THE EVOLUTION OF LABOUR LAW

GENERAL REPORT

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I

Introduction

1.1 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 occurred 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 in 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 mostly influenced by European law and the ways in which the transposition of the Directives has been intertwined with national legislative reforms.

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 programs.

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.

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 codetermination 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 1876/1990) was put under attack by the ILO 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 Nineties, is incumbent and might result into 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 on by tripartite social dialogue.

Several examples support this point. It may suffice to mention Belgium, where the role of the National Labour Council contributed to confirm a solid consensual tradition. In Finland tripartitism 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 pursulegant reforms. In Spain all labour law reforms covered in this study – with the exception of the one intervened 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 national economy, ever since the first deal was reached in the late Eighties.

In Italy a significant contribution came from social dialogue in the early Nineties and contributed to a transition towards EMU. 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.

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.

I.2 The structure of the General Report

This General Report is organised in ten sections:

I. Introduction
II. A comparative legal methodology
III. Constitutional developments
IV. The impact of the EES 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 appendixes and offer to the reader synthetic information on the most significant events which 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 to be changed and simplified. ⁷ Each section opens with a brief summary of the main issues and conclusions drawn from both the General Report and the national reports.
II

A comparative legal methodology

II.1 National constitutional traditions

Before entering a more specific analysis, I anticipate 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 characterized 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.

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.

It is also a fact that the evolution of constitutional law brings about innovative results in legal theory. This is yet another rich patrimony of Europe, both at a national and supranational 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.

The search for differences – rather than for similarities – between legal systems is unavoidable at the present stage of European integration. The brief and yet very intense history of European labour law shows that, even in a multi-level regime of policy-making, European institutions refined their respect for national constitutional traditions and for the social partners as crucial actors in the law-making process.

II.2 Convergence of legal standards

A good guiding principle in capturing some 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. Convergence thus occurs as a 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 modernization - of existing 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 in this report tries 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 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 to measure 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 ‘Draft Treaty establishing a Constitution for Europe’, currently under the observation of the IGC, 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.
III
Constitutional developments

The perspective adopted in this Report when describing the evolution of labour law is a perspective of change, not of resistance to innovation, neither 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 characterized 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 propitious circulation of ideas.

III.1 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 EMU showed 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.

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.

III.2 The incorporation of the 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 for the Future of Europe.

It is submitted that 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.
In the UK the ECHR has been 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 expressed attention towards the ECHR. Denmark incorporated the ECHR into Danish 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 right to privacy, the right to freedom of assembly and association, the right to equality, the right to work and social security, are now all granted by the Finnish Constitution.

Sweden incorporated the ECHR into Swedish 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.

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 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 occurring 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.

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.

III.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, for the strengthening of fundamental rights. The protection of fundamental social rights has been constantly guaranteed in France throughout the Nineties, due to a central role acknowledged by the courts to the Constitution and in force of the introduction in the labour code (art. L 120-2 Labour Code) of new guarantees for the enforcement at plant level of individual and collective fundamental rights.

The 1975 Greek Constitution, greatly influential on the evolution of labour law, has been amended in 1986 and in 2001. New civil rights were recognised, 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 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 to be interpreted. One contentious point has to do with maintaining fundamental labour law rights within the exclusive state competence and delegating to the 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. 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 on the whole State territory of services to promote employment.

Legislation on personal employees’ data often has a constitutional relevance in the protection of individual employees’ dignity at work. We meet examples of legislation in Finland (2001) and in Luxembourg (2002). In the Finnish Act, protective measures are directly addressed to the employees, specifying what the law on the handling of personal data indicates in more general terms. The influence of the EC Directive 95/46 is perceived 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 d’entreprise. In Portugal, the new labour Code of 2003 extensively protects in its Articles 16 to 21, the right to privacy in the employment context.

The Finnish example of special legislation has not led to 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, aiming at balancing employee’s right to confidentiality and employer’s legitimate prerogatives.

Such interesting initiatives of 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 to protect the individual in different phases of the life-cycle.

Another way of looking at the role of fundamental rights is to consider how they operate in contractual relationships and whether they change the balance of powers and obligations. This is particularly interesting for fundamental rights of a ‘new’ generation, including rights enshrined in the Nice charter.
Let us consider the issue of life-long training. In **French** law, from 1992 onwards, the notion of obligation to train’ becomes more and more precise. It implies that the employer can impose a training program within the contents of the individual contract of employment. In case of restructuring, the employee’s dismissal cannot occur if the employer has not fully exploited the possibility to ‘adapt’ the employee to a changing working environment in the enterprise. There is considerable impact of judge-made law on this evolution. In 1992, the *Cour de Cassation* had a leading role in that field in delivering two decisions. The Court argues that there are ‘implicit obligations’ - *obligations d’adaptation et de reclassement* - in the employment contract and contributes in such a way to the fight against unemployment, trying to construct an inventive notion of stability in employment. Without first trying the *adaptation*, the dismissal lacks a just cause.

