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# Labour law reforms in Europe: adjusting employment protection legislation for the worse?

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Isabelle Schömann

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**Working Paper 2014.02**

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**europaen trade union institute**

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## Introduction<sup>1</sup>

As the ILO rightly points out,

it is widely acknowledged that labour legislation is vital to the economy of any country and to the achievement of balanced development in terms of both economic efficiency and the well-being of the population as a whole. This is a delicate balance to achieve. In this context labour legislation plays a critically important role in providing a framework for fair and efficient industrial and employment relations that eventually deliver productive and decent employment as well as social peace. (ILO 2011)

Historically, while the first examples of statutory employment protection were adopted in the early twentieth century, most of employment protection norms in their modern form were developed through legislation, collective agreements or court rulings between 1960 and 1980. The process of increasingly regulating hiring and firing progressively came to a halt and, essentially, a relative regulatory stability characterised the 1980s and, as regards dismissal regulations, the 1990s. Since approximately the year 2000, large deregulation waves have progressively transformed the European landscape of employment protection, branded as too stringent. This trend has been reinforced since the onset of the financial and economic crisis in 2008, in particular in Portugal, Italy, Spain and Greece, but also lately in France, Estonia, the Netherlands, Slovenia, Romania and the United Kingdom (Muller 2011).

This report is intended to map reforms of employment protection law in the member states with the aim of addressing these legal changes in the context of the crisis, but also in the context of the deregulation agenda of the European Commission (Part I). Employment protection law was particularly under attack before the outbreak of the economic and financial crisis and in some member states even more during the crisis (Part II).

The mapping exercise of the employment protection law reforms is based on a survey of the reforms that have been adopted in the member states, which can be found on the ETUI website.<sup>2</sup> It is completed by a literature review of recent

- 
1. My thanks go to Melanie Schmitt (Strasbourg University, France) and Stefan Clauwaert and Maria Jepsen (ETUI) for their valuable and constructive comments. This report was completed in February 2014.
  2. See: <http://www.etui.org/fr/Publications2/Working-Papers/La-crise-et-les-reformes-nationales-du-droit-du-travail-bilan>

research outcomes and studies stemming from the European Union, as well as from national research institutes.<sup>3</sup> However, the report does not pretend to be exhaustive, given (i) the rapidity of reforms in some member states, (ii) the difficulty to get detailed and reliable information for all 28 member states, (iii) the difficulty to evaluate some data, given the methodology used to measure the strictness of EPL (Cazes et al. 2013; Gaudu, 2011).

As far as the timeframe is concerned, the report covers legal developments in employment protection law between the beginning of 2010 and February 2014. However – and when appropriate – an earlier time frame has been considered to include major reforms of employment protection law.

Finally, the information provided will take into account not only reforms of labour law but also – as far as possible – changes stemming from the social dialogue in accordance with industrial relations traditions in the member states. Furthermore – again as far as possible – a second caveat will be followed in order to evaluate reforms in the context of the national regime to which it belongs. This will enable us to better assess the impact of the amendments in each member state, as suggested by Robert Rebhahn (Rebhahn, 2012), who rightly points out that ‘a notice period that is very long from a comparative perspective might compensate for the lack of severance payment or a low level of unemployment benefits or a low standard of justification’ (see also OECD 2013: 79).

By way of conclusion, the report critically addresses the large-scale deregulation of employment protection law in the EU member states, which basically started under the umbrella of flexicurity, in particular the EU’s so-called ‘better regulation agenda’, its follow-up ‘smart regulation agenda’ and, finally, the European Commission’s annual country-specific recommendations and the memoranda of understanding with programme countries within the framework of so-called anti-crisis measures. As the report shows, not only does the European Commission’s deregulation doctrine contradict primary and secondary European hard law on employment protection, but it has also helped to exacerbate precariousness in the workplace and, in combination with other reforms, the pauperisation of workers, thus violating the fundamental rights of workers, as laid down in the Treaty.

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3. The information used in this paper stems from the following sources: (1) information provided to the ETUC by its affiliated organisations, (2) so-called Memorandums of Understanding certain countries have with the IMF, the EU and the ECB, and (3) other sources, such as the Dublin Foundation’s EIROnline website (<http://www.eurofound.europa.eu>), other (electronic) newsletters (for example, Liaisons sociales Europe; Planet.labour) and academic papers. The most recent information is from February 2014.

## **Part I European political and legal context of employment protection law**

Academic and political debates on flexicurity, as well as measures implemented in the European Union, in particular in domestic labour law, are based on a consensus, to be critically assessed, that can be formulated as follows: a high level of employment protection increases labour market segmentation, which makes employers reluctant to hire workers on open ended work contract due to the high costs involved, particularly in relation to potential dismissals (in terms of severance pay and notice period, procedural costs, such as notification to public authorities and so on), as well as potential litigation risks. In a time of crisis, as mentioned in the latest European Commission report on 'Labour market developments in Europe 2012' (European Commission 2012a: 12) 'strict employment protection law is linked to reduced dynamism of the labour market and precarious jobs'. Moreover, the European Commission states that by hampering the inter-sectoral re-allocation of labour, rigid employment protection law may hinder the process of macroeconomic rebalancing. Employment protection law reforms, possibly linked amongst other to a revision of unemployment income support systems, appear to be a key driver for reviving job creation in sclerotic labour markets while tackling segmentation and adjustment at the same time.' However, the European Commission recognises that 'throughout the crisis, a number of Member States have been engaged in important structural labour market reforms and temporary measures for preserving employment. Yet it is clear that progress towards more flexibility and security has been modest and uneven' (European Commission, 2012, page 8).

Furthermore, part of the doctrine (for example, Severin et al. 2008; Cazes et al. 2013) focuses on the employment protection indicators elaborated by the OECD, reflecting the strictness of employment protection law (in terms of procedural inconvenience, notice and severance pay, difficulty of dismissal). The United Kingdom and Hungary have few restrictions on individual dismissals, and France, Germany, the Netherlands, Czech Republic and Portugal have 'far stricter' regulation than in the average country (OECD 2013: 74). Interestingly, while these indicators quantify, for employers, the costs and procedures involved for individual dismissals or collective redundancies, the OECD recognised that 'by contrast, the effectiveness of legislation in protecting workers might not be well captured by these indicators' (OECD 2013: 83). Furthermore, the OECD has developed unfavourable diagnostics concerning the plurality of forms of work contracts and employment protection rules, while the World Bank has elaborated indicators on which they base reform of



the labour market in order to replace employment protection by taxation so as to make labour law protection less costly for employers.

Such diagnostics, however, should be critically assessed as research outcomes (Serverin, et al. 2008; Gaudu 2011: Part II, point 14 and 15; Ramaux 2012: 674–676) show that they cannot provide a reliable measure of the strictness and constraint of labour law in general and employment protection law in particular. Furthermore, the thesis according to which the right not to be unfairly dismissed was a cause of unemployment and to which it has been added that it is a cause of segmentation of the labour market due to the alleged high costs involved in the procedure and in particular in proceedings, has attained ‘mythical status’ that do not resist sound investigation, as demonstrated by Ewing and Hendy in the case of the United Kingdom. Evidently, unfair dismissal law does not impose unjustified burdens on businesses. Instead, procedures put in place by legislation and/or collective agreements in case of individual and collective dismissals are deemed to secure the protection of workers, that is, to give them the means of defending themselves against unlawful dismissals. Finally, the methodology used to support the narrative and providing the template for part of the World Bank series of reports on ‘Doing Business’, but also heavily used by the OECD in its employment outlook, as well as the European Commission since 2006, the so-called legal origins hypothesis does not survive proper scrutiny, as demonstrated by Deakin, Lele and Siems (2007: 3–4, 153). It turns out to be excessively reductive and misleading, in claiming that the quality of legal regulation matters to economic growth and developments and that common law systems are more likely to produce efficient rules than their civil law counterparts. However, the legal origins hypothesis has important implications for policy in the areas of labour law and industrial relations, as it does for company law and financial law.

Much more, the deregulation of labour law goes back to the deregulation agenda that has been implemented by the European Commission since the early 2000s with the aim of loosening employment protection law in the member states so as to get rid of the so-called constraints linked to workers’ protection in terms of substantive requirements (authorisation requirements) and procedural requirements for dismissals (notification, negotiation, trial periods), but also in terms of procedural requirements for collective dismissals (including the obligations of the employer to consider other measures before termination of employment within the framework of a social plan, criteria for selection of employees to be dismissed, priority of rehiring, as well as severance pay), and finally in terms of redress. The deregulation agenda has been further strengthened with the introduction of the new European economic governance that aims, among other things, to influence national labour law reforms towards worrying trends in which ‘social policy becomes the main adjustment variable for managing the debt crisis, (...) a whole series of fundamental social issues are being ignored by the new governance’ (Degryse and Pochet 2011: 84 and 97).

According to Francois Gaudu, in his contribution to the ELLN report of 2011 (Part II, point 14 and 15) the crisis [has neither] brought about any legal rup-

ture nor has it revealed any fundamentally new difficulties in the application of provisions that transpose national laws. It has instead highlighted previously predictable or already committed questions or developments', and Gaudu to conclude that 'although controversial, the law governing collective redundancies gives an impression of relative stability'. By contrast, the OECD reveals in its 2013 report that 'a clearer tendency towards deregulation is observable in the past five years and largely since the onset of the financial crisis. In this period more than one-third of OECD countries – including the United Kingdom, Ireland, Hungary, Denmark, Poland, Slovakia, Spain, Greece, France, the Netherlands, Belgium, Germany, Italy and Portugal – undertook some relaxation of regulations on either individual or collective dismissals, not including reforms adopted at the end of 2012 and in 2013' (OECD 2013: 94). Indeed, as will be developed below, since 2003, major reforms loosening employment protection law have taken place in the member states (Gaudu 2011) with at the time significant findings that 'neither the role of the judge in the dismissals, nor the provisions that oblige the employer to contribute to the reclassification of laid-off employees have been questioned in principle'. On the other hand, and since 2010–2011, however, employment protection law reforms have definitively addressed those issues, thus weakening workers' rights: for example, the increased number of collective redundancies linked to enterprise restructuring, the higher rate of court cases claiming the violation of workers' rights in particular in respect of information and consultation of workers' representatives in restructuring cases, but also the reform of access to justice lead us to say that employment protection law can no longer provide necessary and efficient protection against abusive, unfair or unjustified dismissals.

Over recent decades, research has provided evidence that public authorities and national legislators of all 28 member states have undertaken, under the umbrella of the European Union's deregulatory agenda, a massive deregulation of labour law – also called a 'modernisation of labour law' – to boost enterprise flexibility and allow for market 'flexibilisation' (Escande-Varniol et al. 2012; Laulom et al. 2012; Lokiec et al. 2012; Clauwaert and Schömann 2012). This deregulation agenda has been intensified since the outbreak of the financial and economic crisis (European Commission 2010), in particular for the programme countries (Greece, Ireland, Portugal, Cyprus) with the support of the ECB and the IMF, thus to the detriment of respect for fundamental social rights. Indeed, at its 316st session (1–16 /11/2012), the ILO Committee of Freedom of Association examined complaints submitted by the Greek General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation, the Greek Federation of Private Employees, and supported by the International Trade Union Confederation, concerning austerity measures taken in Greece in 2010 and 2011 within the framework of the international loan mechanism agreed upon with the Troika (EC, ECB and IMF). As mentioned in its 365th Report, the Committee found that, in case 2820, violations of ILO Conventions No. 87 and No. 98, in particular, were entailed by the request for suspension of and derogation to the collective agreements, as well as derogation in pejus and decentralisation of collective

bargaining.<sup>4</sup> Furthermore, in two recent cases, the European Committee of Social Rights of the Council of Europe, examining complaints on austerity measures taken in Greece over the past two years within the framework of the international loan mechanism agreed upon with the Troika, concluded upon the violation of a range of fundamental social rights of the Revised European Social Charter: Article 4 Right to fair remuneration (Complaint 65/2011),<sup>5</sup> Article 7 Right of young persons to protection, Article 10 Right to vocational training and of Article 12 Right to social security (Complaint 66/2011).<sup>6</sup>

Interestingly, there is no evidence that the financial and economic crisis is the result of labour law constraints and rigidity in the member states (Cazes et al. 2013). Much more, labour law has proved to secure the necessary balance between flexibility for employers, while providing security for the workers at the beginning of the crisis, for example by providing them with recourse to short-time working schemes (Laulom 2012). Furthermore, the international authorities admitted that such deregulation of labour law harms much more than it helps. The European Commission itself recognises that four years after the start of the financial crisis, job finding rates remain low in most member states (Labour Market Development in Europe 2012: 2). Empirical studies show that there is no overall link between the strictness of employment protection legislation and the level of unemployment, but the structure and dynamics of unemployment seem to be influenced by employment protection legislation (Ramaux 2012: 674–676). Far from living up to the expectations that labour market bottlenecks and constraints would disappear, such amendments, combined with reforms of atypical employment protection (Lang, Schömann and Clauwaert 2013: 3) but also of unemployment benefits, have led to greater precariousness and pauperisation of the working population (Degryse and Pochet 2011: 8). According to Cazes' s development showing that the link between employment protection legislation and labour market outcomes is not linear, 'deregulation of the labour market is very unlikely to have the desired outcome'. On the contrary, 'there is a not large but positive association between employment protection law stringency and employment' (Cazes et al. 2013: 24).

