

Fraudulent contracting of work: Abusing fixed-term contracts (Belgium, Estonia and Spain)

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Introduction

Employment relations remain defined vis-à-vis the standard employment relationship (permanent, full-time, direct) (Eurofound, 2016). Fixed-term contracts are therefore understood as non-standard employment contracts by which an employer hires an employee for a fixed duration. The main difference between permanent and fixed-term contracts is the certainty, in the latter employment situation, of the expiry date. This characteristic allows for fixed-term relations to be terminated usually at a lower cost than open-ended contracts, as they are built to end at the expiry of the contract.

‘Fixed-term employment’ often co-exists with, or is used as a synonym for, ‘temporary employment’. However, temporary employment is a more comprehensive concept, usually referring to situations that, in different contexts, affect workers with various non-permanent contracts – such as training or temporary agency work contracts.

Differences between fixed-term contracts and full-time indefinite contracts go beyond the contingent nature of the former. The effects of temporary employment on such working dimensions as wages, health, access to training and job satisfaction have been analysed extensively (McGovern et al, 2004; Gebel, 2009; Eurofound, 2013, 2015). Research shows that temporary workers tend to report poorer working conditions such as lower wages, fewer training opportunities and more limited access to social protection and social benefits than workers in standard employment relationships.

Other studies have investigated on whether temporary jobs are a stepping stone towards permanent employment (Toharia, 2002; Gash, 2008; De Graaf-Zijl et al, 2011). The transition is far from being straightforward and several conditions are needed to allow it: the institutional and economic environment, as well as the degree of labour market segmentation, strongly determines the possibilities for fixed-term contracts to be converted into permanent ones (Eichhorst, 2014).

Research into the issue of labour market segmentation/polarisation also illustrates how temporary employment features more strongly in the younger and older segments of the workforce (Prieto et al, 2009). And the challenge for trade unions of representing temporary workers has become more visible in recent years (Standing, 2011).

The abuse of fixed-term contracts raises various concerns. In most countries, fraud related to these contractual practices may occur when they are used for activities whose nature is not temporary or when they are renewed for longer periods or with a higher number of renewals than those permitted by law.

These concerns were already present at the end of the 1990s, when some provisions were taken at European level to address the issue. In order to improve the quality of fixed-term work and to prevent abuse arising from the use of successive fixed-term employment contracts (excluding apprenticeship and training schemes and temporary agency work contracts), the interprofessional European social partners’ organisations concluded the European framework agreement on fixed-term contracts on 18 March 1999 (ETUC et al, 1999), later transposed into Directive 1999/70/EC. The directive: sets out a general principle of non-discrimination against fixed-term employees compared with permanent employees; details responsibilities on the part of the employer in terms of informing workers on fixed-term contracts about vacancies in the organisation; and sets out measures aimed at preventing abuses.

In particular, the directive requires Member States to introduce one or more of the following measures:

- objective reasons justifying the renewal of fixed-term contracts
- the maximum total duration of successive fixed-term employment contracts or relationships
- the number of renewals of such contracts or relationships.

National definitions of 'legal' vs 'fraudulent' fixed-term contracts

Conforming to the requirements of EU directives, the three countries featured in this information sheet regulate fixed-term contracts, requiring specific and objective reasons to conclude such contracts and establishing the maximum total duration of fixed-term employment as well as the number of legal renewals for such contracts.

In **Belgium**, legislation establishes two main reasons for resorting to fixed-term contracts:

- the temporary nature of the work to be performed (a temporary increase of the workload or performing exceptional work)
- specific funding of the job position (for example, research contracts funded by grants or shows in the art sector).

Fixed-term contracts can also be used to replace permanent employees during a period of absence. The Belgian regulation also sets out a maximum of four successive contracts, with a minimum duration of three months for each contract and a total maximum duration of two years. A specific procedure has been foreseen for extending these maxima: if authorisation is granted by the Federal Public Service Employment, Labour and Social Dialogue (FOW–WASO/SPF–ETCS), successive contracts of at least six months each can be concluded for a maximum overall duration of three years.