In this perspective, evolution of labour law in France aims at creating 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 a priority in the 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 a pay equal to 50% the worker’s wages.
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 diversities of national answers, rather than uniformity. The overall impression is that OMC in employment policies, as well as in social inclusion policies, tends to highlight fundamental needs of the individuals. It does so adopting a non-prescriptive terminology and designing wide areas in which active measures – not necessarily legislation – are considered necessary. In doing so, it generates answers from Member States which can be equally vague and detached from coherent labour market reforms.

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 OMC, might upset the balance between hard and soft law measures. Employment policies, while enhancing important innovations, have also accentuated a continuous and dangerous test for labour law. Measures in this field must prove to be ‘efficient’, without losing track of its primary function.

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 primary needs of the excluded and building for them a new floor of rights.

The novelty in the most current debate lies in the exigence to develop a broad frame for the strengthening of fundamental social rights, well grounded in national constitutional traditions and in European law.

IV.1 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.

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 intuitions 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, emphasizing 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 OMC in employment policies. Coordination in this field brings about diversities of national answers, rather than uniformity. Although this result could be acknowledged as the greatest success of comparative law – namely paying respect to national peculiarities, avoiding transposing elsewhere national institutions and national law – it also reveals some weak sides.

Diversities of 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 exigency to see some concrete results achieved.

The Lisbon agenda has put forward three main objectives: full employment, quality and productivity at work, social cohesion and inclusion. Member States are required to pursue such objectives in a balanced manner, involving all
relevant actors. The 2003 employment guidelines\textsuperscript{13}, for example, may help us to visualise the frame 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 job-seekers benefit from an early identification of their needs and from services, such as advice and guidance, job search assistance and personalised action plans’.\textsuperscript{36}

This measure generates expectations in each individual falling under the described category of job-seekers. Each individual becomes the potential addressee of measures which enable the state to reach a target, as indicated in the guidelines (by 2010, 25\% of the long-term unemployed should be involved in an active measure). The individualised assistance that job-seekers 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, only apparently freely entered; the same can be said for some forms of agency work.

The overall impression is that OMC in employment policies, as well as in social inclusion policies, tends to highlight fundamental needs of the individuals. It does so adopting a non-prescriptive terminology and designing wide areas in which active measures – not necessarily legislation - are considered necessary. In doing so, it generates answers 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 loosing its internal coherence.

The novelty in the most current debate lies in the exigence to develop a broad frame 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 evolution 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 on the interpretation of the terminology adopted in the Charter inserted in Part II at Articles II-51 and II-52, where the words ‘rights and principles’ are used.

This reflection is needed in order to improve the coherence of OMC and to give legal grounding to positive integration. Employment policies, while enhancing important innovations, have also accentuated a continuous and dangerous test for labour law. Measures in this field must prove to be ‘efficient’, without loosing track of its primary function.

This issue was addressed with great emphasis in comparative research. Flexibility should not only serve the purpose ‘to optimize market relationship’, but also be functional to ‘numerous production relations’, thus enhancing intervention in areas such as security, both for workers and companies.\textsuperscript{37} This perspective of change should be accompanied by specific measures guaranteeing individual security, when uncertainty becomes a dominant feature in contracts of employment.

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.\textsuperscript{38}

**IV.2 Changes within national administrations under the OMC**

Some important innovations are reported as a consequence of the soft law regime created by OMC. They signal the need to adapt national administrations to new mechanisms of compliance and to do so setting up new specialised bodies inside the most relevant branches of government and ministries. These innovations are significant and yet difficult to be compared. No overall, coherent theory of change can be suggested, but the indication can emerge that a more efficient co-ordination of national ministerial experts can enhance further co-ordination of employment policies and introduce mechanisms of comparability in the evaluation of national performances.
First of all, as indicated in the Report on Greece, the EES brings about ‘horizontal issues’ such as quality of work, active ageing, vocational training and life-long 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 NAP 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 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, favouring the participation of all the interested actors and of the relevant Ministries. The task of the National Committee on Dialogue for Employment is to promote social dialogue in proposing policies to increase employment and deal with unemployment, 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 France the EES forced the government and the social partners to open a discussion on new issues and urged the creation of a permanent forum for the debate of 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 workers, whereas the 2003 agreement on life-long 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 to local development schemes and accentuate the split between dual labour markets. NAPs also fail, according to the drafters of such a report, in including the social partners. Furthermore, if we consider that Italy does not have a tradition in monitoring policies, we should assume that there is space for a positive impact of OMC and that the creation of specialised bodies inside the administration should be favoured.