Despite these evidences, a consensus seems to be found among European policy circles that 'labour market regulation ought to be relaxed to reduce unemployment and spur job creation' (Cazes et al. 2013: 24). Both in Europe and internationally, employment protection law is now at a crossroads, at which political agendas and international and European laws converge. Whereas both are sources of influence on the member states, international law and European primary and secondary law play a significant role in employment protection as regards dismissal protection, in particular in the case of collective redundancies. However, some aspects of the labour law reforms adopted in recent decades run contrary to international legal standards ratified

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4. See : [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meeting-document/wcms\\_193260.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting-document/wcms_193260.pdf)

5. See: [https://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC65CaseDoc1\\_en.pdf](https://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC65CaseDoc1_en.pdf)

6. See: [https://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC66CaseDoc1\\_en.pdf](https://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC66CaseDoc1_en.pdf)

by member states and/or implemented in national legislation via European directives. However, according to Article 30 of the Charter of Fundamental Rights of the European Union, all categories of workers, regardless of their employment status, must enjoy employment protection; member states can decide how this protection is provided and whether separate regulations are needed for different groups.

In general terms, the expression ‘employment protection law’ concerns legislation on workers’ protection and includes rules governing hiring and firing in order to provide protection for employees against unfair dismissals, but cover also protection from the fluctuations in earned income, which normally arise when losing a job, individually or collectively, while it also regulates the use of temporary workers (Cazes et al. 2013: 2). In stricter terms, as understood in the report, ‘employment protection law’ defines the termination of employment relationships at the initiative of the employer for reason(s) not inherent in the person of the worker, in both the private and the public sector.<sup>7</sup>

A common feature of regulations on terminating employment relationships is the classification of dismissals in two categories, namely on (i) individual or (ii) collective grounds, with a common feature inspired and/or reiterated by the Directive on collective redundancies, to the effect that dismissals on economic or collective grounds of a fixed minimum number of workers over a specific period of time have to be dealt with differently from individual dismissals, while both individual and collective dismissals should be justified.

Furthermore, the scope of employment protection law includes the type of work contract involved; the substantive and procedural requirements foreseen by law before the managerial decision; and the duty of the employer to inform and consult workers’ representatives on time. This is of particular importance because one of the foremost – and recurring – problems for workers and their representatives is the difficulty of counteracting the management decision on staff reductions. After a decision to dismiss, substantive and procedural requirements include, in particular, the conditions, procedures and measures taken to minimize the negative consequences of dismissal, such as social plans, in case of collective redundancies. Finally, employment law provides for rules of redress in pre-court dispute resolution procedures and/or court proceedings to ensure appeals against termination if a dismissal is deemed to be unfair (for example, not based on a valid reason).

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7. EuroFound Dictionary <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/employmentprotection.htm> and <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/dismissal.htm>, as well as [http://ec.europa.eu/europe2020/pdf/themes/23\\_employment\\_protection\\_legislation.pdf](http://ec.europa.eu/europe2020/pdf/themes/23_employment_protection_legislation.pdf)

## 1. The European political context

At European level, interestingly, Commission initiatives can be contrasted with – and to some extent contradict – European law as defined in European directives and the jurisprudence of the CJEU on dismissal protection.

On one hand, a brief glance at Commission policy indicates its rhetorical line and dominant doctrine of flexicurity, as specified in the Green Paper on Modernising labour law of 2006 (European Commission 2006) namely to review labour law while advancing a ‘flexicurity’ agenda of increased labour flexibility combined with adequate employment security. In the Green Paper, a vibrant plea is made in favour of alternative forms of employment in parallel with relaxing the rules governing standard contracts, which are considered a source of rigidity, costs and delay. The aim is to ‘urge Member States to assess, and where necessary alter, the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of unfair dismissal’, on the grounds that ‘by availing [themselves] of non-standard contractual arrangements, businesses seek to remain competitive in the globalised economy by avoiding inter alia the cost of compliance with employment protection rules, notice periods and the costs of associated social security contributions’ (European Commission 2006: 3 and 8). The point is alleged that ‘stringent employment protection legislation tends to reduce the dynamism of the labour market, worsening the prospects of women, youths and older workers’. Such a plea is built on the November 2004 report of the European High Level Group on the Lisbon Strategy for growth and employment, led by M. Kok, which was asked by the European Commission to carry out an independent analysis of European growth and employment (European Commission 2003: 9). The report recommended that ‘member states and social partners ... examine and, where necessary, adjust the level of flexibility provided under standard contracts, in order to ensure their attractiveness for employers and to provide for a sufficiently wide scope of contractual forms to enable employers and workers to adapt their working relationship to their respective needs and preferences. They are also advised to examine the degree of security in non-standard contracts.’

With the Green Paper of 2006, the European Commission adopted a liberal programme with an emphasis on structural reforms of labour law to ‘increase flexibility’, as the following quote shows ‘Workers feel better protected by a support system in case of unemployment than by employment protection legislation. Well-designed unemployment benefit systems, coordinated with active labour market policies, seem to perform better as an insurance against labour market risks’.<sup>8</sup> As pointed by Brian Bercusson (Bercusson 2009: 642–648),

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8. At the same time, the Commission states that ‘however, there is evidence of some detrimental effects associated with the increasing diversity of working arrangements. There is a risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position’. Supposedly, such jobs may serve as a stepping-stone enabling people, often those with particular difficulties, to enter the workforce ( European Commission 2006:8).

in advocating so, the Commission has brought about a dogmatic shift from the original purpose of labour law (which is to offset inequality between employers and workers and its traditional model of providing for secure employment status protected against dismissal) to address inequality and conflict between workers, arguing that such a shift stems from a 'demand for a wide variety of employment contracts' and the need to 'flexibilise forms of employment with lesser protection against dismissal to promote entry of newcomers' (European Commission 2006: section 2): i.e. to set a balance between workers with secure employment status (workers with 'overly protective' regular permanent work contracts: so-called 'insiders') and jobseekers (newcomers: so-called 'outsiders'). In doing so, the European Commission clearly diverted the balance labour law has traditionally sought between flexibility for employers and security for workers towards a balance between increased flexibility to promote outsiders' access to the labour market and reduced security for insiders. Furthermore, in doing so, the Commission moves employers away from the scope of labour law.

Another example of the dismantling trend of employment protection law on the part of the European Commission can be witnessed in its communication of 2007 on flexicurity (European Commission 2007) in which employment protection legislation – in particular on standard contractual arrangements – is deemed to discourage or delay job transfers. The Commission states that this is particularly the case with strict employment protection legislation against economic dismissal. Using evidence from the OECD Employment Outlook (OECD 2007: 69–72), the Commission emphasises that 'strict employment protection legislation reduces the numbers of dismissals but decreases the entry rate from unemployment into work. (...) Although the impact of strict employment protection legislation on total unemployment is limited, it can have a negative impact on those groups that are most likely to face problems of entry into the labour market, such as young people, women, older workers and the long-term unemployed. (...) Strict employment protection legislation often encourages recourse to a range of temporary contracts with low protection – often held by women and young people – with limited progress into open-ended jobs. The result is segmentation of the labour market' (European Commission 2007: 5 and 6).

Such evidence should be critically assessed. A critical evaluation has been carried out by the ILO that stresses the need to find the correct balance between employment protection and capacity to counter to the crisis: 'there is a not large but positive association between employment protection law stringency and employment (...), but the slippery-slope on the path of deregulation is not the answer to high unemployment' (Cazes et al. 2013: 24). Furthermore, the labour law reforms and in particular reforms of employment protection legislation have led not only to push particularly fragile workers into unemployment (such as young people, women, older workers, workers with atypical employment contracts) rather than easing their entry into the labour market, but has also led those same target groups to re-enter the labour market under much worse conditions, due to the parallel reforms of (atypical) work contracts, youth employment and unemployment benefits.



Besides the deregulation agenda, the employment guidelines proposed by the Commission – approved by the Council – lay down a range of common priorities and targets for national employment policies. The guidelines for employment policies are associated with the broad guidelines for economic policies and form integrated guidelines for the Europe 2020 Strategy aimed at supporting reforms. The aims of recent guidelines are manifold: they are intended to increase labour market participation of women and men; to reduce structural unemployment and promote job quality; to develop a skilled workforce responding to labour market needs by promoting lifelong learning; to improve the quality and performance of education and training systems at all levels, increasing participation in tertiary or equivalent education; and finally to promote social inclusion and combat poverty. While the employment guidelines do not touch upon employment protection law directly, Guideline 7 recalls that ‘member states should integrate the flexicurity principles endorsed by the European Council into their labour market policies and apply them (...) with a view to increasing labour market participation and combating segmentation, inactivity and gender inequality, while reducing structural unemployment’. Member states should therefore ‘introduce a combination of flexible and reliable contractual arrangements, according to the principle of flexicurity’. According to Article 2 of Council Decision of 2010<sup>9</sup> ‘the guidelines shall be taken into account in the employment policies of the Member States, which shall be reported upon in National Reform Programmes’. Indeed, the Europe 2020 strategy provides for a small set of integrated ‘Europe 2020’ guidelines that have integrated employment and broad economic policy guidelines. It addresses policy recommendations to Member States, including employment recommendations but also country recommendations on selected thematic issues and provides detailed advice on micro-economic and employment challenges. The recommendations are sufficiently precise and provide a time-frame within which the Member State concerned is expected to act (e.g. two years). If a Member State, after the time-frame has expired, has not adequately responded to a policy recommendation of the Council or develops policies going against the advice, the Commission could issue a policy warning (European Commission 2010: 27–28). The employment guidelines were maintained for 2013, as set out in the Annex to Decision 2010/707/EU. For 2014, the employment policies should be maintained and shall be taken into account by the Member States in their employment policies, as stated in a proposal of the European Commission to the Council.<sup>10</sup>

In parallel, since 2011 the Commission has launched reviews of the economic and social performance of each EU member state and works out annual country-specific recommendations<sup>11</sup> to guide national policy reforms. Such recommendations are contained in the so-called European Semester, set by the European Commission as an annual cycle of economic policy coordination, to

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9. Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States (2010/707/EU)

10. Proposal for a COUNCIL DECISION on guidelines for the employment policies of the Member States COM(2013) 803 final, 2013/0392 (NLE) of Brussels, 13.11.2013.

11. See: <http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/>

ensure that all member states, which have committed themselves to achieving Europe 2020 targets, translate them into national targets and growth-enhancing policies. Following the Annual Growth Survey, EU heads of state and government laid down EU guidance for national policies at the Spring meeting so that member states can submit their stability or convergence programmes, as well as their national reform programmes. The European Commission assesses the programmes and proposes country-specific recommendations (CSRs), to be endorsed by the European Council.

As for the programme member states – that is, member states that entered into the Economic Adjustment Programme, Greece,<sup>12</sup> Ireland<sup>13</sup> and Portugal, Cyprus<sup>14</sup> (in 2013),<sup>15</sup> but also Latvia,<sup>16</sup> Hungary<sup>17</sup> and Romania<sup>18</sup> did not receive additional recommendations but were recommended to implement their respective Memorandums of Understanding.<sup>19</sup> Romania, unlike 2011 and 2012, did get specific recommendations in 2013. In 2011, there were no specific recommendations for Greece, Ireland, Latvia, Portugal and Romania.

Croatia, which became the twenty-eighth EU member state on 1 July 2013, has come under pressure from, in particular, the World Bank (World Bank, 2011) and the IMF since 2010 to flexibilise labour market and labour legislation, including the adoption in April 2010 of an Economic Recovery Programme of which the ‘revision of labour regulations to create a more dynamic labour market by ensuring labour force flexibility and job security’ is a central pillar. Key recommendations in respect of employment protection law are to reduce the costs of hiring and firing by: (i) lowering dismissal costs, removing the requirement that fixed-term contracts can be used only on an exceptional basis; (ii) relaxing conditions for lawful dismissal when some individuals or categories of protected workers need to be dismissed for business reasons; and (iii) relaxing the conditions for collective dismissal (in particular consultations with the works council, the detailed social plan and the required approval by the employment bureau). In the concluding statement on the occasion of a staff visit in February 2012, the IMF stated that there were pervasive rigidities and that long overdue structural reforms are necessary to improve competitiveness and attain sustainable medium-term growth (IMF 2012). Therefore priority must be given to structural reforms aimed at increasing labour market flexibility by changing labour laws to reduce hiring and firing costs (IMF 2012a).<sup>20</sup> Basically, the IMF comes to the same conclu-

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12. May 2010, see: <http://peter.fleissner.org/Transform/MoU.pdf>

13. 3 December 2010, see: [http://ec.europa.eu/economy\\_finance/articles/eu\\_economic\\_situation/pdf/2010-12-07-mou\\_en.pdf](http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf)

14. See: [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/cyprus/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/cyprus/index_en.htm)

15. 11 May 2011, see: [http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf)

16. See: [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/latvia/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/latvia/index_en.htm)

17. See: [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/hungary/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/hungary/index_en.htm)

18. See: [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/romania/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/romania/index_en.htm)

19. A Memorandum of Understanding is a detailed ‘adjustment programme’ negotiated between the member state involved and the European Commission, together with the ECB and in liaison with the IMF, stating the conditionality attached to the financial assistance facility.

20. See also, on structural reforms: Cotte, Gilbert, 2012. *Cout du travail et compétitivité*, *Revue de droit du travail*, December 2012, pp. 671–673.



sions as the World Bank, stating that ‘labour market flexibility is limited due to strong employment protection and strict regulations, particularly in the public sector’.

In its conclusion at the end of the first European semester of economic policy coordination (European Commission 2011), the European Commission came to a similar conclusion and stated that

A number of Member States still suffer from the segmentation of their labour market with different types of contracts and need to move resolutely towards a more effective – and fair – combination of flexibility and security in working arrangements (‘flexicurity’), including by rebalancing employment protection legislation, so as to stimulate job creation, labour market participation, mobility across sectors and human capital accumulation.

