1. INTRODUCTION

Dismissal law is traditionally a controversial issue across Europe. The Treaty on the Functioning of the European Union (TFEU) explicitly grants legislative competence to the European Union in the field of dismissal law. Article 153(1)(d) TFEU authorises the European Parliament and the Council to adopt, by means of Directives, minimum requirements as regards the protection of workers whose employment contract is terminated. Therefore, the Council shall act unanimously and in accordance with a special legislative procedure, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.

Nevertheless, it does not seem very likely that the 27 Member States of the EU will agree on legislation in this area at the European level in the near future. At present, three approaches in this area seem feasible, however: firstly, the idea of setting a common floor of rights; secondly, the protection of precarious workers; and thirdly, the definition of common principles of dismissal law. In this contribution, these three approaches are briefly discussed to consider the options for the development of European Union labour law in general, and more specifically in the field of employment protection.

2. A COMMON FLOOR OF RIGHTS

The idea of a ‘common floor of rights’ is usually used to promote a set of rules covering all workers, regardless of the status of their contract. This implies that certain basic rights are common to every type of worker, including workers without an employment contract. These basic rights include, for instance, protection against discrimination, the right to organise in unions, and the protection of health and safety. Other more advanced rights like the protection of minimum wage, or against unfair dismissal, are

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not part of the floor of rights, since they can be restricted to specific groups of workers, like those with a (permanent) employment contract.

An example of this approach can be found in the United Kingdom, where a distinction is made between 'workers' and 'employees'. 'Employees' under UK law are individuals who work for an employer under the terms of a contract of employment.¹ 'Workers' refers to individuals who work for an employer, be it under a contract of employment or not.² Workers without an employment contract include temporary agency workers, casual workers and certain freelance workers, albeit not genuinely self-employed persons. All employees are therefore workers under UK labour law, but not all workers are employees, and genuinely self-employed persons are not deemed to be 'workers'. An employment tribunal or higher court may have to determine a person's contractual status in cases where this may be disputed. Such disputes can be of significance for those involved because the rights of employees and workers differ.

All 'workers' are entitled to certain rights: equality of opportunity (non-discrimination); the national minimum wage; health and safety; working time entitlements such as paid annual leave, daily and weekly rest breaks, protection against unlawful deductions of wages, and the right to be a member of a trade union. However, other rights including, amongst others, those relating to unfair dismissal, redundancy and some parental leave rights, are restricted to employees. This is largely because these rights confer entitlements that are only considered applicable to permanent employment relationships, or require a person to have worked for an employer for longer than a specified period of time (or 'qualifying period'). By the same token, workers do not have the same legal responsibilities as employees (in principle, the option to choose when and whether to work, etc.).³

With regard to dismissal law, the 'floor of rights' approach is usually ineffective, as protection against unfair dismissal is considered to be an advanced right that usually is not considered to belong to the floor of rights.

To a certain extent, one can argue that the 'common floor of rights' approach is already being pursued by the EU. Important parts of EU labour law deal with health and safety,⁴ working time and annual leave,⁵ and protection against discrimination.⁶

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² Idem.
³ Idem.
⁶ E.g. the Directives on equal treatment in employment: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L180/22);
Only the right to a minimum wage, protection against unlawful deduction of wages and the right to join a union are not yet protected by the EU. Supporters of this approach might assert that the EU ought to embrace the concept of a ‘common floor of rights’ as a goal for the EU level as well. Following this line of reasoning, one could argue that the EU should give priority to the achievement of a common floor of rights. Protection of minimum wage at the European level does not seem very realistic considering the substantial differences between the wage levels in the various EU countries. However, the other areas (protection against unlawful deduction of wages and the right to join a union) could, without much controversy, be subject to EU legislation because they are already part of the labour law of most EU Member States. For example, the right to become a member of a union is already guaranteed in the European Convention on Human Rights and Fundamental Freedoms, as well as in the European Social Charter. Endorsement of this right by the European Union, however, would imply that its enforcement could be improved. In that respect, the EU would be more capable than the Council of Europe to create a level playing field within the entire Union.

