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Future perspectives on dismissal protection in the European Union

For many employees as well as employers, the intensity of dismissal protection is – besides the earnings and the total cost of wage labour – one of the crucial features of labour law. The European Union has not yet enacted a comprehensive regulation of dismissal law. Thus, the regulations stem still from the Member States. This motivates firstly to evaluate the differences. Secondly, we should have a look onto the changes that occurred during the last lustrum in the Member States; most of them were triggered by the financial and debt crises of the last years. This leads to the third aspect I want to address here, namely the importance of the differences in dismissal law in a political and economic system such as the EU.

1. A satellite view on dismissal protection[1]

For decades, the European legal orders have restricted the employers' right to dismiss freely 'at will',[2] establishing rules that provide protection in the case of dismissal and protection against dismissal. However, any comparative look thereon has to start with a caveat regarding the scope of application of the national rules. Labour law usually does not reach undeclared work. The estimated share of undeclared work differs remarkably among the Member States. In some countries, it seems to be three times the share of other countries. Further, labour law and its dismissal rules apply mainly to employment contracts, but not to persons performing personal work outside this type of contract. This is especially relevant regarding those own-account-workers who have solely one or two clients and who therefore mostly are economically dependent upon their client. The share of autonomous labour differs as well remarkably among the Member States. Moreover, in most countries the rules governing the dismissal of employees apply only to employment contracts that are open-ended, not to fixed-term contracts. In some Member States, the share of fixed-term contracts is quite high and/or has risen during the last years. Finally, several countries have stricter rules for some groups of employees and less strict rules for others, namely those working in small enterprises. All these facts concerning the field of application of the rules on dismissal make it rather difficult to

[1] Cf. e.g. recently *Rebhahn*, Economic Dismissals – a comparative look with a focus on significant changes since 2006, ELLJ 2012/3.

[2] Cf. ILO-Convention No. 158 on Termination of Employment from 1982, and Art 24 of the European Social Charter (Revised) of 1996.

evaluate comparatively the protective effectiveness of national regimes, because the share of "outsiders" that are not or less protected varies remarkably and therefore the importance of a segmentation of the labour market differs remarkably. This makes it quite difficult assessing which national regime is stricter. Can we really say that a regime that protects only some, the core, very strongly, while it leaves many others unprotected or less protected, is stricter than a regime that protects a much greater share of those who work personally at a medium level?

The national solutions regarding the protection for employees with an open-ended contract differ without doubt in many details. The most important differences relate to the legal aim of litigation (compensation or continuation), the standards of review and the compensations due in case of justified and unjustified dismissals. However, it might be suggested that the differences were– and presumably still are – more fundamental, affecting the attitudes towards dismissals, in particular that for economic reasons (redundancy).

In most Member States, economic dismissals are considered as a rather 'normal' way of terminating employment, as an occurrence that might be unwelcome but is necessary for the functioning of a market economy. According to this approach, a dismissal for redundancy is justified if the workplace is suppressed, even if sales and profits of the business are satisfactory but the employer wants to use his capital differently. Members of this group include e.g., Britain, the Scandinavian countries, Belgium, Austria, most Middle-East-European countries and in practice Germany and the Netherlands, where pragmatism prevails. However, in a second, smaller group of Member States seemingly a different basic attitude prevails at least as a political agenda, namely that every employment should last until retirement, if the employee wants this. According to this approach, the possibility of dismissing employees for economic reasons is regarded as a an offending hardship which has to be endured solely as a mere concession to an unfriendly spirit of the age, and therefore it should be restricted as far as possible. In practice, nearly all countries of the second group nevertheless allow dismissal justified by a lack of work. However, the hurdles are higher, especially if the undertaking prospers, and a dismissal often costs the employer much more than it does in countries belonging to the first group. The second approach was widely held particularly in Greece, Spain, and Portugal, and to a lesser extent, in France and Italy. If my analysis should be correct, then one may doubt if there is a common core of rules on economic dismissal in Europe, as the basic attitudes towards dismissal seem to be quite different. Mental attitudes often matter more than technical legal details. The divergence in approaches to a main feature of labour market regulation is rather astonishing, considering that many of the countries mentioned belong since decades to a common economic structure, the European Community/Union with its Internal market.

