THE EVOLUTION OF LABOUR LAW

VOLUME I: GENERAL REPORT

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Chapter I: Introduction

I. The composition and the mandate of the research group

The present general report is based on the analysis and the evaluation of country studies written by national experts of EU Member States.

The group was asked to interpret the notion of evolution paying attention to changes in national legal systems, both for reasons of innovation and adaptation of previous legislation. The impact of EU law was to be taken into account, for the transposition of relevant directives and with regard to the employment guidelines issued by the Council, according to Title VIII TEC.

The research group dealt with the evolution of labour law in 15 Member States. In the 10 Member States which joined the EU in May 2004 labour law has evolved too, albeit with different points of departure and complex social and political factors underlying these changes. They have in recent years engaged in a sustained process of convergence with the rest of the EU, which should be the object of further investigation in a different research project. The outcome of the present joint study is offered to the observation of new Member States, with a view to expanding the field of comparative research in the near future.

National experts and experts from DG Employment and Social Affairs met for the first time in Brussels in February 2003 and discussed a timetable and a common outline to be followed in national reports. Some headlines were agreed, indicating broad areas to be covered. They mirrored in some passages the terminology adopted in describing the ‘pillars’ of employment policies, thus confirming a strict correlation between national legislation and European hard and soft law.

A common starting point was to underline that the approach to be followed in national reports should be mainly legal. However, it was agreed that some insight into the overall structure and functioning of the industrial relations system should be offered in an introductory section of each country study. The idea was to provide background information which would enable readers to understand the environment in which the evolution of labour law took place over a decade. I refer to national reports for such a rich collection of data regarding the actors of the industrial relations systems, as well as the institutions operating in labour markets.

The impact of EU law on the evolution of labour law was indicated by all experts as a leading theme to be taken into consideration. The ‘Europeanisation’ of national legal systems is a reality which we all encounter in the practice of law and in academic research. One of the intentions of this study is to highlight the areas of the discipline most influenced by European law and the ways in which the transposition of the Directives has been intertwined with national legislative reforms.

Country studies were assigned by the Commission, DG Employment and Social Affairs to the following national experts: Thomas Radner (Austria), Chris Engels (Belgium), Niklas Bruun and Jonas Malmberg (Denmark), Marie-Ange Moreau (France), Niklas Bruun and Jonas Malmberg (Finland), Ulrich Zachert (Germany), Stamatina Yannakourou (Greece), Alan Neal (Ireland), Silvana Sciarra (Italy), Marie-Ange Moreau (Luxembourg), Chris Engels (The Netherlands), Miguel Rodriguez-Pinero-Rios (Portugal and Spain), Niklas Bruun and Jonas Malmberg (Sweden), Alan Neal (United Kingdom). The group met in Brussels in February 2003 and in November 2003. A third meeting was held in January 2004.

The present writer was responsible for drafting the outline to be followed in country studies, in collaboration with experts from DG Employment and Social Affairs. Country studies remained, however, within the responsibility and the discretion of individual authors. In the November 2003 meeting I presented the structure of the General Report in a preliminary form to the research group and received from colleagues a provisional approval. I then incorporated further suggestions and took responsibility for re-organising all materials and selecting the issues to be highlighted. As it frequently happens in collegial work, it is both the privilege and the responsibility of the general rapporteur to combine one’s own interpretation with that emerging from national reports. I express my deep gratitude to each individual member of the group, while maintaining the sole responsibility for mistakes and omissions. I am also indebted to Fernando Vázquez, Astrid de Koning and Michael Wimmer of DG Employment and Social Affairs of the European Commission for assistance throughout the preparation of this project and in the editing of the final version of this Report. Małgorzata Zajac, doctoral student at the EUI, has provided invaluable help in the organisation and editing of bibliographical references.
Chapter I: Introduction

It was also agreed that attention should be paid to the regulatory techniques used in each country to develop its recent legislation. Evolution in this domain has to do with the way in which different sources link together in legislative reforms. The shift among them may be modulated, in order to find the best possible balance.

Despite the fact that labour law has always been engaged in this complex exercise, it seems that there are always new ways of appraising the scales among voluntary and legal means of regulation. This may reflect different orientations of the legislature and respond, in some cases, to contingent problems, rather than to coherent and overall programmes.

A constantly changing relationship among different sources, all interacting in the evolution of labour law, is taken into account in all country studies, when providing relevant background information. Collective agreements continue to be very significant sources in accompanying and complementing law. As such they contribute to shape the evolution of labour law, while, at the same time, evolving themselves.

This report, in line with what emerges from national reports, highlights such a double role of collective sources, but does not provide information on the evolution of collective bargaining as such. The main emphasis in this report is on changes which have taken place in individual labour law.

This is not to say that collective labour law is excluded from evolutionary trends. References are frequently made to shifting levels of collective bargaining which also reflect a changing function of collective agreements in regulating individual contracts of employment and in responding to wage policies. The report on Germany discusses the important 2001 reform of the Betriebsverfassungsgesetz, showing the implications that co-determination has on collective agreements. All country reports emphasise the importance of national legislation transposing the European Directive 94/45 on European Works Councils.

Industrial conflict accompanies the evolution of labour law and marks its main aspects, albeit with differences in the solutions adopted.

In Greece the system of compulsory arbitration provided for by the Greek independent service OMED (Art. 16 Law 1870/1990) was criticised by the International Labour Organisation's Committee on Freedom of Association and was considered by a November 2003 decision not to be in compliance with Conventions 98 and 154, both ratified by Greece. A revision of existing legislation on arbitration and mediation, developed in the early 1990s, is incumbent and could result in social unrest.

A recurring theme in most EU labour law systems has been the recourse to wide forms of consultation of the social partners in view of adopting legislation. Despite the difficulties in evaluating the legal nature of agreements which can result from these consultations, it must be acknowledged that, in general, they played a significant role in shaping important areas of the subject matter. Apart from paying attention to sources of law - be they legal or voluntary - this study does not dismiss the multiple ways in which legislation emerges as a result of the activities carried out by tripartite social dialogue.

This study confirms that as a peculiar feature of European labour law, all forms of negotiated legislation, social pacts and 'concertation' - the latter being a neologism which is now widely recognised as part of the official jargon - must be referred to as important resources for the evolution of labour law.

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2 A comparative project on 'The evolving structure of collective bargaining' in all EU Member States and in candidate countries is under way, co-ordinated by the present writer and co-financed by the Commission and the University of Florence, to be published in 2005. See also the results of the comparative research group sponsored by the Commission and directed by F. Valdes Dal-Re, Labour Conciliation, Mediation and Arbitration in European Union Countries, 2003, Madrid.

3 In several countries decentralisation of collective bargaining is associated with the intention to increase productivity. The national level of bargaining remains, in most countries, a significant and indispensable source for the regulation of working conditions and wages.

4 In some countries legal reforms had to do with strikes in essential services, a sensitive area in which limits to the right to strike counterbalance the protection of individual freedom and fundamental rights. See the Italian and Portuguese Reports.

5 Some less well-known — and yet extremely significant — examples can be quoted. In Greece OKE, an Economic and Social Council, was introduced in 1994 and social concertation started in 1997, in order to ensure consensus in view of EMU. A Confidence Pact was reached in November 1997 (see Chapter IV, section 2 of the Report). In Luxembourg in 2003 negotiation among the social partners and government on the central issue of continuous training made a legislative reform unnecessary. Social dialogue led to a better enforcement of existing measures. A well-established system of social partnership is described in the Austrian Report.
Several examples support this point. It may suffice to mention Belgium, where the role of the National Labour Council contributed to confirming a solid consensual tradition. In Finland tripartism and income policy continued to be common practice.

In Germany, the 1998 Red/Green coalition launched the Alliance for Work, to fight unemployment and to pursue legal reforms. In Spain all labour law reforms covered in this study - with the exception of the one introduced in 1994 - were enacted after making recourse to social dialogue.

In Ireland, 'partnership agreements' have represented an original feature of the evolution of the national legal system and possibly of the recovery of the national economy, ever since the first deal was reached in the late 1980s.

In Italy, a significant contribution came from social dialogue in the early 1990s and contributed to a transition to Economic and Monetary Union. A shift into a more controversial phase of relationships with the social partners - and among the social partners - characterises the centre-right administration currently in power.

In Sweden, the social partners have not been able to overcome dissenting opinions on the needs and modes of flexibilisation, and have not always succeeded in exercising a joint influence on the legislature in this field. Nevertheless, a consensual climate is favoured by the solid structure of collective bargaining.

2. The structure of the General Report

This General Report is organised in 10 sections:

I. Introduction
II. A comparative legal methodology
III. Constitutional developments
IV. The impact of the European Employment Strategy on national labour law
V. Evolution and the 'autonomy' of labour law
VI. Areas of evolution with adjustments towards flexibility
VII. The evolving relationship between law and collective agreements
VIII. Changes in regulatory techniques
IX. The impact of EU law
X. Concluding remarks

Executive summaries of national reports follow this Report as appendices and offer to the reader synthesised information on the most significant events to have marked the evolution of labour law in each country.

In the General Report I have arranged materials and information provided by all national experts under headlines which are different from the ones followed in each country study. I have also drawn on other sources for additional information. Therefore, the General Report must be read in conjunction with all national reports.

The selection of headlines - and consequently of issues to be included in the present account - is submitted as a first outcome of comparative analysis. It also confirms the indication that the main 'pillars' of European employment policies, the ones taken as guidelines for assembling and organising information in the national reports, are in the process of being changed and simplified.

Each section opens with a brief summary of the main issues and conclusions drawn from both the General Report and the national reports.
Chapter II: A comparative legal methodology

I. National constitutional traditions

Before entering a more specific analysis, I will make a few observations which are also indicative of the methodology followed in this General Report.

I suggest that the most innovative solutions marking the evolution of labour law are to be found in legal systems characterised by the solidity of constitutional traditions. In most cases this argument goes as far as saying that constitutional rights, while being adaptable to changes in work organisation, still set a limit on deregulatory approaches in legal reforms, thus favouring creativity.

Such a rich heritage consolidated in European constitutional traditions emerges even more in comparison with the USA. It may suffice to say that sophisticated scholarly work in that country recurrently draws inspiration from European developments.8

It is also a fact that the evolution of constitutional law brings about innovative results in legal theory. This is yet another rich legal patrimony of Europe, both at a national and supra-national level, in which the importance of fundamental social rights is not always fully acknowledged.

In perspective, there are challenging ways to link together both the practice and the theory of fundamental social rights in comparative terms. The evolution of labour law in this field widens the angle of observation on EU law.

2. Convergence of legal standards

A good guiding principle in capturing the most significant trends in the evolution of labour law is to study whether different legal measures reach a similar scope, albeit with different means.

A methodological challenge for comparative labour law is to understand whether or not the EU is providing an institutional set-up in which convergence of legal standards is occurring, while maintaining some differences untouched in national legal traditions.

It has been noticed that a less frequent recourse to harmonisation of hard law measures has, especially in the last few years, been compensated by coordination through soft law.10 Convergence thus occurs by choice of individual Member States and is seen by European institutions as a form of compliance not too invasive of national prerogatives. This tendency may be of interest for new Member States, since it aims at an extension - at times a modernisation - of exist-


Chapter II: A comparative legal methodology

ing labour standards, not at the immediate introduction of new European legislation."

The acceptance of the legislative status quo should not, however, indicate that there is no need to further legislate at EU level. This is a point of great relevance which will be explored throughout this Report and confirmed in the conclusions.

The comparative evaluation offered attempts to detect whether different legislative choices in similar labour law fields are creating an ideal environment for a closer integration of national legal systems.

In line with the previous and most authoritative comparative research, integration through law, even in a specific legal discipline like the one under observation in this study, is valued as a powerful tool in the hands of reformers - be they national or supranational - aiming at a closer Europe. Given the difficulty of measuring the level of compliance in the soft law environment of employment policies, awareness should be created about the great potentialities of positive integration in labour law reforms, particularly in labour market reforms. Otherwise, national administrations would only respond to the impulses coming from the centre by offering what was already part of domestic political agendas.

Very little integration through law would occur, should this be the practical result of preferring soft law procedures and leaving hard law silent. A variable degree of integration would, under such circumstances, be entirely dependent on the political orientation of national governments, choosing to select the same priorities and seeking to pursue them in a similar legislative style.

Hard law measures, on the contrary, have forced similar changes in national legal systems. Even when national legislatures transpose European directives following very different paths, a floor is offered for the integration of basic common principles.

In highly controversial fields, such as in reforming labour markets and introducing new types of employment contracts, original contributions added by national legislatures may create cases of uncertain compliance with EU law, mainly in relation to the lowering of existing national standards.

While pursuing the task of interpreting - rather than measuring - national performances, comparative labour law cannot isolate itself from the institutional debate taking place in the EU.

The discussion on fundamental social rights, first related to the Nice Charter and now to the Treaty establishing a Constitution for Europe, highlights some relevant points to be complemented by a comparative assessment of constitutional developments at national level.

This will be the main theme dealt with in the next section and a good way to start looking at national labour law.

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Chapter III: Constitutional developments

The perspective adopted in this Report when describing the evolution of labour law is a perspective of change, neither of resistance to innovation, nor of strenuous defence of the status quo in national legal systems.

Arguing that respect for fundamental rights in the implementation of employment policies should function as a limit to uncontrolled deregulation is, therefore, a way to interpret labour law reforms in an advanced and modern theoretical framework. Recent constitutional developments in several Member States, as shown in this section, confirm that this approach is already part of national legislative agendas.

The most innovative solutions marking the evolution of labour law are to be found in legal systems characterised by the solidity of constitutional traditions. In most cases this argument goes as far as saying that constitutional rights, while being adaptable to changes in work organisation, still set a limit to deregulatory approaches in legal reforms, thus favouring creativity.

Responses from Member States to the employment guidelines, combined with autonomous choices of national legislatures, let broad areas of labour law emerge as coherent patterns of evolution. A first evidence of autonomous choices and a sign of evolution are to be found in the account of how fundamental rights have been strengthened in some national legal systems, either because of accession to international sources, or because of constitutional reforms.

There is a beneficial mutual influence between the national and the supranational level of law-making for the expansion of fundamental rights. Even the debate on institutional reforms and on the Charter of Fundamental Rights stimulates a positive circulation of ideas.

I. The institutional context

In the early days of the EEC, the dilemma consisted in making efficiency of the market compatible with social rights. National constitutional traditions, while counterbalancing the weak legal basis in the Treaties, also established a level of protection not to be waived.

In subsequent years, the search for a new equilibrium in the construction of Economic & Monetary Union showed up even more dramatically the absence of employment policies. The aftermath of the Amsterdam Treaty meant a further consolidation of the laboratory of ideas and proposals aiming at the consolidation of supranational fundamental social rights.

2. The incorporation of the European Convention on Human Rights (ECHR) in national legal systems

In a comparative study on the evolution of labour law such a rich background cannot be ignored. National developments have to be framed within a changing institutional context. National legal systems took on board the adoption of the Charter of Fundamental Rights and reflected on possible implications in the enforcement of European law. Subsequently, national actors in their different capacities have contributed in feeding the work of the Convention on the Future of Europe.\(^{14}\)

Chapter III: Constitutional developments

It is suggested - and should be substantiated by the results of the present research project - that labour law played a key role in national reforms related to the evolving institutional structure of the EU. The accent put on fundamental social rights must be interpreted in conjunction with the authoritative positions expressed by academics and institutions at a European level, thus confirming the solidity of national constitutional traditions.

Future constitutional reforms at the European level should be such to preserve coherent national systems of rules. The supranational level should provide a unitary source in which fundamental social rights are not separated from civil and political rights. The Charter of Fundamental Rights adopted at Nice already goes in this direction. In the circulation of international standards, this may represent a point of convergence with sources adopted by the Council of Europe, such as the ECHR and the European Social Charter taken together.

Besides the negative freedom of association, Articles 6 (right to a fair judgment) and 8 (protection of private and family life) of the ECHR have been referred to in Nordic labour law.

In the UK the ECHR was incorporated into British law through the Human Rights Act of 1998 (entered into force on October 2, 2000). The Act is supposed to give further effect to those rights which are already enjoyed under the Convention. It means that while previously the application of the ECHR was limited to cases where law was ambiguous, now courts are obliged to decide cases enforcing Convention rights. Existing and future legislation has to be interpreted in conformity with ECHR and courts have to take Strasbourg case law into account as far as they consider it relevant for the proceedings before them. Direct actions under the Act are permitted against public authorities breaching the rights. The relevance of ECHR provisions has been shown in several labour law cases.

Nordic countries too have given attention to the ECHR. Denmark incorporated the ECHR into law in 1997. Finland did the same in 1990; in 1995 a new chapter on fundamental rights was inserted in the Constitution, followed by an overall review in 2000. The rights to privacy, freedom of assembly and association, equality, work and social security, are now all granted by the Finnish Constitution.

Sweden incorporated the ECHR into law with an Act of Parliament in 1994, following the indications of a government 'Committee on Rights and Freedoms'. Notwithstanding the fact that such a source is not constitutional, national legislation should comply with the principles of the ECHR and national courts may not apply legislation in manifest contrast with it.

In Denmark, only trade unions - not individual employees - have locus standi before the Labour Court. If a trade union does not bring the case to the Labour Court, any of its members has the right to apply to the ordinary court. This subsidiary locus standi for individual employees was confirmed in an amendment to the Labour Court Act in 1997. The amendment was introduced to secure compliance with Article 6 ECHR.

In Sweden it has been discussed whether the Labour Court is independent and impartial according to Article 6 ECHR. Art. 8 ECHR has been invoked in several cases concerning drug and alcohol testing.
The impact of constitutional reforms may also be evaluated with regard to subsequent changes in legislation. This is the case in Finland, in dismissal law. Before the constitutional reform, unlawful dismissals in the public sector were regulated under rules internal to the administrations. After the reform, the Supreme Administrative Court found that such rules did not constitute sufficient ground for dismissals of individual employees. New legislation was therefore approved, covering a large part of the working population. The constitutional reform in this country also inspired legislation on the protection of privacy.

Examples taken from the Nordic countries indicate how the incorporation of international sources into domestic law has an immediate and visible implication for individuals enforcing their rights in national courts. In the particular case of Sweden, the incorporation of ECHR was also a way to comply uniformly to EC law in view of acceding to the EC.21 Furthermore, recently in France the Cour de Cassation has repeatedly invoked the ECHR, in particular Articles 8 and 14, in cases dealing with the protection of private life, and Art. 6, for guaranteeing fair judgements.22

3. The expansion of constitutional rights

The expansion of national constitutional rights is a trend in the evolution of labour law which we encounter in several legal systems.

We have previously underlined the role of sources external to the EU, such as the ECHR, in the strengthening of fundamental rights. The protection of fundamental social rights has been constantly guaranteed in France throughout the 1980s, due to a central role acknowledged by the courts to the Constitution and the introduction in the labour code (Art. L 120-2 Labour Code) of new guarantees for the enforcement of individual and collective fundamental rights at plant level.

The 1975 Greek Constitution, greatly influential on the evolution of labour law, was amended in 1986 and 2001. New civil rights were recognised, such as the right to the protection of personal data (new Art. 9A). Such developments were the result of international and European standards. In 2001 the right to collective bargaining in the public sector (new Article 22, paragraph 3) was included. In addition, the recourse to affirmative action to promote equality between men and women is provided for for the first time (new Article 116, paragraph 2).

The Italian Constitutional Law 3/2001 introduced changes in Title V of the 1948 Constitution. The impact on labour law has to do with the distribution of legislative competence between the state and the regions. This highly sensitive subject matter is still in the process of being interpreted. One contentious point has to do with maintaining fundamental labour law rights within the exclusive state competence and delegating to regional competence only very specific legislative interventions.

Several cases are pending before the Constitutional Court and some have been decided. The Court has ruled in favour of a unitary role of legal principles to be kept within state competence and of uniformity in the discipline of fundamental rights.23 This leaves to the Italian regions the competence to intervene on matters which have to do with all relationships established between individuals and the public administration. One example of a unitary competence is the organisation of services to promote employment on a national level.24

22 National Report on France, Chapter I, section 2.
Chapter III: Constitutional developments

Legislation on employees’ personal data often has a constitutional relevance in the protection of individual employees’ dignity at work. We can see examples of such legislation in Finland (2001)\(^{25}\) and in Luxembourg (2002).\(^{26}\) In the Finnish Act, protective measures are directly addressed to employees, specifying what the law on the handling of personal data indicates in more general terms. The influence of the EC Directive 95/46 can be traced in the notion of personal data which can be collected during a life-cycle. In Luxembourg the law transposing the same Directive includes in its Article 11 specific measures on the lawful collection of data at the workplace level, assisted by criminal sanctions. Control is exercised on certain matters by the comité mixte \(\_\_\_\_\_\_\_\) enterprise. In Portugal, the new Labour Code of 2003\(^{27}\) extensively protects the right to privacy in the employment context in Articles 16 to 21.

The Finnish example of special legislation has led to no case law, so far. In Finland, however, legislative efforts in this field have continued. Late in 2003 the Finnish government submitted a proposal to parliament concerning confidentiality and use of e-mail in working places and drug testing of workers. The proposal is agreed upon among the political parties and central labour market organisations. It lays down both procedural and material rules, aimed at balancing the employee’s right to confidentiality and the employer’s legitimate prerogatives.

Such interesting initiatives by national legislatures do not diminish the importance of a specific and much awaited directive on the collection of employees’ data. This is perhaps one of the fields in which reference to fundamental rights does not in itself suffice to provide full protection to the individuals. Legal techniques must be modernised and take into account different ways of protecting the individual in different phases of the life-cycle.\(^{28}\)

Let us consider the issue of lifelong training. In French law, from 1992 onwards, the notion of Obligation to train’ has become more and more precise. It implies that the employer can impose a training programme within the contents of the individual contract of employment. In case of restructuring, the employee cannot be dismissed if the employer has not fully exploited the possibility of adapting the employee to a changing working environment in the enterprise. Case law has had a considerable impact on this evolution. In 1992, the Cour de Cassation delivered two key decisions. The Court argued that there are ‘implicit obligations’ - obligations d’adaptation et de reclassement - in the employment contract so that without the employer first attempting adaptation, dismissal lacks a just cause.

In this perspective, evolution of labour law in France aims to create an obligation directly enforceable in contracts of employment. The right to training is also enshrined in collective agreements (starting with a 1991 inter-sector agreement, followed by a series of other agreements). The 2003 Inter-professional Agreement and the 2004 Bill, which is still being discussed in parliament, deal with different actions, so that each specific training need can be taken into account. The ‘développement des compétences’ is an interesting solution being discussed. It requires the worker’s written consent and takes place during working time. After one year, the trained worker has priority in assignment to the job for which the specific qualification has been gained.

Training can also take place outside working time, for a maximum of 80 hours per year, if there is an agreement between the employer and the worker, with half pay.

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28 The lack of specific legislation applying to employment is indicated, for example, in the Greek Report (see Chapter I, section 4).
Chapter IV:
The impact of the European Employment Strategy on national labour law

The indication emerging from this study is that labour law has to re-establish a language of rights, and make sure that soft law techniques do not indirectly undermine a structure of guarantees which can be adaptable, without losing its internal coherence.

Co-ordination of employment policies brings about diversity of national responses rather than uniformity. The overall impression is that the Open Method of Coordination (OMC) in employment policy, as well as social inclusion, tends to highlight the fundamental needs of individuals. It does so by adopting a non-prescriptive terminology and designating wide areas in which active measures - not necessarily legislation - are considered necessary. In doing so, it generates responses from Member States which can be equally vague and detached from coherent labour market reforms.

In a climate characterised by continuous exchange of information, the only visible danger is that the open process of mutual learning, one of the greatest achievements of this method, might upset the balance between hard and soft law measures. Employment policies, while enhancing important innovations, underline a challenge for labour law: measures in this field must prove to be ‘efficient’, without losing track of their primary function.

Results achieved under the OMC in social inclusion policies are not indifferent to the evolution of labour law. They highlight areas in which labour law could re-invent its function, attempting to satisfy the primary needs of the excluded and building a new base of rights.

What is new about the current debate is the need to develop a broad framework for the strengthening of fundamental social rights, well grounded in national constitutional traditions and in European law.

I. From Maastricht to Amsterdam and Lisbon

In the decade taken into account for this cross-country study, interpreting the evolution of labour law inevitably implies taking on board inputs which have come from the European macro-economic system. In the various phases preceding the adoption of the single currency, labour law reforms and policies of wage moderation have been essential ingredients of national responses to the related challenges and a way to comply with the Maastricht criteria. In some countries the choice to enter EMU coincided with deep reforms inside the administration and with an improvement in the efficiency of the state apparatus.

30 For Italy see M. Ferrera and E. Gualmini, Rescued by Europe? Social and Labour Market Reforms in Italy from Maastricht to Berlusconi, 2004, Amsterdam University Press, Amsterdam. On the role of bureaucratic elites in Italy see also, by the same authors, the Report prepared for ISFOL, La strategia europea sull’occupazione e la governance domestica del mercato del lavoro: verso nuovi asseti organizzativi e decisionali, 2002, ISFOL, Roma. In Greece, trade unions supported the accession to EMU, adopting moderation in wage policies bargained in national collective agreements. See Report on Greece.
Chapter IV: The impact of the European Employment Strategy on national labour law

Employment policies, after the insertion of Title VIII in the Amsterdam Treaty, have been inextricably linked to broad economic policies, while aiming at the furthering of a high level of employment. One of the innovations of the Lisbon Council was, in fact, to bring forward the coordination of existing processes. Subsequently the Commission has pointed to a further ‘synchronisation’ of employment and economic policies, emphasising that these two facets of European integration must proceed on parallel tracks.

The urgency to practice comparative labour law comes into view while observing the evolution of the OMC in employment policy. Coordination in this field brings about diverse national responses, rather than uniformity. Although this result could be acknowledged as the greatest success of comparative law – namely respecting national peculiarities, avoiding transposing elsewhere national institutions and national law – it also reveals some weak sides.

The different national reactions in complying with the Council’s guidelines are the strength and the originality of OMC. However, the comparability of final outcomes is still under discussion and should be developed into clear techniques, in order to further improve that method. This has to do with the need for concrete results. The Lisbon agenda has put forward three main objectives: full employment, quality and productivity at work, and social cohesion and inclusion. Member States are required to pursue such objectives in a balanced manner, involving all relevant actors. The 2003 Employment Guidelines, for example, may help us to visualise the framework within which national labour law is asked to operate.