An argument against this approach (restriction to the common floor of rights) could be that in certain areas of labour law at EU level, social rights have already been developed beyond this floor of rights. This concerns, for instance, the transfer of undertakings, information and consultation of employee representatives, and parental leave. Embracing this approach could also imply that the EU might abandon the ambition to go further than a very minimal form of protection for its workers. This would not only imply a structural change in the aims of European social policies, but would also not contribute to the promotion of a common European labour market.

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7 Which is mainly a result of the fact that these issues are explicitly excluded from the competence of the EU by Article 153(5) TFEU.

8 Although arguments have been made that this issue is regulated through the ‘backdoor’, since it is on the policy agendas of the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF). In this respect, the OECD Jobs Study and its influence on the development of the European Employment Strategy can serve as an illustrative example of the result that can come from such influence. See on this more elaborately, D. Ashiagbor (2005), The European Employment Strategy. Labour Market regulation and New Governance. Oxford Monograph on Labour Law: Oxford University Press, p. 74–100.


10 A current development that has been deduced by several scholars from the introduction of the European employment strategy. Cf. Barnard (2006), op. cit. note 4, p. 137; and M. Freedland (1996),
For good order's sake, it should be noted that the 'common floor of rights' approach is to be distinguished from the 'core rights' policy of the International Labour Organisation (ILO). In this view, certain rights are emphasised as being essential for decent working conditions. This policy, however, does not deal with the scope of the legislation. Dismissal legislation also does not form part of this policy.

3. PROTECTION OF PRECARIOUS WORKERS

The EU’s social policies have focused specifically on what was initially called 'atypical employment'. In the EU’s Green Paper on Labour Law, a distinction was made between 'standard' and 'non-standard' types of contracts. 11

Directives for the protection of part-time workers, fixed-term workers and temporary employment agency workers have been enacted. 12 The basic idea behind these types of legislation has been that workers in Europe used to traditionally be employed on the basis of a standard employment contract for an indefinite term. Other types of work are considered deviations from the standard contract. 13 These new forms of work have largely been applied in the EU countries since the 1980s, and have established a new situation in which many workers no longer enjoy the protection of a standard employment contract. In order to attain employment security for these groups of workers, some minimum standard of legal protection against discrimination and against the abuse of these forms of work had to be developed. Furthermore, due to the highly divergent regulations in the Member States, the proliferation of these forms of work required some streamlining to promote a minimum level playing field in the European Union, as was highlighted in the 1989 Community Charter of the Fundamental Social Rights of Workers. 14

13 Cf. European Commission, op. cit. note 11, p. 5, that also makes reference to the research study 'The Employment Status of Individuals in Non-Standard by Employment', by B. Burchill, S. Deakin, S. Honey, and the UK Department of Trade and Industry (1999), who identify non-standard forms of employment as 'those forms of work which depart from the model of the “permanent” or indeterminate employment relationship constructed around a full-time, continuous work week.'
The question of whether the terms ‘standard’ and ‘non-standard’ contract are still accurate is a valid question, considering that the number of non-standard contracts has increased substantially over the years in some countries.\(^\text{15}\)

It must also be noted that many countries have a number of other distinctions that are not covered by the ‘ideal types’ of the ‘standard’ and the ‘non-standard’ contract. The above mentioned UK distinction between employees and workers is one example which does not parallel the distinction between the terms ‘standard’ and ‘non-standard’ employment. For instance, persons with a part-time employment contract or working on a fixed-term contract with an employer are employees in the UK, even though they are non-standard workers. In the UK context, it can therefore be misleading to suggest that there is an imbalance in employment rights between ‘standard’ and ‘non-standard’ forms of work. The relevant distinction to be made in considering any such imbalance is that between workers and employees.\(^\text{16}\) The personal scope of national dismissal legislation is important for answering the question of which workers are covered by which part of the dismissal legislation. The analysis is the 2011 Report of the European Labour Law Network (ELLN), which shows that to a certain extent, ‘precarious workers’ are also protected against dismissal.\(^\text{17}\)