Moreover, the basic attitudes could differ as well regarding a dismissal on personal grounds. The rules governing these dismissals deeply reflect the prevailing social standards with regard to the behaviour of employees as well as to their employability. It seems that some countries adopt much stricter standards than others do. I will give only one example. In Germany, it seems to be quite easier to dismiss in case of misbehaviour than in Sweden. A strict standard regarding personal dismissals does not necessarily go along with strict standards for redundancy. To continue my example, it seems that it is easier to dismiss for economic reasons in Sweden than in Germany, at least as far as the law is concerned. Strict standards that facilitate dismissals for personal grounds might favour productivity and efficiency of the economy. However, standards that are too strict remit employees with lower performance to unemployment or unattractive work places and might endanger social cohesion, which might encroach on productivity as well. In particular, the practice of some big American enterprises to dismiss annually the five per cent of their employees with the lowest performance obviously could not be generalised throughout the whole economy.

Further, many details of dismissal law differ remarkably. The periods of notice vary between one week and several months. Further, there is no harmony regarding severance payment. Statutory law provides for such payments in case of justified dismissal in many "old Member" states, particularly in France, Great Britain, Spain and Portugal, and some "new" Member States. However, some old and new Member States do not provide for severance payments at statutory level; this is the case in Germany, Sweden, Finland, the Netherlands, Belgium and Italy.

The same applies regarding the (other) legal consequences of an unjustified dismissal, whether the law allows for litigation for the continuation of employment, or whether it stipulates that the only possible remedy is compensation. Only a few countries restrict the employee to compensation from the outset; this applies e.g., in Belgium and Denmark. However, as a first step some countries open the way for the continuation of the employment contract, but then allow the employer to offer compensation instead, an offer that bars the employee from litigating for the continuation of the contract. This is the case particularly in Spain. Other countries only allow the court to award compensation instead of the continuation of the contract, even if the employee wants continuation. This rule is important in Germany, where most unjustified dismissals in fact lead only to compensation. Nowadays, only some Member States give the employee a real right to demand continuation even if the employer prefers compensation; this applies to the Netherlands, Portugal, Greece, Austria and Italy (in larger undertakings). In all other countries, the employee may find herself awarded only compensa-

tion. However, even in most countries where the employee is entitled to the continuation of employment contract, she cannot really enforce her reintegration into the workplace. This is only possible in a few countries like Italy, where it however applies solely to establishments with more than 15 employees.

Summing up, I doubt if there is a common core or model of dismissal law in Europe, as the differences are too big and seem to reflect an underlying economic controversy.

2. Recent developments

If we look at the development of dismissal law, especially in case of redundancy, during the last five years, the picture we find is quite multifaceted.[3] At the beginning we should note, that the changes that liberalised the rules affected other areas of labour law much more , namely working time, atypical work and collective bargaining.

Regarding dismissal law, some countries left their rules mainly unchanged, such as Germany, Austria and the Scandinavian countries. A second group changed the rules modestly, but the changes rarely affected the major issues of dismissal protection. A third group of countries introduced quite material changes. I will cite only some of the most important changes from this third group. Britain extended the qualifying period for dismissal protection from one to two years in 2012, which reduced the scope of protection quite remarkably. Spain enacted two reforms in 2010 and 2012. They abolished the prerequisite of an administrative authorisation for mass dismissals, reduced the amount of severance pay due in case of justified and unjustified dismissal, and added new justifications for dismissal. Already in 2003, the employer was empowered to bar litigation against an economic dismissal by paying the severance payment. Italy simplified the procedural rules in 2012, which might lead to faster litigation and to a reduction of the arrear payments due in case of an unjustified dismissal. The Government had proposed a farther-reaching reform, namely the switch from continuation of employment to (high) compensation in case of an unjustified dismissal (the court should award between 15 and 27 monthly salaries); however, Parliament repudiated this. In Slovenia, the new Labour Code of 2013 abolished in fact the principle that a dismissal should be the ultima ratio, especially it sharply reduced the employer's obligation to look for another job-opportunity. In Greece, several specific protection regimes that went further than the general rules were abolished (however, the necessity of an administrative authorisation for a mass