The European Commission therefore develop country-specific recommendations (CSR) that are based on an economic and financial assessment of a Member State’s plans for public finances (Stability or Convergence Programmes, or SCPs). Country-specific recommendations on employment protection legislation take the form of a request for structural reform of national employment protection law in order to ‘combat segmentation in the labour market, by reviewing selected aspects of employment protection legislation including the dismissal rules and procedures and reviewing the currently fragmented unemployment benefit system taking into account the budgetary constraints’.<sup>21</sup> They are implemented in policy measures via National Reform Programmes. An overall assessment of the CSRs to exert reforms in the social field undertaken to improve the resilience and flexibility of the labour market shows, over the period 2011–2013, a slight decrease in the number of recommendations concerning employment protection law, as shown in Table 1. Such a decrease might be explained by the fact that structural reforms pressured by the European Commission have been implemented (Clauwaert 2013:8 and 15).

Table 1 Number of recommendations on employment protection law, 2011–2014

	CSRs 2011–2012	CSRs 2012–2013	CSRs 2013–2014
Employment protection legislation	6	8	4

Source: Clauwaert 2013:10.

As an example, in the case of Sweden, the European Commission’s proposals for the CSRs 2012–2014 recommended ‘further measures to improve the labour market participation of youth and vulnerable groups by focusing on (...) reviewing selected aspects of employment protection legislation like trial periods to ease the transition to permanent employment.’

21. See this example for Italy, CSR of 12 July 2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:215:0004:0007:EN:PDF>

For the Netherlands,<sup>22</sup> the CSRs 2012–2014 foresee ‘further measures to enhance participation in the labour market, particularly of people at the margin of the labour market (...) Foster labour market transitions and address labour market rigidities, including by accelerating the reform of employment protection legislation and the unemployment benefit system’.

In France,<sup>23</sup> a reform was adopted on 14 June 2013,<sup>24</sup> based on the inter-professional agreement concluded between the social partners in January 2013 with the ambitious title of ‘agreement on a new economic and social model serving the competitiveness of undertakings and securing jobs and vocational training of workers’. It foresees increased rights for workers, while in parallel addressing the legal uncertainty of dismissals and therefore provides greater flexibility for employers. This particular aspect finds its sources in the 2012 guidelines inspired by the European commission to the attention of France for its Stability Programme of France, 2012–2016 that says: ‘The review of employment protection legislation shows that the procedures for dismissals continues to entail uncertainties and potentially large costs for employers’ (European Council 2012:8) and recommend France to ‘take action within the period 2012–2013’ (...) and to ‘Introduce further reforms to combat labour market segmentation by reviewing selected aspects of employment protection legislation, in consultation with the social partners in accordance with national practices, in particular related to dismissals’ (European Council 2012:14).

For Lithuania, the 2012 CSR<sup>25</sup> recommended that it ‘amend the labour legislation with regard to flexible contract agreements, dismissal provisions and flexible working time arrangements’. The 2013 CSR<sup>26</sup> required reviewing ‘the appropriateness of labour legislation with regard to flexible contract agreements, dismissal provisions and flexible working time arrangements, in consultation with social partners’.

For Slovenia,<sup>27</sup> the 2013 CSR reveals that

a labour market reform was adopted in March 2013 on the recommendation of the 2012 CSR<sup>28</sup> to reduce labour market segmentation and increase flexibility on the labour market. The reform reduces protection of permanent contracts by simplifying dismissal procedures in case of individual and collective dismissals and by reducing dismissal costs. Regulation of fixed-term contracts has been further tightened to reduce misuse, while the use of temporary agency work is restricted. Although

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22. See: <http://register.consilium.europa.eu/pdf/en/13/st10/st10658-re01.en13.pdf>

23. See: <http://register.consilium.europa.eu/pdf/en/13/st10/st10635-re01.en13.pdf>

24. Loi n° 2013-504 du 14 juin 2013 relative à la sécurisation de l’emploi

25. See : <http://register.consilium.europa.eu/pdf/en/12/st11/st11262.en12.pdf>

26. See : <http://register.consilium.europa.eu/pdf/en/13/st10/st10643-re01.en13.pdf>

27. See : <http://register.consilium.europa.eu/pdf/en/13/st10/st10655-re01.en13.pdf>

28. ‘Adjust employment protection legislation as regards permanent contracts in order to reduce labour market segmentation, in consultation with social partners and in accordance with national practices. Further tackle the parallel labour market caused by student work’ . See <http://register.consilium.europa.eu/pdf/en/12/st11/st11272.en12.pdf>

the reform goes in the right direction, it remains to be seen whether it is sufficiently ambitious to have a significant impact on labour market segmentation and flexibility, and on Slovenia's attractiveness for foreign direct investment.

As shown by these examples, 'modernising the labour market' involves de-regulation of employment protection law in respect in particular of laws governing redundancies for economic reasons, following 'a thought process from the mainstream of economic theory (...) that advocated (or advocates) replacing 'qualitative' constraints that weigh on employers in case of collective economic redundancies by a flat-rate deduction' (Gaudu 2011). More than eliminating the possibility of discussing the motive of a given redundancy in court, this process leads to the eradication of the obligations aimed at limiting the number of redundancies and at ensuring the reinstatement of workers. These elements, among others, contrast and contradict what European labour law provides for in a large range of directives.

## 2. The European legal context

Employment protection is rooted in a wide range of international and European primary and secondary law. At international level, ILO Convention No. 158 on the termination of Employment of 1982<sup>29</sup> is the main source of international law, complemented by Recommendation 166 and ILO Convention No. 135 on Workers' Representatives.<sup>30</sup> Although the two conventions are not among the eight so-called 'fundamental' conventions (including prohibition of forced labour and child labour, the right to organise in a trade union and against discrimination), which are binding upon every ILO member country, since the Declaration on Fundamental Principles and Rights at Work in 1998, Conventions No. 158 and No. 135 are binding upon member countries whose legislatures have chosen to ratify them. Once ratified, as there is no international labour court as such, Conventions rely for their enforcement upon the jurisprudence of domestic courts. Ratified ILO Conventions have a direct effect on national law systems and can therefore be referred to by a worker against her/his employer in a court case, as it is the case in a recent court case in France, in which the Cour de cassation had to deal with a new recruitment contract.<sup>31</sup> It decided that ILO Convention No. 158 had a direct effect in

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29. The ILO Convention No. 158 enumerates the minimum requirements in respect of the justification for termination, the procedure of appeal against termination, the procedure prior to or at the time of termination, the period of notice, severance allowance and other income protection, consultation of workers' representatives. This convention has not been ratified by 18 EU/EEA member states: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Greece, Hungary, Iceland, Italy, Lithuania, Malta, the Netherlands, Norway, Romania, Poland and the United Kingdom. Available at: [http://www.ilo.org/dyn/normlex/fr/?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID,P12100\\_LANG\\_CODE:312303,en:NO](http://www.ilo.org/dyn/normlex/fr/?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312303,en:NO)

30. ILO Convention No. 135 on Workers' Representatives foresees in Art.1 'Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities'. Not ratified by Belgium, Bulgaria, Iceland, [http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C135](http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C135)

French law according to Article 55 of the French Constitution, which stipulates that the treaties ratified regularly have an authority superior to the statute enacted by Parliament. Furthermore, Article 24 of the revised European Social Charter of 1996 of the Council of Europe on The right to protection in cases of termination of employment must be interpreted in light of ILO Conventions and Recommendations in order to ensure effective exercise of workers' right to protection on termination of their employment in terms of valid grounds, adequate compensation and the right to appeal to an impartial body.

At European level, as regards primary law, besides the principle of non-discrimination, Article 153 TFEU<sup>32</sup> reads that '(...) the Union shall support and complement the activities of the Member States in the following fields: (...) (d) protection of workers where their employment contract is terminated and (e) the information and consultation of workers;' Furthermore, the EU Charter of Fundamental Rights states in Article 30: 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.' The dominant doctrine is that Article 30 applies to all cases in which European secondary legislation, implemented at national level via national law and collective agreement, protect workers against unfair dismissal (Brunn 2006: 343 ff) providing for substantive and procedural grounds.

Complementing this, and in the absence of general employment protection law at the EU level, European secondary law provides for employment protection law in particular cases: specific Directives<sup>33</sup> provide for employment protection in case of dismissals with the clear objective of avoiding collective redundancies or reducing the number of workers affected and mitigating the consequences by recourse to accompanying social measures.

In the case of restructuring, protection against dismissal is covered by a range of directives: the Directive on collective dismissals (98/59/EC) that prescribes mandatory procedures for collective 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned'. It aims at redeploying or retraining workers made redundant; the Directive on transfers of undertakings (2001/23/EC) provides in Article 4(1): 'The transfer of the undertaking, business or part of the undertaking or business shall not of itself constitute grounds for dismissal by the transferor or the transferee. Furthermore, Directive 80/987/EEC on insolvency provides in Art. 3 that Member States shall take measures necessary to ensure that institutions 'guarantee (...) payment of employees' outstanding claims resulting

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31. Social Law Chamber. 1 July. 2008, Civil bulletin, V, No. 146.

32. According to Article 151 and 153 of the Lisbon Treaty of the Title X on Social Policy, the Union and the Member States, having in mind fundamental social rights (...) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

33. In order to adopt a Directive on the subject, the Council of Ministers 'shall act unanimously' (Article 153(2) TFEU).

from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.’

In the case of multinational undertakings covered by recast Directive 2009/38/EC on European Works Councils of 6 May 2009 (amending Directive 94/45/EC of 22 September 1994), the subsidiary requirements in the Annex to the Directive provide for the EWC to be informed and consulted, among other matters, about ‘cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies’.

Directive 2002/14/EC on general principles of information and consultation in the European Union specifies that: ‘Information and consultation shall cover: ... the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment’. Moreover, the Directive on part-time work 97/81/EC specifies in Art. 5 (2) that worker’s refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment.. Interestingly, and unlike the Directive on part-time work, the Directive on fixed-term work does not expressly mention dismissal protection. However, it is implicitly covered by the non-discrimination principle contained in the Directive.<sup>34</sup> The Parental leave Directive 2010/18/EU of 8 March 2010 (implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC) also offers, in both the initial and the revised versions, protection against unfair dismissal on the grounds of taking of parental leave as stated in Article 4.

Additionally, a large branch of European non-discrimination law deals with termination of employment contracts: Directive 2006/54/EC of 5 July 2006 (recast) of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation provides for application of the principle of equal treatment in case of dismissal (Art. 14). In the same vein, similar protection is declared in Article 3 of Directive 2000/43/EC on the principle of equal treatment for persons irrespective of racial or ethnic origin, with respect to ‘employment and working conditions, including dismissals and pay’, and in identical terms with regard to ‘discrimination on the grounds of religion or belief, disability, age or sexual orientation’ and in Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Furthermore, Article 10 of Directive 92/85/EC 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 refers to the prohibition of dismissal. This measure has been maintained in the review of the Directive, now Directive 2007/30/EC

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34. One of the main reasons for the absence of dismissal protection is to be explained by the reluctance of the employer delegation on the ground that it concerns an issue that requires unanimity under Treaty and therefore a mention in the agreement was deemed to risk the further transformation of the agreement into a European Directive by the Council.

of the European Parliament and of the Council of 20 June 2007 amending Council Directive 89/391/EEC, its individual Directives and Council Directives 83/477/EEC, 91/383/EEC, 92/29/EEC and 94/33/EC with a view to simplifying and rationalising the reports on practical implementation.

Finally, Directives set minimum standards for all member states. The notion of minimal norms as interpreted by the CJEU and as stated in Article 5 of Directive 98/59/EC<sup>35</sup> implies the possibility for higher national protection for workers (so-called favourability clause). By contrast, any regression to the existing standards via the implementation of EU law in national legislation is void. The non-regression clause should be interpreted extensively, as ‘protection against unjustified dismissal sets minimum standards for the EU’. The standard is relevant both in the perspective of the enlargement of the EU, as well as in the perspective of potential future deregulatory labour law tendencies which might seek to abolish current legal protections in some member states (Bruun 2006: 354). However, some aspects of labour law reforms adopted in recent decades run contrary to international legal standards ratified by member states and/or implemented in national legislation via European directives. Furthermore, the European Commission initiatives under the flexicurity flagship are aimed at implementing flexibility in the form of deregulating labour law and in particular employment protection law, as the following part will show, thus conflicting with European primary and secondary law.

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35. Article 5 Directive 98/59/EC on collective redundancies stipulates ‘This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.’





## **Part II How has the economic crisis amplified the reforms on employment protection law?**

In the financial and economic crisis, as well as under the European flexicurity agenda, national labour law has undergone profound alterations (Escande-Variol et al. 2012; Clauwaert and Schömann 2012; Lokiec and Robin-Olivier 2012; Cazes et al. 2013). Three main reform trends have been identified that are liable to undermine the foundations of labour law in the member states in such a way that inequality and insecurity will explode: reform of public services (EPSU 2012), reform of industrial relations systems and reform of labour law (including working time, atypical employment, dismissal law). Some of the measures strongly recommended by the European Commission via the country-specific recommendations and via Memorandums of Understanding for programme countries – especially Greece, Ireland, Portugal and Cyprus – have violated fundamental social rights as anchored in international treaties (as for Greece) but also in national constitutions (as for Portugal), in particular in the case of employment protection law when the legislation allows for the possibility to terminate a permanent work contract without notice or severance payment for one year.<sup>36</sup>

The following section maps the reforms of employment protection law in respect of dismissal protection for individual and collective dismissals. In a first part, Table 2 provides an overview of the reforms by member state in general. Then, the analysis focuses on the reforms of individual dismissal law in the 28 member states. A second part analyses the reforms in terms of the principal elements of dismissal protection regulation, focusing on collective dismissals for economic reasons in the 28 member states and reforms introduced between 2008 and (October) 2013. The analysis also tries to put back the evaluation of labour law measures in the context of the national regime to which it belongs in order to better understand the (positive or negative) impact of the measures on workers.