A second point that warrants attention within the scope of this discussion is the idea that the longer the relationship lasts, the more protection the worker should receive. This idea is also referred to as the ‘flexicurity’ approach. The most evident example of this is the distinction between fixed-term contracts and open-ended contracts.\(^\text{18}\) Promoted by the Fixed-Term Directive, the EU countries today all have legislation for the protection against the abuse of fixed-term employment contracts.\(^\text{19}\) However, problems continue to exist, one example of which is the different treatment of fixed-term contract workers with regard to the probationary period. Although there are considerable variations between the 30 EEA countries in terms of length of the statutorily allowed probationary period and the termination

\(^{15}\) Cf. House of Lords European Union Committee (2007), op. cit. note 1, p. 18.

\(^{16}\) See, for a general overview on the personal scope of dismissal protection law within the 30 EEA countries, the 2011 report of the European Labour Law Network, op. cit. note 15, p. 32–34.


\(^{15}\) The ‘flexible firm’ model in which employers increasingly segment their workforce into a ‘core’ of full-time staff, for whom functional flexibility is the norm and a ‘periphery’ of part-time, fixed-term and casual workers being employed on the basis of numerical and financial flexibility.


of the contract during the probationary period, a general principle applies, namely that at the beginning of an open-ended contract a probationary period is allowed, and that the freedom of the employer to dismiss the employee is greater during this period. This period of less or no dismissal protection for the employee is, in most of the 30 EEA countries, strictly limited, among others by the fact that consecutive probationary periods, either in an open-ended contract or in consecutive fixed-term contracts, is prohibited. To circumvent these rules, employers are tempted to 'test' their new employees with the use of fixed-term contracts. This situation illustrates the link between the probationary period and the fixed-term contract. The European Union could consider extending the legislation on fixed-term contracts to the closely connected probationary period. A first step towards legislation in this field could be to introduce a maximum length of probation or to provide more dismissal protection in accordance with the length of the probationary period.

A third relevant aspect is the different rules for small and large companies. Many countries have tried to relieve smaller enterprises from the burden of extensive labour legislation. For instance, Germany only applies dismissal legislation to employers with more than 10 employees and to employees with a length of service of more or less than six months. The question is whether such a distinction between workers is compatible with Article 30 of the EU Charter on Fundamental Rights. The TFEU requires specific attention to be paid to the position of medium- and small-sized enterprises. However, this protection does not necessarily imply that these companies are to be fully exempt from dismissal legislation. It can also lead to a form of employment protection that is adjusted to the size of the company. German courts have developed a certain protection against the dismissal of employees in small companies in spite of the statutory exemption from the dismissal regulation.

21 The 2011 report of the European Labour Law Network, op. cit. note 15, p. 49, shows that this is the case within the vast majority of the 30 EEA countries. In some countries, however, the probationary period is established by a fixed-term contract (Bulgaria, Latvia, Poland and Sweden).
22 The exception is the United Kingdom, which may have less need for separate rules on the probationary period as a result of the extensive use of fixed-term contracts.
23 This practice has been highlighted by some legal experts of the European Labour Law Network (e.g. France, Poland and Slovenia) in their responses to the questionnaire that forms the basis of the 2011 Report of the ELLN, op. cit. note 15, p. 50.
25 Idem.
26 Article 30 of the EU Charter reads: 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.'
27 Article 153(1)(d) TFEU provides the EU with the competence to adopt, by means of a Directive, minimum requirements regarding the protection of workers where their employment contract is terminated, whereas paragraph 2(b) of this Article stipulates that 'such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.'
approach may also be interesting for the development of dismissal protection at the European level, particularly for workers in precarious positions.

