Relationships at Flemish Universities, divergent decisions of the Appeal Labour Court and the Council of State, constitutional and Union law challenges

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Abstract:

The case X v University of Antwerpen no. 247.434 of 21 April 2020 is perhaps the most interesting case of the Belgian Council of State on fixed-term employment relationships at universities in Belgium. This judgment and the reasoning of the Belgian Council of State provokes criticism. It is described as infringing Union law and creating a ground for dismissal of academic staff at a public university in Flanders that does not exist for private state-funded universities by denying admissibility of the plea of an academic employed with one statutory fixed-term employment after successive contractual fixed-term employments based on considerations of i.a. Belgian procedural law.

The author will address the Belgian Council of State's reasoning on the inadmissability of the claim against the background of recent judgments on fixed-term employment relationships by the Court of Justice of the European Union and by the Appeal Labour Court of Brussels.

After a short overview of the facts of the Belgian Council of State's April 2020 judgment, she will show how far the Council of State's approach should be characterized as contradicting Union law. Against this background, divergent trends in protection between the Council of State and the Appeal Labour Court of Brussels could imperil the equal protection and equal benefit of the protection of academic staff employed with fixed-term employment relationships in (public v private) state funded universities in Flanders, granted by Directive 1999/70/EC and the Framework agreement on fixed-term work.

The author's interest in fixed-term employment in education was raised by Professor Roberto Toniatti whose guidance on Italian education law and on the 2014 Mascolo case and the proposals of the Italian government to limit fixed-term job contracts was very enlightening. The scientific labour landscape in Europe is characterised by a minority of academics in permanent (tenured) jobs in the country's state funded universities and a majority of academics operating in the European liberalised academic labour market.

This articles explores the impact of Directive 1999/70/EC and the Framework agreement on fixed-term work on the vast and wild terrain of administrative and labour laws applicable on academic staff at universities in Flanders, and the urgent

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need to guarantee the efficacy of the Framework agreement in the member states even if a state's (procedural) rules are of a constitutional nature.[1]

Facts

The basic facts in X v University of Antwerpen are as follows. An academic staff member was employed by the (public) University of Antwerpen from 1999 till 2015. He performed since the academic year 2005/2006 the same teaching, research and academic services as permanent tenured independent academic staff (ZAP), fulfilling permanent needs of the university in a particular discipline.

In 2012 the university finally held a competitive selection procedure although for 40%[2] only. He was ranked in the first place and was awarded a (first) three-year fixed-term statutory independent academic staff (ZAP) employment relationship which he combined for the remaining percentage with a 23th. fixed-term contractual employment relationship.

In 2015, his employment thus consisted of 24 successive fixed-term employment relationships including 23 renewable fixed-term contractual employment relationships under labour law and 1 renewable fixed-term statutory employment under administrative law pending the opening of a competitive selection procedure for a full-time/structural permanent position.

His (last) statutory employment relationship was not renewed in November 2015 based on a non-binding internal (budgetary) faculty education plan that – in this case - was applied on part-time academic staff only. The teaching positions which the (now former) academic staff member had fulfilled 16 years, were assigned through internal procedures to an academic staff member who was ranked after him

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[1] The Belgian Council of State's reasoning on the application of fixed-term academics (Case no. 247.434, Belgian Council of State, X v Universiteit Antwerpen, April 21, 2020) is discussed in depth in: Lauwers Gracienne, 'The Lack Of Legal Protection Of Union Rights On Termination Of Fixed-term Academics At Public Universities In The Flemish Community Of Belgium: Admissibility issues of an application based on the Framework agreement on fixed-term work at public universities in the assessment by the supreme administrative court of Belgium' in: Białostockie Studia Prawnicze" (BSP; "Bialystok Legal Studies"), 2020.