[3] Cf ETUI. Benchmarking Working Europe 2013; EU-Commission, A decade of labour market reforms in the EU: trends, main features, outcomes, in: Labour Market Developments in Europe 2012, EUROPEAN ECONOMY 5/2012, 64 ff; FORBA, Die Finanzkrise und ihre Auswirkungen auf Sozialstaaten und Arbeitsbeziehungen – ein europäischer Rundblick (Vienna, 2012); *Rebhahn*, ELLJ 2012/3.

dismissal seems to be still in force). Finally, only a few countries discussed restricting dismissal for redundancy. This is especially the case in France since 2012. There, the Government recently proposed an amendment that will restrict dismissals if a plant should be closed that makes money.

Thus, many Member States reduced the protection in case of dismissal. Most of these changes were enacted in the shadow of the financial and sovereign debt crisis that ravage Europe since 2008. Many economists think that the intensity of Employment Protection Legislation (EPL) is a key factor for economic performance. According to economic analysis, a restrictive EPL appears to be robustly associated with lower job finding rates, less strongly with job destruction rates. In consequence, also many institutions recommended reducing dismissal protection in those countries where protection is stricter than in others. In particular, the EU-Commission, notably the Directorate-General for Economic and Financial Affairs,[4] and the so-called Troika demanded such changes as a quid-pro-quo for the financial assistance. They obviously believed that flexible labour market institutions will enhance new employment and that less protection is a step toward such flexibility. Critics however argue that the reforms have not impeded the rise of unemployment, as especially the experiences in Spain and Portugal demonstrate.

It is, not only for lawyers but also particularly for them, difficult to assess the relationship between the features of EPL and the level of employment. It seems obvious, that the exorbitant level of unemployment that prevails today in not a few Member States is not caused by a high level of EPL, but by other factors. However, the rise in unemployment then does not prove either that lowering a comparatively strong standard of protection cannot help to create employment. According to my view, the main question relates to the segmentation of the labour market. The more EPL leads to such segmentation, the more it makes it difficult to create stable jobs and evade precarious work-relations. A very strict protection against dismissal, which covers only a (minor) part of all people who work personally, apparently contributes to such a high segmentation. According to a widespread opinion, a high segmentation is detrimental to economic efficiency and poses problems of social justice.

Besides, a high degree of labour market segmentation might reflect the basic attitude of the society concerned towards an open labour market that offers fair chances to all people working personally throughout their working life. A high segmentation might indicate that this society has less esteem for fair competition than societies with a less segmented labour

[4] Cf recently the analysis on Macroeconomic implications of Employment Protection Legislation, in: EU-Commission, Labour Market Developments in Europe 2012, EUROPEAN ECONOMY 5/2012, 80 ff.

market.

Regarding the legal sphere, we should also remind ourselves that the new Charter of Fundamental Rights of the European Union, which came into force in 2009, contains a provision related to dismissal protection. Article 30 states: "Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices." This provision undoubtedly establishes the stability of an employment contract as a value recognised by Union law. However, one may doubt if Article 30 yet binds the Member States regulating their rules on dismissal as far as a Directive does not predetermine them. According to Article 51 EUCFR, the Charter solely binds Member States 'implementing Union law'. The EU has not legislated comprehensively on the question of when a dismissal is justified or on the consequences of an unfair dismissal. Thus, the Member States do not implement secondary law when they regulate these matters. Further, the national rules on dismissal do not seem to interfere with economic freedoms. However, some argue that the existing secondary legislation already regulates the material aspects of dismissal law implicitly, because several Directives explicitly or implicitly protect employees in some way against a dismissal that is not sufficiently justified.[5] If one follows this reasoning, one may ask what Article 30 requires exactly.[6] It seems to require only a tribunal to review a dismissal to determine whether the employer can justify it on reasoned grounds, but it does not require a specific high standard of review. Thus, the low standards in Sweden or Britain, and mere compensation would comply with Article 30. Therefore, the modifications that some countries have made regarding justification for economic dismissal seem to conform to the spirit of Article 30.

3. Prospects in an Internal Market and an Economic Union

The third aspect I would like to address concerns with the differences of this important part of Labour law in a political and economic system such as the EU. We should ask how far differences in dismissal regulation are compatible with a fully developed Internal Market and a system that relies increasingly on financial transfers between the Member States.