4. COMMON PRINCIPLES OF DISMISSAL LAW

This third approach to dismissal protection at the EU level – the definition of common principles of dismissal law – could result in the agreement on certain basic principles of employment protection in the field of dismissal law between all Member States. As indicated in the previous section, protection against unfair dismissal is one of the basic values of the European Union. Article 30 of the Charter of Fundamental Rights of the European Union mentions that every worker has the right to protection against unjustified dismissal in accordance with Community law and national laws and practices. Furthermore, this fundamental right is supported by Article 153(1)(d) TFEU that provides the EU with the competence to adopt measures in respect of this subject, in order to either complement or support the Member States. However, so far, not much has been published on what this principle means for the Member States, and what it should mean for the EU. This section therefore examines what common principles can be distinguished, and what that could mean in terms of EU level employment protection.

4.1. PRINCIPLES FOUND IN THE REVISED EUROPEAN SOCIAL CHARTER

Article 53 of the EU Charter stipulates that: ‘nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective fields of application, by Union law and international law, and by international agreements to which the Union or all the Member States are party […]’. This link to international standards may make it possible to understand Article 30 EU Charter as recognising, at least, the essential requirements laid down in the more specific Article 24 of the Council of Europe’s revised European Social Charter.\(^{29}\) This may pave the path for that source to become relevant for EU law.

Protection against unfair dismissal was not part of the original European Social Charter of the Council of Europe of 1961. This was introduced in Article 24 of the revised European Social Charter. The revised European Social Charter has been ratified by 19 of the 30 EEA countries.\(^{30}\) Out of the 19 countries that have ratified the revised European Social Charter (further: rESC), four countries have made a


\(^{30}\) Not (yet) ratified by Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Liechtenstein, Luxembourg, Poland, Spain and the United Kingdom. See, for a full overview of signatures and ratifications, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG.
reservation regarding Article 24. As a result, Article 24 rESC has only been ratified by 15 of the 30 EEA countries, exactly half of the group. Nevertheless, in the past all EU Member States traditionally were party to this Charter, and the number of ratifications may increase over time. Moreover, the fact that half of the countries are already bound by Article 24 rESC may be reason enough to let it inspire EU legislation.

Article 24 of the revised European Social Charter reads:

‘With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.’

The appendix of the European Social Charter gives the following explanation of Article 24:

1 It is understood that for the purposes of this article the terms “termination of employment” and “terminated” mean termination of employment at the initiative of the employer.

2 It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons:
   a workers engaged under a contract of employment for a specified period of time or a specified task;
   b workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;
   c workers engaged on a casual basis for a short period.

3 For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:
   a trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;
   b seeking office as, acting or having acted in the capacity of a workers’ representative;

31 These four countries are Austria, Belgium, Hungary and Sweden. See, for a full overview of reservations, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG.
32 These 15 countries are Bulgaria, Cyprus, Estonia, Finland, France, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Portugal, Romania, Slovak Republic, and Slovenia.
Common Ground in European Dismissal Law

c. the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

d. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e. maternity or parental leave;

f. temporary absence from work due to illness or injury.

4. It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.

From Article 24 rESC, the following basic principles of dismissal protection can be derived:

a. that every worker shall have the right to protection against dismissal without a valid reason;

b. that what is regarded as a dismissal without a valid reason must be specified in a binding source (in accordance with national law and practices). This covers both so-called individual and collective/economic reasons for dismissal;

c. that every dismissed worker is entitled to be informed of the reason for dismissal in order to be able to evaluate whether it is justified;

d. that every worker must be entitled to appeal to an impartial body in case of dismissal; and

e. that every worker who has been dismissed without a valid reason must at least be entitled to adequate compensation or other appropriate relief.

The Thematic Report 2011 of the European Labour Law Network presents information on the question of whether this has, to date, been achieved in the 30 EEA countries. From this report, the following conclusions can be drawn:

a. All countries provide for protection against dismissal. However, not every country requires valid grounds for dismissal, but protects against unjustified (unlawful, unfair) dismissals in the sense that the grounds for dismissal can be tested.

b. What is considered an unjustified dismissal is specified in a binding source in all countries, either in legislation, collective agreements, or in case law from the courts.

c. Workers in every country are entitled to be informed of the reason for dismissal.