[2] To be assigned a permanent statutory position, the open vacancy for recruitment as permanent tenured independent academic staff (permanent statutory ZAP) has to be done for a structural percentage, to be defined by the university (for the University of Antwerpen: 60%). A public vacancy for recruitment for a non-structural percentage (Article V.28 in the Flemish Higher Education Code) leaves the academic staff member being employed in a renewable fixed-term non-structural statutory independent academic staff employment relationship (fixed-term statutory ZAP) regulated by administrative law without any limitations in time or number.
To avoid an academic staff member to become permanent statutory ZAP for the purposes of satisfying lasting and permanent staffing needs pending the opening of a structural selection procedure, an employment relationship is split in a statutory non-structural 40% employment regulated by administrative law (ZAP) and a remaining percentage of renewable fixed-term contractual independent staff employment (BAPZAP) or renewable fixed-term contractual researcher (BAP) employment which are both regulated under labour law. This combination of non-structural statutory combined with contractual employment relationships, even when together amounting at 100% employment to fulfil permanent needs of the university, can never lead to a permanent (statutory) position according to i.a. the Flemish Higher Education Code.

in the 2012 competitive selection procedures (former student and internal PhD at the University of Antwerpen) and to the president of the department himself who did not took part in the open selection procedures of 2012 at all.

After having terminated his employment relationship upon its expiry on the turn of the year 2015/2016 based on financial considerations, the Faculty of Social Sciences at the public University of Antwerpen started in 2017 the organisation of the recruitment procedure for a 100% tenured permanent position.

He participated once again in the open selection procedures but was not invited by the selection commission because he had brought a claim before the Rectorate[3], the external prevention service and the Belgian Council of State for unlawful dismissal. The post he held 16 years as fixed-term academic from 1999 till the turn off the year 2015/2016 was assigned after open selection procedures from which he was cleared, in 2018 to the internal PhD student of the Faculty of Social Sciences of the public university.

Having covered this vacant post for more than 16 years of service with 24 successive fixed-term employment relationships till the Faculty of Social Sciences would decide on a full-time/structural open vacancy and competitive selection procedure, the fixed-term academic concerned thus brought an action in the Belgian Council of State for the annulment of the decision of the (public) university against the termination of his employment upon expiry of the agreed term, and the decision not to renew the 24th employment and its refusal to offer a permanent position at the end of the 24th fixed-term contract.

Under Belgian and Flemish law, no compensation is payable at the end or upon the termination of a fixed-term contract. Abuse and compensation under Council Directive 1999/70/EC and the Framework agreement on fixed-term work was therefore at issue in this case.

The Directive 1999/70/EC and Framework agreement on fixed-term work obliges national courts to examine four issues: the procedural position of the temporary staff member; the national provisions of what is to be regarded as 'successive' employment relationship, the national preventive measures against the abuse of successive fixed-term employment relationships, and the effective remedies in the event that abuse of successive fixed-term employment relationships has taken place.

Ruling that the case was inadmissible, the Belgian Council of State did not investigate the substantive issues including preventive measures and measures to penalise the misuse of fixed-term contracts at Flemish universities such as whether the university has to convert these contracts into a permanent position. Neither did it investigate whether the renewal of 24 fixed-term contracts during 16 years covered temporary staff needs or in fact permanent needs.

The no.247.434 judgment of the Belgian Council of State

1. According to the assessment of the Belgian Council of State in case no. 226.345, the fixed-term academic did not contest the successive 24 renewals and

[3] In the period 2012-2016, the position of vice-rector was held by the lecturer of Law of the European Union, Private International Law, and Constitutional Law of the European Union at the University of Antwerpen.

only disputed the lawfulness at the termination of the 24th employment relationship. "Too late". The fact that the academic staff member of the public Flemish university thus (implicitly) consented to the renewal of 24 successive fixed-term employment relationships was thus capable of removing the abusive element from that public university's conduct in the event of abusive use by a public university of successive fixed-term employment relationships in Flanders – according to the Belgian Council of State.[4]

However, in the Court of Justice of the European Union cases C-274/18 Minoo Schuch-Ghannadan and C190/13 Antonio Márquez Samohano[5], applicants employed with successive fixed-term employment relationships in Austria and Spain disputed the lawfulness at the termination of their employment relationship and not at the beginning or renewals of the successive employment relationship.