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

Some preliminary conclusions can be drawn from the observation of 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 OMC, might upset the balance between hard and soft law measures. It did happen, in fact, that, while celebrating the success of the OMC in employment policies, 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.

The ones 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 harmonization.

A parallel fear to the one generated by a possible unbalance among hard and soft law is that legal analysis aimed at facilitating the convergence of labour standards could be overcome – if not made redundant - by the evaluation of statistics on social indicators.

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 – 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.
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 coordination 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 reconnect different levels of governance.  

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. 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 primary needs of the excluded and building for them a new floor of rights.
Evolution and the ‘autonomy’ of labour law

Historically, labour law has been trying to gain its 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 discloses 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 by the proposed Directive, is in itself a guiding principle, in as much 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 loose 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. Authorization 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 dealing with it.

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 favour 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 severely discontinued, 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 favoured by way of creating a floor of rights specifically inherent to 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 could 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 the accession to pension funds, special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leaves, childcare opportunities.

It can be argued that EU law –preferably in the form of a framework Directive – could be an element of clarity in the construction of criteria, analogous to the one on mutuality of obligations in subordinate employment and yet newly tailored on 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 the 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 be introduced and expand to such workers the principle of transparency with regard to working conditions and all other relevant contents of the work to be performed.

V.1 Autonomy from commercial law: agency work

Historically, labour law has been trying to gain its 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 SME. 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 productive systems, 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.

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 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.

Rather than evaluating the rationale of the economic choices lying behind the recourse to agency work and regulate 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.

A possible action may consist in granting an authorisation to the temporary work agency. 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 that agency workers substitute other workers exercising their right to strike, or take the place of dismissed or suspended workers.

Even the draft Directive on temporary workers, a controversial - and yet highly needed - source, still in the process to be adopted, offers a few insights into basic guarantees for temporary workers. The Draft Directive specifies that agencies may be regarded as employers and includes in its scope also agency workers with an unlimited contract of employment. 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 either considered dependent employees or self-employed, leaving it to the common law test to verify whether there is a mutuality of obligations.

A recent case decided by the UK Court of Appeal is worth mentioning. The ruling goes into 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 acknowledges to be inspired by scholarly contributions, and looks carefully into the ‘complex employment relationships’ flourishing in the labour market on a trilateral basis. He also refers 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’.

In Ireland, because of court decisions suggesting that agency supplied workers were not employees, the Government decided, in 1993, to amend the unfair dismissals legislation by providing that, where an individual agrees with another person, who is carrying on the business of 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, b) and any other contract whereby an individual agrees with another person who is carrying on the business of 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 of 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, anticipated 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 intervened to regulate 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, 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 around 30%.

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. In the UK agency workers doubled during the Nineties and are now around 1% of the total labour force (near to 250,000 workers). Even in Germany figures are growing, despite the fact that legislation releasing some of the restrictions is very recent. 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 denounced 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 against 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.

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.

In **Denmark**, despite the fact that there has never been legislation on this matter, in 1992 there were 73 registered agencies occupying 3000 employees and in 1999 there were 346, raising the number of employees to 35000.

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 authorization issued 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.
Two recent reforms have intervened 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 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 ‘somministrazione 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 ‘organizational, 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 authorized 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 to be employed. 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 authorization, contracts of employment are established de jure. German agencies are liable for payment of wages and social security even when contracts are considered illegal.78

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 time pose a series of challenges to labour law. In some countries the regulation 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 to agency workers traditional labour law guarantees.
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 has been a large number of claims in courts, despite the fact that it is not an easy solution for precarious workers. The most original guarantee is to recognise to 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 precarious 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 intervened 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 the one enforced in other countries. One original feature is the obligation to have a minimum proportion of employees hired on a permanent basis.

Spain is also an interesting case for the understanding of a complex social and organizational 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 favour 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 risk for work to be performed, has its own organization 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 for interpreters will be evaluating the true entrepreneurial nature of contractors and investigate into their acting as real employers.

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, in as much as it clarifies the notion of comparable worker within the user company. The tendency to provide temporary agency workers with better guarantees is 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 are open. There is often an imprecise knowledge of the contents of agency work. To investigate about the quality and quantity of the services more frequently required by users is not irrelevant for labour law; similarly important it is to know whether agency workers mainly are 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 face 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 adjusting 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 organization of the company. Split powers between agencies and users and
solidarity in obligations represent only a partial – albeit potentially very powerful – solution. Authorization 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.

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. 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.

V.2. Autonomy from the market: economically dependent work. Beyond dependant 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. Even though only a few years have gone by after the launching of that study, quite remarkable changes are visible in national legal systems. 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.

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’. 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-visitation of traditional labour law thinking, accompanied by the search of 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-nineties proved the difficulty to detect self-employment which was hiding dependent work and to understand the reasons why this phenomenon would occur in such a significant number of cases.