Employment law on dismissal protection depends also on the regulation of other closely related matters used as alternatives to dismissal, such as working time arrangements (short-time working schemes have been much used during the crisis) (Lang, Clauwaert, and Schömann 2013) and as alternatives to indefinite work contracts (which are supposedly less flexible and more expensive than atypical employment), such as fixed-term work (Italy, Poland, Portugal, Romania, Slovakia, Spain) (Lang, Schömann and Clauwaert 2013).

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36. European Committee of Social Rights of the Council of Europe Complaint 65/2011 and Complaint 66/2011.



Furthermore, collective agreements play a determinant role in the regulation of dismissal protection, in particular when statutory rules not only allow for more favourable treatment of workers in case of dismissal, but allow for derogation *in pejus* from labour law regulations (Cazes et al. 2013).

## 1. General overview of the reforms of employment protection law in the member states

Reforms of employment protection law in the member states have taken place at different periods of time and with various speeds, content and scope. Three categories of member state can be identified: (i) member states that amended employment protection law in an early stage, before the financial and economic crisis (France, Germany); (ii) member states that have implemented reforms of the employment protection laws in the wake of the financial and economic crisis (Italy in 2010 and 2012<sup>37</sup>); and in particular (iii) programme member states that have concluded a Memorandum of Understanding with the Troika (European Union, the European Central Bank and the International Monetary Fund). The latter member states include Greece, Ireland, Portugal and Cyprus.

In general, in most member states, employment protection law differs for small and medium-sized enterprises (SMEs) and for large enterprises, without a clear definition of SMEs throughout the European Union. One general trend for SMEs, however, is the flexibilisation of regulation, even including the suspension of particular regulations for a given period of time.

Table 2 Overview of the sources of employment protection law reforms

	Employment protection reforms
Austria	Severance pay reform in 2002
Belgium	Act of 26.12.2013 on harmonisation of the status of blue collar workers and white collar
Bulgaria	–
Croatia	Commission Staff Working Document of 29.5.2013 SWD(2013) 361 final, Assessment of the 2013 economic programme*
Cyprus	Memorandum of Understanding, 2 April 2013
Czech Republic	Reform of the Labour Code 1 and 2 of 2011, Reform of the Act of Employment of 1 January 2012
Denmark	–
Estonia	Reform of the Labour Code in 2009
Finland	–

37. The reforms have been strongly recommended by the ECB in a letter of August 2011 in which the ECB exerted the Italian Government to adopt reforms of dismissal law to facilitate the replacement of workers. See Case 2161/2011/ER on the Decision of the European Ombudsman closing his inquiry into the complaint against the European Central Bank. <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/49229/html.bookmark>

	Employment protection reforms
France	Law of 25 June 2008 based on the national interprofessional agreement of 11 January 2008, Reform of the Labour Code of 14 June 2013 based on the national interprofessional agreement of 11 January 2013
Germany	Agenda 2010, series of reforms (Hartz I – Hartz IV) between 2003 and 2005
Greece	Memorandum of Understanding 1 of 3 May 2010 – Act 3863/2010 and Act 4042/2011, Memorandum of Understanding 2 of 1 March 2012
Hungary	Memorandum of Understanding of December 2008, Act of 1 July 2012
Iceland	–
Ireland	Memorandum of Understanding of 3 December 2010
Italy	Act 183 of 2010, Act 92/2012 of 28 June 2012 Act and Simplification Act of 7 August 2013
Latvia	Memorandum of Understanding of 28 January 2009
Lithuania	National reform programme of March 2012–2013
Luxembourg	–
Malta	–
Netherlands	Reform via collective agreement of April 2013
Norway	–
Romania	Memorandum of Understanding of 26 June 2009
Poland	Law of 2009 aimed at 'alleviating the impact of the economic crisis on workers and employers', New anti-crisis Act of 21 May 2013
Portugal	Reform of 2009 Reform of 1 May 2012, draft Law no. 46/XII, Memorandum of Understanding of 11 May 2011, Reform of 2013, Bill No. 120/XII,
Slovakia	Reform of the Labour Code of September 2011, partially reversed with the 2012 reform of the Labour Code
Slovenia	New Employment Relations Act of March 2013
Spain	Decree 10/2010 of 16 June 2010 = Act 35/2010 of 17 Sept.; Decree 3/2012 of 10 Feb. 2012 = Act 3/2012 of 6 July 2012.
Sweden	–
UK	Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order of 2013 Amendment to the TUPE (Acquired Rights Directive) coming into for on 1 January 2014 Enterprise and Regulatory Reform Act 2013 / Unfair Dismissal (on variation of the limit of compensatory award) Order 2013 / Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012

Note: See: [http://ec.europa.eu/europe2020/pdf/nd/swd2013\\_croatia\\_en.pdf](http://ec.europa.eu/europe2020/pdf/nd/swd2013_croatia_en.pdf). On p. 19, it says: 'Rigid employment protection legislation is another key factor leading to weak labour market performance. In particular, dismissal procedures are complex and lengthy, sometimes running in court for several years. This discourages job creation because it gives rise to higher effective severance pay in the case of negotiated dismissals, as employers have an interest in avoiding appeals. According to the programme, the first phase of a new labour market reform, to be adopted in the first half of 2013, includes measures to (...) simplify the collective redundancy procedure. (...) The amendments also address the implementation of relevant EU directives but no concrete proposals have been communicated yet. The economic programme indicates that a second phase of labour market reform should revise the rules for the notice period and severance pay (...). The reform has not been described in detail in the economic programme; the assessment of a more concrete proposal will depend on the extent to which the reform ensures the streamlining of dismissal procedures and effective lowering of dismissal costs.'

## **2. What kind of reforms have been adopted and implemented?**

Reforms of employment protection law deal with most aspects of ensuring workers' protection against (unfair) dismissal and seek to loosen such protection. They touch upon the main areas of protection covered by legislation: the definition of collective dismissals; the procedure for consultation of workers' representatives; notification to the competent public authority; the obligations of the employer to consider other measures before termination of employment; the criteria for selection of employees to be dismissed; and the priority of rehiring.

Concretely, they range from relaxing the rules on notice periods; reviewing the need for notification; reducing severance pay; and undermining the right to demand compensation or reinstatement and/or the possibility of pre-court dispute resolution procedures; as well as the reorganisation of redress, in other words, access to courts. Indeed, the aim of such reforms is to increase the scope for avoiding employment protection and recourse to (labour) tribunals in case of dispute. Reforms can deal with some or all those issues in separate acts or cumulatively in one act. Reforms may also address the (same) matters at different periods of time during the crisis, further loosening prior amendments, prolonging reforms that were deemed to be temporary to supposedly adapt to crisis situations. In a first part (2.1) developments will be devoted to the reforms of individual dismissal protection. In a second part (2.2), the analysis will focus on reforms of collective redundancies provisions.

### **2.1 Protection in case of individual dismissal**

#### **2.1.1 Notice period**

In case of dismissal, employment may come to an end upon the decision of the employer, who gives notice. The notice, in most cases, must be given in writing and indicate the start and duration of the period during which the employee is still bound to the employer. This period usually varies according to seniority.

In the European Union, the average notice period is fairly short. Some member states in which notice periods were deemed (too) long have had to reduce them: in Greece from 30 to 15 days (in 2010) and in Portugal (in 2009), where the notice period has been shortened significantly, making it dependent on job seniority, while reducing the amount of severance pay. In Austria, where the distinction between blue- and white-collar workers is still in force, the notice periods are, respectively, two weeks and six weeks. The distinction between blue- and white-collar workers was recently abolished in Belgium at the request of the Constitutional Court (Decision 125/2011 of 7.7.2011) with the result that already acquired rights in respect of notice period and severance pay are maintained, while adapted rights will be introduced by law in 2014.

In Greece, the 2010 and 2012 reforms significantly reduced notice periods and severance pay. Act 3863/2011 reduced the notice period from two years to six months to make redundancy less costly for employers, while organising payment in instalments for severance pay instead of letting the employer pay the whole at once. With the Act 4046/2012, severance pay was amended via the reduction of the maximum notice period of 4 months and the introduction of a ceiling if the workers have more than 16 months' seniority.

In Slovakia, the September 2011 reform of the Labour Code reduced notice periods and withheld a requirement making severance pay conditional on respecting the notice period.

In Slovenia a new Employment Relations Act of March 2013 – in force from April 2013 – reduces notice periods and makes them dependant on seniority.

In Romania, a reform of the Labour Code was adopted via Law 40/2011 of 1 May 2011 and provides for an increase in the period of notice from a maximum of 15 days to a maximum of 20 days for all workers and from a maximum of 30 days to a maximum of 45 days for those in executive positions.

The Spanish Act 35/2010 (published in the Official Journal on 18 September 2010) introduces 15 days' notice (instead of 30 days) in the case of individual dismissals. Additionally, non-compliance with the redundancy procedure will not render the employer's decision void and therefore the employee will not be entitled to reinstatement but only to a severance payment in the amount established for unfair dismissals.

In Belgium, the Council of Ministers approved the bill on harmonising the status of white- and blue-collar workers on 27 September 2013, which is very close to the compromise adopted the 2013 summer by the social partners. As far as notice periods are concerned, the law introducing a single status stipulates that in case of termination of a work contract by employer's decision, the notice shall apply to all and shall range from two weeks when a worker has a seniority of less than three months to 15 weeks for workers with seniority between four months and five years in the company. Beyond that limit, notice will increase by three weeks per seniority year started, two weeks after the 20th year and one week for the twenty-first year. Additionally, layoff notices are now shorter in the event of resignation: 50 per cent of the notice applicable for layoff, up to 13 weeks. Besides, notice periods start sooner.

### **2.1.2 Notification**

Notification is an obligation of the employer to formally inform the worker(s) to be dismissed, workers representatives and in certain circumstances, in some member states, notification to third parties must occur before a worker can be dismissed and/or public authorities of his/her decision to dismiss. Notification of individual dismissal must be in writing, usually stating the reasons for dismissal. In Germany, Slovenia and Latvia, for example, a worker cannot be dismissed if the works council or the trade union representatives are opposed

to the dismissal. If the employer maintains his decision to dismiss, he has to seek the authorisation of the relevant authority or a court judgment. In the Netherlands, a agreement between the government and the social partners of April 2013 allows the employer to file a request with a sub-district court to terminate the employment contract on personnel grounds, while collective dismissals can occur if the employer has received prior permission from the Employment Assurance Agency, which is a public administrative body.

Notification to the competent public authority is part of control *ex ante*, so that a dismissal can be deemed null and void if a state authority has not approved it in advance. In some member states, notification to workers' representatives or works councils and/or to the competent public authority is mandatory. As the OECD states, such procedures have been labelled 'cumbersome', in particular because they involve 'substantial' delays between the decision to dismiss and the effective dismissal, creating administrative costs. Furthermore, failure to respect such procedures may lead to a suspension of the dismissal, sanctions and court proceedings, 'whose results often depend on the subjective appraisal of the randomly assigned judge' (OECD 2013: 80). However, this assertion must be assessed critically, in particular because all member states of the European Union – with the exception of the Czech Republic, Finland, Hungary, the Netherlands, Norway and Slovenia – have specialised labour courts or a specialised branch of civil tribunals devoted to labour disputes with lay judges expert in labour matters and nominated by employer and workers' representatives serving alongside – or substituting – professional judges (except in Finland, Greece, Italy, the Netherlands, Portugal, Slovakia and Spain). There are specialised appeal courts in Austria, Belgium, Germany, Italy, Slovenia, Spain, Sweden and the United Kingdom. As the OECD points out, with some contradiction with the previous statement above, the more specialised a court is, the faster the proceedings and the fewer the appeals. This applies to most European member states OECD 2013: 102).

Notification of dismissal and, in some member states, also notification of the reason(s) for dismissal to workers (and workers' representatives) should be in writing (although rules vary among member states). Interestingly, notification rules have not changed much in most member states during the financial and economic crisis, with the exception of the United Kingdom, Portugal and Spain, and in some other member states as show the examples below

In Latvia, within the framework of the national reform programme based on the country-specific recommendations adopted in March 2012, labour law amendments came into force in June 2012. As a result employers wishing to lay off workers no longer has to inform the State Employment Agency of the number and jobs of the employees to be dismissed, which previously was required at least one month prior to redundancy.

In Slovenia the reform of March 2013 (in force since April 2013) has impaired the consultation of workers' representatives/trade unions: the dissent of a trade union can no longer affect the date of a dismissal.

The legal consequences of notification-rule violations vary from a dismissal being declared void (Germany, Austria) to an entitlement to compensation for dismissed workers, although such dismissals remain valid (France, Spain since 2010, Portugal).

### **2.1.3 Severance pay**

Severance pay is usually due in case of dismissal, in the form of a lump sum, via statutory law (France, Spain, Portugal and the United Kingdom) or via collective agreement (Germany, Sweden, Finland, the Netherlands, Belgium and Italy). The amount of severance pay depends upon the seniority of the worker (usually for each year of service and/or a percentage of monthly remuneration). There are large differences between the member states and sometimes severance pay is deemed to be a substitute for notice (Greece) or for low unemployment benefit.