So did the applicant consenting with 8 successive fixed-term employment relationships for a duration of 11 years at a Flemish state-funded university before being dismissed on financial considerations in case 2016/AP/1117 before the Brussels Labour Court of Appeal without encountering any admissibility problems. Moreover, on the substance of the case, the Brussels Labour Court of Appeal ruled that the limits of Article 10a of the (federal) employment contract law were not respected and that the Flemish state-funded university improperly applied the provisions of the university decree (included after codification in the present Flemish Higher Education Code) and its internal regulations to make use of successive fixed-term employment relationships and that it did not rebut the presumption of Article 10 of the (federal) employment contract act and that it did not adduce specific evidence of justification or objective reasons to justify the renewal of such contracts or relationships.[6] It further held that it is for the national court to establish objective reasons justifying that a fixed-term appointment exists in the particular case before it, thereby referring to recital B.16.2 of judgment 55/2016 of 28 April 2016 of the Belgian Constitutional Court.[7] The Brussels Labour Court of Appeal established the classification of the employment relationship between the applicant with the Flemish state-funded university and the legality of the decision terminating that relationship, reminding the parties that the Court may substitute its

[4] Belgian Council of State (Raad van State), X. v Universiteit Antwerpen, judgment nr. 247.434 of 21 April 2020

[5] Case C-274/18 Minoo Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:547; Case C190/13 Antonio Márquez Samohano v Universitat Pompeu Fabra [13 March 2014] EU:C:2014:146

[6] Case 2016/AP/1117, Arbeidshof Brussel, Chimkovitch v Vrije Universiteit Brussel, 2 July 2018, paragraph 36. The applicant in this case had been employed for 11 years continuously at a state-funded university from October 2004 till September 2013 with 8 successive fixed-term contracts before being dismissed officially on financial considerations.

[7] This case concerned part-time visiting professors in university colleges.

own assessment for that of the parties and replace the contractual qualification individually negotiated by the parties with its own qualification.[8]

In its judgement of 19 March 2020 in joined Cases C-103/18 and C-429/18, the Court of Justice of the European Union held that the fact that the worker consented to the establishment and/or renewal of successive fixed-term employment relationships with a public employer, is not capable of removing the abusive element from that employer's conduct, so that the framework agreement would not be applicable to that worker's situation.[9] According to the Court, if this consent resulted in the disapplication of the framework agreement, the goal of the framework agreement—which is to counteract the power imbalances between employees and employers—would be fully undermined.

The procedural position of the fixed-term staff member was explained in more detail by Advocate General Kokott in this case.[10] The Advocate General stated that the provisions of the framework agreement, read in conjunction with the principle of effectiveness, must be interpreted as "precluding national procedural requirements which require the fixed-term worker to take an active stance by appealing (when concluding the fixed-term employment relationship) or by appealing against all successive appointments and dismissals in order to benefit from the protection afforded by the Directive and the rights conferred upon the fixed-term worker by the Union legal order."[11]

According to the Advocate General, such a rule amounts to interpreting the passivity of the fixed-term worker as giving consent to the abuse, although, according to the Advocate General, there may be obvious reasons for the passivity, such as unfamiliarity with one's rights, the cost of court procedures or fear of retaliation. [12]

The author expresses the following major concerns with the "too late" qualification of the Belgian Council of State. As the request for annulment of administrative acts, such as the employment by a public university, based on the plea of illegality of successive fixed-term contracts and on the non-compliance with the Framework agreement on fixed-term work must - at least according to the Belgian Council of State - be lodged with the Belgian Council of State within sixty days after the notification of the employment decision by the university, the academic employed with a fixed-term employment relationship would have to take the university to court in order to preserve the protection of the Framework agreement on fixed-term directly after being re-appointed for another fixed-term. A claim of an academic

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[8] Case 2016/AP/1117, Arbeidshof Brussel, Chimkovitch v Vrije Universiteit Brussel, 2 July 2018, paragraph 20 and 21 with reference to Cass. 23 December 2002, JTT 2003, 271 with note; Cass. 28 April 2003, JTT 2003, 261 and subsequent similar judgement

[9] Joined Cases C-103/18 and C-429/18, Domingo Sánchez Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219

[10] See also Advocate General J. Kokott's Opinion in Joined cases C103/18 and C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 92

[11] Advocate General J. Kokott's Opinion in Joined cases C103/18 and C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 96

[12] Advocate General J. Kokott's Opinion in Joined cases C103/18 and C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 93

being lodged directly after the re-appointment for another fixed-term by the university may lead to a lack of comprehension by the decisionmakers at the university and alienate the actors. Moreover, as the majority of academics at the universities are employed under a fixed-term employment relationship, this could result in a significant rise of claims of academics employed by a public university with a fixed-term employment relationship to safegard their rights conferred by the Framework agreement on fixed-term work. This is undesirable or even impossible for those academics who are not informed in advance of their rights or this practice.

