1. Introduction

Dismissal law is traditionally a controversial issue across Europe.

The Treaty on the Functioning of the European Union explicitly grants legislative competence to the European Union in the field of dismissal law. Article 153 par. 1(d) authorizes 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 to be gradually implemented. The Council shall act unanimously in this area 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 on the European level in the near future.

At present, three approaches in this area are feasible:
- The idea of a common floor of rights
- The protection of precarious workers
- The common principles of dismissal law

In this paper, these three approaches are briefly discussed to consider 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 not part of the floor of rights, but 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. ‘Workers’ refers to individuals who work for an employer, be it under a contract of employment or not.

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 opportunities (non-discrimination), national minimum wage, health and safety, working time entitlements such as paid annual leave, daily and weekly rest breaks, protection against unlawful deductions from 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.). ¹

With regard to dismissal law, the ‘floor of rights’ approach is usually ineffective, as protection against unfair dismissals is considered to be an advanced right that does not 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 protection against

¹ This description is based on the twenty-second report of a select committee of the House of Lords on Europe dealing with the Green Paper on Labour Law of the European Union.
Many workers would apply the deviations from the standard employment contract for an indefinite term. Other types of work are considered as not providing the same level of protection. However, 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

3. Protection of precarious workers

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

Directives for the protection of part-time workers, fixed-term workers and temporary employment agency workers have been enacted. 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 as not providing the same level of protection. However, 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.

The question 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.

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.

For instance, the above mentioned UK distinction between employees and workers does not parallel the distinction between the terms ‘standard’ and ‘non-standard’ employment. For example, 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 of 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. The scope of national dismissal legislation is important to answer the question which workers are covered by which part of the dismissal legislation. To a certain extent, ‘precarious workers’ are also protected against dismissal.

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. A concrete example is the distinction between fixed-term contracts and open-ended contracts. Promoted by the Fixed-Term Directive, the EU countries today all have legislation for the protection against the abuse of fixed-term employment contracts. However, problems continue to exist.

An example that follows from the Thematic Report is 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 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 is higher during this period.\(^2\) 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 towards the closely connected probationary period. A first step towards legislation in this field could be to introduce a maximum length of probation or provide more security for employees the longer their probationary period lasts.

\(^2\) 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.
A third relevant aspect is the different rules for small and big companies. Many countries have tried to relieve small-sized enterprises from the burden of an 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 Treaty on the Functioning of the European Union 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 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. This approach may also be interesting for the development of dismissal protection on the European level, especially for workers in precarious positions.

4. **Common principles of dismissal law**

This final approach to dismissal protection on the EU level could mean that EU Member States could agree on certain basic principles of employment protection in the field of dismissal law.

Moreover, protection against unfair dismissal is also 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.

Since the Treaty of Lisbon was signed, this Charter has had the same legal value as the Treaties (Article 6 TEU), so we should take it seriously. So far, not much has been published on what this principle means for the Member States and what it should mean for the EU.

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. This may pave the way 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 has been 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. Out of the 19 countries which have ratified the revised European Social Charter, 4 made a reservation against Article 24. As a result, Article 24 has only been ratified by 15 of the 30 countries, exactly half of the group. Nevertheless, in the past all EU Member States traditionally were party to this Treaty and the number of ratifications may increase over time. The fact that half of the countries are already bound by Article 24 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;

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4 Not (yet) ratified by Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Liechtenstein, Luxembourg, Poland, Spain and the United Kingdom.
5 These 4 countries are Austria, Belgium, Hungary and Sweden.
6 These 15 countries are Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Portugal, Romania, Slovak Republic, Slovenia and Sweden.
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;

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 of the revised European Social Charter the following basic rules 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 whether this has at present been achieved in the 30 countries.

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.⁷

⁷ In Austria, Denmark, Greece, Iceland and Liechtenstein persons can be dismissed without providing a reason.
b. What is considered an unjustified dismissal is specified in a binding source in all countries, either in legislation, collective agreements or case law from the courts.

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

d. Every worker is usually entitled to appeal to an impartial body, often a court, sometimes other bodies.

e. Every system includes forms of financial compensation for dismissals, but these are not necessarily linked to the absence of a valid reason.

4.2 Principles found in ILO Convention 158

Article 24 of the revised European Social Charter 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.8 Since the ILO Convention contains minimum requirements for dismissal law on a global level, it is remarkable that only such a small group of EEA countries has ratified it.

Nevertheless, it is interesting to examine whether the requirements of this Convention are being met by the Member States. In preparation for the Thematic Report, many national experts reported that this Convention did not play an important role in their country. Countries did not comply with all areas of the Convention.

The ILO-Convention basically contains the following rights:

a. a valid reason for termination (Article 4)
b. a list of invalid reasons (Article 5 and 6)
c. 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)
i. rules for collective dismissals (Article 13 and 14).

It is remarkable that the ILO standards are more extensive and detailed than the regional standards of the revised European Social Charter.

8 Cyprus, Finland, France, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden have ratified ILO Convention 158.
Based on this source one can describe some basic principles of European dismissal law, which might be acceptable for all or at least most of the countries. One of the main problems is the question whether a reason for dismissal is required.

To a certain extent, these rights are recognised in all Member States of the European Union:

a. The principle of a valid reason is recognised in the majority of countries. A few countries do not recognise this principle which, however, seems to be very characteristic for the European approach to dismissal protection.

b. Lists of invalid reasons are either already recognised in European Directives and in all national law systems. The lists will not always be equal 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. The form of organising this may differ from country to country.

d. Appeal to an impartial body is recognised, 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. However, it is important for this principle to be respected as a basic legal value EU-wide.

e. Some countries have rules on the burden of proof. The ILO Convention is also somewhat vague. The burden of proof is a subject that 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 prove that these exist. Perhaps a relation with 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 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 Thematic Report 2011 shows that new principles are recognised within the countries that are not yet reflected in international 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.

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 it is examined whether alternative measures instead of dismissal are possible, like training, re-employment and guidance in outplacement. 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 a of growing importance across Europe. Several countries are trying to promote alternative measures instead of dismissal. The European Union could play a positive 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 like information and services industries.

d. Dismissal on the grounds of incapacity of the employee is a subject that is not extensively dealt with in the national systems of labour law. In most cases, the grounds for dismissal are based on economic grounds on the part of the employer or on personal misconduct on the part of the employee. However, the third reason related to incapacity may become more important in the light of the new qualifications required from 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 for this reason could be prevented by paying more attention to the acquisition of skills, life-long learning programmes and redeployment. 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, but rather 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 on the European level, however, seems insufficient as an overall foundation for European labour law.

If the approach of focussing on the position of precarious workers is 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.

A more challenging form of employment protection on 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 giving up the diversity of their 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 158. Introducing them into European legislation would promote their enforcement. But there are also some principles of dismissal law that are not yet recognised on the European or international level.

Some of these (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.

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