In **Estonia**, the last reform of the Employment Contracts Act, which entered into force in July 2009, provides that fixed-term employment contracts should be used when justified by 'good reasons arising from the temporary nature of the work', especially a temporary increase in work volume or performance of seasonal work. The transposition of Directive 1999/70/EC on fixed-term contracts, implemented through amendments to the previous Employment Contracts Act, was approved in May 2004. This text addressed both the reasons for fixed-term contracts and their duration. Regarding the former, the amendment replaced the closed list of circumstances justifying fixed-term contracts with a more general definition, similar to the one provided by Directive 1999/70/EC. The latter set out the rules on duration.

- Successive fixed-term contracts for the performance of the same work cannot be renewed on more than two consecutive occasions (consecutive meaning 'no more than two months between two contracts').
- The overall duration of fixed-term employment cannot exceed five years.
- Fixed-term employment contracts signed for more than two consecutive terms are automatically converted into permanent ones.

In **Spain**, legislation on fixed-term contracts has been extensively modified and reformed since the 1980s, favouring great fragmentation of fixed-term contracts. Currently, there are three main types of fixed-term contract:

- 'contract for specific jobs or services' (*contrato de obra y servicio*), which can last up to a maximum of three years
- 'contract based on productive needs' (*contrato eventual por circunstancias de la producción*), which can last up to a maximum of six months
- 'replacement contract' (*contrato de interinidad*).

According to the Spanish Workers' Legal Statute, these three types of fixed-term contract can be used:

- when carrying out a very specific project or providing a very specific service
- as a consequence of the specific conditions of the market/sector and/or of temporary excessive workload

- when a worker is hired in order to replace a worker on leave who has the right to return to their post.

Limits on the renewal of fixed-term contracts are also in place. The option of entering into several temporary contracts in a row is restricted, within a period of 30 months, to two contracts signed within 24 months for workers taken on by the same company or group of companies (Article 15, paragraph 5 of the Workers' Legal Statute). The Spanish legislation establishes that if a fixed-term contract has not been signed under one of the conditions specified above, it represents a fraudulent form of contracting work.

Prevalence of phenomenon

There are substantial differences between the three countries in the overall prevalence of fixed-term contracts and to some extent, the prevalence of fraudulent practices: they are least common in Belgium and most common in Spain.

In **Belgium**, 9% of workers in 2015 were working under temporary contracts and this percentage has remained stable in recent years, according to data from the European Union Labour Force Survey (EU-LFS). The main sectors using temporary/fixed-term contracts are agriculture, on the grounds of seasonality of activities, and university research, in the hiring of personnel on a temporary basis linked to the funding of specific research projects. These are also the main sectors where fraudulent practices can be seen.

In **Estonia**, only about 3% of employees were working under temporary contracts in 2015 (EU-LFS data). Among this small share of workers, a substantial proportion is in a 'questionable' situation. According to the Estonian Work Life Survey 2009, some 66% of fixed-term workers work for their employers under successive fixed-term contracts. In addition, 29% estimate that, substantially, their working activity is not temporary in nature and 55% maintain that they could continue working under fixed-term contracts within the same organisation. Although statistical data do not directly describe abusive uses of fixed-term contracts, they indicate that some employees might be hired under fixed-term contracts, although their working activity in itself has a permanent nature.

Nevertheless, the phenomenon is widespread. There are no reliable data on the groups of workers mainly affected by this phenomenon. Fraudulent practices may be implemented in any segment of the labour market. As noted by the social partners interviewed, in all sectors it might happen that after agreeing upon a duration of the temporary working activity, a customer could repeatedly change specifications, consequently leading to repeated extensions of the same fixed-term contract. Nevertheless, fraud seems to prevail particularly in the services sector.

In **Spain**, fixed-term contracts have been widespread since the implementation of the labour market reforms of the 1980s, which increased employers' options in terms of hiring workers through several types of fixed-term contracts, as well as introducing greater flexibility in relation to the circumstances justifying fixed-term employment (López-Andreu et al, 2007). The employment policies dating back to this period led to the spread of fixed-term employment. The first data available from 1987 show a share of 15.3% for temporary employment; by 1995, this had risen to 34.9%. Although fixed-term employment declined in Spain during the 2008 recession, it remains high in comparison with that in other EU countries. Fixed-term employment is especially widespread among young people. According to the EU-LFS (2015 data), 69% of employees aged 15–24 are temporary employees (compared with 25% of the whole population). Indeed, traineeship and fixed-term employment contracts represent the main labour insertion channels for young people.