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.

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 rests with 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.\textsuperscript{92}

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 entered into force on January 1\textsuperscript{st}, 2003, deals with ‘Ich-AG’s’ or ‘me-public limited companies’. The aim is to rescue people unemployed, using an \textit{Existenzgründungszuschuss}, a state financial help which should cover pensions and other social security benefits, in order to start an economic activity.

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

The newly enacted \textbf{Italian} ‘certification’ should serve the purpose to intervene in the interstices of subordinate work and self-employment, with a view to punish abuses and to diminish court cases. Certification is an administrative act and has \textit{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 ‘\textit{lavoro a progetto e a programma}’, the new definition of self-employment proposed by 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 program –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 with a very clear time limit. It is more difficult to detect what a program 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 on similar types of self-employment, thus intending to exclude assimilation to collective agreements and to wages for dependent workers.

For people working ‘\textit{a progetto o a programma}’ health and safety measures apply and a very timid attempt is made to entitle them with other rights. It is specified that work is suspended – with no remuneration - for reasons of pregnancy, illness and casualties. Suspension due to pregnancy implies that a minimum of 180 days will be added to the duration of the project or of the program, whereas for other reasons work will terminate as originally stipulated.

In \textbf{France}, the 1994 \textit{Loi Madelin} – dealing with ‘\textit{initiative}’ and ‘\textit{entreprise individuelle}’, introduced a legal presumption of the non-existence of subordination (\textit{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.\textsuperscript{93} The presumption was abrogated by the 19 January 2000 law, following very critical rulings of the \textit{Cour de Cassation}.

More recently, a language only apparently similar to the one adopted by the Italian legislature is used in the Report put forward by the \textit{Commission de Virville}, appointed by the French Minister of labour and social affairs.\textsuperscript{94} In this document, aiming at introducing elements of efficiency in the law-making and at 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 precarious work. The leading idea is to introduce the regulation of a new 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 given 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 are faced with 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’ – as for the British terminology – was growing, which meant a lowering 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 (1) 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 self-employed.

In the 1998 Greek law, inspired by the now abrogated French Loi Madelin, provides for a presumption for the existence of self-employment, provided that a written declaration exists and information is sent to the labour inspectors within 15 days. Either the self-employed or the social insurance institution can prove otherwise.

In Belgium an organization of small and medium sized employers has elaborated 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 autonomo dependiente - which sounds as a linguistic contradiction - was part of a proposal to identify self-employment, in order to provide new legal guarantees. A criterion based on the measuring of income, rather than the one based on the 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-employed. 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 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.

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 favour 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 severely discontinued, 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 favoured by way of creating a floor of rights specifically inherent to economically dependent workers.

Concepts such as ‘adaptation’ or ‘modulazione’ are useful to understand that labour law in this particular area has to invent new solutions. It is not surprising that even at the ILO a broad area of investigation has recently been opened.

The search for a tertium genus or the construction of a new classification of employment contracts – as in the Italian long-lasting discussion on ‘tipo contrattuale’ - are overcome by a multiplicity of phenomena in which it is difficult to ascertain a univocal and precise intention of the contracting parties. Fraud or imprecise interpretation of the law cannot be punished with traditional sanctions, but should be prevented, 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 of expansion of human rights. The notion of protection could 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 the accession to pension funds, special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leaves, childcare opportunities.

On a parallel track, labour law should construct a series of permanent and generalised obligations on whoever engages in a personal employment contract characterised by the economic dependence of one party. Obligations should rotate around the enforceability of fundamental rights such as dignity, health and safety, access to training, 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 – can be an element of clarity in the construction of criteria, analogous to the ones on mutuality of obligations in subordinate employment and yet freshly tailored on such new social phenomena.

Criteria to tackle economic dependence can be elaborated (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, 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 integration of the earning in between different spells of employment. This area of intervention could be left to a softer approach; co-ordination of national measures of this kind should be favoured, while leaving the choices on fiscal aids entirely to Member States.

The overall impression is that, economically dependent work is spreading and progressively showing its own features, notwithstanding all 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 autonomo dependiente, 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.

In this new wide 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.

V.3 Family friendly labour law

The title chosen for this section does not want to mimic the language adopted by some national legislature. It rather serves the purpose to
underline yet another new feature in the evolution of labour law.

The point to be made is that, in providing measures oriented to support the family, labour law does not have to establish its autonomy, as in the examples discussed before. Labour law offers unique opportunities to the fulfilment of 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.

The most consolidated tradition is in the field of parental leave regulation. Evolution in this case meant to expand the protection for working mothers into a broader pattern of protection of the children, guaranteeing that both parents should be put in the position to deliver care.