2. In judgment no. 247.434 of the Belgian Council of State, the successive fixed-term contractual employment relationships (BAP and BAPZAP) in the public university sector were concluded with the academic staff member from 1999 till 2015 combined with a 40% statutory employment relationship (ZAP) from 2012 till the turn of the year 2015/2016 as the result of the failure of the University of Antwerpen to arrange for a full-time open selection procedure to definitively fill the permanent post.

The university only opened a full-time open selection procedure after dismissing him at the turn of the year 2015/2016 on financial considerations.

This absolute discretion in decision making resulting in arbitrary application of Art. V.25 of the Flemish Higher Education Code regarding the opening of open selection procedures and the percentage for a permanent employment under administrative law for the period 1999-2015 remains without any legal consequence for the the university. Accordingly, the Belgian Council of State ruled that it was possible that the academic staff member who was appointed with 23 successive fixed-term employment relationships under labour law followed by one employment relationship governed by the rules of administrative law to fulfil permanent needs of the university, remains in service with renewable fixed-term employment relationships as long as the public university does not take care of the permanent filling of the permanent positions by opening open competitions for a full time/structural position – in this particular case 16 years and 24 renewals, until the own internal PhD students defended their PhD at the Faculty of Social Sciences and could take up the permanent function.

The question raised whether the 23 contractual relationships followed by one statutory relationship for fulfilling the same permanent needs at the university, have to be considered 'successive'. According to Clause 5(2)a of the framework agreement, Member States shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships shall be regarded as "successive".

According to Advocate General Kokott, a restrictive national legal classification of fixed-term employment relationship being 'successive' within the meaning of Clauses 1 and 5 (2) of the framework agreement[13] and the legality of the decision terminating that relationship, undermines the purpose and the practical effect of the framework agreement. The Court of Justice of the European Union ruled that the need for the efficacy of the framework agreement meant that the interpretation of

[13] Framework agreement on fixed-term work concluded on 18 March 1999, as set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43)

Union concepts such as 'successive' in fixed-term employment relationships cannot be left to the discretion of Member States, even if the state's rules are of a constitutional nature.[14]
Clause 5 of the framework agreement does in the Court's view preclude national law (whether legislation or case law) that considers successive fixed-term contracts to be justified for 'objective reasons' of necessity or urgency where that necessity or urgency could be avoided by the conclusion of a permanent appointment process.
The Court criticizes the use of fixed-term contracts that are not replaced with permanent appointment processes and the continuation of the employment of the employees in 'fixed-term' posts for years on end as the result of the failure of the employers to arrange for a procedure to definitively fill the post in that particular public sector[15] experiencing a structural problem, in that there is a high percentage of temporary workers and a general failure to comply with the legal obligation to fill posts permanently where they are temporarily covered.[16]

Failure by the university to hold legally prescribed competitive selection procedures for filling permanent positions leads to a temporally unlimited continuation in fixed-term employment relationships of academic staff. The practice in Flanders to retain academic staff as fixed-term contractual special academic staff (BAP or BAPZAP) until the permanent position is filled after an open vacancy and selection procedure amounts to the employment of fixed-term academic staff in a permanent position for an indefinite renewable period without stating a definite period for the completion of those procedures and without any guarantee that an open structural vacancy and selection procedures will be held at all.[17]

The question whether the uninterrupted 16-year employment relationship in different statutes for the same tasks with 24 consecutive appointments should be qualified as 'successive' must be distinguished from the follow-up question as to whether such failure can justify abuse of successive employment contracts or employment relationships. The first question concerns the admissibility whereas the last question concerns the substance of the case.