Under the heading ‘specific guidelines’ we find very broad and at times not very specific definitions of measures. Active and preventive measures for the unemployed and inactive must ensure that, at an early stage of their unemployment spell, all jobseekers benefit from an early identification of their needs and from services, such as advice and guidance, job search assistance and personalised action plans. This measure generates expectations in each individual falling under the described category of jobseekers. Each individual becomes the potential addressee of measures which enable the state to reach a target, as indicated in the guidelines (25% of the long-term unemployed should be involved in an active measure by 2010). The individualised assistance that jobseekers should receive has to do with the fact that they are identifiable as members of specific collective entities, such as, for example, the long-term unemployed or other categories of workers not integrated in the labour market.

If we look at the ways in which the regulation of non-standard contracts of employment has developed in recent years in most Member States, we can see that individual freedoms may very often be compressed. Part-time contracts are, in a number of cases, apparently only freely entered into; while the same can be said for some forms of agency work.

The overall impression is that the OMC in employment policy, as well as in social inclusion policy, tends to highlight fundamental needs of the individuals. It does so by adopting a non-prescriptive terminology and designating wide areas in which active measures - not necessarily legislation - are considered necessary. In doing so, it generates responses from Member States which can be equally vague and detached from coherent labour market reforms.

The indication emerging from this study is that labour law has to re-establish a language of rights, and make sure that soft law techniques do not indirectly undermine a structure of guarantees which can be adaptable, without losing their internal coherence.

What is new about the current debate is the need to develop a broad framework for the strengthening of fundamental social rights, well grounded in national constitutional traditions and in European law. Fundamental rights prove to be part of the evo-

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32 Communication from the Commission to the Council, the ER, the ESC and the Committee of the Regions, Taking Stock of Five Years of the European Employment Strategy, COM(2002) 416 final, Brussels 17.7.2002 ‘Synchronisation’ is part of the simplification of employment guidelines pursued by the Commission.
33 This is one of the outcomes highlighted in Jobs, Jobs, Jobs. Creating more employment in Europe. Report to the European Commission of the Employment taskforce chaired by W. Kok, November 2003, Office for Official Publications of the European Communities, Luxembourg.
35 Section I (a).
lution of labour law. They function as limits to individual contractual freedom and as a driving force for legislation.

The results emerging from this comparative analysis on the evolution of labour law can in perspective be linked to the ongoing discussion on the Draft Treaty establishing a Constitution for Europe and in particular to the interpretation of the terminology adopted in the Charter inserted in Part II at Articles 11-51 and 11-52, where the words ‘rights and principles’ are used.

This reflection is needed in order to improve the coherence of the OMC and to give legal grounding to positive integration. Employment policies, while enhancing important innovations, underline a challenge for labour law: measures in this field must prove to be ‘efficient’, without losing track of their primary function.

This issue was addressed with great emphasis in comparative research. Flexibility should not only serve the purpose ‘to optimise the market relationship’, but also be functional to ‘numerous production relations’, thus enhancing intervention in areas such as security, both for workers and companies.

First of all, as indicated in the report on Greece, the European Employment Strategy (EES) brings about ‘horizontal issues’ such as quality of work, active ageing, vocational training and lifelong learning. It thus forces national legal orders to accept and incorporate new concepts. In some countries this may influence considerably the drafting of legislation and the setting of priorities. In other countries changes may appear less traumatic and prepare ways to adapt slowly to the open coordination.

In Greece, the reform of the placement system was introduced through the National Action Plan (NAP) for 2000, and then expanded to professional training. The NAP 2002 indicates that 1795 jobs were created through private employment agencies. The Greek government’s commitment to a correct drafting of NAPs led it to establish two new bodies, the ‘National Committees on social dialogue for Employment and for Social Protection’ are permanent vehicles for the elaboration of national strategies in both areas, encouraging the participation of all interested actors and relevant ministries. The task of the National Committee on Dialogue for Employment is to promote social dialogue in proposing employment policies, as well as in monitoring and evaluating the NAP Employment. A special new body, the ‘Council of experts on employment and social security’, was created. NAPs are considered to have been a vehicle for the reform of the hiring system and of private employment agencies in Greece.

In France, the EES forced the government and the social partners to open a debate on new issues and led to the creation of a permanent forum for discussing employment policies called CSDEI (Comité du dialogue social pour les questions européennes et internationales). A visible sign is the 2003 reform of the pension system, relevant for ageing.

2. Changes within national administrations under the OMC

Some important innovations are reported as a consequence of the soft law regime created by the OMC. They signal the need to adapt national administrations to new mechanisms of compliance and set up new specialised bodies within the most relevant branches of government. These innovations are significant and yet difficult to compare. No overall, coherent theory of change emerges, although it seems clear that a more efficient co-ordination of national ministerial experts can enhance further co-ordination of employment policies and introduce mechanisms to evaluate national performances.

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One of the areas in which labour law should play this role, bringing about security as a guiding principle and enhancing new forms of participation, is economically dependent work.


37 See further Chapter V, section 2.
workers, whereas the 2003 agreement on lifelong training is considered part of a national debate and not influenced by European policies. NAPs too are perceived as internal to the administration and not sufficiently open to the social partners. In Italy, the report on the impact of employment policies requested by the Commission and prepared by a research institution constitutes a valuable and new source of information. It offers a critical evaluation of the EES, mainly due to the fact that NAPs leave little space for local development schemes and accentuate the split between dual labour markets. NAPs also fail, according to the report, to include the social partners. Furthermore, if we consider that Italy does not have a tradition in monitoring policies, it seems that the OMC has had a positive impact and that the creation of specialised bodies inside the administration should be encouraged.

3. How to preserve a language of rights in the OMC

Some preliminary conclusions can be drawn from observation of the OMC with regard to the evolution of labour law. The emphasis that this study puts on national developments is an attempt to indicate that there is a legal language to be preserved; it must be articulated within a normative perspective, broader than that of employment policies.

In a climate characterised by continuous exchanges of information, the only visible danger is that the open process of mutual learning, one of the greatest achievements of the OMC, might upset the balance between hard and soft law measures. It was in fact the case that, while the success of the OMC in employment policies was being celebrated, the directives that saw the light were mainly based on framework agreements between the European social partners, thus signalling a significant ‘shift’ from one policy agenda to the other. Those more closely related to a potential reduction of unemployment and to a proclaimed creation of new employment - namely the Fixed-term Work and the Part-time Work Directives - have as their central focus the principle of equal treatment among all workers, irrespective of their contract of employment. In both cases, convergence means requiring Member States to comply with this fundamental principle. Ways to specify such compliance are not always prescriptive and leave significant space for differentiation, rather than for harmonisation.

In extending OMC to social inclusion, objectives have been expanded. A specialised sub-group within the Social Protection Committee - established by the Council according to Article 144 TEC, introduced by the Treaty of Nice -
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proposed to include in social indicators issues such as financial poverty, income inequality, regional variation in employment rates, long term unemployment, joblessness, low educational qualifications, low life expectancy and poor health.47

Objectives of such a significant relevance are the result of a common initiative of Member States and yet they may create very different reactions at national level, raising, at times, the problem of co-ordination with decentralised levels of state administration. The 1997 UK constitutional reform on the devolution of powers to Scotland, Wales and Northern Ireland left the central government with a competence for overall fiscal policy. The drafting of NAPs on social inclusion was an occasion to re-connect different levels of governance.48

This policy agenda is very close to labour law research, although a very special non-legal expertise is required for the construction and the operation of social indicators.49 Results achieved under the OMC in social inclusion policies are not indifferent to the evolution of labour law. They signal the existence of areas in which labour law could re-invent its function, attempting to satisfy the primary needs of the excluded and building for them a new floor of rights.50

48 I thank K. Armstrong for this information, on the occasion of a presentation of his work in progress on social inclusion during a workshop held at the University of Brescia.
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Evolution and the 'autonomy' of labour law

Historically, labour law has been trying to gain autonomy from commercial law. The boundary between them becomes even less clear in the light of further developments of European law. The emphasis is put on 'efficiency of enterprises' and the task is assigned to labour law to prove its compatibility with market efficiency.

Agency Work

The field of agency work brings a series of new challenges for national labour lawyers and requires the intervention of EU law.

The Draft Directive on agency workers has inspired interesting comparative work. The principle of equal treatment, as clearly stated in the proposed Directive, is in itself a guiding principle, inasmuch as it clarifies the notion of comparable worker within the user company.

Comparative results emerging from this study suggest that a series of ambitious questions are open: labour law could suffer from an identity crisis, in observing how companies constantly reduce the core production and seek services and other related activities from outside. The antidote to such a crisis, as it emerges from the present study, is the constant adjusting of labour law rules and sanctions to a new function of the discipline.

In agency work, as in a multiplicity of non-standard jobs, the possibility is to lose track of a fundamental rights regime. Control exercised through labour inspectors is an efficient solution, but it seems to work only in legal systems with a consolidated tradition. Collective bargaining can also be a way to bring about equitable working conditions and comparable wages.

Split powers between agencies and users and solidarity in obligations represent only a partial solution. Authorisation or licensing systems for agencies are yet another way to introduce a divide between legal and illegal agency work and thus create a suitable environment for workers.

Further evolution of labour law should be such to bring agency workers closer to other non-standard workers, emphasising their similarities and constructing a new system of guarantees.

Economically dependent work

The spreading of self-employment represents one of the most challenging patterns of evolution in the time spell considered by this report. What is most difficult to assess is under which circumstances a grey area emerges, in which criteria of subordination are not immediately visible and yet dependence is an indisputable feature.

The notion of economic dependence - as opposed to personal or functional dependence - has a highly symbolic value and explains the dilemmas of legal reforms attempting to deal with it.
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The overall impression is that economically dependent work is spreading and progressively showing its own features, notwithstanding the different solutions adopted in national legal systems. Rather than evolving as a mere continuation of what used to be described as quasi-dependent work, it attracts in the same area new forms of employment, all similarly characterised by the non-continuity of employment, the low level of earnings and the lack of precise prospects in creating career paths.

Examples taken by various legal systems confirm the variety of solutions adopted to tackle a phenomenon which is still largely undefined. The expansion of non-standard contracts, on the one hand, marks the boundary of a territory which may or may not coincide with new forms of economic dependence. On the other hand, attempts to promote genuine self-employment follow a different direction and have been put forward as well.

Because of the many interconnections that this subject matter has with other evolving patterns of labour law, it seems urgent to adopt an incisive approach towards workers whose fundamental rights might be threatened, because of employment relationships characterised by economic dependence.

The legal presumption, a technique still present in several national legal systems, does not seem to capture the subtleties of situations in which, rather than expanding labour law principles, it is necessary to find new ways to adapt them to economically dependent workers. Certainty about the nature of the employment contract can only be provided by way of creating a floor of rights specifically for economically dependent workers.

Employment is the key word around which entitlements should be constructed. A path should be followed in order to bring together all essential means of expansion of human rights. The notion of protection would perhaps not be appropriate in this regard. What the evolution of labour law is aiming at is the creation of a space in which economic dependence is counterbalanced by a series of economic support mechanisms, such as access to pensions, special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leave, and childcare opportunities.

It can be argued that EU law - preferably in the form of a framework directive - could help to clarify criteria, analogous to the ones on mutual obligations in subordinate employment and yet newly tailored to such new social phenomena. This could be supplemented by a softer approach with regard to economic support mechanisms. Co-ordination of national measures of this kind should be favoured, while leaving the choices on financial aids entirely to Member States.

Mechanisms laid down in Directive 1991/533/EEC (on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship) can be a source of inspiration for new measures to expand to this group of workers the principle of transparency with regard to working conditions and all other relevant contents of the work to be performed.
I. Autonomy from commercial law: agency work

Historically, labour law has been trying to gain autonomy from commercial law. As Davies and Freedland have argued, the boundary between the two disciplines is not so clear, despite the fact that the 'underlying principles' inspiring them are so different: 'labour law has traditionally been concerned with the protection of employees against the operation of market forces, whereas commercial law has been concerned with providing a framework within which market forces could operate effectively.'

Such a boundary becomes even less clear in the light of further developments of European law. The fight against unemployment brings about a variety of arguments and suggests a number of actions which should all contribute to decreasing the number of the unemployed and create new jobs. The emphasis - as again Davies and Freedland have argued - is put on 'efficiency of enterprises' and the task is assigned to labour law to prove its compatibility with market efficiency.

The field of agency work discloses a series of new challenges for national labour lawyers and can be taken as a good example in order to prove the autonomy of labour law. It is also a field in which further intervention of EU law is required, as it will be suggested in the conclusions.

Agency work is the product of a less stable economy and of varying market demands, which often expose companies to unpredictable planning in their production schedules and also to changing needs in the selection of skills. At the same time, agencies providing temporary workers respond to the increased need for flexibility expressed by employers, including SMEs. The uncertain terminology adopted both in scholarly work and in legislation is a sign of the fact that labour law is facing new concepts. In previous comparative research, reference was made to 'traffic in labour' and to criminal sanctions inflicted on fraudulent employers.

This attitude of national legislatures has been observed in different historical phases. It shows a prevailing intent to expand the protective scope of labour law to employees working de facto under the direction of a user-employer, even though formally employed by another entity, be it a legal or illegal sub-contractor, or another commercial firm.

In subsequent historical phases, there has been a progressive tendency not to maintain all core and peripheral activities within the firm. Externalisation and outsourcing of entire areas of the production process, while being the result of deep changes in the structure of the firm, also involved different ways of selecting and acquiring the workforce.

In EU law, we find the expression 'posting of workers' and 'also assigned to work' referred, amongst other situations, to temporary employees assigned by the agency to the user. The expression 'putting workers at the disposal' is also used, and even 'employee leasing', although the latter expression is not, as some non-English speaking commentators argue, typical of the UK official jargon.

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52 Throughout this report the term 'agency work' is used to indicate all forms of work — be it temporary or open-ended — in which work is performed with a user company through an agency. This conventional choice should, at least within the limits of the present study, diminish the risk of overlapping definitions and of different linguistic solutions adopted in different legal systems.
53 See chapter X.
54 European Commission, Jobs, Jobs, Jobs: Creating more employment in Europe, Report of the Employment taskforce chaired by W. Kok, November 2003, Office for Official Publications of the European Communities, Luxembourg, pp. 32-33, indicates that agencies should be the 'new intermediaries in the recruitment and management of both qualified and unqualified staff' and support flexibility and mobility of the workforce, while seeking to guarantee security.
56 For example, in Italy, legislation aimed at combating fraudulent employers' behaviour was first enacted in the Sixties. Italian legislation inspired similar solutions in Spain in the 1970s.
58 The Belgian Report.
59 See, for instance, the most recent Italian debate, attributing this tradition to a not well specified Anglo-Saxon tradition. Leading textbooks in the UK, however, use the expression agency employment, following the 1973 Employment Agencies Act, subsequently amended by the 1994 Deregulation and Contracting out Act (DCOA). The expression 'employee leasing' is used in translations from other languages. See for instance R. Schuren, 'Employee leasing in Germany: the Hiring Out of an Employee as a temporary Worker' (2001), Comparative Labour Law and Policy Journal Vol. 22, No 1, pp. 67 ff. Contrary to what might be implied in the adoption of this terminology, the German system has traditionally been fairly restrictive in this field, granting protection to employees, as well as setting limits for the agencies. Even the recent 2003 German reform maintains the basic restrictions, notwithstanding the fact that no time limit is set for the hiring out of employees.
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Agency work has been a test case for national legislatures. It forced them to verify whether labour law principles were subject to disintegration. The alternative was to let labour law principles move freely through new commercial transactions and adapt them to workers outside the traditional surroundings of a company.

Rather than evaluating the rationale of the economic choices behind agency work and regulating the contract between the agency and the user, labour law attempted to address agency workers with some specific measures. The trilateral relationship - agency/employee/user - may be the object of regulation too when joint liability is provided for the payment of remuneration and of social security, as well as for other typical managerial obligations, such as the provision of health and safety measures, the duty to inform, and so on.

One solution may be to grant authorisation to the temporary work agency.60 This is a way to signal that, without such an authorisation, activities performed by the agency may be considered illegal. Other restrictions may follow, such as forbidding use of agency workers to substitute other workers exercising their right to strike,61 or take the place of dismissed or suspended workers.

Even the Draft Directive on temporary workers,62 a controversial - and yet highly necessary - source, still in the process of being adopted, offers a few insights into basic guarantees for temporary workers. The Draft Directive specifies that agencies may be regarded as employers and also includes in its scope agency workers with an unlimited contract of employment.63 It also introduces a non-discrimination clause, in line with the Part-time work and the fixed-term Work Directives.

The evolution of labour law at national level offers a wide variety of parallel solutions.

The UK presents a situation whereby temporary workers establishing a relationship with an agency may be considered either dependent employees or self-employed, leaving it to the common law test to verify whether there is a mutuality of obligations.64

A recent case decided by the UK Court of Appeal65 is worth mentioning. The ruling goes in the direction of investigating whether there is an employment relationship with the user-company, especially when agency workers are engaged on a long-term basis. In delivering his judgement, Lord Mummery acknowledged inspiration from scholarly contributions, and looked carefully into the ‘complex employment relationships’ flourishing in the labour market on a trilateral basis.66 He also referred to the proposed EC Directive on agency workers to support the idea that, even when general principles in the law of contract allow sufficient flexibility to cope with new forms of employment, only legislation can supply the solution that the common law is unable to deliver.67

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60 In some countries the authorisation becomes permanent after a few years (for example, in Italy and in Belgium), in the latter with the consent of the trade unions and the user company). In the Netherlands, where the authorisation was abolished as a requirement to operate, there are indications that it might be re-introduced, due to degrading working conditions in a number of agencies. In the UK, power is recognised to the Secretary of State to seek a prohibition order against a person hiring out workers for profit. The prohibition order replaced in 1994 a previous licensing system, under the 1973 Employment Agencies Act. See S. Deakin and G. S. Morris, Labour Law, 2001, 3rd edition, Butterworths, London, p. 175. An Employment Tribunal may not grant such an order ‘unless it is satisfied that [that person] is, on account of his misconduct or for any other sufficient reason, unsuitable to do what the order prohibits’.

61 E.g. in Italy Art.20.5,2003/276 Decree and in Greece, see: www.eiro.eurofound.europa.eu/2001/11/feature/gG01i1101f.html.


63 See the recital 16 of the Proposed Directive, stating that derogations from other applicable rights in the user firm are allowed.


67 Point 8 of the decision.
In Ireland, because of court decisions suggesting that agency supplied workers were not employees, the government decided to amend the unfair dismissals legislation in 1993. This provided that where an individual agrees with an employment agency to do or perform personally any work or service for a third person, then the individual is deemed to be an employee employed by the third person under a contract of employment. Subsequent legislation then defined a 'contract of employment' as meaning: a) a contract of service or apprenticeship, and b) any other contract whereby an individual agrees with an employment agency to do or perform personally any work or service for a third person. ‘Employer’ is accordingly defined as the person with whom an employee has entered into a contract of employment subject to the qualification that the person who under a contract of employment referred to in paragraph (b) ‘is liable to pay the wages of the individual concerned’ is deemed to be the individual’s employer. A recent decision by the Labour Court under the 2001 Part-Time Workers Act questions the thinking behind these developments by holding that a worker supplied by an agency to a user company was employed by that latter company under a contract of service.

In the Netherlands, the legislature has proved to be particularly inventive. In the 1999 Flexibility and Security Act, preceded by a 1996 agreement reached by unions and employers inside the Labour Foundation, a wide range of measures is provided for agency workers who are for the first time assigned to a standard contract of employment with the agency. Furthermore, a 1998 Act regulates the position of intermediaries, including temporary work agencies among other legal entities, such as secondment companies and labour pools. It is worth mentioning that this Act poses an obligation on agencies to apply collective agreements and sector wage provisions.

One interesting side of the Dutch legislation is that the abolition of the licensing system for agencies corresponds to a full recognition of improved legal positions for workers. From January 1, 1999 the contract between a worker and the agency falls under the civil law rules of a labour contract. The so-called phasing system consists in granting rights to temporary employees, while increasing entitlements to such rights in the course of the employment relationship.

Whereas no protection against dismissals is provided for in the first 26 weeks (a period extended by collective agreements to 52 weeks), other rights start to be granted, such as the right to training and the right to enter into a pension scheme. An open-ended contract is the final aim of this legal procedure marked in four phases. Even rights to representation are granted under the Works Council Act and, in fact, temporary employees sit on the works councils of temporary agencies. The percentage of workers reaching phase three and four - which implies taking full advantage of this phasing legislation - is estimated at around 30%.

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68 I am grateful to Prof. Anthony Kerr for this example of evolution in Irish labour law.
69 Diageo Global Supply and Mary Rooney, 15 January 2004. A few points in this judgement reveal the tension between labour law principles and agency work. The Court, for example, considers the user company as employer taking into account the claimant’s ‘inclusion’ in the staff regularly employed.
71 E. Sol, ibid., pp. 100 ff. The Kok report also refers that the largest TWAs in the Netherlands are involved in training and active policies of integration in the labour market, as well as seeking to guarantee childcare arrangements, p. 30.
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Even in a very advanced legal system, such as the Dutch one, measures to rescue certain groups of workers from unskilled and insecure jobs are still considered necessary.

In the background to these evolutionary trends, we see that between 1991 and 1998 there has been an estimated growth of 10% in temporary work in Europe, although the share of employment is only around 1.4% of total employment in Europe (2.1 million people expressed in full-time jobs). We also discover that in 1999 80% of temporary workers were concentrated in four Member States: France, the United Kingdom, the Netherlands and Germany.\(^72\) In the UK, agency workers doubled during the 1990s and are now around 1% of the total labour force (close to 250,000 workers).\(^73\) Even in Germany figures are growing, despite the fact that legislation releasing some of the restrictions is only very recent.\(^74\) Agencies are now in the range of over 6000 and the number of temporary workers tripled between 1993 and 2001. The number of agencies is growing and legislation is spreading everywhere.

In **Sweden**, ILO Convention No. 96 was repealed in order to pass legislation in 1993 and in 2001. It was decided not to ratify the new 1997 Convention No. 181 on Private Employment Agencies. It is reported that the traditional opposition of Swedish trade unions to the hiring out of workers has given way to a strong impulse to unionise such workers. Even on the side of the agencies a very serious attempt has been made to create a trade institution - not an employers’ association - organising temporary employment agencies, aiming at the quality and the ethics of their business activities.\(^75\)

In **Finland** a previous licensing system was abolished in 1992. According to the Employment Contracts Act, from 2001 the agency was regarded as the employer. However, the Act explicitly states that if the power to assign and direct workers is transferred to a user company, that company will have the legal obligations directly connected with such powers.\(^76\)

In **Denmark**, despite the fact that there has never been legislation on this matter, in 1992 there were 73 registered agencies with 3000 employees and in 1999 there were 346, raising the number of employees to 35,000.

In **Greece** the first law overcoming the previous strict ban on intermediaries in job placement was approved in 1998 and the creation of temporary work agencies came about in 2001, subject to authorisation by the Labour Ministry and with the consent of the social partners. Temporary agency work represents a very low proportion of the workforce (0.1%). Despite the guarantees provided for in Law 2956/2001 regarding social insurance and trade union rights for agency workers, only some of the issues arising from agency work are dealt with in currently enforced law.

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\(^{74}\) Entered into force on January 1, 2004.


\(^{76}\) Chapter I section 7 of the Employment Act: 'If, with the employee’s consent, the employer assigns an employee for use by another employer (user enterprise), the right to direct and supervise the work is transferred to the user enterprise together with the obligations stipulated for the employer directly related to the performance of the work and its arrangement.' See also R. Eklund, 'Temporary Employment Agencies in the Nordic Countries' (2002), Scandinavian Studies in Law Vol. 43, pp. 311—334.
Two recent reforms have occurred in Germany and Italy. German law was part of the proposals put forward by the Hartz Committee in August 2002, whereas the Italian Decree intervening on several aspects of labour market reforms originates from the October 2001 ‘White Paper on the Italian Labour Market’, drafted by a committee of academics, under the auspices of the Ministry of Welfare in the newly elected centre-right administration.

In the Italian reform, agency work is only one segment of a much wider intervention. It is described as ‘commin/s-traz/one di lavoro’ and substitutes previous legislation on temporary agency work. Art. 20 presents a list of activities for which open-ended contracts can be stipulated between the user company and the agency. Fixed-term agency work can take place when organisational, technical and productive reasons are put forward by the user, even within the user’s Ordinary production process. In both cases collective agreements have wide margins of manoeuvre. Whereas for open-ended contracts, collective agreements can expand the recourse to agency work beyond the letter of the law, for fixed-term contracts they can set quantitative limits to the user.

Several formalities are provided for in the Decree. Agencies must be authorised to perform their activities; the contract with the user must be in writing and include detailed information, even with regard to possible risks for health and safety. Art. 21 very clearly states the agency’s obligations, with regard to the payment of wages and the subsequent user’s obligation to reimburse. In case of non-compliance of the obligation to pay wages and social security, the user is responsible for this and will then have to require restitution from the agency.

The Decree attempts to balance the principle of equal treatment between agency workers and workers employed by the user against a very clear separation of typical managerial prerogatives from the concrete control exercised by the user. It is, for example, specified that the recourse to disciplinary powers is an agency’s prerogative, following the user’s communication of the reasons why disciplinary measures should be taken. The managerial prerogative to move the workers from one job to the other appears similarly split and implies the user’s obligation to inform the agency in case of changes in the content of the job. Even the exercise of collective rights should be made possible for agency workers in the user’s premises.

One of the most significant innovations in both Italy and Germany consists in allowing contracts between users and agencies for an unlimited time. In Germany, equal treatment should be the leading principle applying to temporary workers. Collective agreements in 2003 have, however, lowered the level of wages, in order to open up more possibilities for employment. It is interesting to note that despite the less rigid approach followed in the 2003 reform, the system of sanctions is still rather strict. In case of lacking authorisation, contracts of employment are established de jure. German agencies are liable for payment of wages and social security even when contracts are considered illegal.  

Looking comparatively at legislation in the field of agency work, a main divide seems to run between fixed-term and open-ended contracts entered with the agency. It is difficult to say whether this distinction in contracts of employment coincides with other special characteristics of the agencies and whether this will affect the relationship with users.

The observation of the whole phenomenon suggests that the expansion of agency work and the growing number of agencies should be the object of further investigation, both from the sociological and the legal point of view.

Both contracts for limited and unlimited duration pose a series of challenges to labour law. In some countries the reg-

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77 Consequences under tax law make the agency worker rather vulnerable in case of illegal contracts with the agency, since there is a system of joint liability. See P. Schüren, Employee leasing in Germany: the Hiring Out of an Employee as a temporary Worker (2001), Comparative Labour Law and Policy Journal Vol 22, No 1, p. 79.
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ulation of fixed-term agency work is not too distant from that of other contracts with a fixed duration. Sanctions as well as incentive measures to enter into such contracts of employment are a combination of old and new solutions.