With the crisis, a large number of member states have amended severance pay rules, without much coordination. Some member states have lowered entitlements to severance pay (for example, Estonia: from 4 months to 1 month), while others have increased severance pay for specific categories of workers (blue-collar workers, albeit at a lower level in Denmark and Belgium following the introduction of the single status). In other member states, severance pay legislation or pay regulated via collective agreements has been amended to create a fund financed by employers to exempt them from dismissal costs (Austria in 2002, Spain in 2010). Such funds – also called fee-based insurance schemes or individual savings accounts – already exist in Norway and Sweden and are based on employers' contributions payable as a percentage of payroll and can be drawn on by workers upon dismissal. In the same vein, in Ireland employers are reimbursed 15 per cent of their severance costs by a redundancy fund financed by employer and employee social security contributions. Such funds should be considered deferred wages.

In the Czech Republic, following the adoption of Act No. 365/2011 amending the Labour Code and of Act No. 364/2011 amending the Act of Employment, the reform that came into force on 1 January 2012, provides that the amount of minimum severance pay shall depend on the employee's seniority, combined with the reasons for dismissal. In the event of termination of employment due to so-called organisational reasons, employees will be entitled to severance pay as follows: one average monthly earning if less than one year's seniority, two average monthly earnings if between one and two years' seniority and three average monthly earnings if there is at least two years' seniority. In the case of severance pay due to a work injury or an occupational disease, the amount of severance pay will remain at a maximum of 12 average earnings.

Within the framework of the 2012–2013 CSR, the Lithuanian government took account of the European Commission's evaluation of the 2011–2012 national programme, which stated that 'a comprehensive review of labour law could identify unnecessary restrictions and administrative hurdles that pre-

vent flexible contractual agreements, such as dismissal provisions and flexible working time arrangements' (Council of the European Union (2012)). In this context, the Lithuanian national reform programme of March 2012–2013 foresees measures to improve the conditions for business, individual work and new job creation, among other things by improving the conclusion and termination of employment contracts; establishing a deadline for giving notice of the termination of an employment contract based on the employee's years with that company; repealing the provisions regarding the dismissal of certain categories of employees only in exceptional cases; and cancelling the payment of severance allowances exceeding the average wage for four months.

In Portugal, within the framework of the Memorandum of Understanding signed on 17 May 2011, a national tripartite agreement on 18 January 2012 ('Compromise for growth, competitiveness and employment'), was reached providing for three steps for the establishment of the procedure to cut redundancy benefits from 30 to 20 days per year of seniority and the establishment of a maximum limit of 12 months' pay. This measure came into force in November 2012 and affects all employment contracts. Nevertheless, contracts concluded prior to 1 November 2012 with compensation above the legal maximum will continue to receive compensation equal to what they were entitled to if they had been dismissed before the deadline, so that acquired rights are safeguarded. This rule has been amended and implemented as of November 2013 for newly hired workers who will be entitled to 12 days per year of seniority upon dismissal instead of the 20 days previously provided for. Redundant workers will receive 18 days per year of seniority for the first three years and 12 days for the remaining years; the 12-month cap remains unchanged.

In Slovakia, following the April 2012 elections, amendments to the Labour Code negotiated with the social partners were adopted. Besides reintroducing the option to take severance pay and to continue to work during the notice period, the amount of redundancy payments is to be determined by worker seniority. Employees with seniority of fewer than two years will not be entitled to any payment.

In Spain the reform of February 2012 curbed monetary compensation for unfair dismissal. Severance pay will amount to 33 days per seniority year instead of 45, with a ceiling of 24 months, generalising the existing measure intended to promote hiring (*contracto de fomento del empleo*). Furthermore, the reform abolished the obligation of the employer to pay wages due between dismissal and a ruling of unfair dismissal.

In Croatia, the Commission Staff Working Assessment of the 2013 economic programme for Croatia, prepared within the framework of its accession to the EU,<sup>38</sup> mentioned that 'the rigid employment protection legislation is another key factor leading to weak labour market performance'. This supposedly discourages job creation because it gives rise to higher effective severance pay in the case of negotiated dismissals, as employers have an interest in avoiding

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38. See: [http://ec.europa.eu/europe2020/pdf/nd/swd2013\\_croatia\\_en.pdf](http://ec.europa.eu/europe2020/pdf/nd/swd2013_croatia_en.pdf)



appeals. While the first phase of a new labour market reform, adopted in the first half of 2013, is to include measures to simplify collective redundancy procedures, the second phase is to revise the rules for notice periods and severance pay, which is currently set at one-third of monthly remuneration per year of service, although collective agreements may increase it. Further assessment by the European Commission will focus on the extent to which the reform ensures the streamlining of dismissal procedures and effective lowering of dismissal costs. Unfortunately, no more detailed information could be found on the current state of play of the reform in Croatia.

#### **2.1.4 Right to demand compensation or reinstatement**

As protection against unfair dismissal, a number of legal questions are at stake, including: (i) the legal criteria to establish whether a dismissal is unfair; (ii) the right to reinstatement or compensation; and (iii) the possibility of a pre-court dispute resolution procedure or a pre-trial conciliation settlement.

##### **(i) Grounds for dismissal**

The legal criteria for establishing whether a dismissal is unfair, based on either personal or economic grounds, are laid down by law in most member states in the form of exhaustive lists of grounds justifying dismissal in order to avoid abusive dismissals. In other member states, however, such grounds are formulated in fairly broad terms (for example, ‘unsuitability’ in Spain).

In general, reforms have tended towards broadening the grounds for dismissal, in particular in Estonia in 2009 within the framework of the Estonian Labour Code reform, in Spain in 2010 and 2012, in Italy in June 2012 and in Romania and Latvia in the case of long-term sick leave. In the case of Croatia, the World Bank advised the Croatian government in 2010 to consider, within the framework of the flexibilisation of labour regulations, to relax the conditions for lawful dismissal of an individual due to ‘business reasons’; at the time these included a lack of alternative employment, the worker’s socio-economic status, retraining for a different job and closure of the pertinent job. Unfortunately, no more detailed information could be found on the current state of play of the reform in Croatia.

In Portugal, reforms of 2009, 2011 and 2012 relaxed employment protection in making dismissal for personal reasons easier by including continued reduction of production in the definition of valid grounds for termination and limiting compensation in the case of simple breaches of procedural requirements to monetary compensation, at a reduced rate. Additionally and in cases of individual dismissal, both seniority criteria to rank dismissed workers and the requirement to find another position within the company prior to dismissal are no longer valid.

In France, Law No. 2008-596 of 25 June 2008 on reform of the labour market introduced a new form of termination for open-ended employment contracts called ‘*rupture conventionnelle*’, providing for mutual agreement on volun-



tary redundancy with the benefits to which the worker would have been entitled if he had been dismissed; unemployment benefits are maintained and for the employer judicial recourse is reduced. Furthermore, the 2013 reform of the Labour Code makes it possible, via firm-level collective agreement, to negotiate temporary wage and working time reductions during periods of serious company difficulties in exchange for a job guarantee. However, if a worker does not assent to the agreement, he can be dismissed for economic reasons, which represents a derogation from the former Labour Code, thus adding a new ground for individual dismissal.

In the same vein, the 2013 UK reform goes much further, introducing employee shareholder status in a new employment contract enabling workers to renounce their dismissal protection (except in cases of discriminatory dismissal) in exchange for shares in the company, thus relegating labour law to an optional source of rights for workers and neglecting the entire public order aspect of labour law, namely, protecting workers in the unbalanced employment relationship.

In Greece, the introduction by Act 3863/2010 of a longer trial period to one year at the beginning of a (potential) indefinite employment relationship allows employers to dismiss workers during the first 12 months without notice or grounds and severance pay, thus reducing the cost of dismissal. However, as restated in Case 65/2011 in a decision of the European Committee of social rights of the Council of Europe of 19 October 2012 a notice period below 1 month after one year of service is not in conformity with the Charter, Article 4 that stipulates: ‘workers should have the right to a ‘reasonable notice of termination of employment, applying to all categories of employees, independently of their status/grade, including those employed on a non-standard basis. It also applies during the probationary period. National law must be broad enough to ensure that no workers are left unprotected.’<sup>39</sup> Nevertheless and despite violation of international labour standards, the Greek government has retained the disputed reform on the ground of the ‘emergency situation Greece is facing’ and will not remove it until 2015 at least.

Similarly, the 2010 and 2012 Spanish reforms introduced the possibility for undertakings with fewer than 50 employees to set a probation period of one year, during which dismissal law is not applicable. This case appears to be in contradiction with Article 30 Charter of Fundamental Rights because it excludes a particular category of workers from employment protection over a long period of time (Bruun 2006: 352).

(ii) Compensation or reinstatement?

In case of unfair dismissal as ruled by a court judgment, workers may either be reinstated as if they had never been dismissed, or receive compensation. Reinstated workers are usually entitled to wage arrears and pending social contributions which may, but does not necessarily, make reinstatement more

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39. See: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC65Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC65Merits_en.pdf), p. 8.

costly than compensation. Compensation is calculated in terms of months or previous pay and may vary from 32 months (Sweden) to 16 months (France) at the most, while lower compensation above ordinary pay, severance pay and/or advance notice can be found in Estonia and Poland. Furthermore, member states may introduce legal and/or collectively agreed exemptions, usually during the trial period at the beginning of the employment relationship (from one month in Austria up to one year in Belgium for example); in the United Kingdom, for example, job tenure of two years is required to claim dismissal protection. Finally, legal prescriptions govern the time limit on lodging a claim in the case of unfair dismissal and also on access to dismissal protection. Member states may set a very short time limit so that claims must be lodged directly after notification and possibly before dismissal becomes effective (Austria, Denmark, Hungary and Slovenia, for example) or a (much) longer one (Finland, Iceland or France in case of dismissal for personnel reasons).

Rules on compensation and reinstatement vary widely among member states: reinstatement is usually granted in Austria, Czech Republic, Latvia, Portugal, Denmark and Norway, for example, whereby in most cases compensation appears to be the predominant solution proposed by law and/or collective agreement (Belgium, Estonia, France, Luxembourg and Spain, for example), as a result of which workers may refrain from litigating for reinstatement.

Some significant reforms have been adopted during the financial and economic crisis in the member states, in particular in Spain and Italy, where a drastic reform attempted to restrict employees' right to compensation in case of economic dismissal. Furthermore, the 2012 reform in Italy restricts the number of cases in which reinstatement can be ordered by a court to the more severe cases of unlawful dismissal (that is, in case of discrimination, when the grounds are explicitly forbidden by a collective agreement and in case of a false accusation on the part of the employer).

The amount of compensation awarded is usually defined by law and depends upon the monthly or weekly wage and the seniority of the worker with the last employer; again, member states' rules differ significantly. During the financial and economic crisis, Spain consecutively reformed the rules defining compensation, reducing the amount due to 33 days' salary per year of service (instead of 45 days previously), first for indefinite work contracts and then, in 2012, for fixed-term work contracts.

In the case of Croatia, the World Bank identified an alleged pro-labour bias on the part of labour courts as a source of 'labour market rigidity'. According to Croatian labour law, workers who are dismissed without just cause should be either re-employed or paid their lost earnings (up to 18 months' salary). The World Bank considers that 'the latter option would make the expected cost of dismissal high (expected cost reflects the high probability that the court will rule in favour of the dismissed worker) a powerful and effective deterrent to lay-offs. This in turn negatively affects the ability of employers to adjust the size and composition of their workforce to changing market demands.' Unfor-

tunately, no more detailed information could be found on the current state of play of the reform in Croatia.

In the Czech Republic, the 2012 reform foresees an amendment to reintroduce court moderation in case an employee seeks salary compensation in connection with the invalidity of termination of their employment. If the period for which compensation is sought is over six months, the court may, at the employer's proposal, take into account any other employment the employee may have had during this period and reduce the compensation accordingly.

The new Hungarian Labour Code of July 2012 reduced the legal protection against unlawful dismissal, abolishing the general obligation for re-instatement (Kollonay-Lehoczky 2012). Employers must provide compensation for all losses caused through unlawful dismissal. The damages thus paid may not exceed twelve months leave of absence pay. Re-instatement is still possible at the employee's request, however, if the dismissal did not observe the normal period of notice or if dismissal was discriminatory or, finally, if the employee was an employee representative at the time of dismissal.

In Slovenia the reform of March 2013 (in force since April 2013) cancelled the requirement that employers provide proof that they have attempted to find another position within the company prior to dismissal.

Italian Law No. 92 of 28 June 2012 that came into force on 18 July 2012 (also known as the *Fornero Reform*) amends employment protection law as anchored in Article 18 of the Workers' Statute. The previous version of Article 18 provided that, in case of unfair dismissal in an enterprise with more than 15 employees, the dismissed employee had the right to be reinstated. The employer was also ordered to pay the employee damages amounting to all wages lost from the day of termination to the day of reinstatement. The damages could not amount to less than five months' salary (from the employee's total pay package), in addition to the normal wages received under the contract. Employees that had the right to be reinstated had, however, the option of a payment equal to 15 months' salary (from the total pay package) in lieu of reinstatement. The new version of Article 18 partially moves away from the previous version, limiting the right to reinstatement by identifying serious cases in which the remedy still applies. In other cases, the law awards monetary sanctions equal to 6 to 24 months of an employee's salary when a court finds that an employee was unlawfully dismissed. However, in case of void or verbal termination or for discriminatory reasons, the obligation of reinstatement remains.

In Portugal, a law on dismissals of 8 September 2011 provides for compensation of 20 days per year of employment (instead of 30 days as previously the case) and with benefits not exceeding 12 times the reference base (20 days per year). The new rules apply to labour contracts concluded after 1 November 2011 in the cases of individual and collective redundancies, temporary relocation, bankruptcy, restructuring. The idea of a compensation fund did not materialise due to resistance from both employers' and trade union organisa-

tions, albeit for different reasons. Since 1 October 2013, the compensation system has been further narrowed in line with the Troika's request for more flexibility in employment protection law: workers hired from 1 October 2013 onwards will see their compensation reduced to 12 worked days per year in the event of a mass redundancies, instead of the previous 20. Compensation is also reduced for fixed-term contracts or employees laid off on other grounds, so that it will amount to 18 days for the first three years in the company. Fixed-term workers will get 18 days' pay for each year spent in the company. In the Netherlands, an agreement between the government and social partners of April 2013 is intended to reduce compensation for unfair dismissal to a maximum half a month's salary per year of seniority with a ceiling of 75,000 euros.