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 leaves’ are 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 leaves for ‘urgent family reasons’ are provided for in collective agreements. In France we find legislation on leaves for assisting relatives with terminal illness. Leaves 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 for 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, in view of facilitating the reconciliation of 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 leaves, 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.

The debate in the Netherlands is currently open 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 2 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 Nineties, took the form of flexibilisation of working time and the regulation of leaves.

The notion of reconciliation of family and working life, now enshrined in Article 33 of the Nice Charter of Fundamental Rights, goes even further. It confirms protection against dismissals, but also indicates that there should be ways to enhance and favour 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 to reconcile work and family commitments. It was necessary to turn to ad hoc legislation, such as parental leave.

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 leaves 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 provisions in view of improving employment figures for women.\textsuperscript{106} 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{107} and explore new possibilities, such as the ones emerging in life cycle arrangements.
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 interventions.

The enforcement of the fundamental right to equal treatment constitutes a significant step forward and has given impulse to the evolution of national labour law. However, in a comparative perspective it remains to be ascertained 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, 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 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 make interpreters reflect 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, as other flexible contracts, bring about a significant increase in employment is not fully proved. Adaptations in legislation have occurred also because of an altogether different function of fixed term contracts. This mainly reflects changes in work organization, both in traditional areas of production and in new areas of the service sector and of 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 in 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 having as its general scope the regulation of fixed-term contracts and specific other measures which also imply the 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 on the scene in the Eighties, 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 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 sign of 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.
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 to lower previous levels of guarantees, while transposing a Directive. For example, the Italian ongoing debate on ‘clausole 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 clause 8 and 5 of the Fixed term and Part-time Agreements).\(^{108}\)

The enforcement of the fundamental right to equal treatment constitutes a significant step forward and has given impulse to the evolution of national labour law. However, in a comparative perspective it remains to be ascertained 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, 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. It represents a most significant guiding principle in enforcing equality when workers are somehow inserted in an organization 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 occurred, particularly in the implementation of the Directives’ clauses in which ample space is left to national manoeuvres 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. Once more, it is the feeble position of those who do not enter freely such contracts, starting from a position of social exclusion or marginality, which should be better focused in future developments.\(^{109}\)

VI.1 Fixed term contracts

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

<table>
<thead>
<tr>
<th><strong>Portugal</strong> – where Directive 1999/70/EC was implemented in 2001- the 2003 Code introduces a most significant change in Article 129, bringing 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.</th>
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<tr>
<td><strong>Spain</strong>, where ‘compensation for insecurity’ was introduced as a way to combat fixed-term contracts. This was the answer of the legislature to what was considered an excessive increase in the number of fixed term contracts. In 1994 more space was open to collective bargaining, with the intention to provide specific reasons for entering such contracts.</td>
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<td><strong>Belgium</strong>, on the contrary, offers the example of progressive relaxation of the limits to be put on fixed term contracts. In 1994 and subsequently in 1998 legislation went into the direction of allowing successive contracts, without having to give reasons and without having to consider them permanent.</td>
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<td><strong>Italy</strong> the notion of ‘technical, productive organizational and substitutive reasons’, introduced in the transposition of the Directive(^{110}), has widened the scope for the recourse to fixed-term contracts, thus giving rise to a critical interpretation, since this measure might go beyond the purposes of European law and be, therefore</td>
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29
considered pejorative. The previous technique, namely the indication of binding criteria in which fixed-term contracts were allowed, is substituted by a wide 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 recognizes ‘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 acceding to flexible employment, particularly in certain areas of economic activity.

In Germany legislation in this field originated in a constant growth – 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.

In Sweden numbers of fixed-term contracts increased in the Nineties, raising to 1/6 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.

A problem arose in Greece when fixed term contracts began to be 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 legislation stated that hiring workers with private law contracts in the public sector was allowed only under extraordinary circumstances, such as filling in 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 issued in the Nineties, 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. Following several complaints and an investigation on a 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 high 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.

Apart from the Greek case, we encounter a fairly homogeneous — 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 in 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 having as its general scope the regulation of 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.

VI.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 on the scene in the Eighties, 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.116

In Greece, part-time work was first regulated in 1990. 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 programs. Candidates must be selected from specific target groups, such as unemployed, young people, people with disabilities, following certain percentages.117

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 8%.

Between 1965 and 1980, Sweden 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.118

In the Netherlands, the ‘miracle’ occurred in the Nineties was mainly due to the return of women with children into the labour market.119 The Dutch legal system reacted promptly to a spontaneous process and regulated successfully part-time work. The principle of equal treatment between part-time and full-time workers was already part of the Civil Code ever 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 organizational 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
To confirm the tireless attitude of the German legislature, in 2003 a law on the so called ‘mini jobs’ was approved. The number of casual jobs had expanded considerably and, after 1998, the legislature tried to find disincentives for the recourse to such contracts, imposing at least some form of contribution. The new law regulates employment contracts providing up to 400 euro per month. The employer pays a very small social contribution, namely 23% for the social security and 2% in tax. In a few months there has been a significant increase in mini-jobs, although this phenomenon does not necessarily count for an increase of the overall employment figures. For ‘mini jobs’ in private households the employer pays only 12% contributions (10% in social security and 2% in taxes), in view of fighting illegal work.