It is suggested that in years to come agency work will be the area in which evolution will need to continue, bringing new ideas to national legislatures. The most interesting attitude is shown by legislatures adapting traditional labour law guarantees to agency workers.

We already mentioned the sophisticated Dutch model, in which the entitlement of rights represents a premium for the workers and, at the same time, an investment for the agency.

France should also be mentioned. Attempts in that country have been made to construct a 'statut des travailleurs précaires', namely a series of rules modified over the years and addressed to employment relationships characterised by instability. There have been a large number of claims in court, despite the fact that this is not an easy route for those workers lacking job security. The most original guarantee is to give the works council a droit d'alerte (introduced by the 2002 Loi de la modernisation sociale), a way to warn the employer on the growing number of insecure contracts. Training obligations and the protection of health and safety are also provided for.

In Spain temporary work agencies became operational in 1994, overcoming several problems of adaptation of the legal system and having to take into account a strong social reaction. A negative attitude towards temporary work had to do with the very fragmented nature of employment in this field, and with the varying - but often very short - duration of the contracts. A reform was introduced in 1999, followed by the transposition of the Posted workers Directive, which also led to some further changes in the law. Spanish legislation is now very similar to that enforced in other countries. One original feature is the requirement for a minimum proportion of employees hired on a permanent basis.79

Spain is also an interesting case for the understanding of a complex social and organisational phenomenon, whereby agencies which started to operate for providing temporary workers developed into agencies providing services. This may not be an isolated case.

For instance, it is difficult to predict whether the 2003 Italian Decree will encourage differentiation in the services provided by agencies. Art. 29 deals with appalto or contracting-out of activities different from the ones performed by agencies. The contractor takes full responsibility for the work to be performed, has its own organisation and exercises managerial prerogatives. Equal treatment does not apply to workers involved in contracting-out, due to the abrogation of the previous relevant norm. This relaxation of a previous legal limit might represent a "competitive advantage", when compared to agency work. The delicate point will be evaluating the true entrepreneurial nature of contractors and investigating their validity as employers.

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78 See French Report, Chapter III, section 1.2. Collective agreements have also been very innovative in this field.
The Draft Directive on agency workers has inspired interesting comparative work. National labour lawyers have often been confronted with the need to specify concepts which were new to academic debates and also to law-making. The principle of equal treatment, as clearly stated by the proposed Directive, is in itself a guiding principle, inasmuch as it clarifies the notion of comparable worker within the user company.

The tendency to provide temporary agency workers with better guarantees is already present in a large number of countries. Difficulties in enforcing such guarantees are inherent to the nature of agency work. To quote again the authors mentioned at the beginning of this section, it is the 'multi-laterality of some work relationships which makes them non-standard; for it is their multi-laterality which expresses or embodies an allocation of risks and responsibilities which is different from the standard pattern'.

A statute for agency workers

Comparative results emerging from this study suggest that a series of challenging questions need to be addressed. There is often an imprecise knowledge of the content of agency work. An investigation into the quality and quantity of the services more frequently required by users could be relevant for labour law; and it would be similarly important to know whether agency workers are mainly required for jobs with low qualifications. Such workers may find it difficult to plan a career path inside the agency and may be equally unprepared to take advantage of other labour market opportunities.

Labour law could suffer from an identity crisis, in observing how companies constantly reduce the core production and seek services and other related activities from outside. The antidote to such a crisis, as it emerges from the present study, is the constant adjustment of labour law rules and sanctions to a new function of the discipline.

The impression is that, in some cases, the evolution of labour law cannot go further than adapting old instruments to a completely new organisation of the company. Split powers between agencies and users and solidarity in obligations represent only a partial - albeit potentially very powerful - solution. Authorisation or licensing systems for agencies are yet another way to introduce a distinction between legal and illegal agency work and thus create a suitable environment for workers.

In agency work, as in a multiplicity of non-standard jobs, the risk is to lose track of a fundamental rights regime. Control exercised through labour inspectors is an efficient solution, but it seems to work only in legal systems with a consolidated tradition. Collective bargaining can also be a way to bring about equitable working conditions and comparable wages. Collective agreements can also specify how to entitle agency workers with freedom of association and the right to be informed and consulted.

Further evolution of labour law should be such to bring agency workers closer to other non-standard workers, emphasising their similarities and constructing new system of guarantees.

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Chapter V: Evolution and the ‘autonomy’ of labour law

2. Autonomy from the market: economically dependent work. Beyond dependent and self-employed workers

The title chosen for this section is, once more, a way to acknowledge the seminal contribution to labour law scholarship offered by the Supiot Report.\(^{83}\) Even though only a few years have gone by since this study, quite remarkable changes are visible in national legal systems.\(^{84}\)

The spreading of self-employment represents one of the most challenging patterns of evolution in the time spell considered by this report. What is most difficult to assess is under which circumstances (be they social or caused by deep changes in the enterprise organisation) a grey area emerges, in which criteria of subordination are not immediately visible and yet dependence is an indisputable feature.\(^{85}\)

The notion of economic dependence - as opposed to personal or functional dependence - has a highly symbolic value and explains the dilemmas of legal reforms dealing with it. A powerful metaphor, drawing on economic analysis, suggests that it indicates ‘a bridge between internal and external labour markets’.\(^{86}\)

National legal systems have not fully incorporated such a new notion and present, in the majority of cases, an unsettled debate. In several countries academic research challenges both case law and legislative solutions. The result is a vivacious re-visitisation of traditional labour law thinking, accompanied by the search for empirical data exemplifying the new phenomenon to be regulated.

Germany is a good example of how controversial the work of the legislature can be and how this can create split opinions among commentators. Field-research undertaken in Germany in the mid-1990s\(^{87}\) proved the difficulty in detecting self-employment hiding dependent work and to understand the reasons why this phenomenon was so widespread.\(^{88}\)

Ways to combat abuses of the law, through the elaboration of objective criteria, have continued to be at the centre of academic research and of case law. Whereas the former would be prepared to suggest innovative ideas, the latter - in particular the case law of the Federal Labour Court - tried to maintain a more traditional approach and to ensure criteria of personal subordination, adopting the same notion of dependence for labour law and for social security law.\(^{89}\)

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\(^{85}\) Some country studies present the cases of telework and home work as examples of grey areas in which managerial powers are exercised, despite the fact that work is performed outside the company. Economic dependence can, in such cases, be a further element to consider, when evaluating the precise nature of such contracts of employment. A different example, referring to France, is offered by A. Perulli, ‘Lavoro, autónomo e dipendenza economica oggi’ (2003), Rivista Giuridica del Lavoro, n. 2, p. 227. See also A. Perulli, Report for the European Commission: Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects, 2003, Brussels available at: http://europa.eu.int/comm/employment_social/labourlaw/docs/parasubordination_report_en.pdf

\(^{87}\) Research was carried on under the auspices of the Federal Labour Agency, following a path-breaking academic analysis developed by R. Wank, Arbeitnehmer und Selbständige, 1988, Verlag, C.H. Bea, Monaco.

\(^{88}\) W. Dautler, Working People in Germany’ (1998), Comparative Labour Law and Policy Journal, p. 85 explains this for reasons of a strong tradition dating back to the Weimar Republic and for reasons of strict interpretation of existing law, which does identify categories of ‘worker-like person’.
The Red/Green coalition favoured in 1997 a reform of social security and introduced under Article 7 (4) of the Sozialgesetzbuch — a new provision whereby the obligation to pay contributions would apply to all economically dependent workers, regardless of the personal dependency criterion.

The technicalities of this solution have been criticised. Change in government brought about a new law in 1999, the 'Self-employment Promotion Act', mainly functioning on a legal presumption which binds the social security system to apply the legal definition of dependent worker. The legal presumption can only be avoided if it is clearly stated that no dependent employment is foreseen. The novelty is in the elaboration of criteria for entrepreneurial freedom and for the risks associated with it, but does not seem to tackle the issue of economic dependency. Thereby criticism has been voiced, arguing that the definition of those who are employed only represent a partial solution to a much broader and still unsolved problem.90

In December 2002, the Red/Green coalition struck down the rule on legal presumption and left in force only the inquiry procedure in Section 7 of the Social Code, provided for those who choose to co-operate with the social security system.

Furthermore, the German law that entered into force on January 1st, 2003 deals with 'Ich-AG's' or 'me-public limited companies'. The aim is to help unemployed people start an economic activity by using an Existenzgründungszuschuss, a state financial aid which should cover pensions and other social security benefits.

Every unemployed person who begins to work for himself is entitled to this subsidy if his expected income is not higher than EUR 25 000 per year and if he does not employ other workers (except family members). The subsidy is intended to cover social security contributions which the individual has to pay due to self-employed status. Therefore the monthly amount awarded to the individual is EUR 600 during the first year. In the second year the subsidy decreases to EUR 360 per month and in the third (and last) year to EUR 240. At the end of 2003 more than 100 000 subsidies had been granted, mainly in the service sector.

The newly enacted Italian 'certification' should serve the purpose of filling the gaps between subordinate work and self-employment, with a view to punishing abuses and reducing court cases. Certification is an administrative act and has erga omnes effects; rather than qualifying the nature of the contract, it indicates all legal consequences attached to it, be they civil, administrative, related to social security or fiscal. It applies to 'lavoro a progetto e a programma', the new definition of self-employment proposed in the 2003 labour market reform.

While leaving untouched some forms of genuine self-employment, the reform intends to tackle hidden forms of subordination. It does so suggesting that a project or a programme - rather than a continuous and co-ordinated collaboration, as in the previous legal definition - helps to specify the content of the obligation carried by the self-employed. A first - and still vague - interpretation proposed by commentators is to view a project as a well defined obligation, undertaken by a fairly skilled person within a very clear time limit. It is more difficult to define what a programme should be, since in each job description, even in the simplest one, such a content should be implicit.

The legislature is very cautious in specifying that the principle of remuneration related to quality and quantity of the work performed should be measured against similar types of self-employment, thus excluding assimilation to collective agreements and to wages for dependent workers.

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For people working 'a progetto o a programma', health and safety measures apply and a very timid attempt is made to endow them with other rights. It is specified that work be suspended - with no remuneration - for reasons of pregnancy, illness and injury. Suspension due to pregnancy implies that a minimum of 180 days will be added to the duration of the project or of the programme, whereas for other reasons work will terminate as originally stipulated.

In France, the 1994 Loi Madelin — dealing with 'initiative' and 'entreprise individuelle' — introduced a legal presumption of the non-existence of subordination (présomption de non-contrat de travail) for those who registered as self-employed. The criticism with regard to such a solution was that it confused criteria for the affiliation to the social security with criteria for the definition of a contract of employment and created a lack of professional identity for those who did not engage in permanent dependent work, as the law specifically indicated. The presumption was abrogated by the 19 January 2000 Law, following very critical rulings by the Cour de Cassation (the French Supreme Court).

More recently, a language only apparently similar to the one adopted by the Italian legislature is used in the report put forward by the Commission de Virville, appointed by the French Minister for Labour and Social Affairs. In this document, aimed at making law-making more efficient and clarifying the interpretation of obscure principles, it is suggested that 'definite projects' should be assigned to experts or skilled workers, in order to clarify ambiguous employment offers, often leading to insecure work. The main idea is to regulate a new sort of contract in the Labour Code, inspired by the fixed-term contract regulation and yet different because of its scope.

The Report de Virville also states that an 'imprecise boundary' runs between dependent work and self-employment, despite the useful contribution made over the years by the Cour de Cassation. It favours, therefore, the introduction of 'contrats types', which should allow the parties to choose the legal regime most appropriate for specific contracts of employment, thus enhancing flexibility even further. Such proposals face opposition in the academic debate.

Choosing a different perspective, in the United Kingdom an empirical study was launched by the Department of Trade and Industry with a view to finding out the status of employed people. The results proved that, due to the expansion of non-standard and very flexible contracts of employment, the number of workers 'according to British terminology - was growing, which meant a falling number of employees' entitled to legal guarantees.

It is illuminating to discover that recent research in this field develops a 'personal employment contract' as a new 'definitional category', in order to try and include within the same elaboration contracts of employment and semi-dependent workers' contracts. For the latter category, it is acknowledged though, that the law is still 'an uncharted territory'.

The discussion on Section 23 (I) of the 1999 Employment Relations Act and on the powers conferred to the Secretary of State to extend rights to individuals who are not protected by them, is an example of how difficult it proves to include self-employed in this area of guarantees. It has been argued – and this is an argument to be further elaborated in the conclusions – that 'labour legislation with a human rights dimension' could be extended to the self-employed.
The 1998 Greek law, inspired by the now abrogated French Loi Madelin, provided recognition for self-employment, provided that a written declaration is made and information is sent to the labour inspectors within 15 days. Either the self-employed person or the social insurance institution can prove otherwise.

In Belgium an organisation of small and medium-sized employers has designed a test to verify the elements of dependence, putting together 12 criteria and attributing points to each of them. Below a certain number of points, workers are not considered self-employed. For cases falling in between the established number of points, a special commission decides. Reforms of this highly technical mechanism are under discussion.

In Spain trabajo autónomo dependiente (or 'dependent autonomous work') which sounds like a linguistic contradiction was part of a proposal to identify self-employment, in order to provide new legal guarantees. A criterion based on income, rather than recognition of one exclusive employment relationship, was put forward. It emphasised elements such as co-ordination and collaboration, albeit with more than one employer.

To confirm that the evolution of labour law in this field is closely related to social security, Sweden should be mentioned. Tax and social security laws provide the definition of self-employment.8 In this country, as well as in Denmark and Finland, no legal definition of worker is provided and space is left to the ongoing evolution of case law.

In the Netherlands, the UWV (Institute for employee benefit schemes) and the tax department have adopted common policies on the collection of criteria according to which compulsory contributions are due. This should facilitate the distinction between dependent work and self-employment.

The British debate, similarly to the German one, illustrates the way in which scholarly work can intertwine the interpretation of the law with insights into future developments. Some Italian legislative proposals, dating back to the previous centre-left administration and currently under discussion inside the same coalition, now in opposition to the present administration,9 go in a similar direction. There are indications that such issues will be addressed by an independent commission of labour lawyers, appointed by the present Minister in charge of labour affairs.

Examples taken by various legal systems confirm the variety of solutions adopted to tackle a phenomenon which is still largely undefined: The expansion of non-standard contracts, on the one hand, marks the boundary of a territory which may or may not coincide with new forms of economic dependence. On the other hand, attempts to promote genuine self-employment follow a different direction and have been put forward as well.

Because of the many interconnections that this subject matter has with other evolving patterns of labour law, it seems urgent to adopt an incisive approach towards workers whose fundamental rights might be threatened by economically-dependent employment relationships. The legal presumption, a technique still present in several national legal systems, does not seem to capture the subtleties of situations in which, rather than expanding labour law principles, it is necessary to find new ways to adapt them to economically dependent workers. Certainty about the nature of the employment contract can only be encouraged by creating a base of rights specifically aimed at economically-dependent workers. Concepts such as ‘adaptation’ or ‘modulazione’ are useful to understanding that labour law in this particular area has to invent new solutions.10 It is not surprising that even at the ILO a broad area of investigation has recently been opened.11

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8 The Report on Sweden describes the F tax and the A tax, the former for persons who run their own business, the latter for dependent workers.
9 T. Treu, former Labour Minister under the Prodi government, launched the ‘Statuto dei lavori’. See an early draft in T. Treu, Politiche del lavoro, 2001, II Mulino, Bologna. Further contributions have been added to that project and are currently discussed in a legislative proposal (n. 2049, approved by the Italian Senate in 1999).
10 A. Perulli uses the expression ‘tutele inédite’, p. 259.
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The search for a tertium genus or the construction of a new classification of employment contracts - as in the lengthy Italian discussion on 'tipo contrattuale' - are overcome by a multiplicity of phenomena in which it is difficult to ascertain an univocal and precise intention on the part of the contracting parties. Fraud or imprecise interpretation of the law cannot be punished with traditional sanctions, but should be prevented, by providing a suitable legal environment in which to establish a clear and flexible framework of obligations for both parties and an incisive apparatus of inspectors within the social security institutions.

Following Mark Freedland’s conception of personal employment contracts it should be clarified that employment is the key word around which entitlements should be constructed. A path should be followed in order to bring together all essential means to expand human rights. The notion of protection may perhaps not be appropriate in this regard. What the evolution of labour law is aiming at is the creation of a space in which economic dependence is counterbalanced by a series of economic support mechanisms, such as access to pension schemes, special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leave, and childcare opportunities.

On a parallel track, labour law should construct a series of permanent and generalised obligations for whoever engages in a personal employment contract where one party is economically dependent. Obligations should rotate around the enforceability of fundamental rights such as dignity, health and safety, access to training, and reconciliation of work and family life. Voluntary sources could complement this floor of legal guarantees and indicate the applicable labour standards.

It is suggested that EU law - preferably in the form of a framework directive - could help clarify the construction of criteria similar to those on mutual obligations in subordinate employment and yet specifically tailored to such new social phenomena.

Criteria to tackle economic dependence can be developed (employment mainly performed with one or with numerous purchasers, direct access to the market, levels and continuity of earnings, number of dependent persons within the family) and so can entitlements which are strictly functional to employment, such as the right to define the scope of the 'personal employment contract' and to know which working conditions will apply, the right to receive notice if employment is to be terminated, and the right to information on health and safety measures.

Entitlements for economically-dependent workers are, in most cases, costly. They may range from the creation of special social security funds and pension funds, to a privileged access to social services, even when workers are short of employment, to forms of spreading earnings in between different spells of employment. This could be left to a softer approach: giving preference to co-ordination of national measures, while leaving the choices on fiscal aids entirely to Member States.

The overall impression is that economically dependent work is spreading and progressively becoming more defined, notwithstanding the different solutions adopted in national legal systems. Rather than evolving as a mere continuation of what used to be described as quasi-dependent work, or lavoro parasubordinato, or trabajo autónomo dependiente, it attracts in the same area new forms of employment, all similarly characterised by non-continuity, the low level of earnings, and the lack of precise prospects in creating career paths.

In this broad new area of work, evolution should be interpreted for the future as a way to find suitable answers to primary needs of labour law, almost a challenge to its ability to be born again.

3. Family-friendly labour law

The title chosen for this section is not intended to mimic the language adopted by some national legislatures. It rather serves the purpose of underlining yet another new feature in the evolution of labour law.

The point to be made is that, in providing measures orientated to support the family, labour law does not have to establish its autonomías in the examples discussed so far. Labour law offers unique opportunities to fulfil objectives which only apparently fall outside its scope.

What is described as family-friendly labour law opens up a new dimension for the evolution of the discipline. Measures in this field are such to adapt contractual obligations to the fulfilment...
of aims which fall outside the contract of employment and have a wider social implication, such as providing care and assistance within the family. The important point to underline is that such measures may also aim, in line with some European employment policies, to help workers - very often women - to return to the labour market or to stay in it with better chances and proceed further in acquiring new entitlements.

In this context, in Ireland the relevant provisions of the 1997 Organisation of Working Time Act should be noted. These provide that, in determining the times at which annual leave is granted, the employer must take into account: the need for the employee to reconcile work and any family responsibilities, and the opportunity for rest and recreation available to the employee. It should also be noted that, although a social welfare benefit is available for working mothers taking maternity or adoptive leave, no such benefit is available for working parents who take parental leave. Research commissioned by the Working Group on the Review of the Parental Leave Act 1998 showed that only 20% of eligible employees were estimated to have taken parental leave, with the majority of those taking such leave being women (84%).

The notion of care is also further expanded in more recent legislation, to include other members of the family in need of assistance. Since 2002 'compassionate leave' is provided for in Austria, to care for dying or seriously ill relatives. A conditional entitlement is introduced to the reduction of working hours. In Belgium leave for 'urgent family reasons' are provided for in collective agreements. In France we find legislation on leave for assisting relatives with terminal illness. Leave for assisting close relatives and partners are part of Italian law too. In Ireland, the Carer's Leave Act 2001 confers a right on employees to take temporary leave from their employment for up to 65 weeks to look after persons in need of full-time care and attention. It is designed to complement the carer's benefit scheme introduced by the Minister for Social, Community and Family Affairs in October 2000. In the Netherlands, the 2001 Work and Care Act brings together provisions on leave to help reconcile work and family responsibilities. In addition to the amendment of existing regulations, such as those governing maternity and parental leave, new provisions cover various other forms of leave, for emergency circumstances, or to take care of a sick child or parent living at home, or for parents adopting a child. Deviation from the law in a way unfavourable for employees is possible if it is agreed upon in a collective labour agreement.

A debate is currently taking place in the Netherlands on so-called 'life cycle collective agreements,' which are part of a negotiation between the social partners and government. The trade-off could be between a two-year wage freeze, pre-retirement and the introduction of life course arrangements, which cover work, care, education and leisure. The predecessors of such a new policy on life cycle are labour law and social security measures which, especially in the second half of the 1990s, took the form of flexibilisation of working time and the regulation of leave.

The notion of reconciliation of family and working life, now enshrined in Article 33 of the Charter of Fundamental Rights, goes even further. It confirms protection against dismissals, but also indicates that there should be ways to enhance and promote choices to devote more time to the family. However, in France - as the report indicates - legal reforms aimed at the reduction of working time (1996, 1998, 2000) did not serve the purpose of reconciling work and family commitments. It was necessary to turn to ad hoc legislation, such as parental leave.

I am grateful to Prof. A. Kerr for pointing out these references to me.

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In Germany, under certain conditions, it is possible to change from a full-time into a part-time job. This is the case in France too, when compatible with the employer’s organisational priorities.

The role of collective agreements is pivotal in this field. In large German companies some better schemes for leave are presented and training measures are added. In Italy too, a recent survey showed the distribution of measures in company agreements, ranging from telework and reduction of working hours, to company services and financial support for career interruptions. In the Netherlands childcare services should become part of collective agreements for agency workers.

Measures of this kind should in the future become more directly functional to employment policies and to a correct enforcement of the equality principle. The Barcelona European Council, for example, set very specific targets for childcare provision in view of improving employment rates for women.\textsuperscript{105}

However, legislative initiatives in the EU countries are less dynamic and inventive than one would expect. This is a field in which the evolution of labour law should be pursued in a more visible and significant way\textsuperscript{106} exploring new possibilities, such as those emerging in life cycle arrangements.

\textsuperscript{105} Targets are: 33% for children under three years of age; 90% for children three years old to school age.

Chapter VI: Areas of evolution, with adjustments towards flexibility

In this section, the evolution of labour law will be evaluated in two main areas - fixed-term contracts and part-time work - both characterised in the majority of cases by national legislation pre-dating the years covered by the present study and then adapted and modified by subsequent measures.

The enforcement of the fundamental right to equal treatment constitutes a significant step forward and has given impetus to the evolution of national labour law. However, in a comparative perspective it remains to be seen how the link with employment policies functions. The open question is how to evaluate the trade-off between levels of protection and promotion of employment.

The great diversity of solutions adopted by Member States seems to suggest that the principle of non-discrimination does not, in itself, suffice to introduce comparable standards of protection, when fixed-term and part-time workers find themselves in a marginal position in the labour market and therefore not entirely free to enter such contracts of employment.

Examples selected from country studies reveal fragmentation, rather than consolidation, of national legislation. They also reveal new areas of work performed in situations of uncertainty, both for economic and normative conditions. All these elements have provoked debate on how to enhance a more harmonious and effective way to combine European soft and hard law.

Fixed-term contracts

The assumption that fixed-term contracts, like other flexible contracts, bring about a significant increase in employment is not fully proved. Changes to legislation have also occurred because of an altogether different function of fixed-term contracts. This mainly reflects changes in work organisation, both in traditional areas of production and in new areas of the service sector and the public sector.

Apart from the Greek case, we encounter a fairly homogeneous evolutionary trend in most countries. One unsolved contradiction seems to be in the combination of traditional sanctions - typically the conversion of the contract into an open-ended one - and new aspirations of the fixed-term workers, often marginalised in unskilled areas of the labour force. In such cases conversion into open-ended contracts might not necessarily fulfil the aspirations of fixed-term workers.

Moreover, it should be noted that fixed-term contracts are adopted in diversified areas of labour law (agency work, contracts for workers over a certain age, contracts with mixed scope such as work and training). Better coherence should be established in legislation covering fixed-term contracts and other specific measures concerning recourse to such contracts. A unitary floor of rights and obligations might be the result of linking together what appears to be a rather fragmented system of rules.
Part-time work

In most countries we encounter a series of acts, amending previous legislation and re-entering a controversial terrain. This shows that, despite the fact that in several Member States legislation first appeared in the 1980s, there is still a need to specify the function of part-time work.

Examples taken from national legal systems show that legislative approaches on part-time work and solutions adopted can be very different. This is probably due to the fact that social phenomena behind this type of contract reflect diverse traditions. Very different gender balances in the labour market, reflecting cultural approaches and economic disparities, may influence the legislature.

In legal systems in which civil codes still provide continuity in the evolution of labour law, resistance to flexibility measures is almost unconsciously put forward as a fear to alter a traditional equilibrium in contracts of employment.

In this section the evolution of labour law will be evaluated in two main areas - fixed-term contracts and part-time work - both characterised in the majority of cases by national legislation pre-dating the years covered by the present study and then adapted and modified by subsequent interventions.

Furthermore, both areas are dealt with in the previously mentioned Framework Directives. The transposition of both Directives has given rise to adaptations in national legal systems, even when the subject matter was already widely covered by previous legislation. This has, in some cases, initiated a debate on the comparability of national and supranational standards and on the possibility of lowering previous levels of guarantees, while transposing a directive. For example, the ongoing Italian debate on ‘c/couso di non regresso’ shows the complexity of this legal issue, raised by the language of both Framework Agreements, when mention is made to the fact that no reduction of ‘the general level of protection afforded to workers’ should occur, when implementing European sources (respectively Clauses 8 and 5 of the Fixed-term and Part-time Agreements).107

The enforcement of the fundamental right to equal treatment constitutes a significant step forward and has given impetus to the evolution of national labour law. However, in a comparative perspective it remains to be seen how the link with employment policies functions, since fixed-term and part-time contracts have been repeatedly regarded by European institutions as appropriate measures to combat unemployment. The open question is how to evaluate the trade-off between levels of protection and promotion of employment.