In Estonia, the new Labour Code of July 2009 drastically amended the range of remedies available to courts in the case of unfair dismissal by requiring for reinstatement a joint agreement of the employer and the dismissed worker (with a few exceptions) and reducing by half the compensation due to workers.

(iii) Pre-court dispute resolution procedure/pre-trial conciliation settlement  
Most member states' legislation and/or collective agreements provide recourse to pre-court dispute resolution mechanisms in order to help the parties to resolve their disputes before lodging a complaint with a court (except in Austria, Belgium, France, Hungary, Iceland, Portugal and Poland). Usually (labour) courts take pre-court dispute negotiations into account when making a decision on unfair dismissal. In Italy, Sweden and Spain a pre-court dispute resolution attempt is a prerequisite for a court proceeding.

In the Czech Republic, the Mediation Act entered into force on 9 January 2012, making mediation agreements legally binding. However, enforcement of mediation requires a notary with consent that it may be part of the conciliation process during court proceedings.

In Greece, Law 3899/2010 considerably weakens the Organisation for Mediation and Arbitration (OMED), providing that in the case of unsuccessful mediation not only the trade unions but also the employer may refer matters unilaterally to arbitration if the other party does not accept the mediator's proposals. In terms of the scope of arbitration proceedings, the new regulations introduce a significant restriction: arbitration awards shall determine only minimum monthly or daily wages. Other terms of employment – such as termination of employment, grounds for termination and termination procedures and severance pay – can no longer be regulated by arbitration awards.

The Spanish agreement of 7 February 2012 reviewed the public mediation and arbitration system (SIMA) for collective disputes. This agreement allows appeals to alternative dispute settlement in cases of disagreement arising within the framework of consultation with employee representatives with regard to the application, in the company, of the opt-out clause (that is, when employers, for economic reasons, wish to opt out of wage increases provided for in a collective agreement at a higher level), or when negotiating a company

agreement derogating from provisions agreed at a higher level. Second, to help boost sectoral bargaining, the agreement also provides that the parties to a sectoral agreement can, in turn, provide for mandatory appeal to arbitration when negotiations on the renewal of an agreement are deadlocked. The agreement also provides recommendations for so-called bipartite committees on collective agreements (*comisiones paritarias*) which now also have to determine, in addition to the modalities for settling disputes that may arise from their application or interpretation, the modalities for settling disagreements during consultations on substantial changes to working conditions or opt-out clauses.

In Italy the reform of 2010 already introduced the possibility (Article 31) to include in the employment contract an arbitration clause specifying that any disputes will be settled via arbitration, thus leading workers to abandon their rights to redress via judicial proceedings. The reform of July 2012 introduced a leaner and faster procedure for dispute resolution, in particular with the amendments of Art. 18 (see 2.1.4 (ii) above).

In France the Labour Code reform of 2013 introduced a specific order for workers' compensation in pre-trial conciliation settlements lower than standard levels of compensation awarded by courts when the judge rules that the dismissal is unfair.

### **2.1.5 Access to court – redress**

If a pre-court dispute resolution procedure cannot resolve the issue between the parties, workers may lodge a complaint of unfair dismissal with a court tribunal. However, the first stage of the proceedings usually involves mediation and/or conciliation to try to find a negotiated solution, whereby an opt-out is possible in France, Germany, Hungary, Italy and Spain. In case of a successful conciliation, the agreement between the parties is legally binding. The court judgment may be appealed in most member states (except in a number of Nordic countries) to a higher level (labour) court. In most member states, except in Austria, Czech Republic, Finland, the Netherlands, Norway, Slovenia and Slovakia, simplified procedures are in place for labour disputes. Additionally, in most member states (except in the Czech Republic, Denmark, France, Hungary, Ireland, Poland and the United Kingdom) the burden of proof lies with the employer, on the grounds that, first, the employer has better access to information and, second, dismissals must be in compliance with the rules and thus justification is required.

Protection against unfair dismissal touches upon the legal question of redress in terms of access to courts. However, (i) the qualifying period of employment that allows access to a court, (ii) the time limit for lodging a complaint and (iii) required fees may inhibit workers' options for redress.

#### **(i) The qualifying period**

A qualifying period of employment for claiming unfair dismissal is not common in EU member states, except in the United Kingdom.

In the United Kingdom, the already low level of protection has been further relaxed in combination with an extension of the qualifying period of employment for claiming unfair dismissal. A fee for bringing a case to court has also been introduced. Within the framework of a major review of employment law that commenced in April 2012, the employment tribunal system has been amended. One aspect of the reform is the doubling of the qualifying period to two years for those recruited on or after 6 April 2013, bringing it into line with the service requirement for a claim for redundancy pay. The stated aim is to reduce tribunal claims and to give businesses more confidence to recruit (Ewing and Hendy 2012: 115–121). For those who were already in employment before that date, the current one-year qualifying period will remain. The same qualifying period will apply to the right to demand written reasons. However, as already pointed out by the CJEU, in 1999 when the qualifying period was of two years (C-167/97 of 9 February 1999), this measure might prove to be discriminatory on the ground of age, in particular for young workers entering the labour market. Furthermore, the rationale behind the reform of the qualifying period for claiming unfair dismissal – namely, to eradicate unfair-dismissal rules that are alleged to be major barriers for employers to hire – is questionable, as shown by Palmer (Palmer 2011), as the government impact assessment of the reform does not provide an estimate of how many jobs might be created via the reform.<sup>40</sup> Furthermore, similar reforms have already been tested back on time and did not lived up to the expectation: indeed, in May 1999 there was no perceptible increase in the unemployment rate when the unfair dismissal qualification period was reduced from two years to one.

(ii) The time limit for lodging a complaint

Again, large differences exist in member states' employment protection laws. Some have reduced the time limit for lodging a complaint as a mean to act against supposedly too long delays in proceedings: Portugal from one year to 60 days and in Italy to within 60 days of dismissal.

In France,<sup>41</sup> a reform was adopted on 14 May 2013, based on the inter-professional agreement concluded between the social partners in January 2013. This addresses the legal uncertainty of dismissals and provides greater flexibility for employers, further reducing the time limit for lodging a complaint in order to lower the price of dismissal for employers, but also to restrict the possibility for tribunals to intervene in managerial decisions (Sachs 2013: 9). Furthermore, in a joint agreement settled by labour arbitration, employer and worker may agree to a lump-sum defined by Legal Decree of 2 August 2013 (No. 2013-721) based on seniority, which covers issues prejudices linked to the dismissal, thus consolidating dismissal compensation and compensation for unfair dismissal.

In Italy the 'Labour market reform for growth' of 27 June 2012 introduced a special procedure for labour disputes, amending Article 18 of the Workers'

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40. See: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-work-place-disputes-consultation>

41. See: <http://register.consilium.europa.eu/pdf/en/13/st10/st10635-re01.en13.pdf>



Statute and introducing a new twofold procedure: first, it introduces ‘emergency protection’ that allow judges to organize a preliminary hearing within 40 days (instead of 60) of a worker’s challenge to being laid off. The judge may issue an ordinance that immediately enforces acceptance or rejection of the appeal. Second, it introduces the possibility to challenge the ordinance.

(iii) Access fees

In general, labour tribunals refrain from applying court costs (fees or administrative costs, for example), whereby the costs of the proceedings are to be paid by the losing party (in particular, the other party’s legal costs). Legal aid in various forms is available in most member states, except in the Czech Republic, Ireland and the United Kingdom, in addition to trade union and employer association legal advice and support to their members.

The introduction of a fee regime for lodging a complaint for unfair dismissal is not a common feature in EU member states.

However, the recent review of employment law in the United Kingdom, which came into force on 7 October 2013 within the framework of reform of the employment tribunal system, introduced tribunal fees of between £150 (approximately € 180) and £250 (approximately € 303) for lodging a claim and a further fee of £1,000 if the case goes to a hearing; this may be even higher for cases in which the compensation claim exceeds £30,000 (approximately €36,000). Only in successful cases will the fees be reimbursed to the claimant. As pointed out by Knight and Latreille (Knight and Latreille 2000: 723–744) and recently by Ewing and Hendy (Ewing and Hendy 2012: 115–121) such developments aim at shifting redress from legal proceedings to pre-trial settlements, in which workers with little bargaining power (for example, women, low-skilled, part-time and low-paid) and/or with little support from trade union or workers’ representatives – as a consequence of company policy – are more likely to settle their disputes at the conciliation stage than to go to court, risking an inferior agreement and, as Venn demonstrates (Venn 2009), with the most likely outcome being acceptance of the dismissal in return for an additional payment.

In Sweden, a Governmental Inquiry Report on disputes concerning dismissals was presented on 28 September 2012 (SOU 2012:62, *Uppsägningstvister En översyn av regelverket kring tvister i samband med uppsägning av arbetstagare*). The aim of the Inquiry was to review the rules on disputes about dismissals and to present proposals on how to reduce costs for employers and to promote employment. The Report proposes three amendments to the (1982:80) Employment Protection Act, which ‘aims to speed up the handling of disputes concerning dismissals to lower the costs for the employer and to safeguard employment protection and the employee’s rights’: the first amendment intends to reduce the duration of an employment relationship during an ongoing dispute on the validity of a dismissal to no more than one year. The second amendment foresees that economic damages according to Section 39 of the (1982:80) Employment Protection Act shall be reduced proportionately to the number of employees of the employer. Finally, it will no longer be

possible to declare a dismissal for reasons of redundancy to be null and void because the employer has not fulfilled its responsibility to find the employee alternative work within the company.

## 2.2 Requirements in case of dismissals for economic reasons

Dismissals for economic reasons ‘are one of the most direct and visible consequences of the financial and economic crisis’ (Muller 2011). In this situation and generally in time of crisis, the function of labour law is to lay down the legal rules that guarantee ‘greater protection to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community’, so as to provide for an ‘improvement in the living and working conditions of workers in the European Community’.<sup>42</sup> Such improvement must cover, where necessary, the development of certain aspects of employment regulations, such as procedures for collective redundancies and those regarding bankruptcies.<sup>43</sup> Clearly, employment protection law should aim at minimizing as far as possible the negative effects of collective dismissals for workers. However, recent labour law reforms show a loosening of employment protection law in respect of the protection of workers in case of collective dismissals. Recent and ongoing reforms have been implemented in a number of EU member states, such as France, the Netherlands, Portugal, Slovenia and the United Kingdom.

### 2.2.1 Broadening the definition of collective redundancies for economic reasons

The definition of collective redundancies for economic reasons is of particular importance because it involves a range of legal obligations and specific procedures that must be complied with, such as the information and consultation of workers’ representatives, notification to public authorities with a view to searching, together with the employer, for alternatives to redundancies and to provide for a social plan. As ruled in Article 1 of Directive 98/59/EC on collective redundancies implemented in the member states, employment protection law provides for a quantitative definition combining the number of workers involved or the percentage of the enterprise’s workforce within a given period of time.<sup>44</sup>

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42. Intend 2 of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

43. Intends 7 and 8 of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

44. Art. 1 (a) Directive collective 98/59/EC stipulates; ‘redundancies means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is: either, over a period of 30 days: (i) at least 10 in establishments normally employing more than 20 and less than 100 workers, (ii) or at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers. (iii) or at least 30 in establishments normally employing 300 workers or more, (iv) or, over a period of 90 days, at least 20, whatever the number of workers normally employed.’



Such thresholds were reformed in Greece in 2010 (Law 3863/2010) so that dismissals are now considered to be collective when more than six employees lose their jobs in companies employing between 20 and 150 employees over a period of 30 days, compared with the previous threshold of four employees for companies with 20–200 employees. The threshold is set at 5 per cent of the staff or more than 30 employees for companies with more than 150 employees, compared with the previous level of 2 to 3 per cent of staff and 30 employees for companies with more than 200 employees (Palli 2013).

Reform of the collective redundancies procedures foreseen in France are mentioned in the roadmap for social reforms presented at the ‘Grand Social Conference’ that took place in July 2012, held at the initiative of the French government and bringing together national social partners and the government. The aim of the reform is to make employment protection law more flexible, while making collective redundancies the last resort. In the aftermath of this conference, the government launched a consultation of national social partners on the ‘*sécurisation de l’emploi*’ (employment security). A guidance document issued by the Ministry of Labour sets as one of its priorities possible reform of collective redundancy procedures, in order to develop schemes aimed at allowing companies to keep workers in employment instead of resorting to redundancies by improving existing short-time working schemes and setting rules on collective agreements at company level specifically designed to counteract difficult economic circumstances.

In Slovakia, in the September 2011 reform of the Labour Code the reference period for collective redundancies was reduced to 30 days from 90 and the threshold was reduced to 10 instead of 20 dismissed workers.

In Portugal, a tripartite agreement of 18 January 2012 (‘Compromise for growth, competitiveness and employment’) was reached on a full set of measures on growth, employment and active labour market policies. It contains a series of measures concerning revision of the Labour Code as foreseen in the Memorandum of Understanding: (i) In the case of redundancies for business reasons, the employer now has the possibility of determining the criteria – although non-discriminatory – that can lead to redundancies. Consultation of workers’ representatives is strengthened; (ii) in the case of inadequacy for the job, ‘a substantial change in the employee’s work leading to a decline in production, quality, or to repetitive failures or dangerous situations for the worker or third parties’, without any previous changes in the methods of production may lead to dismissal. Training, a period of adaptation and proof of the change in the worker’s activity are nevertheless prerequisites for such dismissals, although the Memorandum of Understanding did not foresee them. In both cases, the company is no longer required to offer another job.