An original sample of legislation is the 1996 Act originating from the ‘Alliance for Work’ (Bündnis für Arbeit) in Germany, oriented to favour 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, the opportunity can be created to offer new jobs to unemployed younger workers. The employer has to compensate the loss in pension resulting from the reduction of the working hours paying into the fund his contribution, as if the worker’s income was equal to 90%. These sums will be reimbursed to the employer from 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 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 ‘clausole 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 represented by 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, it is indicated that such contracts will be favoured for young unemployed people under the age of 25 and unemployed over 55, made redundant.

The contract of employment must be in writing, with all necessary indications to the details of the parties’ obligations. It may provide that, if workers declare their availability even when work is not requested, an indemnity for this time 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 individualization in employment contracts. This choice may give rise to an unbalance, 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 submitted 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 on 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 sign of 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 the theory and in the practice of labour law the challenge is not to interrupt a tradition of social protection, and to start 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 make interpreters reflect on how to enhance a more harmonious and effective way to combine European soft and hard law.
### 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 nation wide 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 increases and improvements in working conditions, they had to adjust to provisions in the law dealing with decreases 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 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 established between law and collective agreements appears stronger and leads towards more visible results, as it is suggested in section VII.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 precarious conditions in the labour market.

This section deals with a central feature in the evolution of labour law. European national traditions in this field present many different angles. 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 pejorative 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’.

#### VII.1 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 nation wide 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 increases and improvements in working conditions, they have had to adjust to provisions in the law dealing with decreases 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 Nineties, 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 the ones decreasing certain standards, favoured a discussion on possible ways to reform the whole system of collective bargaining.

Starting in 2000, employers' organisations demanded, as a contribution to the so-called 'refondation sociale' to indicate a program of structural changes in the functioning of the negotiating machinery. 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 on such issues.

A deep change in the evolution of labour law is prepared by the introduction of a ‘majority principle’ for the signature of deregulatory agreements, which 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 admitted. The role of voluntary sources is presented as equal to the one of the law in as much as it expands the scope of legitimate agency work.

Collective agreements can also provide for the 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-organization of working time, following the transposition of Directive 93/104/EC. Some commentators argue critically that individual guarantees have been lowered, thus confirming the non enforcement of the ‘clausola di non regresso’. Not only the legislature indicates 40 hours as ‘normal’ working time - a requirement not in the Directive, it also remits to collective agreements the definition of 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 Bundesferfassungsgericht 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.

VII.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.

Other examples can be mentioned. The centre-right coalition in Spain was capable to gain social consensus and to maintain alive the practice of concertation, even though it could not impede the emergence of dissenting points of view and criticism expressed by the trade unions on some labour market reforms. In Italy too the recent labour market reform was enacted in a climate of social unrest and deep disagreement among the unions. However, the recourse to nation-wide collective agreements, to complement the enforcement of the law, is not refused by the unions and by employers' associations, who have already signed some agreements, at the highest centralised level.
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.127

Finland maintains a tradition of income policy, whereby broad ‘policy’ agreements at national level lay down directions 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.128

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 labour government 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 A1 (amending TULRA 1992) has introduced the principle of statutory recognition of unions, which should favour 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.129

In Spain a series of nation-wide 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 rationalizing levels of bargaining, in order to avoid excessive fragmentation. Similarly the Italian 1993 Protocol of Agreement, signed under the Ciampi 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 melius 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.130

In France legislation aiming at a deep reform of collective bargaining is under discussion in Parliament.131

VII.3 The expansion in the scope of collective agreements towards new groups of workers and new contents

Collective agreements have been trying to expand their scope in the attempt to include under their coverage new categories of workers. One example can be mentioned. The appearance of agency workers in national labour markets, apart from substantiating one of the deepest changes in the evolution of labour law, may also activate a new role for collective bargaining.132

In 1996 in the Netherlands agreements reached between trade unions and employers served the purpose to diminish rather strong reservations for agency work and paved the way to legislation.133 In this country the so-called ¾ legislation, namely legislation partially assisted by collective bargaining, represents a well experimented 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 dismissals.

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 on fixed term contracts.

In Spain a model quite different from the rest of European legal systems was created, whereby temporary agencies were covered by centralised agreements. Before the end of the three years, 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.

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 put 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.\(^\text{134}\)

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 1/5th and the right of workers aged 50 or more to work part-time.