The great diversity of solutions adopted by Member States seems to suggest that the principle of non-discrimination does not, in itself, suffice to introduce comparable standards of protection, when fixed-term and part-time workers find themselves in a marginal position in the labour market. It represents a most significant guiding principle in enforcing equality when workers are somehow inserted in an organisation and comparability in all working conditions is made possible. But this is not always the case, especially in some areas of production.

National legislation in these fields is thus characterised by the many changes which have occurred, particularly in the implementation of the Directives’ clauses in which ample space is left to national measures for the concrete fulfilment of flexibility. There is space to intervene at a supranational level and to specify how the principle of non-discrimination should expand its beneficial effect before fixed-term and part-time contracts are entered into. Once more, it is the feeble position of those who do not enter freely into such contracts, starting from a position of social exclusion or marginality, which should be better focused on in the future.108

107 See on these points the report on Italy, Chapter I, sections 2 and 4.
108 See Concluding remarks.
I. Fixed-term contracts

In dealing with this important chapter of national labour law, one can visualise the shift from traditional protective measures to flexibility and confirm that the scope of labour law has been adapted to different economic circumstances. The assumption that fixed-term contracts, like other flexible contracts, bring about a significant increase in employment is not fully proven. Changes to legislation have also occurred as a result of an altogether different function of fixed-term contracts. This mainly reflects changes in work organisation, both in traditional areas of production and in new areas of the service sector and of the public sector.

In Portugal - where Directive 1999/70/EC was implemented in 2001 - the 2003 Code introduces a most significant change in Article 129, bringing up to six years the maximum duration of fixed-term contracts. It also imposes higher contributions on the employer (taxa social única) according to the number of workers and to the length of the contracts, thus showing a visible preference for open-ended contracts.

This is also the case in Spain, where ‘compensation for insecurity’ was introduced as a way to combat fixed-term contracts. This was the response of the legislature to what was considered an excessive increase in the number of fixed-term contracts. In 1994 more space was given to collective bargaining, with the intention of providing specific reasons for entering into such contracts.

Belgium, on the contrary, offers the example of progressive relaxation of the limits on fixed-term contracts. In 1994 and subsequently in 1998, legislation went in the direction of allowing successive contracts, without having to give reasons and without having to consider them permanent.

In Italy, the notion of 'technical, productive, organisational and substitutive reasons', introduced in the transposition of the Directive, has widened the scope for the recourse to fixed-term contracts, thus giving rise to criticism, since this measure might go beyond the purposes of European law and therefore be considered disadvantageous. The previous technique, namely the indication of binding criteria in which fixed-term contracts were allowed, is substituted by a broad definition, which will be open to the evolution of case law. The still relevant requirement of the written form indicates that some form of evaluation of the reasons for entering such contracts will be necessary.

In France, there is a tradition of judicial control over abuses in the recourse to such contracts. Recent case law, however, accepts that a correct recourse to fixed-term contracts may occur in cases in which the law recognises 'contrats d’usage'. This implies a less strict attitude of the court and an acceptance of the fact that employers must have a wider option for flexible employment, particularly in certain areas of economic activity.

In Germany, legislation in this field originated in a constant growth in these contracts - up to 9% of the total workforce in 2000 - albeit in jobs with low qualifications. The leading principle in case law is that employers must have an objective reason to hire workers for a limited time. Legislation approved in 2003, lasting until December 2006, specifies that workers over 52 (no longer 58, as suggested by the Hartz Committee) can enter fixed-term contracts without an objective reason, thus raising the doubt that there might be ground for age discrimination. Renewal can occur three times, but collective agreements can derogate even in pejus from this limit. Field research shows that fixed-term contracts are more frequent among unskilled workers, who are more liable not to benefit from renewals. This flexible measure is, on the whole, considered not very relevant for the expansion of working opportunities.**

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109 Decreto legislativo 6 September 2001, n. 368. Previous legislation from the 1960s with subsequent amendments in the 1980s, is explicitly abrogated.


Chapter VI: Areas of evolution, with adjustments towards flexibility

In Sweden, numbers of fixed-term contracts increased in the 1990s, rising to one-sixth of the total labour force. The adoption of the 1999/70 Directive and the enforcement of the principle of equal treatment seem to have improved individual guarantees.

In the UK, the consultation preceding the transposition of the Directive was very long. The government took advantage of a provision in the Directive allowing one more year for ‘special difficulties’. Primary legislative powers were taken in the Employment Act 2002. The decision was to treat employees hired on subsequent contracts as permanent employees after four years. But a number of not very precise references in the Regulation make this protective measure debatable. In particular, it is indicated in Clause 8 (5) of the Regulation that the four years statutory standard can be overcome by a different standard provided for in a collective or workforce agreement. This is seen by some commentators as a risk for employees not covered by collective agreements and forcefully made more adaptable to the employer’s needs.2

A problem arose in Greece when fixed-term contracts began to become widespread in the public sector and ended up covering permanent positions, first presented as temporary. Both Article 103 of the Constitution of 1975/1986 and subsequent legislation3 stated that hiring workers with private law contracts in the public sector was allowed only under extraordinary circumstances, such as filling unforeseen, emergency or temporary positions, which could only be covered by fixed-term contracts.

A legal issue arose as to the reiteration of such contracts. Would Article 8, paragraph 3 of Law 2112/1920 (providing that, in the private sector, after several renewals contracts are intended as open-ended) be applicable also in the public sector? The Supreme Court, in a series of cases in the 1990s, answered in the negative.

The Constitution, as amended in 2001, supplemented Article 103 with a new paragraph (8), which, for the public sector, forbade the transformation of successive fixed-term contracts into open-ended ones.

In the meantime, the Council Directive was, with some delay, transposed into Greek law.4 Following several complaints and an investigation into possible non-compliance with Art. 5 of the Directive (abuse in use of successive fixed-term contracts in the public sector), the Commission is likely to bring an action before the ECJ.

The distorted recourse to successive fixed-term contracts in the Greek public sector is a legal question with considerable social and political implications, which involves almost 45 000 persons. It is very interesting that, rather than referring preliminary rulings to the ECJ, from April to June 2003 a number of Greek courts decided to enforce directly the 1999 Directive and to convert successive fixed-term contracts into contracts of indefinite duration.

It can be argued that in such a peculiar case, resistance to EU law is motivated by domestic political and financial difficulties and that courts have proved to be independent actors in complying with such specific legal provisions.

113 Article 103 paragraph 2 of the 1975/1986 Constitution: ‘No one may be appointed to a position which has not been provided for by law. Exceptions may be provided for by special law, so that unforeseen or emergency needs can be covered with staff that will be employed for a fixed-term under private law’. Law 993/79 was passed to give effect to this Constitutional provision. This law, together with subsequent supplementary and amendatory provisions, was codified into a unified text — Presidential Decree 410/1988 ‘Codification in a unified text of provisions of the existing law referring to staff with a private employment relationship in public administration, organs of local government and legal entities under public law’, Government Gazette A 191-30-8-88.
Apart from the Greek case, we encounter a fairly homogenous – and yet not uncontroversial – evolutionary trend in most countries. One unsolved contradiction seems to be in the combination of traditional sanctions – typically the conversion of the contract into an open-ended one – and new aspirations of the fixed-term workers, often marginalised in unskilled areas of the labour force. In such cases conversion into open-ended contracts might not necessarily fulfill the aspirations of fixed-term workers.

Moreover, it should be noted that fixed-term contracts are adopted in diversified areas of labour law (agency work, contracts for workers over a certain age, contracts with mixed scope such as work and training).

Better coherence should be established in legislation on fixed-term contracts and other specific measures, which also imply the recourse to such contracts. A unitary floor of rights and obligations might be the objective to aim for, when intervening in this rather fragmented system of rules.

2. Part-time work

In most countries we encounter a series of acts, amending previous legislation and re-entering a controversial terrain. This shows that, despite the fact that in several Member States legislation first appeared in the 1980s, there is still a need to specify the function of part-time work.

There is, however, the case of Portugal, where the transposition of the Directive (Law 103/1999) represented the first occasion to regulate part-time work. These amendments intervened in 1998, while dealing with Directive 97/81. Part-time was extended to the public sector, in line with the indications of the 1997 ‘Confidence Pact’, signed by the government and the social partners. In August 2003, a new Law (3174/2003) on part-time was enacted. It provides for public sector organisations to recruit unemployed people and other marginal groups in the labour market with a combined formula of part-time/fixed-term contracts, in order to provide social services. Employment under such contracts should not exceed 20 hours a week; they can last up to 24 months. After termination, such contracts may be renewed with the same worker only after an interval of two months. Social services such as home care, assistance in schools, children’s road safety or social integration of immigrants are indicated and funding is provided either by the state or by EU programmes. Candidates must be selected from specific target groups, such as unemployed, young people, people with disabilities, following certain percentages.

Figures reported in national studies are very different. To quote only a few examples, in Germany there is an increase from 15% in 1991 to 25.6% in 2001. In Ireland figures grew from 8.1% in 1990 to 16.7% in 1998. In 2002 in Greece the rate is 4.3% and in Italy it is around 5%.

Between 1965 and 1980, Swedish part-timers doubled from half a million to one million, and have since then covered 23-25% of the working population. Women represent over 80% of all part-timers. This peculiarity justifies the Swedish approach, described as prevention of involuntary part-time, in the framework of the 1995 Parental Leave Act.

References:

116 See extensively, on the details of this legislation, the Greek Report, Chapter III.
117 See the Swedish report.
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In the Netherlands, the ‘miracle’ that occurred in the 1990s was mainly due to the return of women with children into the labour market. The Dutch legal system reacted promptly to a spontaneous process and successfully regulated part-time work. The principle of equal treatment between part-time and full-time workers had already been part of the Civil Code since 1996. Legislation encourages voluntary part-time, establishing the right of the individual worker to ask for a reduction of working time up to 20%. The employer must, within three months, indicate the organisational reasons which impede the recourse to part-time. The percentage of companies employing more than 10 people and having at least one part-timer is very high. The obligation, arising from the Directive, to eliminate obstacles to the creation of part-time work, was on the whole already fulfilled by previous legislation.

In 2001, in adopting the 97/81 Directive, German law introduced an original definition of the right to part-time work for workers employed in firms with more than 15 workers, whose contract had lasted for at least six months. In case of refusal, the employer has a duty to prove that there are organisational reasons impeding the reduction in working hours. Collective agreements can regulate such cases. There are indications that this law is successful. This would prove that flexible measures function in a more efficient way when individual workers are put in a position to enter freely non-standard forms of work. The national report on Germany stresses the fact that legislation goes beyond the scope of the Directive and facilitates potential links with full-time work.

An original sample of legislation is the 1996 Act originating from the ‘Alliance for Work’ (Bündnis für Arbeit) in Germany, to promote part-time contracts for workers aged over 55. The rationale behind this law is that if older workers are supported to move from active working life to retirement, new jobs can be offered to unemployed younger workers. The employer has to compensate the loss in pension resulting from the reduction in working hours paying into the fund, as if the worker’s income was equal to 90% of the salary. These sums are reimbursed to the employer by the Federal Employment Service if the newly employed are registered unemployed workers having completed their training. There is no individual right to enter these part-time contracts, but the incentive for employers is to benefit from the skill and experience of older workers, while creating new opportunities for the unemployed.

In Austria, an allowance for old-age part-time is paid to the employer as a reimbursement for the payment made to workers. Workers who choose to work part-time are entitled to at least 50% compensation of the loss of earnings due to the reduction of working hours. The success of this measure will almost certainly lead to restrictions, such as limiting the choice of this scheme to five years before pension and imposing on the employer the obligation to hire an unemployed person as a replacement.

In Italy, a very different scenario is offered in the new reform of the labour market, amending previous legislation. There is now a much more flexible recourse to part-time, due to the so-called ‘clausule elastiche’, now provided for even in the absence of a collective agreement. This implies that individual workers have to give their consent to an...
employer's request. 'Elasticità' or 'elasticity' thus risks being an unbalanced exercise, even though there is protection against unjust dismissals following workers’ refusal to consent.

Furthermore, overtime is governed by the same principle of individual consent, when there is no collective agreement. In this case, there is no maximum number of hours and no guarantee that the salary will be increased accordingly.

A complete novelty in the Italian system is the introduction of ‘lavoro intermittente’, an extreme form of part-time, whereby the employer can, in a very discontinuous way, request that work is performed in areas of production indicated by collective agreements. In an experimental way, such contracts will be favoured for young unemployed people under the age of 25 and unemployed people over 55, who have been made redundant.

The contract of employment must be in writing, with all necessary details of the parties’ obligations. It may provide that, if workers declare their availability even when work is not requested, an indemnity for the period of non-work is due. Refusal to work can only occur in case of illness or any other serious impediment. Even in such cases of refusal to work for legitimate reasons, workers will lose their indemnity. In all other cases, refusal to work may lead to the termination of the contract for just cause and will also imply the payment of compensation for damages caused to the employer.

In this last example of intermittent work and in the regulation of part-time work we find one of the most controversial parts of the new Italian reform. The legislature has, as one can see, expressed a precise philosophy of individualisation in employment contracts. This choice may give rise to an imbalance, particularly in those contracts characterised by a significant disparity in exercising bargaining powers.

The whole equilibrium between collective agreements and individual contracts of employment is put at risk. It must be said, however, that spaces for collective agreements are left open throughout the new discipline. Should the social partners take this opportunity, this could represent a way forward in a balanced interpretation of the new Italian way to flexibility.

An equally controversial solution - but for reasons related to the way in which the Directive was brought into domestic law - is the one offered by the British legislature. The Directive was transposed by the ‘Part-time Workers - Prevention of less favourable Treatment Regulations’ in 2000, which covers in a highly technical and detailed way the issue of comparability with full-time workers. Some commentators believe that, because of serious difficulties for the majority of part-timers in finding suitable comparable workers, issues of unequal treatment will continue to be dealt with more successfully via the sex discrimination law. It is also suggested that the way in which the government chose to consult and to transpose, through the Regulations, led to ‘minimal implementation’.

Examples taken from national legal systems show that legislative approaches to part-time work and solutions adopted can be very different. This is probably due to the fact that social phenomena behind this contract of employment reflect diverse traditions. Very different gender balances in the labour market, reflecting cultural approaches and economic disparities, may influence the legislature.

In legal systems in which civil codes still represent a form of continuity in the evolution of labour law, resistance to
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flexibility measures is - almost unconsciously - put forward as a fear to alter a traditional equilibrium in contracts of employment.

In the theory and in the practice of labour law the challenge is to avoid interrupting a tradition of social protection, and to begin new policies of emancipation for new categories of under-protected workers.

This section focused on examples revealing fragmentation, rather than consolidation, of national legislation. It also revealed new areas of work performed in situations of uncertainty, both for economic and normative conditions. All these elements encourage debate on how to achieve a more harmonious and effective way to combine European soft and hard law.
Chapter VII:
The evolving relationship between law and collective agreements

In the context of economic constraints, the function of labour law changes. In all cases, be it a sector or enterprise crisis, or a nationwide crisis induced by external and supranational factors, collective agreements have been at the centre of a difficult re-organisation of priorities. Rather than providing for improvements in working conditions, they had to adjust to provisions in the law dealing with deteriorations and trade-offs. This characteristic is still visible in most of the country studies.

The conclusion we draw from the selected examples referred to in this chapter is that there is a tendency to recognise a wider scope for collective agreements, dealing with issues previously assigned to law. This form of trust in collective actors is not widespread and must be framed in very different national contexts. In countries in which social consensus has been kept alive and forms of mutual control have been established within the legal and the voluntary systems of rules, the relationship established between law and collective agreements appears stronger and leads towards more visible results, as suggested in section 2.

A sign of evolution, parallel to the one previously described, is visible in the attempts made in some countries to expand the coverage of collective agreements in order to include new categories of workers. This can be viewed as a very positive and innovative tendency, when collective agreements intend to cover non-standard workers and address the issues related to unstable and insecure conditions in the labour market.

This chapter deals with a central feature in the evolution of labour law. European national traditions in this field present many different perspectives. Part of the evolution has to do with an original combination of sources in the regulation of employment contracts. This connection between legal and voluntary sources may lead to different outcomes, sometimes with an impact on the overall balance of bargaining levels.

A controversial side of evolution regards the complex relationship established among different levels of collective agreements, when disadvantageous wages or working conditions are provided for at a lower level. Although this is by no means a new issue, it re-emerges in current national debates. It reveals a tension between legal and contractual regulations, which has to do with the very sensitive nature of the rights to be protected. It may suffice to mention the debate in Germany on so-called Opening clauses'. Whereas legislation on collective agreements (Tarifvertragsgesetz) treats the rights provided for in collective agreements as binding, Opening clauses' in national agreements allow for derogations at company level. The level of protection may, therefore, change. A re-definition of labour standards is assigned to collective parties, thus revealing that the evolution of labour law can set voluntary - rather than legal - limits to managerial prerogatives. Areas in which Opening clauses' more frequently occur are the reduction of working time and other measures to introduce flexibility, including at times reduction in wages. This subject matter is at the centre of contrasting proposals, which may affect the primary role of collective agreements, opening too much space for company level agreements. The optimal solution, described as 'controlled decentralisation' would safeguard the role of national agreements, by assigning to this level of negotiation the definition of Opening clauses'.

122 This term is suggested by Ulrich Zachert.
Chapter V The evolving relationship between law and collective agreements

I. Collective agreements and derogation from the law

In the context of economic constraints the function of labour law changes. In all cases, be it a sector or enterprise crisis, or a nationwide crisis induced by external and supra-national factors, collective agreements have been at the centre of a difficult re-organisation of priorities. Rather than providing for improvements in working conditions, they have had to adjust to provisions in the law dealing with deteriorations and trade-offs. This characteristic is still visible in most of the country studies.

France and Italy can be mentioned as examples of a recent controversial debate.

In the 1990s, France saw an increase in collective agreements departing from the law, in the implementation of legislation on working time, known as ‘35 heures’. Moving from collective agreements which brought about improvements in working conditions to ones decreasing certain standards, promoted a discussion on possible ways to reform the whole system of collective bargaining.

Starting in 2000, employers’ organisations demanded a programme of structural changes in the functioning of the negotiating machinery as a contribution to the so-called ‘refondation sociale’. In particular, they favoured a system of authorised derogation from the law in collective agreements. The ongoing discussion on such themes is indicative of an unsolved tension.123

The introduction of a ‘majority principle’ for the signature of deregulatory agreements represented a deep change. These are now enshrined in the January 2004 proposed legislation to allow further restructuring measures.

Frequent references to collective bargaining are made in the Italian 2003 reform. In several cases the rationale is to allow derogations by collective agreements at all levels, even local and plant agreements.

One more complex example is Article 20 of the 2003 Decree, dealing with agency work. The indication is that collective agreements can expand the list of activities provided for in the same article, for which agency work is admissible. The role of voluntary sources is presented as equal to that of the law inasmuch as it expands the scope of legitimate agency work.

Collective agreements can also provide for quotas of temporary agency work allowed within the user company, even for habitual activities carried on in the company. This too is a significant quasi-legal role attributed to voluntary sources.

One further Italian example is in the re-organisation of working time following the transposition of Directive 93/104/EC.124 Some commentators argue critically that individual guarantees have been lowered, thus confirming the non-enforcement of the ‘cuosso/o di non regresso’. Not only did the legislature indicate 40 hours as ‘normal’ working time - a requirement not in the Directive - it also gives a remit to collective agreements to define the average duration of work during one year. Unlike in previous legislation, recourse can be made to collective agreements at all levels, not necessarily to national ones.

In Belgium derogations from sector agreements are allowed at company level on important issues, all mostly related to working time (maximum number of hours, night work, Sunday rest). The tendency to allow derogations, notwithstanding the highly hierarchical structure of the Belgian system of sources, has opened a discussion on the role of binding minimum labour standards.

In Germany the Bundesverfassungsgericht has recently accepted that law can violate the autonomy of collective parties, by lowering the standards provided for in collective agreements. In a somewhat contradictory way, in a judgement given on July 18th, 2000, it has also ruled that when workers are insufficiently protected by collective agreements, such as in the building industry, minimum wages can be set by ordinance.

123 See National Report on France.
124 Decree 8 April 2003, n. 66.
2. How to rationalise the structure of collective bargaining

Attempts made by the law to regulate the structure of collective bargaining may be more or less invasive, according to national traditions.

It is often the case, especially in the Nordic countries, that rationalisation is pursued by the social partners and is part of an internal re-definition of bargaining functions.

Denmark, among all the Nordic countries, represents an example of strenuous defence of a voluntary system, both with reference to domestic legislation and for the transposition of EU law.126

Finland maintains a tradition of income policy, whereby broad ‘policy’ agreements at national level lay down guidelines on tax, wage and social policies. The latest agreements for the years 2001-2002 and 2003-2004 also introduced ‘buffer funds’, to combat possible negative consequences of the single currency.127

The UK, on the contrary, offers an example of legislation which has deeply affected the structure of collective bargaining. The ‘Third Way’, the emblem of the Labour government’s legislative agenda, took a new direction from 1997 onwards. The legal principle was re-introduced according to which a bargaining unit, constituted with a majority of trade union support, is entitled to seek negotiation with the employer over certain conditions of employment. The 1999 ERA in Schedule AI (amending TUPLRA 1992) has introduced the principle of statutory recognition of unions, which should encourage the conclusion of collective agreements.

In Ireland, the Industrial Relations (Amendment) Act 2001 established the power of the Labour Court to issue binding recommendations on pay and conditions of employment, if one of the parties refuses to enter the voluntary procedure. The latter consists in trying to reach an agreement through the Advisory Service of the Labour Relations Commission. This example confirms the legislature’s attitude to favour voluntary solutions and yet to support the parties with legal measures not too invasive of their autonomy and yet efficient in conflict resolution.

Partnership agreements have, according to most commentators, contributed to the growth of the Irish economy. The 2003 agreement, which will last until 2005, is divided in two parts, one devoted to policies such as housing, migration and interculturalism, the other oriented to the definition of pay increases both in the private and public sector. The latter part is assisted by a system of dispute resolution through the Labour Relations Commission and the Labour Court and also indicates specific government’s commitments in issuing statutory reforms of redundancy pay terms.128

In Spain a series of nationwide agreements (acuerdos interconfederales) culminated in the Royal Decree 8/1997, on the promotion of stability in employment. The 1997 acuerdo also dealt with ways of rationalising levels of bargaining, in order to avoid excessive fragmentation. Similarly, the Italian 1993 Protocol of Agreement, signed under the

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125 Trade unions confederations and employers’ associations signed nation-wide agreements on the transitory into the labour market of groups at risk of social exclusion (February 2004).
126 See the Danish Report, mentioning the example of the Part-time Work Directive, transposed first into national collective agreements and then into law. See further Chapter VIII for a discussion of the Working Time Directive.
127 Finnish Report section 1.3.
128 Details are in European Industrial Relations Review, April 2003, p. 1S ff.
Chapter VThe evolving relationship between law and collective agreements

The government, formalised the commitment of the preceding government led by Amato, to provide a more functional structure for collective bargaining.

In Portugal, the 2003 Labour Code (Article 557) devotes space to the regulation of collective bargaining, dealing with levels of bargaining and the enforceability of collective agreements, when one source substitutes the previous one. The new Code introduces a ‘strategic’ change in the function of collective agreements. Article 4.1 states as a general principle that, unless it is specified differently, collective agreements can change legal regulation, both in mēs and in pejus, thus leaving an almost residual role to the law. The system seems deeply influenced by the recourse to compulsory arbitration as a solution in cases of long-lasting disagreement among the parties. It is worth mentioning that the Constitutional Court ruled on several points raised by the President of the Republic, before the promulgation. One of the rulings had to do with the possibility to remove rights enshrined in law by collective agreements. The court found that this provision was contrary to the Portuguese Constitution. 129

In France, legislation aiming at a deep reform of collective bargaining is under discussion in Parliament. 130

3. The expansion of collective agreements to new groups of workers and content

Collective agreements have been trying to expand their scope in the attempt to include new categories of workers.

In 1996 in the Netherlands, agreements reached between trade unions and employers served to diminish rather strong reservations for agency work and paved the way to legislation. 132 In this country the so-called ‘Three-quarters legislation’, namely legislation partially assisted by collective bargaining, represents a well-tested technique in linking together different sources of regulation.

In Austria, a 2002 collective agreement for agency workers introduced minimum wages and the recognition of other rights, such as protection against dismissal.

In Germany, the 2003 law provides that collective agreements signed by associations of temporary agencies can derogate even in pejus to the principle of equal treatment. Similarly, they can introduce looser criteria for fixed-term contracts.

In Spain a model quite different from the other European legal systems was created, whereby temporary agencies were covered by centralised agreements. In 1999 the legislature introduced the principle of equal wages to enhance a ‘convergence process’ and to establish equal wages for temporary workers and workers in the user company, over a period of three years.

130 The Loi Fillon was voted in parliament in a first reading on 6 January 2004.
131 Attempts to unionise agency workers are reported in Sweden. In Italy the three main confederations have extended membership to associations of non-standard workers. Associations of self-employed are also active in the Netherlands.
Another way to expand the role of collective agreements is to include in their scope broad subject matters, which become complementary to the evolution of labour law.

For example, in Sweden ‘redundancy programme agreements’ provide for active measures before the expulsion of workers from the productive process takes place; they may even include financial compensation. Collective agreements also address the development of skills for people employed, either with shared costs, or with costs entirely placed on the employer. The obligation to train constitutes a further limit on the employer’s initiative to terminate the contract, if it can be demonstrated that there was a skill development scheme and dismissal could be avoided on that basis.

France must also be mentioned for the 2003 agreement on training previously analysed.133

In Belgium a recent collective labour agreement (No 77bis as amended by No 77ter) provides for the right to time credit, for at least three months and for a maximum of one year in a person’s career. It also establishes the right to reduce working time by one-fifth and the right of workers aged 50 or over to work part-time.

4. Conclusions

The conclusion we draw from the selected examples referred to in this section is that there is a tendency to recognise a wider scope for collective agreements dealing with issues previously assigned to law. This form of trust in collective actors is not widespread and must be framed in very different national contexts.

In countries in which social consensus has been kept alive and forms of mutual control have been established within the legal and the voluntary systems of rules, the relationship between law and collective agreements appears stronger and leads towards more visible results. This is the case of the Nordic countries and of countries with centralised tripartite bodies. In Germany, on the contrary, the Alliance for Work, started by the Red/Green coalition, has been unstable in the early part of 2003, due to unprecedented economic constraints.

It is noteworthy that in some countries - one example is Italy - legal provisions on the recognition of a wider scope in collective agreements does not correspond to a clearer identification of the criteria to establish representativeness, particularly on the side of the unions. This implies that there may be cases of strong disagreements among the unions.