33 In Austria, Denmark, Greece, Iceland and Liechtenstein, persons can be dismissed without providing a reason. See the 2011 Report of the European Labour Law Network, op. cit. note 15, p. 53.

34 Although not specifically defined in the 2011 Report of the European Labour Law Network, op. cit. note 15, this can be deduced from several sections in the report. These are section 7.1 (p. 52–53), sections 7.3 and 7.4 (p. 53–55), and section 9.2.2 (p. 89–91).

d. Every worker is usually entitled to appeal to an impartial body, often a court, sometimes other bodies.\textsuperscript{36}

e. Every system includes forms of financial compensation for dismissal, but these are not necessarily linked to the absence of a valid reason.\textsuperscript{37}

4.2. PRINCIPLES FOUND IN ILO CONVENTION NO. 158

Article 24 rESC is inspired by ILO Convention No. 158 on Termination of Employment. This Convention – almost unanimously endorsed by the International Labour Conference of 1982 – has currently been ratified by 9 of the 30 countries of the EU and EEA.\textsuperscript{38} Since the ILO Convention contains minimum requirements for dismissal law at a global level, it is remarkable that only such a small group of EEA countries has ratified it. Also, in preparation for the 2011 Thematic Report of the European Labour Law Network, many national experts reported that this Convention did not play an important role in their countries. Countries did not comply with all areas of the Convention. Nevertheless, it is interesting to examine which requirements of this Convention are generally met by these countries.

The ILO Convention basically contains the following rights:

a. a valid reason for termination (Article 4);

b. a list of invalid reasons (Articles 5 and 6);

c. the opportunity to defend in advance (Article 7);

d. appeal to an impartial body (Article 8);

e. division of the burden of proof (Article 9);

f. sanctions: reinstatement or financial compensation (Article 10);

g. notice period (Article 11);

h. severance allowance or social security unemployment benefits (Article 12); and

i. rules for collective dismissals (Articles 13 and 14).

The first thing that can be noted from this list is that it is remarkable that the global ILO standards are more extensive and detailed than the regional standards of the revised European Social Charter. However, this may be due to the specified character of ILO Conventions compared to the general character of the European Social Charter as a human rights treaty. Secondly, when this list of rights is compared with the findings in

\textsuperscript{36} Cf. 2011 Report of the European Labour Law Network, \textit{op. cit. note 15}, p. 95–96 (especially table 12, which provides an overview of litigation possibilities within the 30 EEA countries).

\textsuperscript{37} Cf. 2011 Report of the European Labour Law Network, \textit{op. cit. note 15}, p. 78–81 (which covers section 9.1.2 that describes the underlying reasons for, and regulation of, severance payments) and p. 91–94 (especially table 11, which provides an overview of remedies in the case of unlawful dismissal).

\textsuperscript{38} Cyprus, Finland, France, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden have ratified ILO Convention 158 (see, for a full overview of ratifications, www.ilo.org/dyn/normlex/en/f?p=100 0:11300:460504624962861::NO:11300:P11300_INSTRUMENT_ID:312303).
the 2011 Report of the European Labour Law Network, the following basic principles of European dismissal law might be acceptable to all or at least most of the 30 EEA countries, since they are, to a certain extent, already recognised in these countries.

a. The principle of a valid reason is recognised in the majority of countries. Only a few countries do not recognise this principle, which, nonetheless, seems to be very characteristic of the European approach to dismissal protection.\(^{39}\)

b. Lists of invalid reasons are either already recognised in European Directives\(^{40}\) or in all national law systems.\(^{41}\) The lists will not always equate with the ILO list, but are comparable. The EU could harmonise these lists or formulate a generally accepted basic list.

c. The right of an employee to defend himself against dismissal in advance is also recognised in several countries.\(^{42}\) The form of organising this may differ from country to country.

d. Appeal to an impartial body is recognised,\(^{43}\) also because of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Some specific procedures in the Member States may be seen as problematic in this respect,\(^{44}\) whereas others provide more procedures that make it easier for employees to access a court.\(^{45}\) However, it is important for this principle to be respected EU-wide as a basic legal value.