Spanish Act 35/2010 introduces a new definition of reasons for dismissal. For both collective and individual procedures, the employer need only show the reasonableness of the connection between an organisational, productive or technological change and improving the company’s situation. This notion of reasonableness did not previously exist and is supposed to encourage employ-

ers to resort to justified dismissals (20 days compensation per year worked) instead of automatically choosing unjustified dismissal, which gives rise to compensation of 45 days' salary per year worked. However, the precise interpretation of the new legal text rests with the judiciary and with the labour administrations, which must authorise or reject collective dismissals if there is no collective agreement.

Spanish Law 3/2012, which came into force on 13 February, further provides for simpler modalities for economic redundancies, compensated at 20 days per year. Businesses may resort to economic redundancies when they experience economic deterioration, such as actual or foreseen losses, or when invoicing or sales levels fall constantly for three quarters in a row. The objective of the legislator is to make redundancies safer, in legal terms, in order to limit the control of the judge to the strict economic situation of the undertaking, thus leaving aside the aim of dismissal protection, which is to ensure that dismissal is the last resort or *ultima ratio*. It also opens up the possibility of mass redundancies in public organisations. Businesses and organisations in the public sector may instigate staff cuts for economic, technical, organisational or production reasons. This was not previously provided for by law. This measure is supposed to make it easier to resize administrations to adjust them to budget reviews.

In the United Kingdom, an amendment of the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 was approved early in 2013 and substantially modified the rules governing collective redundancies, from 6 April 2013, with the aim of giving employers more flexibility to respond to economic problems by letting them dismiss a large number of workers in a shorter period of time. According to the amendments, the period during which workers' representatives must be consulted before announcing the first redundancies has been reduced from 90 days to 45 days in case of collective redundancies of at least 100 employees. The threshold of 30 days before announcing the first redundancies in case of collective redundancies of between 20 and 30 employees remains unchanged. Furthermore, consultation of workers' representatives does not include any more information on fixed-term contract termination when it occurs during the redundancy procedure. However, this obligation remains for fixed-term contracts not included in collective redundancies.

In Belgium, the new bill introducing the single status of 27 September 2013, does not provide for the obligation for employers to justify a layoff (with some exceptions), and employees do not even have special protection against arbitrary layoffs. This flexibility is offset by the particularly long notice period. By 31 October 2013, workers were supposed to sign a collective agreement within the framework of the National Labour Council providing for rules applying to all workers as far as layoff grounds are concerned, thus overturning Article 63 of the law of 3 July 1978 on abusive layoffs of blue-collar workers.

### **2.2.2 How has the crisis impacted on the obligation of information and consultation of workers' representatives?**

Article 2 of Directive 98/59/EC provides that, in paragraph 1, 'Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.'; paragraph 2 clearly states the aim of such a provision: 'These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.'

In Spain, the 2010 reform limits the duration for consultation of workers' representatives to 30 days in enterprises with more than 50 employees and to 15 days for enterprises employing less than 15 employees. Furthermore, employers and workers' representatives may go for arbitration and mediation instead of consultation, leading the administrative authority, in case of an agreement reached between the parties, to accept and authorise the collective redundancies.

In Romania, a reform of the Labour Code was adopted via Law 40/2011 of 1 May 2011 and provided for the abrogation of a number of protective norms for union leaders, including the ban on dismissing them within two years of the end of their mandate or during their mandate for reasons not specific to the employee in question. However, this provision has been amended so as to modify the contested Act on Social Dialogue No. 62/2011. The most important amendment proposed is to restore greater protection for trade union leaders (their dismissal is to be prohibited during their mandate and for two years after their mandate ends).

On 8 November 2011, the ILO delivered its Memorandum of Technical Comments (ILO, 2011a) on Hungary's draft Labour Code, criticising several provisions on both collective and individual rights that run counter to Hungary's obligations under various ILO Conventions. Several comments referred to the collective redundancies ruling: in Chapter 6 (Sections 71 to 76) of the Hungarian draft Labour Code the ILO identified, within the framework of the consultation of workers' representatives, the lack of a requirement of specific reasons as grounds for an employer to call for collective redundancies: the Hungarian Labour Code mentions merely that collective redundancies should relate to the employers' operations. This is contrary to ILO Convention No. 158 and Recommendation No. 166 (Article 24). No information is available on whether the draft Labour Code has been amended accordingly.

The French reform adopted on 14 May 2013 further amends collective redundancy rights in allowing for agreements maintaining jobs in undertakings facing severe business difficulties. Such agreements foresee the obligation for the employer not to dismiss during the validity of the agreement (at most two years). In return, workers are obliged to agree to changes in their working time and remuneration, as long as minimum legal standards are

complied with. Such agreements lead to a modification of individual work contracts. Before the reform and in case of a refusal by workers, the employer had to announce collective redundancies. With the reform, the dismissal is qualified as an individual dismissal, not subject to the information and consultation of workers' representatives, and as such contrary to Article 2 (1) of the Directive.

In the United Kingdom, Draft Regulations amending the Transfer of Undertakings (TUPE) of 2006 have been issued and foresee, from January 2014 onwards, major changes in terms of the information and consultation procedure and the scope of protection, in particular in cases of redundancy. Provisions amending the collective redundancy legislation will allow that pre-transfer consultation by the transferee will count for collective redundancy consultation purposes, provided the transferor agrees. Additionally, businesses with fewer than 10 employees will be able to consult staff directly about TUPE where there is no recognised union or existing employee representative body.

These changes are to be added to others, such as reduction of the scope of protection in case of transfer, so that the relevant protections will apply only where the reason for the dismissal or contract change lies with the transfer, suppressing the additional ground when the dismissal is 'connected with' the transfer. Additionally, the new employer will be able to rely on pre-existing arrangements within employment contracts to change contract terms in the same way as the transferor could have done. Furthermore, the draft regulation allow employers to avoid the judgment that genuine 'place of work redundancies' are automatically unfair – which is the current position – in making changes in the location of a workforce or its work in connection with a TUPE transfer. These are now to be covered by the ETO defence of 'an economic, technical or organisational reason entailing a change in the workforce'.

In an interesting case law the Spanish Supreme court, in the *Talleres López Gallego* case of 20 March 2013,<sup>45</sup> confirmed that, although the new Labour Act of 10 February 2012 made the information and consultation procedure simpler, it does not simply constitute a formal approach and mass redundancies require proper information and consultation of workers in elaborating a social plan.

### **2.2.3 Criteria for selection of employees to be dismissed**

According to Article 2 (3) (v) of Directive 98/59/EC, in order to 'enable workers' representatives to make constructive proposals, the employers shall in good time supply (...) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefore upon the employer'.

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45. See: <http://www.planetlabor.com/wp-content/uploads/2013/04/Arr%C3%AAt-de-la-Cour-supr%C3%A4me.pdf>

In Estonia, the new labour law of 2009 no longer features a detailed list of selection criteria. The new law provides instead that the principle of equal treatment must be observed during the selection process. Workers' representatives and employees with children under the age of three have priority in retaining their jobs (as reported in Muller 2011: 9).

In Romania, the reform of the labour code was adopted via Law 40/2011 of 1 May 2011 and provides, in case of collective redundancies, that employers will be able to give priority to employees' performance criteria, not social criteria, as was previously the case. The rules on collective redundancies also no longer apply to public sector employees.

In the United Kingdom, recent case law in 2009–2010 questioned the selection criterion according to which the last person recruited is the first to be made redundant. It is considered to be valid only if embodied in the collective agreement and on the express condition that it is not the only criterion employed in the selection process. Otherwise, this criterion may be challenged as indirect discrimination on the grounds of age. Moreover, the criterion concerning absence, particularly with regard to illness or childbirth, should be used with circumspection, in that it may constitute discrimination based on state of health, gender or maternity.

In Sweden, waivers exist concerning the legal principle of selection based on seniority. Indeed, in companies with fewer than 10 employees, the employer has the discretionary power to exclude two employees from this rule. In 2009, a labour tribunal decided that this principle should not be applied to employees who had turned down alternative job offers that were reasonable in terms of remuneration and responsibility.

In its 2011 Memorandum of Technical Comments (ILO 2011) on Hungary's draft Labour Code, the ILO identified further provisions that run counter to Hungary's obligations under various ILO Conventions in respect of employment protection in case of collective redundancies. The ILO stressed that no detail is to be found in respect of the selection criteria to apply when a worker is dismissed. It is, however, of 'particular importance' to ensure that, as a result of the preference given to some criteria, certain protected workers – such as workers' representatives – are not dismissed in an arbitrary manner on the pretext of the collective termination of employment. This is contrary to ILO Recommendation No. 166 (para. 23).

#### **2.2.4 Obligations on the employer to consider other measures before termination of employment**

Article 2 of Directive 98/59/EC reads: 'These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.' The text and the spirit of the Directive clearly indicate that collective dismissals should be implemented as a last re-

sort and that the emphasis should be on working out reemployment, retraining and outplacement schemes, sometimes with extra monetary compensation. However, practices in the member states diverge from this *ultima ratio* principle and permit dismissals for economic reasons, even if the business is not facing economic difficulties (in the United Kingdom, the Scandinavian countries, Belgium, Austria, Germany and the Netherlands, with recent reforms by Greece, Spain, Portugal and, to a lesser extent, France and Italy) (Rebhahn 2012: 243). The World Bank advised the Croatian government to relax the conditions for collective dismissal in order to lower dismissal costs and encourage job creation and hiring. The World Bank further proposes a series of measures, such as '(i) removing the requirement that fixed-term contracts can only be used on an exceptional basis (a specific task or the occurrence of a specific event; (ii) relaxing conditions for lawful dismissal when some individuals and some categories of protected workers need to be dismissed for business reasons; (iii) relaxing the conditions for collective dismissal (i.e.: relaxing consultations with the workers' council, a detailed redundancy social security plan, and approval by the employment bureau)' (World Bank 2011:4).

(i) In general

In 2010, France adopted a law specifying that any offer of alternative employment abroad must be accompanied by equivalent remuneration. This law was adopted in response to certain instances of collective dismissals where employees were offered jobs in other countries with much lower wages than those paid in France. The Court of Cassation further ruled in 2011 that all contracts terminated by mutual agreement for economic reasons and in the context of workforce reduction must be counted within the number of intended redundancies, in order to determine whether an employment safeguard plan is to be established by the employer. Thus, termination of employment by mutual agreement may not serve to circumvent the implementation of a social plan (Muller 2011: 9).

Additionally, the 2012 French national reform programme provides a number of measures implementing the concept of flexicurity, among others, the '*contrat de sécurisation professionnelle*' (career path security contract), negotiated by the intersectoral social partners in an agreement concluded in May 2011 and put into a legislative act with the Law of 28 July 2011 (now Articles L1233-65 to L1233-70 of the Labour Code). It targets workers made redundant for economic reasons in companies with fewer than 1,000 employees. By mean of this agreement, workers are entitled to personalised support measures, such as retraining or help in setting up a new business. The workers concerned receive compensation equivalent to a percentage of their former wages for a one-year period.

In Sweden, in September 2011 a committee was set up by the government to evaluate the regulations governing redundancies and resultant disputes and to put forward suggestions that would help employers to reduce costs and encourage them to recruit new workers. The committee submitted its report in mid-2012, recommending three major legislative changes to make the law



more flexible. These were to be implemented on 1 January 2014: (i) dismissals on economic grounds cannot be invalidated simply because the provisions on redeployment have not been respected; (ii) rapid conflict resolution should be promoted, and allowing for example to decide that the claiming employee is no longer a company employee after one year, whether or not the case is filed and whether or not they have found a new job; (iii) SMEs with fewer than 50 employees should be liable for lower sums less than bigger businesses in terms of the amount of damages due for failure to comply with the recruitment security Act. The Committee suggests implementing these changes from 1 January 2014.

In Belgium the new bill introducing uniform status for white- and blue-collar workers of 27 September 2013, stipulates that outplacement will still be reserved for workers over 45 years of age, but, in the future, anyone laid off with nine years of seniority will be entitled to redeployment measures financed by the employer. However, the costs will be deducted from the allowance compensating the notice. Moreover, from 1 January 2014, the sectoral social dialogue will have five years to provide for measures aimed at improving the 'employability' of the workers laid off. The cost of these measures will be included in layoff costs (up to one-third).

(ii) Hiring priorities

ILO Recommendation No. 166, paragraph 24<sup>46</sup> lays down priorities with regard to rehiring, whereby workers whose employment has been terminated for economic reasons should be given a certain priority if the employer again recruits workers with comparable qualifications. The Recommendation limits this priority of rehiring to workers who have, within a given period of time from their dismissal, expressed a desire to be rehired.

In Estonia, the 2009 reform of the law on employment contracts removed the priority of rehiring which was possible during six months following dismissal.

In Slovakia, under the Labour Code, the employer may not, for a period of three months, establish a position and recruit another employee in place of the employee dismissed for economic reasons. In 2011, the government proposed to reduce this period from three to two months.

In Romania, a reform of the Labour Code was adopted via Law 40/2011 of 1 May 2011 and provides, in case of collective redundancies, that the regulation under which an employer undertaking collective redundancies cannot re-hire for the jobs of dismissed workers for a period of nine months has also been eliminated. When employees are notified that business is to be resumed, they can agree in writing to resume working within no more than five days compared with 10 days under the previous Labour Code.