This chapter in the evolution of labour law is, therefore, still an incomplete one and confirms a long-lasting tension between modernisation and collective representation.

133 See Chapter III, section 3 of this Report.
Chapter VIII: Changes in regulatory techniques

The evolution of labour law is characterised by a variety of solutions in the choice of regulatory techniques. Even the language adopted by the legislature is particularly rich and inventive.

For example, the notion of semi-mandatory law is inspiring as much as it shows a potentially perfect equilibrium between law and collective bargaining. When the law pre-determines the space for the intervention of voluntary agreements, an effective balance is set in the hierarchy of sources and mutual consideration is given to different - and yet concurring - regulatory techniques.

This section aims at putting forward unique examples selected from national studies and, because of this choice, does not propose to draw comparative conclusions. The selected examples are not presented as 'good' examples in comparative terms, since they very much relate to national legal discourses and to well-rooted traditions. It is, nevertheless, important to add this element of reflection to the evolution of labour law and confirm that the debate at national level is vivacious and inventive even in the choice of regulatory techniques.

The evolution of labour law is characterised by a variety of solutions in the choice of regulatory techniques. Even the language adopted by the legislature is particularly rich and inventive. Let us select some examples.

In Denmark, within a very different national tradition, 'semi-mandatory laws' - that is legislation which can be derogated from by collective agreements but not by individual employment contracts - are aimed at saving a traditional and deeply-grounded voluntary approach, while correctly implementing EU directives. In 1996 a nationwide collective agreement was signed, setting the scene for the implementation of EU directives. The Ministry of Labour has to consult the social partners when a new directive needs to be transposed and ask them whether they intend to conclude a collective agreement. The Working Time Directive, however, was not correctly transposed according to the European Commission, due to the fact that collective agreements are not ergo omnes enforceable. Semi-mandatory law was then enacted in 2002, covering only workers not covered by collective agreements and leaving the voluntary sources untouched.

Finland presents a variety of possibilities, since legislation can be mandatory or 'semi-mandatory' and in some cases can simply create a framework for collective agreements or confer to them the status of legally binding sources.

As for the Netherlands, mention has already been made of the so-called 'Three-quarters legislation', which vividly exemplifies a way to link together law and collective agreements. Legislation 'in four phases' has also been referred to, discussing agency work. The interesting element of this technique is how to gain in the final phase what may appear as a premium for workers and employers who have been able to comply with rights and obligations in the previous phases. Rather than being constructed as a traditional sanction, the transformation into a permanent contract of employment is the result of a joint and well-constructed plan, which is mutually convenient for both parties.
Chapter VIII: Changes in regulatory techniques

In France, new ways of creating interactions between law and collective agreements are reported. The 2003 Loi FHI on suspends the effect of articles on economic dismissals in the 2002 Act on Modernisation Sociale and opens up new negotiations on restructuring. It also suspends the initiative of the works councils to propose alternative suggestions in case of work restructuring. The 2003 Act opens up the possibility to bargain on how to achieve such restructuring (accords de méthode), leaving untouched the autonomy of the social partners.

The word ‘modernisation’ also appears in recent reforms enacted in Greece and Italy. The legislature relates this concept - which in itself is not a legally objective criterion, but rather a subjective evaluation of the aims of legislation - to EU targets and to the need to adopt a new style in law-making.

The Italian 2003 Decree states in Article 86.12 that some of the provisions are ‘experimental’ and will be subject to review by the Ministry after 18 months. This is the case of active employment policies for unemployed and other measures for socially excluded groups, jobs on call for the unemployed aged under 25 or over 45. During these months of experimentation, information will be gathered through various institutions linked to the Ministry and with the help of a committee of experts.

In France the Constitutional Court has accepted that laws can be ‘experimental’.

Legislation can also be ‘temporary’, like the Finnish leave-related legislation, in force until 2007. It deals with cases of training and sabbaticals or career breaks.

This section does not lead to overall comparative conclusions, since it puts forward unique examples, related either to well-established national traditions, or to more contingent choices of the legislatures. The selected examples are not presented as ‘good’ examples in comparative terms, since they remain part of national legal discourses. It is, nevertheless, important to add this element of reflection to the evolution of labour law and confirm that the debate at national level is vivacious and inventive even in the choice of regulatory techniques.

One concern has to do with the difficulty of setting up national voluntary mechanisms for the transposition of EU law, including EU framework agreements. Regulatory techniques do not seem to be too open to changes, at this regard. The semi-mandatory laws enforced in Nordic countries rely on national social partners well aware of their own tradition and, at times, a little suspicious of too much legal intervention. They also rest on the principle that law can be subsidiary to collective agreements and intervene only when no satisfactory initiative is taken voluntarily.

The possibility to extend erga omnes a collective agreement, as experienced for example in Denmark, while implementing the Part-time Directive, constitutes a good resource and helps in maintaining an equilibrium between national traditions and the obligation to comply with EU law.
Chapter IX:
The impact of EU law

The impact of EU law on the evolution of labour law can be measured in many ways.

A vital result, not comparable with the influence exerted by other large supranational legal systems, is the one affecting legal culture. National academic communities have been deeply influenced by European law.

Courts have also been receptive in the understanding of how EU law penetrates national legal orders. National judges have progressively expanded their horizon by including EU sources among the ones to be enforced. They have also introduced elements of change and adaptation, confirming how powerful judicial institutions can be.

There are countries, like France, in which the presence of a powerful supranational legislature has been acknowledged slowly and at times in a contested way.

On the contrary, in Sweden, ever since this country joined the EU in 1995, or in the United Kingdom, most initiatives of the legislature have been linked to European targets. In Portugal and Greece evolution due to the impact of EU law meant, in some cases, opening up for the first time to completely new patterns of labour law.

There may be instances of disputable impact of EU law, because of side effects on internal labour standards following transposition of a directive.

In this regard, EU law can be used strategically and serve to justify legal interventions which do not encounter widespread and unconditioned acceptance. As a consequence of this attitude, we encounter in some cases an 'ideological' use of EU law, as a justification for internal political disagreement. Examples of this kind emerge from the present study and are often the outcome of changes in government coalitions.

The impact of EU law can also be seen on the building of institutions. Several examples show that in complying with employment policies, specialised bodies have been created within national administrations. Even though such innovations may not always be permanent, they facilitate learning processes and put an emphasis on compliance mechanisms, as well as on the comparability of national responses.

There is no doubt that anti-discrimination law represents the area in which the impact of EU law has been most remarkable, in terms of quality of the legislation and for its dissemination in all countries.

Anti-discrimination law is a field of consolidated tradition in EU law and proves how a slow process of adaptation piloted the introduction - and in other cases the specification - of fundamental constitutional rights. In this field, as the recent 2000 Directives confirm, there is an ongoing open process of evolution, which still has to prove its potential in changing national legislation, as well as in modifying legal culture.
Chapter IX: The impact of EU law

The results emerging from this comparative study prove that there are many ways to measure the impact of EU law on the evolution of labour law.

It has been stressed repeatedly that patterns of evolution, different from country to country, did not question the solidity of fundamental rights and of constitutional traditions. In this regard, the role of national constitutional courts, acting as guardians of an internal legal coherence - and yet as interlocutors of the ECJ - has been crucial. Changes brought about by EU law have deeply influenced national academic communities.

The Italian Constitutional Court, for example, presented a strenuous defence of labour law principles in deciding that a request for a national referendum to repeal legislation on fixed-term contracts and part-time work was not admissible. The Court referred to Article 75 of the Constitution, namely to the prohibition to repeal laws which ratify international treaties. With a very articulate argument, the Court found that the Italian legislation on part-time and fixed-term contracts anticipated compliance with the two European directives covering the same fields. A referendum causing the abrogation of such laws was found not to be admissible because it could have exposed a Member State of the EU to the violation of EU law.

The British example is most remarkable. Intellectual freedom and open-mindedness have characterised labour law scholarship in the evaluation of EU law and of its impact on the domestic legal system. One could argue that critical approaches taken by the national community of scholars counterbalanced the - at times sceptical or reticent - attitude of the legislature.

In some cases the evolution of labour law has been driven by advanced and sophisticated legal theories, resulting in the re-discovery of a comparative method. Comparative labour law has progressively gained an invaluable role in the understanding of the many differences which characterise national legal systems. Scholarship, when it follows this path, endorses the process of European integration, by showing that different approaches do not impede a progressive interpretation of supranational legal standards. However, EU law can in some cases be used strategically, to justify legal interventions which do not encounter widespread and unconditional acceptance. This proved to be the case in labour law reforms of the labour market and in the regulation of working conditions affecting workers’ health and safety. As a consequence, we encounter an ‘ideological’ use of EU law in some cases. The latter may be taken almost as a justification for domestic political disagreement.

Examples of this kind emerge from the present study and are developed in national reports, often as the outcome of changes in national governments. National courts have also been deeply influenced by the understanding of how EU law penetrates national legal orders. National judges have progressively expanded their horizon by including EU sources among the ones to be enforced. They have also introduced elements of change and adaptation, confirming how powerful judicial institutions can be. The selection of cases sent to the ECJ through the mechanism of preliminary ruling procedures proves that significant domains of labour law are part of a constructive interchange. All this confirms that national judges are relevant actors in the ongoing process of integration through law.

2 Corte Costituzionale 41/2000.
3 For example in J. Malmberg (ed.), Effective enforcement of EC labour law, 2003, Aspen Publishers, Uppsala. See also K. Kilpatrick, ‘Community or Communities of Courts in European Integration?’ Sex Equality Disputes Between UK Courts and the ECJ (1998), 4 European Law Journal 121. 1
However, a detailed comparative study of certain areas of labour law, such as the ones dealt with in Sections V and VI, proves that the evolution of labour law relies on legislatures, both at the national and the supranational level. The suggestion emerging from the present study is to start a new phase of positive integration through law. This will imply measures aimed at enhancing further coherence in the evolution of national laws, by assessing some binding principles.

It is difficult to ascertain whether compliance with EU law was also at the origin of complexity and fragmentation in the style adopted by the legislature.

A number of reports comment on the fact that legislators have been hyperactive, often reiterating interventions on previous texts and cross-referring to other laws.

It is more likely that complexity and at times lack of clarity in drafting legislation has to do with the nature of the measures required. Labour law reforms aimed at broad regulation - at times re-regulation - of the labour market fall into a new evolutionary pattern. The scope of legal intervention is often so wide that it seems more correct to talk in terms of employment law, rather than labour law.

This terminology is suggested with several implications. It includes legislation related to the individual contract of employment and, in a much wider perspective, to employment policies under the OMC. In contrast to legislation implementing fundamental rights, employment policies are open to more frequent changes and may vary over the years.

The combination of the two techniques, as for example the right not to be discriminated coincides with the aspiration to be employed under just and equitable conditions, constitutes a great challenge for the future of labour law.

If we look at some national cases, we find interesting signs of evolution due to the impact of EU law.

There are countries, like France, in which the presence of a powerful supranational legislature has been acknowledged slowly and at times in a contested way. One example worth quoting is the difficult acceptance of the ECJ’s ruling Stoecke/, which brought about the repeal of the ban on night work for women in November 2001. On the other hand, the Renault case in 1997 showed the limits of EU legislation and prompted necessary legislative measures.

The Cour de Cassation started to show a more open attitude towards EU law after 2001. The overall disposition towards EU law has slowly changed in the last ten years. It is now reported as a widespread impression that the supranational legal system brought about guarantees for minimum rights of workers, notwithstanding the pressure due to restructuring and economic dismissals.

In Greece and in Italy, changes introduced by recent reforms in compliance with EU law are described as ‘modernisations’ and are mainly related to the search for more flexibility in the labour market, which also determines changes in individual labour law.

In Greece it is recognised that innovations have been introduced because of EU law, for example, with the transposition of the Working Time Directive. Even the current harsh confrontation with the Commission on the implementation of the Directive on fixed-term contracts confirms the extraordinary impact of EU law.

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140 In France — to mention a very recent example — a group of experts, the Commission de Virville, has been asked to put forward proposals for simplification of existing law.

141 This idea is clearly presented by S. Yannakourou in the Greek report as an explanation of a national pattern in the evolution of labour law, but also stands as a comparative observation, drawing on other country reports.

142 To this path-breaking decision very controversial debates started in both Germany and Italy, leading in the end to the abolition of the ban on night-work for women.

143 The European Company Regulation (2157/2001) and Directive (2001/86) were unlocked following the controversy raised by Renault’s decision. Above all, it created the conditions for the adoption of the so-called ‘National Information and Consultation Directive’ (2002/14) and the launching of a European debate on corporate restructuring (a first consultation of the European social partners was launched in January 2003).

144 The Greek report, quotes difficulties with the concrete enforcement of working time regulation.
Chapter IX: The impact of EU law

There may also be cases of disputable impact of EU law because of side effects on internal labour standards following a transposition of a directive.

This is the case with the 1998 British Working Time Regulations, transposing the 1993 Working Time Directive. The introduction of standards in this field has been counterbalanced by controversy over the derogations which, according to some commentators, go beyond the scope of the Directive.145

In Italy too the transposition of the Working Time Directive has given rise to similar criticism, since the legislature introduced standards not provided for in the Directive.

The transposition of the Part-time Work Directive, both in Italy and in the UK, has given rise to very controversial evaluations, whereas for a country like Portugal it meant introducing legislation for the first time in this field.

Formal notice from the Commission was sent to the Swedish government in March 2002, to signal difficulties in the implementation of the Working Time Directive. In Sweden both the Fixed-term and Part-time Directives introduced significant changes through the enforcement of the equal treatment principle.

The present research also shows the impact of EU law on the building of institutions. Several examples indicate that in complying with employment policies, specialised bodies have been created within national administrations. Even though such innovations may not always be permanent, they facilitate learning processes and put an emphasis on compliance mechanisms as well as on the comparability of national responses.

The report on Finland highlights how the social partners accepted the challenge of EU membership and contributed to fulfilling its obligations. This has also increased co-operation for the transposition of legislation. The apparatus of semi-mandatory law put in action in Denmark, relevant for the transposition of EU law with the social partners’ participation, is equally interesting.

In Ireland the Employment Equality Act 1998, the purpose of which was to outlaw discrimination in employment on nine separate grounds (gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller Community) further implemented Directives 75/117/EEC and 76/207/EEC and anticipated Directives 2000/43/EC and 2000/78/EC.

In the UK, in 2003 the government introduced two new regulations covering discrimination on the grounds of sexual orientation [the Employment Equality (Sexual Orientation) Regulations 2003] and religion or belief [the Employment Equality (Religion and Belief) Regulations 2003]. The 1995 Disability Discrimination Act was also amended in 2003, and is due to take effect from October 2004. New laws on age discrimination are expected in 2005. All these pieces of legislation implement the Directives 2000/43/EC and 2000/78/EC.

I. Anti-discrimination law

There is no doubt that anti-discrimination law represents the area in which the impact of EU law has been most remarkable, in terms of quality of the legislation and for its dissemination in all countries.

In Chapter IV, section 2, reference is made to committees created in Greece and France for the promotion of social dialogue and facilitating implementation of employment policies. Bodies created within the administration for monitoring the concrete enforcement of such policies are equally valuable tools in strengthening what should become a permanent learning process. The openness of such a process confirms that the impact of EU law goes beyond the binding legal effects due to the transposition of directives.

In Greece the transposition - which is still in the process of being completed - of Council Directives 2000/43/EC (implementing the principle of equal treatment of persons irrespective of racial or ethnic origin) and 2000/78/EC (establishing a general framework for equal treatment in employment and occupation) implies opening up to notions previously unknown such as harassment and indirect discrimination. Another major innovation, departing from civil law principles, regards the reversal of the burden of proof, following the transposition of Directive 97/80/EC.146

In Italy too the Decrees transposing the 2000 Directives opened up the system to the new concept of harassment, not previously regulated. They also included among discriminatory acts those based on religion, personal conviction, handicaps, age and sexual orientation. The two recent Decrees have been criticised for their unnecessarily wide derogations to the principle of non-discrimination. For instance, some requisites for the hiring of workers in the army and the police, as well as in jails, even related to the above mentioned areas of anti-discrimination law, are considered genuine qualifications for employment. Furthermore, a very wide derogation from the principle of non-discrimination is introduced with no link to specific cases, but simply based on Objective justifications. Finally, it appears completely out of context in a text devoted to anti-discrimination measures an article in which it is stated that people found guilty of pornography and other sex-related crimes can be refused employment in several places, including schools, centres for care and social assistance.148

In Finland the Equality Act was amended after accession to the EU. This piece of legislation presents an interesting combination of normative principles and soft law indications, which are meant to promote equality, particularly in working life. The ‘equality pools’, derived from nationwide agreements on income policy, favour wage increases for low-wage groups. Such increases are paid to both women and men, although the number of poorly paid women is higher.149

In equality law, Sweden went beyond EU law, providing the duty to take active measures in the 1999 Ethnic Discrimination Act, not as wide as that enshrined in the 2000 Equality Act, but extremely important also in comparative terms. The notion of work of equal value was introduced and the employer's obligation to promote equal opportunities with regard to wages was further specified.150

In Denmark, proposals to expand the Equal Pay Act were presented in 2001 by the then Social Democratic government, but then stopped in Parliament by the Conservative/Liberal government. Rather than setting an obligation for employers to draw up statistics, as in the previous proposal, the task to identify situations of wage discrimination was assigned to the Employment Ministry.151

In Germany, the Civil Code has been repeatedly amended following rulings of the European Court of Justice. Sanctions are now very effective for discrimination in recruitment procedures on the ground of gender.152

Finally, Spain should be mentioned. The latest intervention in anti-discrimination law is framed in a ‘Ley-omnibus’, approved on 30 December 2003 and refers to the EU Directives. Given the unusual choice of the legislature, under pressure at the end of the year and therefore forced to mix together very different legal measures, evolution in this case will need to be tested in the future.

146 See the Greek report, Chapter III, section 1 . 1 .4 and Chapter IV, section I.I . 1
147 Decrees 9 July 2003, n. 2 1 5 and 2 1 6.
149 Finnish Report, section 4.1.
150 Swedish Report, section 4.1.
151 Danish Report, section 4.1.
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Anti-discrimination law is a field of consolidated tradition in EU law and proves how a slow process of adaptation pilot-ed the introduction - and in other cases the specification - of fundamental constitutional rights. In this field, as the recent 2000 Directives confirm, there is an ongoing open process of evolution which is proceeding very quickly. It still has to prove its potential in transforming national regulation as well as in modifying legal culture.
Chapter X:
Concluding remarks

I. Main features in the evolution of labour law

The perspective adopted in this General Report when describing the evolution of labour law is a perspective of change, not of resistance to innovation or strenuous defence of the status quo in national legal systems.

Rather than attempting to include in this all areas of labour law in which legislative reforms have occurred, attention has been concentrated on areas where changes allow us to make a comparative evaluation. Coming to the concluding phase of the Social Policy Agenda in 2005, the selective choice made in the present report highlights the need for a new programme for the years 2006-2010. In the years taken into consideration in this study - 1992-2003 - policy-making in labour law has been central in the shaping of national economic and social change. It will continue to be so in the coming years, if we consider the commitment made by European institutions to increase the co-ordination of broad economic policies and employment policies. An indication that this is the way ahead is also made in the Draft Constitutional Treaty.

- A comprehensive result to be drawn from the present study is that national legislatures have been very active in the time spell taken into account.

This General Report only covers the most relevant - and, at times, the most controversial - areas of labour law, particularly those in which legislation has been introduced in several Member States.

It can be argued that similar labour law reforms made by national legislatures, notwithstanding different accents on individual and collective guarantees, match closely because of supranational guidelines, first in macro-economic policies and later in employment policies. This argument would prove that labour law has been one of the core issues of co-ordinated strategies, from Maastricht onwards, and has been key to a closer European integration.

However, this study confirms that, particularly in the implementation of employment policies under the Open Method of Coordination (OMC), the Member States have not been deprived of their own legislative initiative. National governments have continued to follow national priorities following their own internal political agenda.

- The present study also confirms the analysis carried out by the Commission in a first evaluation of employment policies, namely the fact that national performances in implementing the European Guidelines remain very different. Diversities in national responses when complying with the Council’s guidelines make the comparability of the outcomes a difficult task. Comparative legal research can complement the study of statistical figures, showing whether a variety of legal measures aim at similar goals.


Chapter X: Concluding remarks

- Responses from Member States to employment guidelines, combined with autonomous choices of national legislatures, let broad areas of labour law emerge as coherent patterns of evolution.

A first evidence of autonomous choices and a sign of evolution are to be found in how fundamental rights have been strengthened in some national legal systems, either due to international sources, or constitutional reforms. Case law may also be an active vehicle of evolution in this field.

- This comparative outcome leads to some reflections. First of all, constitutional traditions remain solid within national legal systems. There is a beneficial mutual influence between the national and the supranational level of law-making for the expansion of fundamental rights. Furthermore, the most innovative solutions are to be found in legal systems with solid constitutional traditions. In most cases this argument goes as far as saying that constitutional rights, while being adaptable to changes in work organisation, still set a limit to deregulatory approaches in legal reforms, thus favouring creativity.

Even an open process, such as the one on the implementation of the Charter of Fundamental Rights, seems to stimulate a propitious circulation of ideas.155

- Further evidence of evolution is closely associated with the implementation of the European Employment Strategy (EES). There is no doubt that the latter has contributed to push forward a number of legal reforms at national level. There are clearly areas of such reforms in which the aims pursued by national legislatures impose a challenging test on labour law. Comparative analysis, however, indicates that in complying with the EES and in enforcing the Council’s employment guidelines, there has not been a drastic departure from consolidated labour law principles.

To verify whether such principles have remained solid, comparative labour law must investigate changes in the balance of powers in individual contracts of employment and for the shifting role of voluntary and legal sources governing changes.

- There is no indication that, when enforcing employment policies, national laws provided a scenario of uncontrolled deregulation. On the contrary, research carried out in this field shows that, when answers to high unemployment were sought, changes brought about by labour market reforms have, on the whole, been 'selective' and have not completely overturned basic labour law principles.156

To substantiate the idea of 'selective' changes even further, it is important to indicate that the evolution of labour law goes in different directions. In some cases, changes are the consequence of deep innovations in work organisation, at times affecting in a meaningful way the structure of the firm. In other cases, changes follow a pattern of continuity, through subsequent adaptations of existing legislation. In some cases, particularly in the area of labour market reforms, a series of successive legislative interventions have given rise to a fragmented system of rules.

- Areas of labour law which have been deeply influenced by reforms, thus giving rise to changes and opening spaces for innovative solutions, have been explored.

The example of agency work has been explored as an illustration of how the evolution of labour law is torn between granting non-standard workers full entitlements or weaker guarantees. Whereas in some countries agency work is expanding through the enforcement of the equal treatment principle, in other countries lower standards are introduced as a way to further flexibility and increase employment opportunities.

Agency work has been a test case for national legislatures. It forced them to question whether labour law principles were subject to disintegration. The alternative to a disappearance was to let labour law principles move freely through new commercial transactions and adapt them to workers outside the traditional surroundings of a company.

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• The concept of 'flexibility' needs to be balanced against that of 'adaptability', in order to find new ways of modulating labour law principles in new working conditions. 'Recalibration' is another concept put forward in comparative research which proves to be highly useful in the context of the present study, particularly for its implications for policy-making.

In elaborating on such concepts, the role of EU law is central. The need to further legislate and to do so via hard law has been repeatedly presented as an outcome of the present study.

In making reference to this non-technical terminology, which is, nevertheless widely adopted by lawyers and social scientists, there is awareness of the fact that different meanings are attributed in different national environments.

• Economically dependent work, a notion falling in between autonomous and subordinate employment, is yet another area of labour law exposed to significant changes.

Workers engaged in this kind of activity express better than others the need to adapt traditional guarantees to unstable and variable employment conditions. Looking at the expansion of non-standard contracts of employment, it has been suggested that aspects of employment law having to do with the 'welfare' of workers - as opposed to those related to 'efficiency' - must be further elaborated.

This field may become a laboratory of new ideas for future evolution of labour law. The novelty in most current national debates has to do with ways to counterbalance economic dependence. Measures to be fostered should not aim at traditional forms of protection, linked to each employment opportunity; they should broaden the spectrum of economic support mechanisms to all employment opportunities offered to each worker. They should create a network of benefits and facilities, mostly related to the life cycle (access to pension funds, access to special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leave, and childcare facilities).

• Legislative reforms adopted in different countries reveal that the evolution of labour law has taken place in similar areas and been achieved by way of approximation to similar goals, giving rise, at times, to piecemeal interventions, rather than to overall general reforms.

Examples selected to illustrate legislation which should further enhance flexibility are part-time work and fixed-term contracts. The great diversity of solutions adopted by Member States seems to suggest that the principle of non-discrimination does not, by itself, suffice to introduce comparable standards of protection, when fixed-term and part-time workers find themselves in a marginal position in the labour market. The overall impression is that legislation in both fields proceeds by way of progressive adaptations of already existing norms. At times the result is a fragmented system of rules, rather than a well-organised set of principles and procedures. There are also situations in which both contracts of employment are not freely entered into and workers find themselves in situations of uncertainty.

• Major changes observed in recent years in labour law concern the relationship between law and collective agreements.

Not only can the latter derogate from legal provisions. A new equilibrium can be established among collective agreements of different levels, when disadvantageous wages or working conditions - the most controversial example being working time - are provided for at a lower level. Although this is by no means a new issue, it re-emerges in current national debates. It reveals a tension between legal and contractual regulations, which has to do with the very sensitive nature of the rights to be protected.

157 M. Ferrera, A. Hemenjick, and M. Rhodes, The Future of Social Europe: Recasting Work and Welfare in the New Economy, 2000, Celta Editors, Oeiras, first presented at a conference organised by the Portuguese Presidency. Recalibration is a concept implying that several initiatives need to be considered simultaneously in reforms affecting welfare states. Recalibration policies address issues of social protection and of redistribution of social risks among social groups, as well as normative issues, such as equality.

158 I am grateful to Marie-Ange Moreau for this observation.

159 P. Davies and M. Freedland, Labour Markets, Welfare and the Personal Scope of Employment Law' (1999), 2/1 Comparative Labour Law and Policy Journal, p. 233 ff. It is interesting to underline that these writers do not adopt the word 'protection', often attributed to the scope of employment law and see that terminology as an effect of Scandinavian law in the 1970s, mainly through the 1975 Employment Protection Act.
• A sign of evolution is visible in the attempts made in some countries to expand the coverage of collective agreements, in order to include new categories of workers.