e. Most of the EEA countries have specific rules on the burden of proof.\(^{46}\) The ILO Convention is in this respect somewhat vague, however. The subject is settled in various ways across Europe. However, a basic general principle could be that the employer has to give reasons for the dismissal, and therefore has to prove that

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\(^{40}\) E.g. employee representatives/delegates are not only protected by national legislation, but are, for instance, also protected by Article 7 of Directive 2002/14/EC (framework Directive on information and consultation, OJ 2000, L80/29) and Article 10(3) of Directive 2009/38/EU (on the establishment of European Works Council, OJ 2009, L122/28). Pregnant employees, besides national law, are also protected by Article 10 of Directive 92/85/EEC (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ 1002, L348/1), and employees on parental leave are also protected by Clause 5(4) of the revised framework agreement on parental leave that has been adopted by Council Directive 2010/18/EU (OJ 2010, L68/13). See also on this the 2011 Report of the European Labour Law Network, op. cit. note 15, p. 37–38.


\(^{44}\) E.g. in Denmark and the Netherlands, where it is not possible to appeal the decision of the joint committee and the administrative office, respectively. Cf. 2011 Report of the European Labour Law Network, op. cit. note 15, p. 98.


these exist. Perhaps a relationship between the burden of proof in discrimination cases and the relevant Directive can be found.

f. By offering the choice between reinstatement/re-employment or financial compensation, most EEA countries have a sufficient sanction against unfair dismissal. The EU should not choose between various options and practices, but should merely guarantee effective enforcement as is usual in all Directives.

g. The principle of a notice period is recognised by most countries. The length of notice periods varies highly, also in connection with national systems of severance payments and unemployment benefits, but the principle could in general be recognised.

h. Most countries provide for severance allowances and/or social security benefits in case of unemployment.

i. Rules for collective dismissals are already foreseen in an EU Directive.

4.3. OTHER GENERAL PRINCIPLES OF DISMISSAL LAW

On several issues, the 2011 Report of the European Labour Law Network shows that new principles are recognised within the countries that are not yet reflected in European or international legal documents:

a. Regarding the rules on the selection of employees, there are a number of different systems. One general principle could be that the criteria should be objective and determined in advance. This could cover all kinds of objective criteria, like seniority, age patterns or agreements with unions.

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47 Cf. 2011 Report of the European Labour Law Network, op. cit. note 15, p. 104–105, particularly table 15, which gives an overview of the organisation of the burden of proof. In principle, the burden of proof lies with the employer, except in Austria, Belgium, Estonia, France, Greece, Iceland, Lithuania and Poland, where the principle of *actori incumbit probation* (burden of proof on the initiator of the procedure) is followed.


50 Cf. 2011 Report of the European Labour Law Network, op. cit. note 15, p. 25–26, which includes table 1 that provides an overview of statutory minimum periods of notice to be taken into account by the employer. See Annex 1 to the report for a more detailed overview on the notice periods that need to be observed by the employer.


54 Cf. 2011 Report of the European Labour Law Network, op. cit. note 15, p. 71–73, where five criteria are described by means of examples. These criteria are: a. seniority principle (examples: Sweden...
b. The principle of 'managerial prerogative' leaves room for the management to take decisions that are required by the business. This principle is found in many national systems, but the impact on the scrutiny of a dismissal seems to vary significantly. However, it could be accepted as a general principle, acknowledging the fact that the actual form of the concept can differ from country to country.

c. The principle of proportionality (and the 'ultima ratio' principle as part of it) implies that whether alternatives to dismissal – like training, re-employment and guidance in outplacement – are possible, is investigated. This is another example of a principle that is accepted to some extent in many countries, but with very different implications in practice. Nevertheless, it could be recognised as a basic principle of dismissal law in Europe. It seems to be of growing importance across Europe. Several countries are trying to promote alternatives to dismissal. Although the EU already plays a positive role in this through its employment strategy, which includes the idea of flexicurity, of which further employment, (re)training and lifelong learning are part of, it could strengthen its role in promoting modern ways of resolving employment problems by supporting forms of re-training and replacement of workers from industries that are suffering, like manufacturing companies, to new developing branches, such as information and services industries.