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46. See: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R166](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166)

In Hungary, the ILO 2011 Memorandum of Technical Comments (ILO 2011) on Hungary's draft Labour Code identified additional provisions that run counter to Hungary's obligations under various ILO Conventions in respect of employment protection in case of collective redundancies. The ILO pointed out that re-hiring measures were missing in respect of the prohibition on re-recruiting any new staff for a limited period of time after a collective termination or to re-offer any opened positions first to workers made redundant. This is contrary to ILO Recommendation No. 166 (Article 24). The ILO also found that the draft Labour Code no longer provides for the reimbursement of lost wages and any damage arising from that loss in case of unlawful dismissal. It only provides for compensation that in any case may not exceed the amount of 12 months' absence pay, additionally providing the possibility via collective agreement to deviate *in pejus* from this measure so as to set even lower compensation. This is contrary to ILO Recommendation No. 143 (Article 6f).

(iii) Other alternatives

In Poland, a law of 2009 aimed at 'alleviating the impact of the economic crisis on workers and employers' – which was partly based on proposals negotiated with the social partners – includes the possibility for employers whose company is experiencing temporary financial difficulties and therefore cannot offer its employees any work, to dismiss them for (a maximum of) six months as an alternative to collective redundancies.

### 2.2.5 Notification to public authorities

According to Article 4 of Directive on collective redundancies 98/59/EC, 'projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) (...)'. In reaction to the financial and economic crisis, and to speed up collective redundancy procedures, some member states have loosened their employment protection law as regards the obligation to obtain authorisation from the relevant authorities to carry out dismissals for economic reasons.

In Estonia, where an employer does not have to obtain permission from the labour inspectorate to instigate collective dismissals, the 2009 law reform only requires notification to the unemployment insurance fund and gives the employer the right to carry out dismissals within 30 days after notification.

In Spain, Law 3/2012, which came into force on 13 February 2012, provides for the removal of authorisation for administrative layoffs. Permission from national, regional or local public authorities, depending on the size of the business, is no longer necessary for a collective redundancy programme. It should be noted that in Spain collective redundancies are defined as dismissals for economic, technical, organisational and production reasons affecting 10 employees in undertakings of up to 100 employees, or 10 per cent of the employees in undertakings with between 100 and 300 employees, or at least 30 employees in undertakings employing more than 300 employees. In practice, this means that unions will have less room for manoeuvre to negotiate decent leaving conditions. According to E.M. Puebla, it seems that judges



counterbalance the absence of administrative authorisation for mass redundancies by a extensive control of the procedure. In particular, judges check that consultation and negotiations in the frame of the mass redundancies do not replace consultation of workers representatives or work council, as foreseen in Art. 64 of the Statute of the Workers Act (Puebla 2013:136).

In Belgium, a 2009 Royal Degree introduced the obligation to notify the federal employment service, in addition to the information and consultation of workers' representatives.

In France, the Labour Code reform of 14 June 2013 shortened and simplified procedures for collective redundancies. This reform introduced an important change: the collective agreement or the unilateral document established by the employer that sets the procedure and social plan for 'safeguarding employment' have to be approved by the regional labour director within 15 days. If there is a delay, the administrative judge assumes competence with regard to procedural aspects and the validity of the social plan. However, difficulties occur in determining respective competences between the administrative tribunal or the employment tribunal (*Conseil de prud'hommes*) competent to rule on the merits, in other words, on the grounds for dismissal, including compliance with the reinstatement obligation.

In Slovakia, the September 2011 reform of the Labour Code removed the obligation to negotiate with the public authorities.

In the Netherlands, an agreement of April 2013 between the government and the social partners states that economic dismissals will be subject only to the approval of the Employee Insurance Agency and only in case of a negative decision of the Agency will the employer be given the possibility to go to court to terminate an employment contracts.

### 2.2.6 Court proceedings

According to recital 12 of Directive 98/59/EC, 'Member States should ensure that workers' representatives and/or workers have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this Directive are fulfilled'. Furthermore, Article 6 urges member states to 'ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.'

In all member states except Italy legal representation in court is not mandatory and leaves the possibility for workers to organise their own defence, with(out) the support of trade union and/or workers' representatives.

In general, member states have institutionalised the possibility for the parties to have recourse to pre-trial settlements, for example, France's introduction in 2008 of agreed termination of the work contract in case of dismissal for economic reasons, and with the characteristics that a pre-trial agreement

may include for the workers dismissed for economic reasons the possibility to trade their right to contest the agreement in court against a guarantee minimum severance payment, such as in Germany. However, mediation and consultation usually take place after the lodging of a complaint.

In general, concerns have been expressed about the reduction in access to judicial and/or administrative procedures, in particular in the United Kingdom (see point 3, page 33 of this report) increasing access fees and seniority requirements in the frame of the employment tribunal reforms of 2013. However, information of reforms affecting the access of worker's representatives to judicial and/or administrative procedures in case of collective redundancies has been very scarce so that for the moment, no relevant point on this issue can be made.

### 2.2.7 Redundancy funds

In Estonia, a new law on labour contracts was adopted by the Estonian Parliament (*Riigikogu*) in December 2008 and came into force on 1 July 2009, making changes to collective redundancies in order to increase labour market flexibility and in particular to ease the financial burden of redundancies on the employer: the payment of redundancy benefits is now shared by the employer and the Estonian Unemployment Insurance Fund. In all redundancy cases, the employer must pay a proportion of the redundancy benefit amounting to one month's average wage of the employee, while the Unemployment Insurance Fund funds the rest of the benefit. In addition, the redundancy benefit amount has been reduced by one month's salary to between one and three months' average wages, depending on the length of previous employment. In the case of people who have been employed for more than 20 years, a five-year transitional period is foreseen.

In Portugal, within the framework of the Memorandum of Understanding of 17 May 2011, the government agreed to enforce the measures defined via social dialogue and to provide for their application as of 2012 to all existing labour contracts. It extended a fund to finance unemployment benefits, the labour compensation fund, which is exclusively company-funded. The protection offered by the fund covers more cases than initially planned and where a company goes bankrupt and closes or when a worker is dismissed, the fund is to guarantee an immediate payment of 50 per cent of the amount owed to the workers, thus underpinning the existing payment guarantee. An additional fund, the labour guarantee fund, has been created and will be financed by a 0.075 per cent employers' contribution, which will guarantee the payment of benefits, for instance when a company goes bankrupt.

In Spain, Act 35/2010 (published in the Official Journal on 18 September 2010)<sup>47</sup> provides for the creation of a new redundancy fund: within one year, a new capitalisation fund, based on the Austrian system, was to be estab-

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47. See: <http://www.planetlabor.com/wp-content/uploads/2010/09/BOE-A-2010-14301.pdf>

lished to pay for redundancies. If employees did not use it in the course of their working lives, they could receive payment when they retire. The fund was supposed to start operating in 2012 for contracts signed from that date onwards. There is no available information on whether the fund has been introduced.

## Conclusion

In the context of the economic crisis, labour law in most countries has undergone profound reform, characterised by an explosion of inequalities and insecurity for workers, in some cases, ignoring fundamental social rights. Employment protection law in particular is at stake, and reforms affecting Greece, Spain and – distinctively – the United Kingdom and Estonia are on an altogether different scale from the ones introduced in France, Belgium, Italy and the Netherlands, for example. Additionally, some member states adopted reforms affecting employment protection law prior to the crisis. All reforms, however, are structural and based on the same grounds: reforming labour markets to provide more flexibility by reducing the costs of dismissal protection and simplifying procedures. Such grounds are deemed to be even more relevant in the financial and economic crisis that Europe has endured since 2008. They are praised as a necessary medicine and a state of emergency seems to have been generalised as an ‘accepted’ situation in Europe, in which an alleged need for reform legitimises the reduction of labour rights, even if violating international law and/or constitutional law.

Since the onset of the financial and economic crisis, most member states and in particular those that did not reform their employment protection law prior to the crisis (as Germany did) have loosen or diluted their regulations on individual or collective dismissals, sometimes coupled with reforms of working time schemes and atypical employment law, while decentralising collective bargaining systems, reforming unemployment insurance and restructuring public services. Atypical employment regulations have also been reformed (for example in Poland, Portugal, Romania, Slovakia, and Spain). Such reforms took place in Germany in an earlier stage (the so-called Hartz Reforms of 2003–2005) with dramatic effects on the growth of job precariousness and pauperisation of the working population (Dörre et al. 2013). Other components include reforms of probationary periods (as in Portugal, Romania). Furthermore, specific rules have been established for small enterprises (United Kingdom, Spain) to generally exclude them from the scope of employment protection law. Additionally, public services have undergone structural reforms at the behest of the European Commission’s austerity programme. Cumulatively, those reforms, together with the reforms of dismissal and collective redundancy rules, have severely damaged the protective role of labour law.

These reforms took place under the umbrella of the European Commission’s country-specific recommendations and for the programme countries under

the dictate of memoranda of understanding. In some cases – for example, Estonia, Greece, Italy, Portugal, the Slovak Republic and Spain – the extent of reforms was significant. These developments have in common that they diminish the protection of all workers, whether insiders (with a permanent work contract) or outsiders (in an atypical employment relationship), hence breaking the necessary balance between stringent regulation of typical regular work contracts and flexible temporary work contracts. Furthermore, this equilibrium between the definition of unlawful dismissal and the level of compensation, which characterised employment protection law in Europe, is largely being dismantled, forcing a one-size-fits-all solution upon member states. Such developments seem to have brought about a shift in the aim of employment protection law from job protection to compensation, while compensation is being reviewed at lower levels.

The limitation of access to judicial redress is one of the most alarming aspects of the reforms; clearly the flexibility given to employers to dismiss employees does not provide for the necessary counterpart of security for workers, as required, for example, in Directive 98/59/EC on collective dismissals. In its Communication of 2013,<sup>48</sup> the European Commission emphasizes further that ‘the crisis has also revealed the negative economic impact of slow and outdated legal systems and the relevance of the quality, independence and efficiency of the judiciary for maintaining or regaining investor confidence’. Some Member States are now taking steps to overhaul insolvency laws, to increase the efficiency of their court systems (Portugal and Spain) but in others (Malta, Romania, Italy, Slovakia, Hungary, Latvia and Bulgaria) the Commission has made recommendations for faster and more effective action and/or for measures to strengthen the independence of the judiciary.

However, reforms do not live up to expectations that labour market bottlenecks and constraints would diminish and economies will start to recover. On the contrary, reforms have produced extremely adverse effects that have led, among other things, to precariousness and a pauperisation of the working population (Clauwaert and Schömann 2012; Laulom et al. 2013; Crazes et al. 2013). Evidence shows that reforms involving the relaxation of allegedly rigid regulatory provisions on individual and collective dismissals, combined with reforms of atypical employment, unemployment-benefit schemes and the public sector, have increased the number of dismissed workers, raised youth unemployment and worsened working conditions and, in particular, pay, even via collective bargaining in pejus. As Ramaux points out (Ramaux 2012: 674), this is an ‘intellectual hold up’ to keep on imposing neoliberal austerity reforms and fiscal consolidation, despite the fact that such reforms are destroying the economy and the labour market. Furthermore, Barnard points out that ‘there is a (...) insidious challenge to national labour law’, that comes from centre right governments ideology pre-disposed to deregulation’ (...) that have used the crisis as cover for some deregulatory push (Barnard 2013:

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48. 2013 European Semester: Country-Specific Recommendations Moving Europe Beyond The Crisis <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0350:FIN:EN:PDF>

251), as in the UK, Portugal put also Hungary. This is coupled with a narrative of flexicurity that clearly favours flexibilisation for the benefit of employers to employment security, thereby profoundly calling into question the protection of workers in the employment relationship and undermining the foundations of labour law.

European secondary law puts into effect European (Treaty) values and principles and, on the issue at stake, effective employment protection law against unfair dismissal on economic grounds. Instead of promoting further harmonisation of European law on dismissal, the European Union should secure better implementation of existing labour law and in particular the whole range of directives covering dismissal protection to ensure that provisions have a reasonably comparable effect in the member states. Furthermore, national labour laws, far from being the source of rigid and stringent rules, have proved to provide the adaptability needed to respond to the need to reduce economic activity while preserving job security (for example, with short-time working schemes). In this respect, deregulation of labour law is not the way out of the crisis, as demonstrated by the catastrophic unemployment figures and the lack of economic recovery. Additionally, as stressed by Professor Gaudu, there is an urgent need, especially in times of crisis, to rethink the flexicurity agenda, dissociating it from deregulation of collective redundancies and atypical employment in order to emphasise its role in the better and safer organisation of professional transitions (Gaudu 2011: 15–16).

Indeed, as Manuel Barroso said in his State of the EU Speech on 11 September 2013, ‘We will not return to the old normal. The crisis is a structural one. We need to establish a new normal’. However, this ‘new normal’ must comply with international, European and national constitutional values and principles and in particular labour law binding upon member states and European institutions, as embodied in the Lisbon Treaty. Such values and principles are the basis for Europe’s sustainable development based on a highly competitive social market economy, aimed at full employment and social progress, and a high level of protection, as well as the promotion of employment and the improvement of living and working conditions. This would make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour and the development of human resources with a view to achieving lasting high employment and combating exclusion. Only by fully respecting the Lisbon Treaty and the Charter of Fundamental Rights can a new economic governance of the European Union be implemented successfully with the aim of reducing the divergence – currently exacerbated by the economic and financial crisis – between economic and social integration, and return European citizens and workers to the centre of the European project.

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*All web page links were checked on 27 February 2014.*

#### **Electronic newsletters/websites**

- Eironline – <http://www.eurofound.europa.eu/eiro/> (reference period 2010–2014)
- ETUC website section on economic and social crisis
- ETUI website section on crisis: <http://www.etui.org/Topics/Crisis>
- Liaisons sociales Europe
- Planet Labor – <http://www.planetlabor.com> (reference period 2010–2014)