The provisions of the framework agreement, in conjunction with the principle of effectiveness, should be interpreted as precluding the Belgian Council of State's interpretation of national procedural rules requiring the fixed-term academic staff

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[14] Joined Cases C-103/18 and C-429/18, Domingo Sánchez Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219

[15] Spanish public health sector

[16] Case C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219; Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 39. See also Case C190/13 Antonio Márquez Samohano v Universitat Pompeu Fabra [13 March 2014] EU:C:2014:146 with regard to the practice in the public education sector in Italy of the use of fixed-term labour relationships for long term permanent positions of the authorities concerned, pending the requirement to fulfil the successful selection in open competitions for which no precise time frame has been fixed.

[17] By analogy with the case-law on employment in compulsory education in Joined Cases C22/13, C61/13 to C63/13 and C418/13, Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli [26 November 2014] EU:C:2014:2401

member to actively engage by objecting or bringing an action (against all successive appointments and dismissals) in order to benefit, in this way, from the protection afforded by the Directive 1999/70/EC and the framework agreement on fixed-term contracts and the rights conferred by the Union legal order.[18] According to the author, the Belgian Council of State had to take all the 24 fixed time employment relations into account and not only the last statutory employment relation.

3. When a staff member is employed after 23 fixed-term contractual appointments under labour law with a statutory employment relationship under administrative law for a renewable period of three years, according to the Council of State, this temporary appointment will automatically expire and a new decision must necessarily intervene in order for the staff member to have his mandate extended.

According to the author, the Belgian Council of State creates an additional ground for dismissal for public universities which private state-funded universities cannot invoke. If that reasoning of the Council of State were to be followed, it is sufficient that the public university that wants to dismiss an academic with a large number of successive fixed-term employment relationships, renews/appoints him with a single statutory fixed-term employment relationship under administrative law in order to escape the obligation to pay a severance payment under national law.

According to Belgian procedural law and the scope of competencies of administrative and labour courts, the Belgian Council of State rules over statutory employment relationships disputes whereas the labour court rules over contractual employment relationships disputes.

Taking into account that the labour courts are competent for individual contractual employment disputes including contractual employment relationships at the public university and that procedures have to be initiated within 12 months after dismissal before the labour court, it was sufficient for the public university to employ the fixed-term academic staff member with one fixed-term statutory employment relationships for exactly the same (previous) permanent duties of teaching, research and academic service as permanent statutory independent academic staff to make the labour court reject the claim of the successive fixed-term contractual relationships because the claim was too late.

At the same time, the Belgian Council of State ruled that it is only competent to rule on statutory employment relationships when applying Directive 1999/70/EC and the Framework agreement on fixed-term contracts. As is was the first statutory employment relationship of the fixed-term academic after 23 successive fixed-term contractual employment relationships, based on Belgian procedural law, the Belgian Council of State in judgment no. 247.434 ruled that the fixed-term academic staff member with 24 successive fixed-term employment relationships in 16 years was employed with a single statutory employment relationship and thus not unlawfully dismissed. It held that the university should not make any payments for wrongful dismissal after 16 years of employment. This creates in reality an 'easy and cheap' dismissal ground for public universities in Flanders that does not exist for private state-funded universities as all the employment relationships with private state-funded universities are brought before the labour courts, both the employment

[18] Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, conclusion 4

relationships based on general labour law (BAP and BAPZAP) and those based on the Flemish Higher Education Code (ZAP).

According to the author, the divergent trends in protection between the Council of State and the Appeal Labour Court of Brussels imperil the equal protection and equal benefit of the protection of academic staff employed with fixed-term employment relationships in (public v private) state funded universities in Flanders, granted by Directive 1999/70/EC and the Framework agreement on fixed-term work.

4. The Council of State accuses the academic staff member of "strikingly ignoring" what had to follow "legally" after the termination of the last successive employment relationship.

"The Court of Justice states that Union law does not provide for specific sanctions in the event that, despite the preventive measures to be taken under clause 5(1) of the Framework Agreement, abuse has occurred as a result of the use of successive fixed-term employment contracts. It is therefore for Member States to adopt appropriate measures, which are proportionate and sufficiently effective and dissuasive.