Representatives of the Labour and Social Security Inspectorate (ITSS) and the Trade Union Confederation of Workers' Commissions (CCOO) recognised the relevance of fraudulent practices linked to fixed-term contracts, which, they say, are widespread in most sectors and may affect all categories of workers.

Table 1 summarises the regulation, prevalence and fraudulent use of fixed-term employment in the three countries.

**Table 1: Fixed-term employment in Belgium, Estonia and Spain:
Regulation, prevalence and fraudulent use**

	Legal definition		Prevalence*	Fraudulent use
	Reasons justifying fixed-term contract	Maximum duration		
Belgium	<p>Temporary nature of the work to be performed</p> <p>Temporary replacement of a permanent employee</p>	<p>Total duration: 2 years (3 years with authorisation from public employment services (PES) of successive contracts of at least 6 months)</p> <p>Number of legal renewals: 4</p>	<p>9% of the overall workforce</p> <p>Stable over the years</p>	Agriculture and higher education
Estonia	<p>Temporary nature of the work to be performed</p>	<p>Total duration: 5 years</p> <p>Number of legal renewals: 2</p>	3%	<p>All sectors potentially (Estonian Work Life Survey):</p> <ul style="list-style-type: none"> • 66% successive full-time • 29% consider themselves not on temporary job or activity • 55% foresee continuing under full-time contract in the same organisation
Spain	<p>Temporary nature of the work to be performed</p> <p>Temporary replacement of a permanent employee</p>	<p>Total duration (depending on the contract): 6 months/ 3 years</p> <p>Number of legal renewals: 2</p>	<ul style="list-style-type: none"> • 25% of all temporary employed • Huge increase from 15.3% in 1987 to 34.9% in 1995 • 69% of 15–24 year-olds 	Misuse of the ‘causality link’ in contracts for ‘specific jobs and services’

* Data from EU-LFS 2015

Drivers and enablers of fraudulent practice

Two main drivers

Avoiding high severance pay: Fraud associated with fixed-term contracts is generally the result of employers' practices aimed at increasing flexibility in the use of the workforce and reducing costs in the case of dismissal. As noted in the interviews conducted in **Belgium** and **Spain**, a key motive leading companies to fraudulently sign fixed-term contracts is to circumvent the payment of severance pay associated with the termination of permanent contracts. Successive renewal of fixed-term contracts provides employers in both countries with a high degree of flexibility to terminate employment relationships at a lower cost or none, simply at the expiry date of the contract.

Increasing control of the workforce: This argument has been raised by some experts (Prieto, 2014; **Spanish** union CCOO), who stress that fraud related to fixed-term contracts is perpetrated with the aim of increasing surveillance and control over workers. The problem of temporary employment is rooted in corporate strategies aimed at granting a company as much control as possible over its workforce by taking advantage of the insecure and less protected nature of the contract; it creates opportunity for lower wages and longer working hours and increases staff turnover.

Enabling factors

The research points to institutional and structural conditions that make fraud possible, although the assessment of them and views on them differ, depending on the stakeholders and the country background. They comprise

- a lack of clarity in the regulatory framework
- issues with enforcement
- vulnerability of workers
- difficulties in collective representation of workers.

Lack of clarity of regulatory framework

In this regard, the **Spanish** situation is topical. Representatives of both ITSS and CCOO pointed out that the most common fraud occurs in relation to the misuse of the 'causality link' associated with 'contracts for specific jobs or services'. This is the result of the "vague" definition of causality associated with this type of contract, making it for instance, relatively easy for employers to include 'generic' jobs or services under the 'specific' category. Illustrations of fraudulent practices are:

- the signing of temporary contracts created on the basis of a specific reason, such as 'launching and initiating a media company' where, in reality, the media company has already existed for two years
- contracts signed in the retail sector for 'seasonal campaigns', which do not turn into permanent contracts once the campaigns, which justify the temporary nature of the work, are over and workers continue to work for the company.