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 representativity, 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.
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. 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 - aim at saving a traditional and deeply grounded voluntary approach, while implementing correctly EU directives. In 1996 a nation-wide 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 Commission, due to the fact that collective agreements are not erga omnes enforceable. Semi-mandatory law was then enacted in 2002, covering only workers not covered by collective agreements and leaving untouched the voluntary sources.

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 then the status of legally binding sources.

In As for the Netherlands, mention has already been made of the so called 3/4 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.

In France, new ways of creating interactions between law and collective agreements are reported. The 2003 Loi Fillon suspends the effect of articles on economic dismissals dealt with 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 legal 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 unemployed 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’, as in 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 element of concern has to do with the difficulty to set 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.
The impact of EU law on the evolution of labour law can be measured in many ways.

A vital result, not comparable to 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 a transposition of a Directive.

At 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 to internal political disagreement. Examples of this kind emerge from the present study and are often the outcome of changes in governmental coalitions.

The impact of EU law can also show its effect on the building of institutions. Several examples show that in complying with employment policies specialised bodies are created inside 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 the dissemination of the same 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 potentialities in changing national legislation, as well as in modifying legal culture.

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. At 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.

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 admissible because it could have exposed a Member State of the EU to the violation of EU law.

Changes brought about by EU law have deeply influenced national academic communities.
The British example is most remarkable. Intellectual freedom and open-mind 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.\textsuperscript{137} 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, intends to favour the process of European integration, by showing that different approaches do not impede a progressive interpretation of supranational legal standards.\textsuperscript{138}

However, EU law can in some cases be used strategically, to justify legal interventions which do not encounter widespread and unconditioned 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 of this attitude, we encounter in some cases an ‘ideological’ use of EU law. 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 governmental coalitions.

National courts have also been deeply influenced by the understanding of how EU law penetrates national legal orders.\textsuperscript{139} 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 inter-change.\textsuperscript{140} All this confirms that national judges are relevant actors in the ongoing process of integration through law.

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.\textsuperscript{141}

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.\textsuperscript{142}

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 what emerges in 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 it appears in areas in which the right not to be discriminated runs parallel to 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 Stoeckel, which brought about the repeal of the ban on night work for women in November 2001.\textsuperscript{143} On the other hand, it was for the Renault case in 1997 to show the limits of EU legislation and to further necessary legislative measures.\textsuperscript{144}

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 a minimum floor of rights for workers.
notwithstanding the pressure due to restructuring and economic dismissals.

**In Greece and in Italy** on the occasion of recent reforms, changes occurred in compliance with EU law are described as ‘modernisation’ 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.

There may 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 of the 1998 **British** Working Time Regulations, transposing the 1993 Working Time Directive. The introduction of standards in this field has been counterbalanced by controversies over the derogations which, according to some commentators, go beyond the scope of the Directive.

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 for the first time legislation 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 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 are created inside 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** puts the accent on how the social partners accepted the challenge of membership within the EU and contributed in fulfilling all obligations. This has increased cooperation also 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 partner's participation, is equally interesting.

In Section IV.2 reference is made to committees created in **Greece** and **France**, for the promotion of social dialogue and for facilitating the implementation of employment policies. Bodies created inside 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.

**IX.1 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 the dissemination of the same in all countries.

**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.

In Greece the transposition – which is still in the process to be 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, after the transposition of Directive 97/80/EC.147

In Italy too the Decrees transposing the 2000 Directives 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. The two recent decrees have been criticised for the unnecessarily ample derogations 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 the employment. Furthermore, a very wide derogation form 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.149

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’, also in force of income policy nation-wide agreements, favour wage increases for low-wages groups. Such increases are paid to both women and men, although the number of poorly paid women is higher.150

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 the one 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.151

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 statistics, as in the previous proposal, the task to identify situations of wage discrimination was assigned to the Employment Ministry.152

In Germany repeated amendments to the Civil Code have been introduced, following rulings of the European Court of Justice. Sanctions are now very effective for discrimination on the ground of sex in recruitment procedures.153

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.

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. It still has to prove its potentialities in changing national regulation as well as in modifying legal culture.
Concluding Remarks

X.1 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, neither of strenuous defence of the status quo in national legal systems. Rather than attempting to include in this General Report all areas of labour law in which legislative reforms have occurred, attention was concentrated on domains in which the evolution of the discipline allowed to draw some comparative evaluation. Coming to the concluding phase of the Social Policy Agenda in 2005, the selective choice made in the present Report highlights the urgency to intervene with a new program 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 changes. It will continue to be so in the following years, if we consider the commitment declared 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 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 intervened in several Member States.

It can be argued that similar choices made by national legislatures when launching labour law reforms, notwithstanding different accents put on individual and collective guarantees, have come close to each other 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 functional to a closer European integration.