National courts are free to make use of any interpretation methods and powers available to them to effectively sanction misuse resulting from the use of successive fixed-term employment contracts or employment relationships.

It is for the national court to determine whether the relevant provisions of national law fulfill those conditions." [19]

It is not the task of the academic staff member seeking a judgment form the Council of State to explain what had to follow "legally" after the termination of the last successive employment relationship, but the task of the Council of State to find out what should follow "legally".

5. The Council of State declares that - in case the staff member is of the opinion that the employment contract with the defendant has been converted into an employment contract or into a sui generis agreement -, it is not competent to rule on such a dispute.

The Court of Justice declares that in case national courts consider that effective measures within the meaning of clause 5 of the framework agreement are lacking in national law, insofar as the employment relationships concerned are subject to administrative law, they can apply to the Court of Justice of the European Union to ask for clarification on the basis of the questions referred for a preliminary ruling in order to guide them as national courts in their assessment.[20]

In the above mentioned Spanish case Ruiz of 19 March 2020 at the request of the Spanish administrative judge, the Court of Justice itself lists a number of possible solutions for punishment for abuse with successive employment relationships: conducting open selection procedures, the conversion of fixed-term employment relationships into relationships for an indefinite period, the recognition of a

[19] Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 58-61

[20] Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 38

permanent appointment equal to that of permanent statutory staff for an indefinite period of time.

In addition, these measures must be accompanied by full compensation for the harm suffered in the past by the academic from the abuse of successive employment relationships.

In addition, when applying the Directive and Framework agreement, the provisions of the Charter of Fundamental Rights of the European Union must be taken into account as well: freedom to choose an occupation and right to engage in work (Article 15), non-discrimination (Article 21), equality between women and men (Article 23), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31).

Subsequent procedures and remedies

The Flemish public University of Antwerpen raised the preliminary pleas of inadmissibility that the action was brought out of time and that it solely relates to the last statutory appointment of the 24 successive fixed-term employment relationships.

The Belgian Council of State upheld both pleas. It upheld that the action was brought out of time because the academic staff member consented in their view to the renewal of 24 successive fixed-term employment relationships which it deemed to be capable of removing the abusive element from that conduct of the public university. It declared that the competencies conferred upon it by national procedural law did not cover the 23 successive fixed-term employment contracts based on the constitutional division of the powers of the judicial authorities among the administrative court and the labour courts and thus did not take the successive fixed-term employment relationships ruled by labour law into account when ruling on the lawfulness of the last (and only) fixed-term statutory employment relationship which constituted the 24th successive fixed-term employment relationship of the academic staff member with the University of Antwerpen.

Although the interpretation of the framework agreement by the Belgian Council of State contradicts well-established case-law of the Court of Justice of the European Union, the Belgian Council of State did not put a preliminary question concerning the interpretation of the framework agreement before the Court of Justice without stating any reasons.

1. In light of the above considerations, the principle of cooperation arising from Article 4 TEU imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where the organ, in case the public university,

- has the power to reopen that decision under national law;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Union law which was adopted without a

question being referred to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU; and

- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.[21]

2. As it is a principle of Union law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Union law[22] and incorrect application of Union law by the courts for which they can be held responsible, the fixed-term academic - being a Belgian national and thus a subject of the Union legal system - , has the possibility of obtaining redress from Belgium as the full effectiveness of Union rules is subject to prior action on the part of Belgium and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Union law.[23]

3. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Union law correctly in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals[24]. The Court of Justice of the European Union cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. National courts may, and sometimes must – which is the case for the Council of State as supreme administrative court of Belgium –, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.[25]

As the Belgian Council of State is the highest administrative court, the academic staff could also bring an action before the European Court of Human Rights. Relying on Article 6 §1 (right to a fair hearing), the academic staff could complain not to have access to a court in order to obtain recognition of the existence of a permanent and statutory employment relationship with the University of Antwerpen[26] and, consequently, admission to the relevant pension scheme. Moreover, relying on Article 1 of Protocol No. 1 (protection of property), the fixed-term academic could complain to be deprived of pension entitlements for the period of employment as academic, as the application before the Belgian Council of State in judgment no. 247.434 had failed to satisfy the conditions of admissibility, and on Article 14