Furthermore, the assessment by Spanish employer organisations of the lack of flexibility of the regulatory framework supports the claim that 'the problem of temporary employment is rooted in the legal framework that allows for the existence of several types of fixed-term contracts, and fails to foster job stability with the right measures'. This is the position, for instance, of the Spanish Confederation of Employer Organisations (CEOE), which considers that stability could be better achieved by reducing severance pay, as employers would not then be so reluctant to hire workers by means of open-ended contracts. This argument resembles the one developed by several authors (Dolado and Felgueroso, 2010; Dolado et al, 2010), who argue that the high rate of workers on fixed-term contracts and the 'insider–

outsider' division can be explained by the rigidity and excessive costs of open-ended contracts, or in other words, by the gap between the amount of severance pay of open-ended contracts and that of fixed-term contracts.

Enforcement issues

In **Estonia**, the main trigger of fraud seems to be linked with enforcement rather than with legal provisions. As no special procedure or arrangement aimed at enforcing legislation on fixed-term employment exists. The Estonian Labour Inspectorate does not have direct authority to inspect the terms stipulated by the legislation on fixed-term employment contracts. In order to settle a labour dispute regarding a fixed-term employment relationship, the parties have the right to resort to a labour dispute committee (*Töövaidluskomisjon*) or to court. According to representatives of the Estonian Labour Inspectorate, the inspectorate has sometimes used its authority to inspect employers' compliance with the general obligation of notifying employees of the date of entry into the employment contract. However, increased powers could make the process more transparent and effective.

In **Spain**, problems in enforcing regulation were also reported, suggesting a lack of capacity of both the labour inspectorate and trade unions. For labour inspectors, the resources earmarked for inspections allow the relevant authority to monitor only a very low proportion of potential cases. In relation to the trade unions' capacity, their actions – implemented at company level with a view to reducing temporary employment and preventing fraud – face different challenges related to low union density, especially in certain companies (particularly small and medium-sized enterprises – SMEs).

Workers' vulnerability

The weak position and vulnerability of workers are considered enabling factors in all three countries.

In **Belgium**, a main trigger of frauds specifically in the agriculture sector is the limited literacy in French or Dutch of migrant workers; in addition, since they stay only temporarily in Belgium, these workers also lack contact with unions. Consequently, they are not always aware of their rights. Moreover, the Flemish Farmers' Union (Boerenbond) stressed that a large proportion of seasonal workers in agriculture are migrants, especially from Poland, who are reported as being employed illegally rather than fraudulently.

In **Estonia**, fraudulent uses of fixed-term employment may be favoured by employees' limited bargaining power, including the lack of alternative employment opportunities. Also in **Spain**, the labour inspectorate and trade unions highlighted that being in a vulnerable situation in terms of employment opportunities increases the likelihood of being subjected to fraudulent practices. Accordingly, young workers, as they are more likely to be hired under fixed-term contracts, have a higher incidence in cases of fraud.

Challenges to collective representation

Permanent workers form the core of trade union membership. However, the priority that trade unions may give to their own members working under standard contracts does not mean that they have abandoned any attempt to combat temporary employment, as has been suggested (Dolado and Felgueroso, 2010). For instance, **Spanish** trade unions express concerns at the high levels of temporary employment, especially among young people. Unions have engaged in a fight for stable employment at a political level, denouncing labour market reforms and – to a lesser extent – at company level (Pulignano et al, 2016). Furthermore, low union density in SMEs complicates unions' work further, as it hinders the enforcement of labour rights.

The issue also challenges employer organisations. No straightforward answer is available. In **Spain**, the CEOE representative cited – as one measure preventing fraud – the outcome of a working group on undeclared work, whose main conclusion was about the need to increase flexibility.

Consequences of fraudulent practices

The impacts of the fraudulent use of fixed-term contracts are particularly difficult to identify. The contingent nature of these employment relationships partly explains both the impacts and the difficulties.

Impacts on business competition

In **Belgium**, no significant impact of fraud on business competition has been stressed, yet the reduction of dismissal costs related to the use of fixed-term contracts can guarantee, to dishonest employers, some unfair advantage compared with their competitors in term of labour costs.