This can be viewed as a very positive and innovative tendency, when collective agreements intend to cover non-standard workers and address issues related to unstable and insecure conditions in the labour market. It is often the case that new organisations representing workers and employers, for example in agency work, are created. In expanding the coverage of collective agreements or in negotiating new agreements, the issue of representative bargaining agents is central.

• The evolution of labour law is characterised by a variety of solutions in the choice of regulatory techniques.

The language adopted by the legislature is particularly rich and inventive. It proves the need to adapt labour law to different functions and to do so by reasonably co-ordinating legal and voluntary sources.

• The impact of EU law on the evolution of labour law has been acknowledged throughout this study.

The influence on national legal culture and on national judges is perceptible and is a sign of evolution in many directions.

There are also instances of disputable impact of EU law, because of side effects on internal labour standards, following a transposition of a directive. Cases have been shown of a 'strategic' or even 'ideological' use of European law, as a justification to internal political disagreement.

• Anti-discrimination law is a field of consolidated tradition in EU law and proves how a slow process of adaptation piloted the introduction - and in other cases the specification - of fundamental constitutional rights.

In this field, as the recent 2000 Directives confirm, there is an ongoing open process of evolution which is proceeding very quickly.

2. Challenges and open questions

Changes in governments and in political coalitions occurred in all countries included in the present study. Therefore, different ‘philosophies’ of labour law emerged, showing the likelihood of a very distinct national style of the legislature and, in other cases, a more dogmatic approach, linked to the need to solve contingent problems in the adaptation of existing law.

The concept of modernisation is often used in national laws or adopted by commentators. It is a very unclear concept, adaptable to different political agendas and open to opposite interpretations. It does not necessarily coincide with the widespread ‘reformist’ approach taken by several national legislatures in the last century. Nor does it signal a total change of perspective in legislation. It appears in some instances almost as a justification of the need to intervene and to do so urgently, often under the pressure of supranational institutions.

Rather than a total departure from labour law principles, the present research reveals that, in some areas of the discipline, there is a risk of reducing the enforceability of certain rights or to exclude certain categories of workers from basic entitlements. The challenge is to resist this tendency and prove that the expansion of fundamental rights at EU level and at national level constitutes the most significant and widespread sign of evolution. For this reason, the point has been made that, in the interaction with other disciplines, autonomy of labour law means to preserve a coherent structure of regulatory principles and to create new ones in areas of employment characterised by instability.

In other cases, when issues of social inclusion are at stake, labour law needs to find a new centrality and to seek closer co-ordination with other measures. From a theoretical point of view, this may represent an expansion of traditional labour law functions. The evolution of labour law, in a close interrelation with social inclusion policies, should be pursued through supportive and auxiliary legal measures, addressed to groups, rather than to individuals. The fear of overburdening employers with protective measures and individual guarantees should, therefore, be overcome.
Comparative analysis carried on in this project suggests that reforms of national labour markets are the most controversial and sometimes reveal strong ideological divides. The danger is to depart from national legislative traditions and to lose track of a coherent system of rules. However, it has not been impossible to gain social consensus even in cases of radical reforms.

During the years included in the present study reforms of a broad scope took place.

An important point to stress is that the evolution of labour law goes in all possible directions. All levels in the hierarchy of sources are affected by changes and all techniques are tested. This confirms a characteristic feature of European labour law, ever since its early appearance on the agenda of national legislatures, dating back to the post-Second World War period.

In several passages of the report the impact of EU law has been put forward as a guiding force behind national evolutionary trends. For some legal systems this meant opening up for the first time to significant innovations. EU law also meant implementing important constitutional principles, especially in the field of anti-discrimination law. This field, unlike other areas of labour law, is characterised by a solid and possibly more durable style of legislation.

These concluding observations indicate that one possible future direction for EU law is to further intervene in new areas of labour law in which fundamental rights of individuals need to be better specified and strengthened.

Positive integration in some areas of labour law should be pursued, in order to establish a steadier equilibrium in the supranational legal system and to bring national labour markets closer together. Fundamental rights represent the conceptual framework in which to construct the new social policy agenda for the years to come.

The addressees of new European social policies should be individuals who are excluded from the labour market, or included but in an insecure and peripheral way. Adressedes are also the victims of discrimination substantiating in a subtle and yet penetrating marginalisation towards weak areas of the labour market.

This study proves that future legal interventions should be preceded by a better understanding of social phenomena which have added new terrains to the evolution of labour law.

Labour law has to strengthen its own internal rationale in such areas and suggest suitable new developments to new Member States and to candidate countries.
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Austria

The main reforms since 1992 have taken place in the past six years. Essentially the reforms are confined, in accordance with the structures of Austrian labour law, to the legislation governing labour and social law. Like other Member States, Austria too has seen an increased focus on the interaction between labour law and social law. This can be seen particularly through measures that account for income for social security and through measures to improve the employment rate of older workers. Reforms are often justified by considerations of fairness, but have mostly resulted in adjustments at the bottom or lower end (for example with regard to the new severance pay arrangements or to pension insurance) or an increase in contributions (e.g. obligatory insurance for all earnings).

Towards the end of the coalition between the Socialist Party of Austria (SPÖ) and the Austrian People’s Party (ÖVP) (up to October 1999), the main emphasis was on labour market reforms to promote the occupational integration of young people (Young People Training Guarantee Act, pre-apprenticeship) and the employment of older workers. More ‘age-independent’ labour market measures intended to encourage employment have had hardly any practical significance. Examples of these are ‘educational leave’, ‘unpaid leave’ and the ‘solidarity premium model’. There has however been a very high acceptance of ‘partial retirement’. This is presumably due to the fact that in many cases it amounts to a form of assisted ‘pre-retirement model’.

The Austrian People’s Party (ÖVP) and the Freedom Party of Austria (FPÖ), have a programme generally aimed at bringing about a ‘turn-around’ in Austria. Since the coalition of these parties there has been increasing intervention in existing substantive labour and social law. This has, however, led to little actual improvement in the legal position of employees. Improvements of the level of labour and social protection have been driven either by the requirements of European law (such as the prohibition of discrimination and the obligation to provide information in the case of fixed-term employment relationships) or considerations of family policy, as for example with family care leave or childcare allowance. However, even the childcare allowance has brought about only minor improvements compared to previous entitlements for female workers. The main beneficiaries are self-employed or non-active women. Equal status for manual and non-manual workers has not been properly implemented. A particular example of this is that the improvement to the law governing the ‘entitlement to continued payment of wages in the event of illness’ for manual workers has been offset by the negative practical impact of the abolition of the compensation fund. A result is that employers now often exert considerable pressure on sick workers to consent to termination of the employment relationship with a concomitant loss of entitlements (with re-employment when the illness is over). The abolition of job search days upon notice and further restrictions on compensation for unused holiday leave upon termination of the employment relationship were also detrimental to employees. Moreover, reductions in non-wage related labour costs to promote the Austrian economy only concerned costs borne by the employer.

More recently, attempts have also been made by the government to curtail the importance of Austria’s tried and tested ‘social partnership’. This is shown in particular by the current move to reform the pension system. This has led to the most significant industrial action and protest measures Austria has seen in the last 40 years. Nevertheless, the most significant reform of Austrian law in the past 20 years, i.e. the complete overhaul of the law governing severance pay in 2002, follows a model agreed by the social partners and consequently exhibits all the advantages of legislation based on the broadest possible consensus. This reform, while worsening the position of some individuals compared to the previous situation, introduces substantial improvements for both employees and employers, if it is considered globally.

A number of the (in some cases) very innovative reforms of Austrian labour and social law in the past decade clearly demonstrate that necessary legislative adjustments to changing economic circumstances are not necessarily associated with a deterioration in the level of labour and social protection. A prerequisite for this has been the sufficient involvement of both the labour and employer organisations in the legislative process and their readiness to arrive at a compromise acceptable to both sides of the industry, taking into account the legitimate interests of the other social partner. In precisely those areas where such an involvement has been absent, an increased trend towards a reduction of the level of
social protection has recently become evident. In these cases, the social policy reforms are, together with an increase in the contribution burden particularly for employees, not providing any noticeable stimulus for development of the labour market and the economy. From a personal standpoint, this seems all the more regrettable as in recent decades the excellent competence exhibited by the Austrian social partners in resolving economic and social policy issues has constituted one of the foundations of the positive economic development and at the same time a guarantee for the preservation of social peace.
Belgium

Belgian labour and employment law has undergone a number of changes. The number of legislative acts (in the broadest sense) that have been passed has not been reduced. On the contrary, it seems that the number of Parliamentary Acts and Royal Decrees regulating various aspects of individual and collective labour relations has increased.

This does not mean, however, that other sources of obligations in the labour and employment field have disappeared. Actual working conditions are often - as they have always been - determined not by the legislation, but by the social partners themselves. Collective bargaining takes place at the various levels of industrial relations in Belgium.

Belgium has a long tradition of implementing legislation through inter-industry-wide collective bargaining agreements, even before this was explicitly foreseen at the European level. There are no indications of any shift in this practice.

In addition to the 'legislation' that is produced by the National Labour Council (and rendered generally binding through a formal government intervention), the number of legislative acts (Parliamentary Acts) and government acts (Royal or Ministerial Decrees) has increased over the years. Legislative intervention remains high on the agenda, except in the area of collective industrial conflicts.

It has already been stated that there is an increasing number of acts regulating labour and employment matters, making it extremely difficult for employers to know all of their obligations. Throughout the 1990s, a large amount of legislation (sensu lato) was directly inspired or required by the obligation to implement European directives. Most directives are implemented very faithfully and often the European texts are reproduced at the national level. References to the European directives that are implemented by the national legislation are now included in the text of the legislative acts.

While the discussion on the criteria to distinguish subordinate employees from self-employed workers is not new, and has been going on for decades (even before the 1990s), the debate has clearly intensified. The attempts by both workers and employees to avoid paying the high social security contributions levied on subordinate employment are certainly factors that have contributed to the intensification of the debate. While there has been much talk about reducing the cost of labour in Belgium, no real action has been taken.

An area in which more leeway was created for companies over the last ten years deals with triangular employment relationships. Temporary work through temporary employment agencies has been a fact of life in Belgium even before the beginning of the 1990s.

The legislative framework, combined with the collective bargaining agreements specifically for the sector of temporary work, provide sufficient breathing for the temporary employment agencies and companies and a sufficient degree of protection for the temporary workers. The system has been in place for a long time, but was completed and improved over the years.

While the applicable legislative act on putting workers at the disposal of a user, that saw the light of day in 1987, foresaw a number of articles dealing with the issue, the conditions that were imposed were so stringent that it was almost impossible in practice to put a worker at the disposal of a user company. A modification of the act in the late 1990s made it even more difficult. A very recent modification of the act, however small the amendments to the legislative act actually were, left the system only in principle intact. The act, as phrased now, allows for the leasing out of personnel at least if decent service agreements are concluded between the actual employer of the worker involved and the 'user' company.

With the encouragement of the EU and as a reaction to a specific Supreme Court case, a new employment contract was created, namely the employment contract for the teleworker, which could cover any form of teleworking and paid attention to the specifics of working at home. This kind of contract may not be used that much yet, but certainly has potential for the future.

For the same reasons that the employment contract for home work was established, the issue of data protection was also regulated because of the need to accommodate the
specifications of teleworking. Besides the general law on data protection that was implemented and amended to correspond fully to the EU Directive, the social partners also tackled the issue of Internet and e-mail use. A national inter-industry-wide collective bargaining agreement was concluded to provide the employer with some possibilities for controlling Internet and e-mail if these facilities are granted to the employees of the company.

Another recent development is the issue of outsourcing. In this field, the EU Directive on the Transfer of Undertakings has been faithfully implemented and applied in Belgium. Collective bargaining agreements have also tried to cope with the problems that emerged in outsourcing deals where the Directive would not apply by trying to extend the scope of the Directive partially or completely. These agreements have tried to foresee similar rules as those put forward by the Directive.

The legislation on company closures and collective dismissal was modified and sanctions in case of violation of the information and consultation duties were stiffened. The aim was to give the workers and their representatives the possibility to influence decision-making by suggesting alternatives to the intended measures. It is clear that the modification had the effect in making employers much more aware of their obligations and much more careful in the ways they communicate with their personnel and the outside world. This is an advantage in itself. However, it is doubtful that the impact on the actual decision-making process has been as high as expected.

The reconciliation of working life and family life has been high on the agenda, especially since the second half of the 1990s. The numerous forms of career leave that were introduced caused the system to become very complicated. A new and more transparent system has since been set up which allows for all kinds of justified and unjustified leave.

Flexible working time regimes were primarily introduced to grant employers the ability to make more optimal use of the available working time and cope with peaks and troughs in production.

In the same line of thought with respect to the harmonisation of working life and family life, the government has tried to reduce working time even below the levels that are set in sector-level collective bargaining agreements. It therefore gives incentives in the form of a reduction in social security contributions that can vary according to the number of hours of working time reduction below 38 hours a week. Furthermore, the introduction of a four-day working week can lead to a reduction in social security contributions. The legal acts do not oblige the employer to hire additional personnel, although this was certainly one of the aims of the legislative acts.

Employees that are on career leave or that have filed a request to go on leave are protected against dismissal. This is just one additional protection against dismissal granted by Belgian employment law. It is part of a long list of specific protections that have been established over the last couple of years and in which the government uses the technique of the reversal of the burden of proof.

The same techniques are also to be found in the various acts that deal with employment discrimination through which the Belgian legislator implemented the European Directives.

Since the second half of the 1990s, the legislator has introduced various instances in which an employer is confronted with a reversal of the burden of proof. Furthermore, the concept of cease and desist orders was also introduced. Cease and desist orders were previously primarily known in commercial law and were requested, for example, in files in which there was a violation by one party of commercial trade secrets. This technique is now generally introduced in the area of employment discrimination. While practical experience does not exist, it is presumed that this legislation will introduce more procedural burdens on employers. It is clear from all of this that the employment relationship is certainly not moving towards deregulation; instead it is going in the direction of increased government intervention and formalism.

Belgium has proven faithful to European legislative acts (although their implementation has not always been timely). It has also followed up on European calls for initiatives to include risk groups by taking measures to reduce the costs of employing workers that belong to the group of those at risk from exclusion. Furthermore, various actions of a more qualitative nature have been undertaken in order to better prepare those looking for employment. Incentives to engage in training and lifelong learning have been established. It is not clear to what extent these kinds of government intervention have led to a reduction of unemployment. It seems that the government was, at least over the past years, riding on the wave of the economic boom. When economic times become more difficult again, it may be harder to provide actual evidence that the government measures have led to any increase in jobs.
Denmark

The industrial relations regime in Denmark is commonly referred to as ‘the Danish model’. A distinctive feature of this model is that there is a high trust tripartite co-operation between trade unions, employers’ organisations and the government. There has been a long-standing consensus that the state shall not interfere in regulation as regards wages and other employment conditions, without a joint request from the social partners. And the social partners have generally preferred regulation through collective agreements. Thus, legislation has traditionally played a minor role in the field of labour law. Another feature of the Danish model is that the social partners play a predominant role in dispute settlement through industrial bodies, such as the Labour Court and industrial arbitration tribunals.

The predominant issue in the evolution of labour law in Denmark since 1992 has been how to integrate EC labour law into the Danish model. As for implementing EC directives, the procedure used in practice is to transpose the directive into national law. After that the legislator will adopt the statutes necessary to guarantee that every employee is ensured the rights of the directives. The opinion that it is possible to implement an EC directive only through traditional collective agreements seems to have been abandoned. Several different techniques have been used when drafting the statutes. The act transposing the directive is usually semi-mandatory, i.e. the statutes apply only in workplaces not covered by collective agreements. This kind of legislation has, for instance, been used in relation to the Working Time Directive and the Fixed-Term Work Directive. While implementing the Part-Time Directive, the major Danish collective agreements on its implementation were given an ergo omnes effect through legislation. Here too, the individual contract was given preference to the clauses in the collective agreements. This change occurred after the shift in political power from the Social Democrats to the Conservative/Liberal coalition in 2001. The legislation issued by the new government led to a complaint to the International Labour Organisation (ILO). The ILO held it not to be consistent with the basic conventions on free collective bargaining.

On the whole, however, the procedure used in transposing EC directives shows that tripartite co-operation in the field of labour law is still a reality in Denmark. The state still accepts the idea that regulation of employment conditions is mainly an issue for the social partners. From this aspect the Danish model has survived.

On the other hand, it must be stressed that the number of labour law statutes has increased dramatically during the last decade. Although there are some examples of purely national legislation adopted during the last decade, the bulk of new legislation has been introduced in order to transpose EC directives. Further, individual human rights have become more important. In 1997, the European Convention on Human Rights was incorporated into Danish law. The Convention has had a significant impact on the labour law debate (e.g. the questions on negative freedom of association and locus standi for individual employees).

New forms of employment (such as agency work and fixed-term work) have not been a major issue in Denmark.
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Finland

The Finnish development of labour law since the early 1990s can be characterised by consensus and tripartism. The national incomes policy that co-ordinates collective bargaining and Finnish membership of the European Union are factors having particularly marked the evolution of labour law. Although EC law set the agenda for labour law to a large extent, an extensive modernisation of national labour law has taken place in parallel.

During the last ten years a remarkable renewal of Finnish labour law legislation has occurred. The process has been driven especially by the central employers’ organisations TT and the central trade union SAK. The Employment Contracts Act, the Act on Working Time, legislation on health and safety, protection of young employees, personal integrity in the working place and legislation on so-called alteration leave are only some examples of an impressive list of legislative achievements during this period. The content of this legislation can be described in a few catchwords: simplification, modernisation and continuity.

From the perspective of substance, the main trends of the evolution can be summarised in four points:

• Individual constitutional and human rights have clearly gained importance in Finnish labour law.

• Also on a more general level individual labour law and the rights and duties of the individual worker have gained importance.

• The effort to combine flexibility for employers with security for workers has been strongly felt in the development of different legal instruments. The high level of unemployment has been an important factor that has been taken into account in the legislative process.

• The collective bargaining system is still an important and central regulator of the terms and conditions on the Finnish labour market. The bargaining system has to a large extent, however, been decentralised from within.
France

The period between 1992 and 2003 saw a great deal of change in labour law. Regular changes in political power led to frequent changes in the law on sensitive issues such as redundancy and reduced working time. The economic crisis and high unemployment figures led to efforts by all the parties involved to tackle the issue of defending jobs and fighting unemployment.

Over this eleven-year period, judges had a central role in developing labour law. This was partly because the judges reinforced the control of constitutionality and the fundamental rights of workers in companies, and partly because the judges introduced a genuine social policy via a consistent creation of jurisprudence, guided by a concern for safeguarding jobs and fighting unemployment.

The result has been a certain legal uncertainty (which employers have strongly opposed) due to changes to labour law on issues which have the most important market interaction. Legislators and social partners had to resort to 'experimental' techniques demonstrating the difficulty that exists between reconciling the need to adapt labour law to economic developments, and the essential need for legal security.

A number of guiding principles can be seen with regard to the sources of labour law. There is a clear reinforcement of the protection of fundamental rights, along with a preference for flexibility mechanisms that favour the management of the company with regard both to individual labour relations within the framework of the employment contract and to collective relations. Where flexibility is imposed by the employer, it is procedurally defined and controlled if it removes benefits or results in a move towards a form of insecure contract. When it is negotiated, it gives rise to a derogatory type of negotiation that is strictly controlled from a procedural point of view so that the majority union organisations have the right to object.

There has been a movement towards diversification of forms of labour, a preference for the flexible management of the employment contract, and a strong movement by companies towards outsourcing to encourage management flexibility.

This movement has tended to increase insecurity and lead to the development of new forms of poverty that have mainly affected women. However, the move towards greater flexibility and job insecurity has been accompanied by measures aimed at making the works council responsible for monitoring the employment policy chosen by the employer.

The need to rethink collective bargaining has arisen in a context where both the number and quality of the negotiation partners involved (these are no longer only unions) have increased. There has also been an effort to give greater legitimacy to the unions.

During this eleven-year period, the unions had to introduce, in the context of derogatory agreements and the revision of collective agreements, strategies based on the possibility of exercising a right of objection for the unions who were in the majority at the last elections.

This majority-based principle was also applied during the implementation of agreements relating to the reduction of working hours. A profound change took place, affecting all the parties involved and the conditions of negotiating legitimacy, while at the same time company negotiation increased. These changes led to a major reform of collective bargaining in 2004, causing this form of negotiation to be considerably decentralised and giving greater autonomy to company negotiation in important areas of labour relations.

Labour law increasingly included mechanisms aimed at increasing employee flexibility both through the individual employment contract (adaptation and redeployment obligations) and through a number of complex mechanisms organised within the context of continued vocational training and unemployment. A strong movement towards individualising the legal instruments covering the flexibility and reintegration of the unemployed can be seen.

In 2003, a right to lifelong training was introduced as part of a major national interprofessional agreement. The balances leading to a position of relative job security are created by a strict procedural supervision of the powers of the employer.
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checks on the use of short-term contracts, strict controls over the redundancy procedure and the reinforcement of sanctions against employers not complying with the requirements of the restructuring plan.

Over this eleven-year period, the Court of Cassation has rigorously developed these requirements qualitatively, which has greatly upset employers due to the legal uncertainty created by the evolving nature of the rules imposed on them with regard to jobs, especially as part of the plan to safeguard employment. It is very clear that, throughout this period, there has been a strong demand on employers to try to reduce the dimension of their restructuring plans. This demand has been translated into strict controls on the redundancy procedure imposed by judges. Despite the severity of sanctions introduced since 1997 (restructuring plan rendered null and void), this demand will not stop huge numbers of jobs from being lost and will make the restructuring issue highly controversial.

A response to unemployment was given by the reforms of working time, known as ‘KTT or ‘the 35-hour week’, in 1998 and 2000. These reforms forced companies to negotiate, allowed them to introduce new forms of flexibility and made them adapt to market demands within a negotiated framework. In 2003, the development of RTT in small companies was stopped. The results of RTT are highly controversial and contrasting.

Lastly, concerning equal treatment, French labour law effectively reinforced all its mechanisms: extension of the principle of equality of treatment, reinforcement of the fight against discrimination and all forms of harassment (sexual and moral). The French legislator has however not introduced an equal opportunities policy.

The introduction of an equal opportunities policy comes up against the barriers of formal equality and clear political and social inertia.

It can be concluded that, over this eleven-year period, the influence of Community law increased in terms of both legislation and jurisprudence. There has been a great deal of learning about techniques, reasoning and procedures in every sphere of drawing up and applying labour law. There is however still some reluctance about applying social directives.

The approach to labour law is still a national one. In France, there is still no thought of developing labour law rules on an European scale, though it should be noted that the European Employment Strategy (EES) is starting to have an effect. The EES has forced the government to introduce permanent consultation with unions and employers over employment (but without tripartite negotiation), the guidelines are taken into consideration when reforms are envisaged (reform of the labour market envisaged in 2004, extension of working life in 2003), and exchanges of best practices are opening up to new ideas about ways to fight unemployment.

It appears that France is slowly opening up towards Europe, as can be seen by the analysis and taking into consideration of employment policies followed by other European countries.

However, the significant advances made in France as a result of Community influence have been brought about by ‘hard law’. Certain domains have only changed in France due to the creativity of Community social law (equal treatment between men and women, burden of proof in cases of discrimination, European works council and health policy).

It is also very difficult to analyse the extent of existing convergences with other countries in the European Union.

It appears that these convergences can be seen when they are the result of both the market (pressure linked to competitiveness) and government decisions. This is the case with: the general move to find new forms of flexibility in contracts; the move to decentralise collective bargaining; the diversification of initiatives to help the unemployed; and the individual treatment of the latter. Similarly, it seems that the move to reinforce fundamental rights is a response to the insecurity generated by the market and the globalisation of the economy.

But if we look carefully at the techniques chosen, we can see the limitations of this approach in terms of convergence. For example, the very notion of flexibility expresses itself very differently because of the counter-balances that are organised and introduced.

At the heart of its paradoxical changes, labour law in France shows clearly that the balance between job security and flexibility is the outcome of forms of arbitration that are constantly being questioned, linked to the rules and techniques chosen.

It is important to emphasise that social directives have acted as a base to allay fears of deregulation when political changes led to reforms in the areas of redundancy and working time.
THE EVOLUTION OF LABOUR LAW (1992-2003) - GENERAL REPORT

Germany

During the reporting period, the basic structures of German labour law remained remarkably stable. However, various initiatives by the legislator and the social partners have generated significant changes and modernisation processes.

With regard to state labour law, the Red-Green coalition has, since 1998/1999, been focusing more on minimum social protection than the previous Conservative-Liberal government did. Changes have been made in the areas of protection against redundancy, sick pay, temporary and part-time work, parental leave on the birth of a child, economically dependent work and adapting corporate codetermination procedures to a changing company environment. However, rather than bringing about a complete change of paradigms in labour (and social) law, these reforms have represented more of a change of focus in some areas. Particularly innovative (and also controversial) is the right of every worker to shorter working hours (right to part-time work) in the Teilzeit- und Befristungsgesetz (Part-time Work and Fixed-term Employment Act) (2000/2001).

A number of initiatives introduced in the summer of 2001 under the 'Hartz Reform' are typical of this new trend. These initiatives were not translated into law on a one-for-one basis, but took, in some cases, the form of a compromise. This was (and still is) due to the parliamentary majorities which, since 2002, have created a stalemate between the Red-Green government and the Conservative-Liberal opposition in the Bundestag (Lower House) and the Bundesrat (Upper House: representation of the Länder).

In the meantime, the legislative packages Hartz I, Hartz II, Hartz III and Hartz IV have come into force: the many social law provisions aim to restructure the Bundesanstalt für Arbeit to make it an efficient service agency and to tighten up certain aspects of employment promotion law. In the area of labour law, the liberalisation of temporary agency work with a guarantee of equality for these workers is worthy of note. Where corresponding collective agreements apply, which is now the case, the statutory protection provisions for temporary workers no longer apply. The promotion of small-scale, self-employed people (the so-called Ich-AGs or ego companies), amounting to a virtual change of paradigms compared with the critical approach to economically dependent work in the 1999 legal initiatives, should also be mentioned. In other areas, too, the Red-Green government has adopted measures that in some cases reverse its own reforms introduced during the first legislative period (1998-2002). For instance, in the Teilzeit- und Befristungsgesetz, temporary contracts are allowed (without judicial control) for older workers (52 years +) and in the case of start-ups (up to four years). The amendments that came into force on 1 January 2004 weakened certain aspects of protection against dismissal: raising the threshold (for the application of the Kündigungsschutzgesetz - Protection Against Dismissal Act) to businesses with 11 employees or more, rather than six or more, taking account of qualifications and social criteria when selecting workers for redundancy for business reasons, etc. The Conservative-Liberal government had already taken similar steps in 1996, but they were scrapped by the Red-Green government in 1999 for failing to achieve visible success in terms of labour market policy.