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[21] Case C-453/00, Arrest HvJ-EU 13 januari 2004, Kühne & Heitz NV

[22] Judgment of 19 November 1991, Francovich and Others (C6/90 and C9/90, EU:C:1991:428, paragraph 40

[23] Case C-6/90 Francovich with reference to the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585, paragraph 30-37

[24] See in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19

[25] Article 267(2) TFEU

[26] For the application of the principles, see European Court of Human Rights, Vergauwen and Others v Belgium, 10 April 2012, Application No. 4832/04, §§ 89-90; European Court of Human Rights, Dhahbi v Italy, 8 April 2014, Application No. 17120/ 09, §31.

(prohibition of discrimination) in conjunction with Article 6 §1 and Article 1 of Protocol No. 1, for the difference in treatment between staff in a fixed-term contractual or a fixed-term statutory employment relationship, and tenured academic staff at the University of Antwerpen who had secured recognition of their pension entitlements.

4. Finally, the European Commission could decide to refer Belgium to the Court of Justice of the European Union for failing to adopt all measures necessary in order to transpose the Directive and the Framework agreement also in the higher education sector.[27]

Conclusion

The author is of the opinion that the reasoning of the Belgian Council of State that 23 contractual relationships followed by one statutory relationship for fulfilling the same permanent needs at the university, are not 'successive' based on considerations of national procedural law, is incompatible with the protection pursued by Directive 1999/70/EC and the Framework agreement on fixed-term contracts and the observance of the principle of effectiveness of Union law and that it undermines the right to an effective remedy affirmed in Article 47 of the Charter of Fundamental Rights of the European Union.

The author also asserts that the contested national legislation places the academic staff member with successive fixed-term employment relationships at a public university in a situation of (procedural) disadvantage compared with an academic staff member with successive fixed-term employment relationships at a private state funded university.

There is no doubt that the cost of these complex and lengthy legal procedures act as deterrents for individual academic staff to start proceedings whereas the decisionmakers at the Faculty of Social Sciences and the University of Antwerpen pay the legal costs and fees not out of their own pockets but university funding[28] received by the Flemish ministry of education. Even a successful applicant's award of compensation will not cover the legal costs, while refusing to refer a question for a

[27] See in particular the judgments in Case C-47/08 (Grand Chamber) European Commission v Kingdom of Belgium [24 May 2011] EU:C:2011:334; Case C-293/85 Commission of the European Communities v Kingdom of Belgium [2 February 1988] EU:C:1988:40; Case C317/14 European Commission v Kingdom of Belgium [5 February 2015] EU:C:2015:63; Case C-149/79 Commission of the European Communities v Kingdom of Belgium [26 May 1982] EU:C:1982:195. In 2015, the Commission decided to bring a case against Estonia for failure to fulfil its obligations under EU law before the Court of Justice of the European Union (Article 258 TFEU) for not providing effective protection against abuse arising from successive fixed-term employment in the academic sector as required by the Framework agreement on fixed-term work. (https://ec.europa.eu/social/main.jsp?langId=en&catId=706&newsId=2224&furtherNews=yes).

[28] Minutes of the 24-01-2017 meeting of the executive board BC/24.01.2017/150/PV (University of Antwerpen, Bestuurscollege, Notulen 150ste zitting van het Bestuurscollege d.d. 24 januari 2017)

preliminary ruling denied the applicant effective judicial protection and a fair trial[29], injustices which should be overcome. It remains to be seen whether the Council of State will use the opportunity offered by a subsequent case, to review its jurisprudence when it comes to the rights of an academic staff member employed with successive fixed-term contracts followed by one single statutory fixed-term employment relationship at a public university in Flanders, such as the University of Antwerpen.

[29] Article 47 EU Charter of Fundamental Rights and Article 6, paragraph 1 (right to a fair trial) European Convention on Human Rights; see also European Court of Human Rights, Vergauwen et al v Belgium, 10 April 2012, Application No. 4832/04; European Court of Human Rights, Dhahbi v Italy, 8 April 2014, Application No. 17120/ 09.