Similarly, no effects on business competition were outlined in **Estonia**. The representative from the Estonian Labour Inspectorate argued that there are ‘no considerable consequences of fraudulent forms of fixed-term employment on business competition, as business costs do not depend on whether the contract is temporary or permanent’. Employers would – ‘indirectly’ – be able to achieve a competitive edge by associating fixed-term contracts with other practices, such as undeclared work. Consequently, the fraud becomes even more difficult to identify.

As for **Spain**, again, no specific consequences of these practices on business competition were outlined. Interestingly, different reasons are put forward, depending on the stakeholder. The unions underline ‘the general and cross-sectoral extent of the fraud associated with these contractual forms’, CCOO representatives stressing that ‘the principle of causality is barely respected’; they maintain that this kind of fraud has become widespread, and is adopted by an increasing number of employers. However, CEOE considers the extent of fraud to be ‘overestimated’.

Impacts on working conditions and workers’ rights

All observations underline the difficulty in distinguishing the consequences for working conditions between those related to the temporary/contingent nature of this type of contract when legally used, and the impacts of fraudulent (or even illegal) practices.

General working conditions associated with the regular use of fixed-term contracts are already characterised as ‘challenging or even potentially negative’; these features also apply to fraudulently concluded fixed-term contracts.

Being trapped in precarious conditions: Given the nature of the employment relationship, the main issue is for workers not to be ‘trapped’ in precarious conditions, as has been stressed in **Belgium**. In these cases, a succession of fixed-term contracts leads to uncertainty both for workers’ careers and in terms of revenue.

Problematic working conditions: In **Estonia**, various negative effects of temporary employment on working conditions were identified. Representatives from the Estonian Labour Inspectorate and the Estonian Trade Union Confederation (EAKL) pointed out a number of situations where employees on fixed-term contracts could plausibly experience unfavourable conditions. The temporary nature of these contracts could lead, first, to an absence of motivation for employers to invest in training, career development or protective equipment for these workers. Second, it could make employees feel insecure. As a result, surveillance and control of the workforce increase, with employees being pushed to work more intensively or to overwork to demonstrate their value to employers. Third, in certain cases, the temporary nature of the relationship could mean that an employee does not meet social security insurance criteria, given the duration of the contribution requested. For instance, the sickness benefits regime requires contributions over a contractual period longer than one month.

Abusive practices and fraudulent use of temporary contracts are typical situations in which workers face poorer working conditions and increased difficulty in getting labour rights implemented.

In **Spain**, representatives of the labour inspectorate noted that temporary employees in a fraudulent situation usually have lower wages and poorer working conditions than other employees. And unions suggest that fraud in fixed-term contracts negatively impacts on psychosocial risk, accidents at work and training opportunities (UGT, 2015). The labour situation of these workers is also more insecure, with impacts on all spheres of life. These workers are generally aware that their situation is fraudulent, but they usually take no action because they are afraid of retaliation by their employers. For them, a fraudulent fixed-term contract is better than unemployment or undeclared work.

According to the NGO Alter-EU, **Belgian** employers in the agriculture sector do not necessarily comply with minimum wage or working time regulations. Workers are often paid less than the minimum wage, often on an irregular basis. Some workers also sleep on the farm, in precarious accommodation and work longer than the collectively agreed working hours. Precarity and long working hours are also characteristics of undeclared work, particularly prevalent in the sector.

The **Estonian** Labour Inspectorate and EAKL pointed to illicit practices that affect the quality of employment of those hired under fixed-term contracts. Employers could push employees to shift from a permanent contract to a fixed-term one prior to taking parental leave, with a view to circumventing the legal provisions that give employees the right to return to the same job after parental leave.

The research shows that fraudulent practices can exacerbate the negative effects on working and living conditions already associated with contingent work/fixed-term contracts.

Measures to address issue

Several policies and actions, devised mostly to prevent fraud (mainly through regulation) were found.