Article 153 TFEU on Social policy seems to allow legislating on many if not most matters of Labour law. However, there are different hurdles to use this competency. The most

[5] Prof Numhauser-Henning at the Conference in Frankfort put this proposition forward in 2012. Primarily, one therefore invokes the rules against an unlimited use of consecutive fixed-term contracts; these rules would not make sense if employers were allowed to terminate an open-ended contract without any justification.

Further it was put forward, that a demand of the Troika, which is grounded on Union law, leads to the applicability of the Charter. Cf in this context ECJ 7.3.2013, C-128/12, Sindacatos dos Bancarios do Norte.

[6] Cf. e.g. *Bruun*, Protection against unjustified dismissal, in Bercussion (ed.), European Labour Law and the EU Charter of Fundamental Rights (2006), 337.

important hurdle in this context flows from Article 153 TFEU paragraph 4 stating that legislation based onto this article "shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties." Therefore, Article 153 TFEU allows only for Labour legislation that can be altered by the MS in favour of the employed and thus only to establish a "floor of rights". Thus, social directives cannot lead to real harmonization (approximation), but can procure only a harmonized minimum standard. In particular, the reservation of better protection likely excludes to use Article 153 TFEU for Directives that prescribe a "corridor" allowing the Member States to choose a rule inside this corridor.[7] An example would be a Directive that sets a minimum and a maximum standard for the period of notice; the reasons required to justify a dismissal or for the payment due in case of justified and unjustified dismissal. Real harmonization of labour legislation could therefore be achieved only if Union legislation is adopted pursuant to another competence, which albeit seems barely conceivable at the moment.

Different regulations of labour law in general and of dismissal law specifically barely hinder the free movement of employees or that of undertakings. Such differences could however hinder the free movement of services, if the posting employer would have to apply the whole range of labour law that is in force in the host state. However, the ECJ construes the Posting Directive in a way that restricts this application to a minimum; further, it tries to reduce the possibilities of the host state to control. Besides, the example of the United States of America shows that diverse regimes of employment law (contract law) are quite compatible with an internal market.[8] Thus, the divergence of labour law regimes inside the Union poses primarily economic problems. In the past, it was widely held that different costs of labour were merely a matter of competition: Competition inside the internal market could lead to an approximation of the labour standards of the Member States, unless some of them use specific standards (not only for social reasons but also) as a tool to compete (e.g. if they believe that higher standards also increase productivity). However, hitherto the internal market barely led to a real approximation of labour law. Beside the divergences in dismissal law there are still other important differences, such as those regarding the importance of collective agreements. In my view, different standards of labour law are also from an economic point of view quite compatible with an internal market as such.

However, it might be questioned how far this assessment could further prevail in a

[7] Cf. Busch K., Das Korridormodell: ein Konzept zur Weiterentwicklung der EU-Sozialpolitik, IPG 1998, 147. This corridor model was then favoured by the German Social democrats, but – to my opinion unfortunately – not welcomed by other MS.

[8] In the USA, only Collective Labor Law is federally regulated, whereas Employment Law is widely left for regulation by the States. In the European Union, the situation is rather the reverse.

changing surrounding, namely in a Union that establishes an economic governance and a transfer union that goes much farther than up to now. The new instruments of economic governance inter alia provide for guidelines regarding the evolution of labour costs and thus primarily of wages. These guidelines will affect primarily the freedom of the social partners to conclude collective agreements. However, these guidelines do not necessarily affect the content of individual labour law, as they focus more on the overall costs than on the details of regulation. To the contrary, an intensified transfer union might induce an approximation of social law not only for economic, but also for social reasons. This will apply primarily to social benefits. It might seem inappropriate if e.g. the net replacement rate of the pensions system is much higher in a country that receives financial help than in the countries that help. Transfers are a sign of solidarity, which usually requires reciprocity. However, an increased and substantial transfer system might lead also to a demand for approximation at least regarding some central pieces of labour regulation. This might apply in particular to dismissal law, as the employees in the country that helps might find it inappropriate if the employees in the other country have to endure much less flexibility at the workplace than they have.

Thus, the development of dismissal law in the near future might be quite interesting, at least from a lawyer's point of view.