In principle, state law (labour law) must be seen together with the standards established in autonomous collective agreements. This is particularly true in Germany, where collective agreements play a more important role than in many neighbouring countries. Although, in Germany (too), the trade unions are in a relatively weak position, and a debate has been running for years about the supposed ‘crisis of (general) collective agreements’, the latter still govern directly (by precept) and, in some cases, indirectly (through various legal and practical measures) the employment relationships of some 80% of employees. The flexibility and innovativeness of German labour law is demonstrated empirically not only by the many openings in collective agreements for company-specific solutions, but also by data on movements on the labour markets (termination and renewal of contracts of employment, the ‘job turnover rate’). Nevertheless, the discussion about the supposed over-rigidity of labour law structures continues.

In the autumn of 2003, a controversy erupted about the statutory introduction of saving clauses in collective agree-
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ments. The Conservative opposition (CDU/CSU) had proposed draft legislation that would have led to a fundamental change in the relationship between works agreements and individual labour contracts. This would have amounted to a radical break with the labour law structures developed by Hugo Sinzheimer even before the Weimar Republic [i.e. before 1919] and which prevailed for many decades. However, due to the resistance of the unions and constitutional concerns, it did not come about, although the political controversy continues."

The influence of EU law on German labour law was very important indeed during the period under review. This applies to European legislation, in particular directives, as well as to the case law of the European Court of Justice. The following could be cited as examples: the equality principle, labour protection law, European works councils, working time law and employee claims in the event of transfers of undertakings. European labour law is much better known and accepted now in Germany. Its application does not pose any fundamental problems, despite the complexity of the relationship between European and national law.

The discussion on the impact of the European Charter of Fundamental Rights on national labour law [2] has (probably) lost some of its momentum because of the stalemate on the European constitution resulting from the draft Constitutional Treaty.

With regard to the outlook for (European) labour law, it is particularly important to build interfaces and bridges between different types of contracts and between paid work and other activities, such as providing care and assistance within the family. It is broadly agreed that the labour markets are now changing faster than in previous decades.

The Danish and the Dutch debates led to the emergence of the term ‘flexicurity’ to describe a hybrid of flexibility and security. This idea is also being fleshed out in German labour law.

The country report confirms that, despite all the contradictions of labour law developments, illustrated by many examples of State and collective agreement law, economic efficiency and social protection do not have to be mutually exclusive.

1 For the latest, see: Buschmann, MP 2004, p ff.
This report examines the evolution of labour law in Greece over the past ten years. This evolution is seen in four areas: first, the regulatory techniques of labour law; second, the possible transition from job protection to employability; third, the encouragement of adaptability of both workers and enterprises by labour law; and finally, the promotion of equal opportunities as far as employment and occupation are concerned.

I. Labour law trends 1992 to 2003

A combination of factors (EMU\(^3\), EES\(^4\) and OMC\(^5\), EC legislation etc) has influenced the development of Greek labour law during the 1990s. Among the aforementioned factors, two served mainly as a force to accelerating changes in the field of labour law and labour relations: the Greek preparation for the country’s access to economic and monetary union on the one hand and the European Employment Strategy and the Open Method of Coordination on the other. The European Union and convergence with the other Member States became synonymous with modernisation and normalisation, i.e. the pursuit of a solution to the widespread hidden economy and the establishment of a controlled and disciplined system of regulating labour relations similar to that of other European systems.

The main trend in the evolution of labour law in Greece during the reporting period is modernisation, meant as the search for some flexibility, through changes mostly in individual labour law, related especially to new forms of employment and working time. Changes were instigated by the EU, but performed in a national way. As a whole, the 1990s were characterised by a lack of innovation and radical legislative reform in the field of labour relations. Changes focused on the creation or modernisation of structures, infrastructures, institutions and mechanisms, many of which did not actually function or fell into disuse.

Changes were much sounder as regards employment policy. The EES forced Greece to include its legislative policy on labour relations within a national employment strategy, which until then was lacking. However, even today there is no unified legislative planning, as there is still no comprehensive strategy embracing a partnership approach with the social partners aiming to step forward labour law.

Two points represent a radical reorientation of Greek employment policy. Firstly, the promotion of active and individualised employment policies, together with a tightening of the conditions for entitlement to unemployment benefits; secondly, the abolition of state monopoly in job placement and the decentralisation of powers and functions from the state to private actors\(^6\).

Another major influence of the EES is that Greek labour law has acquired a new content, adapted to more horizontal issues, such as quality at work, active ageing, vocational training and lifelong learning, which were completely foreign to its legal tradition. This larger scope tends to lead to interconnection between labour law and other legal fields, especially tax law, social security law and education law.

Besides these factors, the need to adapt Greek labour law to EC legislation, as a form of hard law and as a result of the classic community method of governance, also greatly influenced the development of certain parts of Greek labour law - particularly in the fields of health and safety, gender equality and the restructuring of enterprises. To this must also be added the contribution of EC legislation in covering legislative gaps (Directives 93/104/EC, 97/80/EC, 91/353/EC, 98/59/EC), in improving existing regulations on part-time work (Directive 97/81/EC) and on parental leave (Directive 96/34/EC) and in protecting pregnant women (Directive 92/85/EC).

3 Economic and Monetary Union.
4 European Employment Strategy.
5 Open Method of Coordination.
6 i.e. Temporary Employment Agencies, private Labour Offices and other private agents, which were authorised to get involved either in the job placement or in providing vocational orientation services.
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It must, however, be noted that the incorrect transposition of Labour Council Directives are a frequent phenomenon in Greece, reducing the level of protection awarded to the workers. Many times domestic legislation simply reiterates the provisions of the directive, without accompanying them with the statutory prerequisites that would allow for their effective implementation and without adapting them to the Greek legal order.

In parallel, one should stress that other forms of non-binding EU regulation (‘soft law’), such as Green Papers, Community Action Plans, as well as broader horizontal strategies such as mainstreaming, were also important. Actions of an educational and informative nature played a large part in heightening the awareness and responsiveness of the Greek judges to Community law on gender equality. Although the implementation of EC labour law is a very complicated task, one should note that the possibility of challenging national labour law through preliminary rulings by the European Court of Justice (ECJ) was very rarely used.

II. Ongoing developments

The transposition of the Fixed Term Directive 99/70/EC through Presidential Decree 81/2003, has actually become the most controversial issue of Greek labour law. Following an investigation, which resulted in official meetings of European Commission's officials with representatives of the Greek Ministry of Labour in January 2004, the Commission did not seem convinced that the Greek government had fulfilled its obligation to transpose the Fixed Term Directive into domestic law as regards the use of successive fixed term contracts in the public sector (Art. 5 of the fixed term Directive). At this time the Commission gave the Greek government formal notice by letter, in accordance with Article 226 of the EEC Treaty, allowing it a period of two months to respond. The EC is then likely to bring an action before the ECJ.

The conclusion of successive fixed term contracts in the Greek public sector is a legal question with high social and political implications, which involves almost 45,000 employees, employed under this kind of contract. A number of Greek court rulings issued in April-June 2003 converted workers’ successive fixed-term contracts into contracts of indefinite duration, on the basis of direct application of the EU 1999 Fixed Term Contracts Directive. It is very significant that the Greek courts avoided addressing the ECJ for preliminary rulings on the correct or incorrect adaptation of Council Directive 99/70/EC and its compliance or not with existing Greek law. A recent development of significance in 2003 was the effect of the legal engagements derived for Greece from international labour conventions, which after having been ratified are considered a part of national law (Art. 28 Para. I of the Constitution), and take precedence over any national provisions to the contrary. A November 2003 decision by the Committee of Freedom of Association of the ILO stated that the system of compulsory arbitration provided by the Greek independent service OMED (Art. 16 Law 1876/1990) was no compliant with international labour Conventions 98 and 154, which have been ratified by Greek law. Therefore it recommended the Greek government start consultations with the most representative trade union and employer organisations in view of measures which will restrain compulsory arbitration in cases involving companies providing goods and services covering substantial and vital needs of the population (mainly public corporations).

This decision, which is binding for the Greek authorities, requires Greece to review its legislation on mediation and arbitration, through extended social dialogue with the social partners. The fact that this extrajudicial legal mechanism of resolving conflicts of interest was a product of political compromise in 1990, which reflected also a balance of powers between social partners, is likely to have an impact on social peace in the near future. A possible outcome of this change could be the individualisation of labour relations. Concluding collective agreements in several sectors or enterprises of the private sector - where either trade unions have a weak bargaining power or are completely absent - will be impossible, if unilateral appeal to arbitration is limited in theory to very few conflicts involving mainly public corporations, which in practice rarely reach OMED.

We should also stress that discrimination in the workplace is another field in which Greek labour law is expected to undergo drastic changes, under the influence of the Council Directive 2000/78/EC. New draft legislation, which will probably pass before the Parliament after national elections take place, will cover important legislative gaps, as Greece lacks specific anti-discrimination regulations, especially in terms of age discrimination and of sexual orientation.

III. Two significant changes

There are two changes that are considered as the most significant changes to Greek labour law during the reporting period.

The first concerns the procedure of law-making. The way in which Greek labour law was formulated, changed. First, its drafting and content has evolved as an indirect effect of the
EES and the OMC. Under pressure by changes instigated by the EU, labour law has become more the result of consultation and social dialogue with the social partners than it was in the past. Besides the foundation of an Economic and Social Council (OKE) in 1994, as a central forum for social dialogue, the government introduced by law in 2003 two new social dialogue bodies: the National Committee on Social Dialogue for Employment and the National Committee on Social Dialogue for Social Protection. However, even today, legislative changes in the field of labour relations and employment do not reflect a real partnership approach. They are neither a product of a wider employment strategy nor of central negotiation and agreement between the state, employers and workers. For this reason, legislation remains fragmentary and not fully effective.

The role of collective autonomy in the law-making process has been strengthened during the last decade, but has not reversed the primary role of state legislation. Collective bargaining manifested dynamism and innovation only on the national inter-sectoral level and as this did not permeate to other levels, where more specialised regulations are still needed. Qualitative aspects of work have been completely neglected till now. What is needed is for the social partners to abandon the authoritarian state mindset which would have the state as the initiator of all regulations and for them to take on initiatives to regulate and deal with matters such as corporate restructuring, collective redundancies and their consequences, organising working time, the new forms of employment, lifelong learning, flexicurity etc., through innovative and radical collective agreements. We should also note that no European directive on labour law was ever transposed into domestic law through collective agreements.

The second change concerns the progressive transformation of Greek labour law, both statutory and autonomous (collective autonomy), into employment law, which, among its other aims, seeks to facilitate the demand for employment, its management and the re-regulation of the labour market. This change in the function of labour law is still in the early stages. It coexists with the traditional function of Greek labour law, which is the protection of workers' rights and jobs both as to their substance (limits on termination and end of work relations) and as to their contents (forbidding the unilateral change in the terms of employment contracts). Because of this, and according to the findings of this study, there is still no clear change in the function of Greek labour law from protecting workers' rights and jobs to regulating transitions from one status to another (i.e. from unemployment to active employment or from employment to training and career breaks) and from one employment profile to another (i.e. from dependent employment to self-employment or from stable employment to temporary and vice-versa).

One major challenge for Greek labour law is to tackle various forms of discrimination in the workplace and in employment in general, which go beyond the grounds covered by Council Directive 2000/78/EC. The most sound are those concerning blue-collar and white-collar workers, those employed in a private and a public law relationship and those employed with standard and non-standard employment relationships.

IV. Overall assessment

Inflation and complexity of legislation are also a result of the large number of EU labour directives which need to be implemented. This bloated legal system, based mainly in statutory rules more than in collective autonomy rules, has produced a de jure over-regulation of the Greek labour market and at the same time it has encouraged its de facto deregulation. This has rendered the Greek labour market intensely dichotomous in nature. One part, which includes undeclared employment (particularly in small businesses), and is a part of the hidden economy (which accounts for approximately 33-35% of the GDP), is flamboyantly flexible and not necessarily regulated - a fact which creates conditions for unfair competition. The other part, that of the public sector and the 'law-abiding' part of the private sector, remains rigid and over-regulated, but organised, nevertheless, by rules that are not always adjusted to its real needs. Besides that, there exists also a flourishing of the so-called 'grey zones of subordination', which are on the fringes of salaried and independent employment and which serve as a means to circumvent labour law.

Thus, there is still an imperative need to support and enhance the state control mechanisms which monitor the enforcement of labour law and of collective agreements on the one hand and the proper operation of the labour market on the other. Measures need to be taken to reduce the hidden economy, convert illegal and undeclared employment to regular employment, and to drastically deal with the phenomenon of 'pseudo-independent' employment, which distorts the image of salaried employment and transgresses labour and social security law.
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Ireland

The Irish report indicates (with supporting statistical data) dramatic shifts in the development of Ireland’s labour law over the past decade. In the course of the presentation, the development of Irish labour law during the latter half of the 20th century is outlined, and key challenges for the national economy at the beginning of the 1990s are outlined. The institutional context is presented, with emphasis upon the Labour Court, whose task primarily has been conflict resolution of a ‘non-judicial’ nature in relation to collective labour relations. The underlying framework established by labour law reforms in 1990 is presented, and this is set in the context of a desire to concentrate upon conciliation and non-legalistic approaches to dispute resolution.

Concerns are noted that the scope for ‘industrial relations’ has been narrowing in the face of increasing use of ‘hard law’ techniques (primarily, statutory interventions). This is considered to be even more problematic in the face of increasing numbers of EU measures requiring implementation into domestic law. Such factors have given rise to pressures for reform of the institutions and substantive content of Ireland’s labour law.

Dramatic changes in the fortune and health of Ireland’s economy are highlighted during the 1990s. The high speed of labour market change is identified as an immediate problem in the context of the economic downturn. In particular, dramatic rises in the incidence of part-time work are highlighted, and the fear of large-scale youth unemployment is noted. In the face of this, important measures to address the objectives of post-‘Luxembourg Process’ employment policy are evident in the most recent national pacts between the social partners. Note is taken of an increasing number of individual employment rights disputes being raised, together with a growing number of issues relating to discrimination of various forms throughout the Irish labour market.

It is concluded that severe doubts exist as to the adequacy and suitability of the institutions which have served Ireland’s system well during the 1990s. Put starkly, if labour law is to be relevant in Ireland’s post-millennium economy, that country’s remarkable economic decline has to be arrested, the structural shortcomings have rapidly to be addressed, and a new ‘Irish model’ has to be developed out of the phoenix of the ‘miracle’ of the 1990s.
The report on Italy highlights the essential characteristics of the national legal system, and underlines the changes that have occurred in labour law. The overall impression is that 'evolution' meant in the Italian case not a radical change in the system of legal and voluntary rules governing the subject matter, but rather an adaptation to a changed economic environment.

However, a complex and often unclear legal field has been created by numerous legal interventions, one following the other in a series of subsequent adaptations of previous rules. This legal technique does not always produce very clear results. The paradox is that an obscure style of the legislature is often adopted in the area of labour market reforms, which should, more than any other measure, bring about transparency and efficiency.

This point needs to be addressed as a serious challenge to the coherence of labour law in cases such as the Italian one in which the legislature has been hyperactive.

The decade taken into consideration has been interpreted with some flexibility, so that some important reforms in 1991 have nevertheless been mentioned, since their enforcement continued in subsequent years and also gave rise to change.

A recent Legge delega (L. 23 February 2003, n. 30) on labour market reforms, followed by Decreto 10 September 2003, n. 276, brought about major changes in Italian labour law. It originated from the October 2001 so-called 'White Paper on the Italian Labour Market', drafted by a committee of academics, under the auspices of the Ministry of Welfare, soon after the elections and the victory of the centre-right administration.

There is wide and articulated discussion on the impact that such new measures will have on Italian labour law as a whole. Opinions are currently split between those who think that this will introduce a complete change of perspective in the discipline and those who see elements of continuity in an evolution which inevitably moves towards reduced guarantees, both for the individual and the collective actors, in view of a more flexible labour market. 7 G.U. n. 235,9.10.2003, suppl. ordinario n. 159.

References to this new piece of legislation are made throughout the report on Italy, albeit in a brief and informative way. Part of this legislation is, in fact, 'experimental' and may be subject to changes within a 18 months' time from the coming into force of the Decree. Other innovations introduced by this reform will need time to be fully implemented and evaluated, both in the field of work and in case law.

Inputs from the EU were significant in the decade considered and are highlighted in the report. In the 1990s Italy faced one of the most radical and effective reforms of the public sector, relevant for the privatisation of employment contracts, but also part of a broader programme of economic recovery, essentially due to compliance with European economic guidelines.

Despite the fact that several changes in government occurred in the space of a decade, Italy entered EMU and gained from other Member States widespread positive evaluations of its economic performances. In 1994 and 1996 there were changes in the majority governing the country. In 2001 the latest change in the coalition winning the elections coincided with a dense agenda of labour law reforms.

The Italian employment rate is among the lowest in Europe (an average of 54.6% in 2001, for people between 15 and 64). The increase in the employment rate was significant in the years 2000-2001, amounting to 2%, thus reflecting an improvement in economic growth, reaching almost 3% in 2000.

Like other European countries, Italy is now suffering from the negative effects of reduced growth in the economy. Labour law may become instrumental to a debate on economic stability. It is, at times, over-evaluated, as if rigidities in the labour market were mainly due to the burdens placed by legislative measures both in individual and collective labour law. On the other hand, it may also be that the relevance of measures enhancing social consensus be under-evaluated and reforms with a very low social acceptance are pursued anyway. The latter explanation is at the origin of the frequent recourse to general strikes in very recent years.
The report on Italy shows that concertozione and a consensual climate in the relationship between government and the social partners has been one of the recurring elements in the Amato, Ciampi and Prodi governments. Important labour law reforms were the product of this political climate.

It is not without relevance that such a consensual climate allowed also an innovative and original thinking in the contested area of welfare reforms. They were started by the Amato and Ciampi governments and found an exceptional outcome in 1996, with the Dini reform of pensions, launched by the centre-right Berlusconi government and yet agreed upon with the unions, due to an open and transparent bargaining mechanism, which allowed for some concessions to the interested parties.

On the contrary, opposition to the present centre-right government with regard to the proposed reform of the pension system saw again, as in the most recurring Italian tradition, all three main confederations acting together, despite the lack of a formal unitary structure.

Labour law is therefore facing potential changes in the political and union climate, as well as in its contents, both in legislation and in collective bargaining.

The report on Italy also deals with areas of labour law in which the transposition of European directives has given rise to significant discussion among policy-makers and scholars. The delay in complying with European deadlines - still a recurrent feature of the Italian legislature - may appear incoherent with the diffuse pro-European approach of public opinion and with the capacity shown by Italian politicians to make economic constraints acceptable in view of the adoption of the single currency.

The answer probably lies in the difficulty for the national bureaucracy to adapt to external demands within a given time and to the slow law-making process, subject to constant compromises to be reached within large and highly differentiated political coalitions. However, compliance with EES may introduce changes in some structures of the administration and impose some coherence in the preparation of NAPs. This is not yet a well-grounded practice and will require more attention by policy-makers.

No significant shift can be detected between law and other regulatory techniques. Collective agreements are, in some cases, parallel sources to the law and raise problems in interpretation when they deal with delicate matters, such as collective dismissals and redundancies.

Even in the recent reform of the labour market, collective agreements should continue to be relevant. In some cases collective agreements have a very wide scope. For instance, they can indicate activities for which the recourse to agency work is allowed. They have in such cases a function parallel to the one assigned to the law, inasmuch as they broaden legal provisions.

To take another example, in the recent reform on part-time work, collective agreements are no longer deemed necessary for the definition of clauses on 'elasticity', namely the unilateral modification of working conditions decided by the employer. This implies that individual employees are exposed to such unilateral exercise of managerial prerogatives, and collective sources are not considered a protective measure but an impediment to a case-by-case agreement.

Commentators are pointing, therefore, to the potential dangers enshrined in this new function of collective agreements, particularly in the light of the 2003 reform which gives an unclear role to most representative unions.

In the decade taken into consideration, collective bargaining has functioned within significant economic constraints. This is also one of the reasons why decentralised bargaining has not been a relevant feature. The macro-economic framework has dominated the evolution of bargaining policies and wage policies in particular. The control of inflation has therefore prevailed over the creation of employment, but the philosophy of the whole 1993 Protocol of agreement on bargaining levels has been valued positively. In such a Protocol decentralised plant agreements are supposed to integrate national ones and not to deal with subject matters that are already covered. The present government has announced a review of the 1993 Protocol.

Legislation on immigration is of relevance in the current Italian debate. Its recent development, related to the controversial enforcement of the so-called Bossi-Fini 2002 law are, on one hand, intertwined with similar measures adopted in other EU countries. On the other hand, measures typical of the Italian system are the object of close observation. This is the case, for instance, of the 'contratto di soggiorno', an unusual contract under which an immigrant needs a contract of employment to become a legal resident.
One of the most important outcomes of the evolution of labour law is in the area of social inclusion of immigrant workers. Italian labour law shows, however, its difficulty in gaining an overall coherence in this field.

In the section on job security and employability, attention is given to the reform of the hiring system. The technicalities of the reform are intertwined with job Centre, a contested ECJ decision, which put the Italian legislature under severe pressure and showed how in practice negative integration can take the place of a coherent approach through positive integration. Such a reform is still controversial and has been in the agenda of the current government, thus showing how slow the adaptation of a public hiring system is to the liberalised rules of the market.

In the section dealing with adaptability, the most relevant legal reforms in the ten years have been analysed. They are part of the so-called Pacchetto Treu, a series of legal measures enacted when Tiziano Treu, a leading labour lawyer, was Minister of labour and social affairs. Some of these measures (all articles dealing with temporary agency work) have been replaced by the 2003 Decree; some other measures have been subject to changes.

The methodology inspiring labour law reforms - in centre-left as well as in centre-right administrations - is not separated by the aspiration to comply with European law. This is an interesting characteristic not to be underestimated. All legislatures, each of them carrying a different political orientation, claim to have the best approach to the implementation of European law. They often justify controversial initiatives in legislation as necessary steps in the implementation of EU law or as indispensable measures to improve economic competitiveness.

The reflection on the transposition of EU directives is still open among labour law scholars. The most controversial point, currently under examination, has to do with the interpretation of the so-called ‘clausole di non regresso’, these are clauses inserted in recent European directives, which should not leave space for national legislation lowering existing individual guarantees. The issue of comparison among different legislative measures is a very complex one, since an apparent decrease in the level of protective measures may be intended as an increase in flexibility and, as such, an improvement in employability.

The evolution of Italian labour law has often been faced with a balance between internal strategies to grow and to develop, and external European demands to comply with supranational goals. The European Employment Strategy (EES) acts as an interesting element of dynamism and has on several occasions offered an opportunity to all actors involved to approach labour law issues with an overall perspective, rather than in a fragmented way.

One of the most relevant and original contributions that reformers can achieve is expanding the scope of labour law beyond the area of subordinate employees. This is not to say that there should be an over-weight of protective measures, just at the time when the need for flexibility in labour markets is still very high. Reforms which should characterise the evolution of labour law in the years to come have to do rather with a new distribution of legal guarantees among a wider circle of addressees. Modulazione delle tutele - an adaptation of guarantees - is one of the descriptions offered in the Italian debate of a possible and optimal trend in labour law reforms.

Proposals currently on the agenda of the centre-left political parties, in opposition to the current government, deal with a new ‘statute’ for workers who are not covered by a standard contract of employment, and without guaranteed continuity of their occupation. It is significant that the word lavoro in the plural is being used to describe the area in which the most inventive exercises of a ‘reformist’ labour law should take place. This exercise is often linked to the area of social inclusion, functionally relevant for the evolution of labour law, since it aims at bringing into the labour market categories of the population which are either outside of it or at the margins.

It is interesting to note that, from a totally opposite point of view, the expansion of guarantees to the under-protected is claimed by the centre-right coalition and is part of the overall reform of the labour market currently under way. A ‘statute’ of a similar kind to the one previously described should be one of the next proposals put forward by the Ministry of Welfare, in order to complete labour market reforms.

In the section on equal opportunities, legislation on parental leave has been taken into account, as well as recent anti-discrimination legislation.
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The most interesting impact of European law and policies is visible in a 2000 law which introduces significant reforms in the previous 1991 legislation. Positive action is re-interpreted in its function and gender mainstreaming is attempted through the strengthening of consigliere di parità.

Decrees enforced in 2003 for the transposition of the 2000 EU Directives (2000/43 and 2000/78) opened up the system to the new concept of harassment, not regulated before. They also included among discriminatory acts those based on religion, personal conviction, handicaps, age and sexual orientation. These two recent Decrees have been criticised for the unnecessarily ample derogation set to the principle of non-discrimination. For instance, some requisites for the hiring of workers in the army and the police, as well as in jails, even related to the above mentioned areas of anti-discrimination law, are considered genuine qualifications for employment. Furthermore, a very wide derogation from the principle of non-discrimination is introduced, with no link to specific cases, but simply based on Objective justifications.

In the conclusions, attention is paid to a study produced in 2002 by the research centre ISFOL, under the auspices of the European Commission, aimed at evaluating the impact of the EES on the Italian legal system and in particular on the evolution of labour law. This study gives rise to a series of considerations which should, however, be updated to deal with the most recent developments.

The impression one receives from looking at the ISFOL Report is that, up to 2001, there were reassuring elements of continuity in the legislation. Pressure put on the system because of European targets was visible and beneficial. The most interesting phenomenon is how a soft law procedure was combined with hard law reforms.

The question is whether national administrations should become the leading force in the implementation of policies. If such a technical and objective expertise could regularly inspire the administration in its role of proposer, the legislature would receive a more specialised support. It could still follow its own agenda and yet establish a strict correlation with internal branches of the public administration.

We can therefore see two very different sides in the evolution of labour law. Legislation continues to be the expression of changing political alliances. At the same time, responses to EES are somehow dispersed through an implementation procedure which is external to parliaments.

Linking together soft and hard law regimes is one of the main challenges of modern labour law, torn between its internal coherence and its external supranational dimension.
In Luxembourg, changes in labour law between 1992 and 2003 have been influenced by the special characteristics of the labour market. During this period, Luxembourg has continued to enjoy strong growth and an increase in jobs. In addition, the level of unemployment over the period has been one of the lowest in Europe.

The presence of 38% of cross-border commuters, a figure that has increased since 1995, shows that companies can have a breeding ground of qualified labour.

Lastly, the banking sector represents 45% of economic activity and is therefore a vital reference sector.