Legislative statements: sanctions and harmonisation

The creation of sanctions for terminating fixed-term contracts under specific circumstances is the aim of the **Estonian** Employment Contracts Act, which entered into law on 1 July 2009. The act requires the employer to pay compensation upon cancellation of a fixed-term contract for economic reasons; it specifies the amount of the compensation up to ‘the wages that the employee would have been entitled to until the expiry of the contract term’. However, the efficacy of the measure has been questioned. The Estonian Labour Inspectorate argues that these rules could have discouraged the use of fixed-term employment overall, including fraudulent forms; employers organisations complain that the existing legislation overregulates employment and that it discourages even normal business and employment practices.

Harmonisation of regulations is an approach that has been followed to prevent potential leverages in abusing differences between employment statuses. Two **Belgian** reforms follow this path: the federal law of 12 April 2011 and the Unified Employment Status Act of 26 December 2013. The former came into force in 2012 and established that all the temporary work performed for one employer be taken into account to determine the relevant seniority for the notice period payment. The latter introduced a unified status for blue-collar and white-collar employees, and specifically a single dismissal procedure for all employees. Moreover, it fixes the same notice periods for blue-collar workers who carry out certain activities at temporary and mobile workplaces (particularly relevant to the construction sector). These measures are considered effective. According to the labour inspectorate and trade unions, these regulations ‘allowed closure of the loopholes of previous regulations on fixed-term contracts and abuses are now very rare’.

Social partners’ initiatives

The **Belgian** social partners have developed actions reaching beyond fraudulent practices and especially those associated with fixed-term employment. Their actions have focused on sectors, such as the food service industry (hotel/restaurant/catering – horeca) and agriculture, being oriented towards the prevention of abuses and fraud on seasonal work and the fight against undeclared work.

While not being the systematic focus of collective bargaining, fraud prevention is also addressed by the **Spanish** social partners through negotiated clauses aimed at fostering indefinite employment, traditionally included in collective bargaining.

Monitoring and enforcing regulation

Labour inspectorates and monitoring bodies are at the forefront when it comes to ensuring implementation. For instance, in **Spain**, labour inspectors carry out on-site monitoring to detect the use of fraudulent forms of fixed-term contracts; they then have the power to adopt corrective measures. When a fraudulent situation is detected, the company may choose between a fine or converting the fixed-term contract into an indefinite one. Companies usually prefer converting the contract. According to the data provided in the Labour Inspectorate’s annual reports, in 2014, labour inspectors’ interventions led to the transformation of 40,802 fixed-term contracts into open-ended ones. Given the fact that, in 2014, there were 14,285,800 workers in total and 3,428,700 workers hired under fixed-term contracts (Spanish LFS data), labour inspectorate activities remain insufficient to tackle fraud, as trade union representatives tend to stress.

While the **Estonian** social partners did not jointly develop specific additional measures to prevent and/or tackle fraudulent forms of work, unilateral initiatives can be found to support the enforcement of the government’s measures, especially from the trade unions’ side.

Policy pointers

Harmonising situations of permanent and temporary workers: In addition to well-known measures, such as running preventive awareness-raising campaigns and increasing systematic fines, there should be a greater focus on harmonising situations of permanent and temporary workers.

Avoiding undue cost competition between temporary and permanent positions: As stated in clause 4 of the framework agreement on fixed-term work: ‘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’ (ETUC et al, 1999, clause 4, paragraph 1). To this aim, all the costs should be duly taken into account, including the actual costs of employment termination, to meaningfully compare the two situations.

Clarifying existing regulation: Clarifying existing regulation, especially in relation to the definition of objective causes that justify fixed-term employment, is a relevant precondition for preventing abuses and fraudulent practices, as well as for facilitating the enforcement of existing rights.

Encouraging representation and engagement of fixed-term workers in trade union activities: Workers on fixed-term contracts may decline to unionise, either because of language barriers, or their overall limited contractual power resulting from job instability. This contributes to a vicious circle, whereby they lack the means to claim stabilisation of employment. Accordingly, actions addressed to handle those problems could be effective in preventing and combating fraud.

Ensuring enforcement of rights: While the legislative framework can create barriers against abuse, effective field inspections are necessary to ensure the enforcement of workers’ rights. Equipping authorities with the appropriate powers for combating fraud could be effective in discouraging it. Such powers might include the capacity to convert fixed-term contracts into open-ended contracts depending on the circumstances (for example, permanent activity, number of renewals or maximum contractual period).

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