d. Dismissal on the grounds of incapacity of the employee is an area that is not extensively dealt with in the national systems of labour law. In most cases, the

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55 See, for an impression of the variety 2011 Report of the European Labour Law Network, op. cit. note 15, p. 59–60, where the extent of judicial review of dismissals for business reasons is described, which essentially takes three different forms: a. judicial review of entrepreneurial decisions as such; b. judicial review of the implementation of a decision by the employer; and c. judicial review of business needs.


59 In particular, as part of the ultimo ratio principle, which means that dismissal is regarded as being necessary and is a last resort after all other possibilities of further employment of the employee have been singled out. These other possibilities include: a. further employment in the undertaking or company; b. further employment within a group of companies; c. further employment after modification of terms; and d. further employment after retraining or further training. See more elaborately: 2011 Report of the European Labour Law Network, op. cit. note 15, p. 67–69.


61 This conclusion is based on earlier drafts of the 2011 Report of the European Labour Law Network that included lists of grounds for dismissal relating to the employee, among which were reasons
grounds for dismissal are based on economic grounds on the part of the employer or on the personal misconduct of the employee. However, the third reason for dismissal, related to incapacity, may become more important in light of the new qualifications required of employees in this era of new technologies. Adaptation to new working methods and computer software and rapidly changing tasks are demanding a lot in terms of the flexibility of employees. Dismissal on this ground – incapacity due to new qualification requirements – could be prevented by paying more attention to the acquisition of skills, life-long learning programmes, and redeployment. 62 Here, too, if Europe was to promote action in the field of employment protection, this could be an area in which Europe could facilitate new developments that contribute to a proper functioning of the European economy, as well as to new ways of promoting employment protection. 'Employability' could become key in modernising Europe's social model.

To conclude this section, one can say that huge differences exist between the dismissal laws of the 30 EEA countries, but these differentiations are not so much found in the basic principles, rather, they are found in aspects such as length of notice periods and the level of severance payments. These aspects are clearly related to the economic welfare of the specific country, and should therefore be left to the national labour relations. Important differences also exist with regard to the intensity of the scrutiny of the employer's managerial prerogatives, the alternative measures employers have to consider instead of dismissal, and the procedures that are to be followed, and bodies to be consulted. These differences do not, however, touch upon the basic principle as such.

5. CONCLUSIONS

In this paper, three approaches of the role of EU labour law in employment protection were outlined.

The 'common floor of rights' approach could be chosen, but would not affect employment protection. This approach could result in some additional measures at the European level, however it seems insufficient as an overall foundation for European labour law.

If the approach of focusing on the position of precarious workers were selected, one could use the probationary period as a link between fixed-term and open-ended contracts. Another priority could be to adapt the protection for workers of small and medium-sized enterprises.

62 A problem that has generally also been identified within the realm of the European employment strategy. Cf. European Commission (2010), op. cit. note 60.
A more challenging form of employment protection at the European level would be the formulation of principles of dismissal law in the EU. In order to reach a more comparative playing field in dismissal law between the countries without losing the diversity of traditions in labour relations, the ‘principles of dismissal law’ approach could be fruitful. The Thematic Report 2011 of the ELLN indicates that in spite of all the differences between the Member States, several principles are acknowledged in the majority of countries. These principles have partly already been formulated in the revised European Social Charter and the ILO Convention No. 158. Introducing them into European legislation would promote their enforcement. However there are also some principles of dismissal law that are not yet recognised at the European or international level in legislative form.

Some of the latter principles (like the principle of proportionality and measures in the field of training and promoting employability) could be used to let European labour law play a role in the modernisation of labour markets. Policy on these issues should not necessarily take the form of legislation. Alternative methods like the Open Method of Co-ordination could also be of use in this respect.