Labour law in Luxembourg has changed under the almost exclusive influence of Community law due to the obligation to transpose social directives and, since 1998, as a result of European strategies for employment.

This change has materialised in practical terms through changes in the law. The sources of labour law have changed very little, except in the area of collective bargaining, where controversial issues concerning union representation in certain banking sectors have led to a major reform programme.

Collective bargaining in Luxembourg remains very sector-based. Company-level bargaining has not significantly evolved, despite a reform carried out in 1999.

The mechanisms relating to employee adaptability are not very advanced: no specific requirements concerning contractual obligations; a continuing training system that is still in its infancy, apart from occasional, short-term training programmes according to employer needs; integration mechanisms for the unemployed that are directed mainly at young people.

This situation is explained by the specific nature of the labour market, which is a strong creator of jobs, and by the use of a cross-border labour force: this qualified labour force remains cheaper than retraining schemes.

The same trends can be seen in the area of employability. Though there are strict controls on contracts offering little job security and on part-time work, redundancy procedures, which are in line with Community law, give way to plans based on voluntary participation and early retirement. Here again we see the specific nature of Luxembourg’s labour market as, despite the slowdown of growth, it continues to create jobs and does not require reforms to encourage employability.

Measures to help the unemployed are aimed particularly at young people and are not directed towards employees over the age of 54, most of whom are excluded from the labour market. Nor is there a retraining mechanism to help introduce long-term training programmes.

Since the Act of 12 February 1999, the legislature has tried to introduce flexibility in working time by allowing unions and management to lay down reference periods of up to one year for the calculation of maximum working time. This attempt has been unsuccessful, mainly because of the cautious union attitudes to rights given to employers to modify working time and the lack of sufficient compensation linked to the introduction of this flexibility. However, in 2003 it was extended to 2007.

Despite encouragement in the guidelines to move towards greater flexibility, and the existence of a genuine tripartite dialogue over employment issues, there have been no new reforms.

With regard to changes in labour law aimed at reconciling working life with family life, there has been significant evidence of a will to keep women at home. The most important measures concern parental leave and, to a lesser extent, part-time work. At best, collective agreements have led to extra leave for family reasons.

However, under the influence of the EES, the Luxembourg government is introducing measures to encourage women to join the labour market and crèche-building programmes to help increase the number of women going out to work.

On the ground, the appraisal of equality of opportunity gives very clear results: Community legislation is well transposed in Luxembourg but does not give rise to any real initiatives.
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The high level of salaries in Luxembourg, allows couples in many situations to live on one salary, which increases the social authorities’ inertia on the issue of women at work. However, the number of women at work is increasing, but remains well below the European average.

On the other hand, protection of individual liberties is effective in terms of the fight against discrimination (major policy in favour of the disabled), sexual harassment and the protection of personal information (2002).

In any case, it is very clear that changes in labour law in Luxembourg closely interact with Community social law in terms of the impact of restrictive norms and of employment strategies, which have reinforced tripartite negotiation.

The reference period is considered to have given rise to a great deal of legislative activity due to the transposition of a large number of directives that have led to the most evident changes in labour law (particularly with regard to the protection of workers in the most insecure situations, discrimination, European works councils, organisation of working time and the processing of personal data).

The modernisation of labour law is also due to Community social law, particularly with regard to work inspection, which was introduced when the directive relating to the posting of workers was transposed.

However, Luxembourg will probably have to strengthen its industrial relations system and increase employee adaptability and employability to meet the employment guideline objectives, especially those relating to the number of working women and the prolongation of working life. However, one can assume that significant reforms will only take place if the flow of cross-border workers were to be reduced.

The economic situation is still very favourable in Luxembourg, which explains the differences with neighbouring countries. These differences reinforce the idea that convergence take place if there is a need in the national labour market that fits with the guidelines.

However, changes in labour law in Luxembourg also show that these laws are very unlikely to be modernised without some form of Community obligation and that the influence of the guidelines, and of ‘good practices’, opens the way for discussion in Luxembourg, which is accompanied by action or incentive programmes.

But it does not appear that the guidelines are sufficient in themselves to change the behaviour of businesses in Luxembourg or lead to significant reforms if these are not imposed.
The Netherlands

The Netherlands is often looked upon as a 'model country' for solving employment and labour issues. The origins of the Dutch model, often referred to as the 'Polder model', date back to the end of the Second World War. An important step in the development of labour relations and labour law in the Netherlands took place with the 'Wassenaar Agreement'. In 1982, in the village of Wassenaar, near The Hague, the leaders of the most important national trade union (FNV), and the most important employers' association (VNO) reached a historic agreement. The impact of the Agreement on Dutch labour law has continued until the present day. A drive towards more flexibility has been dealt with on the basis of centralised labour-management agreement. This way of dealing with labour issues has served as a basis of what became known in the 1990s as the Dutch Polder Model.

The use of flexible labour relations became very popular during the 1990s. The courts accepted these new forms of flexible labour relations, but in case of long-standing relations they often granted the worker with the regular protection of employment contracts. The unions gradually accepted the need for flexibility in the employment contract.

In 1996 a new deal was reached by the Foundation of Labour. The central organisations of management and labour agreed upon a report called 'Flexibility and security'. This was a 'package-deal': the unions wanted to preserve the system of preventive checks on dismissals of regular contracts by the government in order to protect workers against unfair dismissals. The employers accepted this in exchange for greater flexibility in other types of contracts, especially fixed-term contracts. The unions also accepted the 'on call-contracts' and Temporary Work Agencies in exchange for a stronger position of workers dependent on these types of work. The deal is summarised in the concept of flexicurity.

In the 1980s and the 1990s the pressure for a major reform of the law on dismissals was high. The Dutch law on dismissals was analysed as one of the most rigid systems of Europe. The existing procedures required almost every single dismissal to be approved beforehand by a third party, either a high-ranking civil servant or the local civil law court. The political debate on the reform of the law jumped from one solution to the other but it was only in the mid 1990s that the ground was apparently fertile for a compromise solution. The trade union movement was ready to renounce excessive pay claims if the law on dismissals were maintained. And it was prepared to give up its ideological resistance against flexible work contracts if the law would provide atypical workers with more rights and job security. The social partners endorsed this project in an agreement of 1996, which was subsequently implemented by two acts of parliament, the Act on Labour Market Intermediaries and the Flexibility and Security Act.

Traditional work incapacity rules in the Netherlands have created problems for many years, certainly in budgetary terms. It has also been seen as a problem for the employability and adaptability of the workforce. New regulations on work incapacity in the Netherlands have set a new scene for ongoing employment and adaptability of workers. The so-called 'Law Improvement Gatekeeper' (Wet Poortwachter) is the most recent example. Sick workers and employers have to cooperate in the re-introduction of workers in the employment process.

In the Netherlands, part-time work is generally accepted as 'normal' work. The implementation of Directive 97/81/EG concerning the Framework Agreement on part-time work (O.J. 20 January 1998, L 14) did not pose a big problem in the Netherlands.

It has always been possible in the Netherlands to conclude a first fixed-term contract freely, for whatever purpose and whatever period. In principle, its use has not been legally restricted. As a result of the agreement on flexibility and security of 1996, the Dutch government introduced a new system of fixed-term contracts. Under the present rule (Article 7:668a Civil Code), it is possible to have three consecutive contracts that may be ended without having to give notice, as long as they fall within a period of three years. The fourth contract, or the contract that makes the total working period from the beginning exceed 36 months, will change automatically (ex lege) into a contract for an indefinite term, which gives the worker the aforementioned protection against dismissal. This change is an important form of deregulation that is expected to make the fixed-term contract more attractive for employers.
The popularity of on-call contracts in the Netherlands is rather high. It is estimated that around 6% of the workforce are employed under this type of contract. The Act on Flexibility and Security firstly aims to strengthen the position of workers with on-call contracts.

In a 1996 agreement with the unions, the Dutch Temporary Work Agencies' organisation (ABU) accepted the principle that temporary workers were working on the basis of an employment contract. In exchange, the unions accepted Temporary Work Agencies as normal employers who, as such, do not require specific government supervision. By January 1999, this agreement was formalised in the Civil Code. The system of permits was abolished on 1 July 1998, according to the new Act on Allocation of Workers by Intermediaries. Temporary Work Agencies are now free to operate like any other company.

On 16 July 2002, the central EU-level social partners formally signed a new EU-level framework agreement on telework. In the year 2002 there was, however, no specific response in the Netherlands to the European agreement on telework. Recent trends in the Netherlands also show more focus on internal flexibility rather than on external flexibility, implying a stronger attention to the reconciliation of work and family life. On 22 November 2001, a new Work and Care Act was passed, which regards flexibility from the employee's point of view. It still has to be seen what the practical effects of the law and its application are over the next few years.

With regard to sex discrimination, the issue of the implementation of Directive 2002/73/EC has been dealt with in the Dutch Parliament. Depending on the results of new pieces of European legislation, a modification of the Dutch laws will be considered in the near future. In the context of equal treatment on other grounds than sex, two new laws have been discussed (or are in the process of discussion) in the Dutch Parliament, largely in response to EU Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, as well as for the implementation of EU Directive 2000/43 with regard to discrimination on the basis of race and ethnic origin. The most problematic issue is that of age discrimination. The Dutch Supreme Court has taken a reluctant viewpoint with regard to age discrimination. The reticence of the Supreme Court is likely to be a result of the fact that the issue has only moved slowly in Parliament during the past few years.

Developments after 2002

The comprehensive Dutch approach to the reconstruction of the law on dismissal and on flexibility, addressed under the word 'flexicurity', and captured within the concept of the Polder Model, was revived at the end of 2002 and also at the end of 2003. In this period, central social partners and the Dutch government concluded central agreements on several issues of social economic policy, with the purpose to function as guidelines for the collective agreements at sectoral level and company level. There are some discussions on the evaluation of the system of collective bargaining and collective agreements, which concentrate on the question of how to use the benefits of that system while also developing more flexibility within the framework of collective agreements. The reality is that collective bargaining agreements remain a fairly popular instrument with a reasonable scope of coverage.

In a recent report from the Dutch Ministry of Social Affairs and Employment (Pari. Docs. I 2001/2002, 222a, n°9c) the coverage of collective bargaining agreements is explained. It appears that in the Netherlands, 53% of employees (except higher management, but including civil servants) are covered by a sector collective bargaining agreement. 12% is covered by a company collective bargaining agreement. 7% of the employees are covered by a sector agreement after its extension. 16% is not covered by a collective bargaining agreement. The union density is about 20%.

With regard to 'yellow unions', the Ministry of Social Affairs and Employment has issued a decision which provides more insight into the conditions of 'independence' of such unions under the ILO Convention 98 (Decision of 1 December 2003, n° AI 20.027, Annex State Gazette 3 December 2003, 234). This decision became necessary because many companies deviated from general framework collective agreements through company collective agreements. Indeed, if a company is already bound by a company collective agreement, the extension of sector agreements can be avoided. The Ministry now has a form of control over the independency of the yellow union (such as financial independency from the employer).

With regard to dismissal law, the number of dismissal permits rose by 15% in the third quarter of 2003 compared with the third quarter of 2002. The Centres for Work and Income (CWI's) issued permits for 15,134 employees in 2003 as opposed to 13,137 last year. These figures are based...
on the dismissal statistics on the third quarter of 2003 published by the Ministry of Social Affairs and Employment. In the second quarter of 2003 the number of dismissal permits issued was 20% higher than in the second quarter of 2002. The number of dismissal permits rose by 15 percent in the third quarter of 2003 compared with the third quarter of 2002.

The current ‘Cabinet Balkenende’ also proposes to revise the Working Hours Act. The number of rules on maximum working hours and night work needs to be reduced dramatically, according to the cabinet, and the separate rules for overtime work should be repealed. It is argued to be sufficient to set the maximum number of working hours at 12 hours a day and 60 hours a week. These are the Cabinet’s proposals for simplifying the Working Hours Act that the Minister for Social Affairs and Employment presented to the Lower House of Parliament. The Cabinet’s position is intended to serve as a basis for a debate about simplifying the law. These proposals are part of an action plan entitled ‘Simplifying Social Affairs and Employment Regulations’, which is based on the coalition agreement of the first Balkenende government. In the Cabinet’s view, the new Working Hours Act should provide only a limited set of basic rules. The simplified law is in keeping with international worker protection standards. Simplification of the law is expected to strengthen the Netherlands’ position on the international labour market. The Cabinet wants the Working Hours Act to offer employers and employees more latitude for making collective and individual agreements about work and rest periods. In addition, the Act should not impose more restrictions and contain more rules than necessary to protect the health, safety and welfare of employees. The new Working Hours Act should set the maximum working hours at 12 hours a day and 60 hours a week. Employees should not be required to work more than an average of 48 hours a week within a 13-week period. This would give employers and employees more discretion in scheduling daily and weekly working hours.

The Working Hours Adjustment Act makes it easier for employees who want to work more or fewer hours to adjust their working hours accordingly. The law gives employers and employees more legal security and makes it easier for women in particular to keep working. However, workers and small-scale employers are not familiar enough with the law, especially an employee’s right to expand the number of working hours. This is the conclusion of the government based on research into the efficiency of the Working Hours Adjustment Act.
Portugal

The ten-year period we have analysed in this report has meant for Portuguese labour law a number of very relevant changes, affecting almost every aspect of the legal regulation of the labour market.

By 1992 Portugal’s labour laws had already suffered some parallel processes of reforms, as a reaction to a number of factors: the adaptation to a democratic constitution, after the fall of the dictatorship in 1973; the increase in the quality of labour law, extending and reinforcing its protective measures; the need to adapt to the impact of the successive economic crisis; and, finally, the duty to implement the European acquis in the field of labour law.

Portuguese labour law, when dealing with employment problems in the 1980s and 1990s, was forced to progressively introduce techniques of flexibility in many institutions of the labour market, but it never accepted an overall flexibilisation of labour law, nor a general deregulation of the labour market. Instead a different technique was adopted, using legislation as an instrument to adapt traditional labour law to the new demands. In the 1980s this process of reform had already started, and a number of labour institutions were affected.

In the 1990s the process continued and increased its pace and intensity - particularly in 1991 when an important reform was enacted, affecting a number of relevant pieces of legislation. The decade being analysed in this report experimented with a number of these reforms, changing the face and dynamic of Portuguese labour law. Among others, legislative interventions have taken place in the fields of:

- Workers’ right to be informed about working conditions;
- Individual and collective dismissals;
- Protection of wages in case of insolvency;
- Work of minors;
- Work of foreigners;
- Posted workers;
- On-the-job training;
- Health and safety at work;
- Temporary work agencies;
- Working time.

In many cases these reforms were the implementation of previous agreements in the context of social consultation practices, a distinctive feature of Portuguese labour relations during this period. There were also a number of legal reforms during this decade implementing European labour law directives.

The legislative technique used during this period also meant a new factor of complexity for labour law in Portugal. Its reforms have been put into practice through a number of small, precise interventions, which in many cases have not substituted older pieces of legislation, but rather added to them as exceptions, special regimes and the like. The result of this approach has been a strong increase in the complexity of Portuguese labour law, which causes practical problems in the legal system. In order to avoid them, a project for a Code of Labour Laws was elaborated through a long and complex procedure, before being finally passed in November 2003. Although many of its rules will not be applicable in practice until some lower level regulations have been approved, this is very likely to happen during 2004.

The Code is divided in two parts, the second one dealing with criminal and administrative liabilities. The first is divided in three parts: a general part; a part on individual labour law, and a part on collective labour law. The whole text clearly shows a general objective of increasing the level of flexibility in the regulation of the employment contract, something which can be easily seen in matters such as working time, the place of work and the content of work.

There is also a general tendency to use the instruments and categories of private law to regulate the employment contract, thus increasing the level of individual self-determination in its constitution and development.

Article 4.1 of the Code states a general rule, that its regulations can be overruled by any instrument of collective regulation, except in cases explicitly mentioned by the Code. This rule means a real change in a long-lasting tradition of relations between statutory law and collective agreement, where the latter could only improve the levels set by the former.
Spain

During the decade we have analysed, Spanish labour law went through a strong process of reform, which affected not only the regulations of most labour market institutions, but also the philosophy, objectives and priorities of labour law itself.

By 1992 a number of changes had already occurred, but most of the contract of employment regulations remained the same. Prior to 1992, employment policy concerns were but one of the factors affecting the evolution of labour law; there were others, such as the implementation of a democratic system of labour relations or the effect of Spain's membership of the Common Market. In general, those reforms, aimed at improving the critical employment situation in the country, did not alter substantially the legal regulation of the contract of employment. On the contrary, these reforms focused on fixed-term contracts, a particular feature of Spanish labour policies up to 1994, and the other aspects remained mostly untouched.

The 1992-2002 period witnessed a completely different attitude and strategy of the government, the parliament and social partners regarding regulation of the labour market. After the failure of the 1980s strategies, a different, more profound and systematic, approach was needed, trying to put flexible regulations through all aspects of the labour market. In 1994 a very important and far-reaching reform took place, affecting almost every aspect of labour law. This reform introduced strong elements of flexibility in the regulation of the contract of employment; it started a process of liberalisation of the labour market; and also transferred to collective bargaining important regulatory functions, previously held by state legislation. The face of labour law in Spain changed substantially after 1994.

For the rest of the period a number of additional reforms of the main pieces of labour legislation took place, although not as extensive as the 1994 one. In 1997 a big reform was enacted, implementing a social agreement of the same year. At the end of the period, two more labour law reforms were enacted in 2001 and 2002, implementing the labour policies of the second conservative government. Besides these general reforms, a large number of specific acts on labour law were enacted, most of them implementing EU directives:

- posted workers, European works councils, protection of 'mother workers', etc.

All these reforms tried to correct the evolution of the Spanish labour market, which suffered not only from high unemployment, but also from a strong rise in fixed-term work. The objective was to reduce entry flexibility through fixed-term contracts, and to increase internal flexibility, through new rules governing the employment relationship.

Exit flexibility, mainly the cost of dismissal, was a taboo in Spanish labour relations, so it was not directly faced. Nevertheless, a number of measures were taken in order to reduce the different costs of termination in fixed-term and indefinite-term contracts of employment, a factor that produced a strong imbalance in the labour market, increasing the presence of atypical work.

In the second half of the period being analysed, an interesting change took place in the evolution of Spanish labour law. A number of legislative measures were enacted, containing regulations that were more protective towards workers, and less flexible as a whole. These reforms, which were the direct consequence of a revival of social dialogue during these years, meant a change of direction, some steps backward in the road to flexibility. The concern was no longer to create as many jobs as possible, but to create good jobs, meaning these measures were aimed at the quality of jobs being created, and not only their quantity. This development ended by the turn of the century, when the 2001 and 2002 labour law reforms meant a new change of direction, these being more receptive to the traditional techniques and goals of flexibility.

Generally speaking, the Spanish model of flexible labour law did not mean deregulation, but rather an increase in the size and number of labour laws. Special rules for certain situations, more exemptions, detailed processes for some decisions, all these had to some extent an effect of inflation of the legal order, making it more difficult to know and to apply.

Not much of this labour law policy changed during the year 2003. The two previous years saw two important reforms: one of labour law itself, in 2001; and the second on unem-
Annex: National report executive summaries

ployment benefits, in 2002. Although for the first nine months of the year almost no new pieces of legislation were enacted, this trend changed and some important new acts saw the light. These acts were: Ley Orgánica 14/2003, on rights and duties of alien citizens, which regulates, among others, conditions for the access to employment of immigrants; Ley 51/2003, on equal opportunities, non-discrimination and access of disabled citizens; Ley 52/2003, on social security; Ley 54/2003, reforming legislation on health and safety; and Royal Decree 326/2003, enacting the legal status of the ‘Becario de Investigación’, researchers working under a grant or fellowship.

This last piece of legislation deserves some attention, as it is the first time Spanish labour law regulates something close to a semi-labour status for a group of persons. These researchers, not being workers technically speaking as they do not have a contract of employment, nonetheless they get some protection from the public system of social security as if they were workers.

From the point of view of the evolution of Spanish labour law itself, the most relevant piece of legislation during this period has been Ley n° 56/2003. This ‘Ley de Empleo’ regulates employment policies and public placement agencies, trying to build a comprehensive legal framework for all employment-related policies. This Act was strongly needed, as the piece of legislation still in force regulating these issues, the ‘Basic Act on Employment’ (‘Ley Básica de Empleo’), from 1980 was severely outdated, coming from a completely different model of labour market regulation.

The new ‘Ley de Empleo’ is a rather complex piece of legislation, which tries to respond in a single text to a number of different legislative demands. One of the main issues to be dealt with at the moment is the question of legislative powers to deal with employment issues. The Spanish Constitution of 1978 did not foresee employment as a power of either the central state or the regions; during the 1980s and 1990s all regions developed employment policies of their own, including placement services. And a number of transfers of powers from the state to the regions took place. Now the situation is rather complicated, and the Constitutional Court has not been able to give a clear answer to all the problems being raised. In a way, this ‘Ley de Empleo’ deals primarily with this question, facing a major problem in the development of labour market regulation. For the rest, it does not change much of the real regulation of placement and employment policies, as it follows the same model of cooperation of public and private (non-profit) initiatives already in force in Spain since 1994.

Besides this ‘Ley de Empleo’, the most important development in the field of labour law during 2003 took place on the last day of the year, when the traditional act on social, financial and economic matters was passed. This is a peculiar piece of legislation which is enacted every year along with the Budget of the State (the so-called ‘Ley de Presupuestos Generales del Estado’); it embodies a number of measures of diverse nature and scope, and sometimes it is used to approve measures of implementation of European directives, if the deadline is about to expire. This is what has happened this year, and the act on social, financial and economic matters of 2003 included a chapter on non-discrimination, in order to implement the recent directives on this topic.

Therefore, it includes a whole chapter which, under the title ‘Measures to implement the principle of equal treatment’, deals with a number of aspects of this matter, including an extensive treatment of discrimination in employment. This chapter, Chapter III in the Act, is divided into three sections, the first on general rules, the second on non-discrimination on the grounds of race or racial origin, and the third one on equality and non-discrimination in employment. The grounds for discrimination under the scope of this new legislation are the same as foreseen by Article 13 of the Treaty.

In Section 3 a number of provisions related to fighting discrimination in employment are introduced, including a new definition of discrimination, harassment, positive action, etc. A number of articles of the ‘Estatuto de los Trabajadores’ are reformed, to introduce explicit references to non-discrimination: Article 4, which states fundamental rights for workers; Article 16 on placement; and Article 17 on non-discrimination. Other pieces of legislation are affected as well: legislation on the procedure at the labour courts (‘Ley de Procedimiento Laboral’); the act on posted workers; the act on integration of disabled people; the act on labour administrative sanctions; etc.
The development of labour law in Sweden has, since the 1990s, evolved around three different but partly interrelated themes: the discussion on flexibility, the 'Europeanisation' of labour law, and the importance of equal treatment and other individual human rights.

The starting point in the debate on the evolution of labour law has usually been the economic crises of the early 1990s. The argument has been that the labour law must provide more room for flexibility in order to promote economic growth and rise in employment. The discussion has often focused on the Employment Protection Act. The private employers' confederation, with support of among others the Conservative Party, has argued for a far-reaching deregulation, while the trade unions, mostly backed by the Labour Party, have defended the existing legal regulation. The debate has been rather hostile and the social parties have not been able to influence the legislator. The debate has resulted in some changes of the regulations of the Employment Protection Act regarding redundancies and fixed-term work. Most of the changes were later repealed and the law was restored to its former condition. The changes that have survived concern minor issues. Despite the extensive debate, the legislative changes that have actually taken place have been rather few. On the other hand the substance of collective agreements concluded during the same period have undergone a dramatic decentralisation, in moving from detailed regulation to framework agreements, leaving generous leeway for negotiations at company level.

Sweden became a member of the EU in 1995. This event is certainly the most important factor in explaining the development of Swedish labour law during the last decade. A series of new acts have been adopted in order to transpose EC directives. It is no exaggeration to say that most of the legislation adopted during the period is a response to the demands of the Community legal acts.

The discrimination legislation constitutes an area where the changes that have taken place are most significant. A new Equal Treatment Act was adopted in 1991 and this Act has been strengthened several times. In 1999 Acts concerning discrimination on the grounds of ethnic origin, sexual orientation and disability were adopted. This development is partly due to the membership of the Community, and partly a response to domestic political demands.

Alongside the equal treatment issues, individual human rights issues have gained importance. In 1994 the European Convention on Human Rights was incorporated into Swedish law. The Convention has had a significant impact on the labour law debate (e.g. the questions on negative freedom of association and privacy for employees).
United Kingdom

The report on the United Kingdom offers a brief picture (with supporting statistical data) of labour law developments over the last decade. Fast-changing features of the labour market and industrial relations are illustrated. Labour law approaches and techniques, faced with key challenges of ‘employability’, ‘entrepreneurship’, ‘adaptability’ and ‘equal opportunities’, are then presented in a Common Law context.

The legacy of traditional collective bargaining is emphasised, where concepts such as ‘social dialogue’ do not fit easily into the UK mould. It is noted, however, that declining levels of collective organisation have reduced the impact of bargaining, and there has been a shift towards single-employer bargaining within the enterprise. Overall, there is a well-established trend towards self-employment, part-time, fixed-term and temporary working.

It emerges that much of the structural modernisation needed to deliver ‘employability’ had already been addressed between 1979 and 1992, while UK experience during the 1980s is now being reflected in other EU Member States. Measures to upgrade workforce skills are well-rooted, and particular attention has been paid to measures for young people and long-term unemployed adults.

The historical model of ‘collective laissez-faire’, based upon ‘free collective bargaining’, has dramatically and consistently given way to ‘hard law’ normative legislation. This is the case for ‘employment protection’ in relation to dismissal, as well as measures such as the national minimum wage. There is a modern trend towards establishing labour law protections within frameworks designed to address problems of discrimination, equal opportunities, and ensuring ‘fundamental rights’.

The responsiveness of UK labour law to changing patterns of work is found to have been sluggish. It is suggested that UK labour law at the beginning of the 21st Century remains constrained by traditional concepts - including ‘the employee’, ‘equality of bargaining power’, and a host of other issues. Consequently, it is concluded that UK labour law stands ill-equipped to respond effectively to the swiftly-changing phenomena emerging in a labour market which has changed out of all recognition over a quarter of a century. Added to the position of the UK outside the ‘euro-zone’, this raises serious question marks over the ability of UK legal regulatory structures to respond adequately to the challenges of post ‘Luxembourg Process’ EU employment and social policy.
European Commission


Luxembourg: Office for Official Publications of the European Communities