However, this study confirms that, particularly in the implementation of employment policies under the Open Method of Coordination (OMC), each Member State has not been deprived of its own legislative initiative. Government coalitions have continued to signal national priorities and to do so following their own internal political agenda.

The present study also confirms the analysis carried on 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 on statistical figures, showing whether a variety of legal measures aims at similar goals.

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 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. 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 marking the evolution of labour law are to be found in legal systems characterized 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.

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.

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.

I submit that there are 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 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 occurred in the balance of powers in individual contracts of employment and/or the shifting role of voluntary and legal sources governing the transition to changes.

➢ There is no indication that, when enforcing employment policies, national laws provided a scenario of uncontrolled deregulation. On the contrary, research carried on in this field shows that, when answers to high unemployment were requested, changes brought about by labour market reforms have, on the whole, been ‘selective’ and have not completely overturned basic labour law principles.157

To substantiate the idea of ‘selective’ changes even further, it is important to indicate that the evolution of labour law goes into different directions. In some cases, changes are the consequence of deep innovations occurred in work organization, 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. It happened in some cases that, particularly in the area of labour market reforms, a series of succeeding interventions of the legislature gave 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 examined and offered as a paramount case in which the evolution of labour law is thorn between the recognition of entitlements to non-standard workers and the granting to them of 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 verify 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.

➢ 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 research158 which proves to be highly useful in the context of the present study, particularly for its implications in 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 a-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.159

➢ 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 activities 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.160

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 throughout all employment opportunities offered to each worker. They should create a network of benefits and facilities, mostly related to the life cycle (accession to pension funds, accession to special bank credits, social security benefits, mobility allowances, training facilities, pregnancy and parental leaves, childcare facilities)
Legislative reforms adopted in different countries reveal that the evolution of labour law took place in similar areas and was achieved by way of approximation to similar goals, giving origin, at times, to peace-meal 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 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 pejorative 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.

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 precarious 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 into 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.

X.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 livelihood of a very distinct national style of the legislature and, in other cases, a more dogmatic approach, linked to the urgency 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. Neither it signals 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, the risk to reduce the enforceability of certain rights or to exclude certain categories of workers from basic entitlements is present. The challenge is to resist this tendency tend 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 ones and sometimes reveal strong ideological divides. The danger is to depart from national legislative traditions and to loose track of a coherent system of rules. However, it was not impossible to gain social consensus even in cases of radical reforms.161

During the years included in the present study reforms of a wide spectrum took place.162

An important point to stress is that the evolution of labour law goes into all possible directions. All levels in the hierarchy of sources are affected by changes and all techniques are experimented. 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 the 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 closer together national labour markets. Fundamental rights represent the conceptual frame 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 in it, but in a precarious and peripheral way. Addressers 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 terrains and suggest new suitable developments to new Member States and to candidate countries.

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1 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 Rodríguez-Piñero Royo (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 by 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 remaining the sole responsible for mistakes and omissions. I am also indebted to Fernando Vasquez, 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. Malgorzata Zajac, doctoral student at the EUI, has provided invaluable help in the organization and editing of bibliographical references.

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 emerged from the comparative research group sponsored by the Commission and directed by F. Valdés Dal-Re, Labour Conciliation, Mediation and Arbitration in European Union Countries, 2003, Madrid.

1 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.

2 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 freedoms and fundamental rights. See the Italian and Portuguese Reports.

3 Report on Italy, Executive Summary. See also on this point M. Ferrera and E. Gualmini, Rescued by Europe? Social and Labour Market Reforms in Italy from Maastricht to Berlusconi, 2004, Amsterdam University Press, Amsterdam.

4 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 concentration started in 1997, in order to ensure consensus in view of EMU. A ‘Confidence Pact’ was reached in November 1997 (see sec. VI.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.


15 See also national contributions available at: http://europa.eu.int/futurum/congov_en.htm


21 Swedish Labour Court (for instance AD 2001 nr 3), on art. 8.


29 The lack of specific legislation applying to employment is indicated, for example, in the Greek Report (see sect. D).


31 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 assetti organizzativi e decisionali, 2002, ISFOL, Roma. In Greece, trade unions supported the accession to EMU, adopting moderation in wage policies bargain in national collective agreements. See Report on Greece.


33 Communication from the Commission to the Council, the EP, 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.

34 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.


36 Section 1 (a).

See further section V.2.

In a report issued by the Ministry for employment, *Les politiques de l’emploi et du marché du travail*, published in 2003, a specific commitment is made towards the enforcement of employment guidelines through appropriate legislation.

C. Dell’Aringa (ed.), *Impact evaluation of the European employment strategy*, May 2002, ISFOL.

A ‘Master Plan’ was prepared by the Ministry in 2000, to be circulated among decentralised local administrations, in order to react against the Commission’s negative evaluation of the Italian reform of the hiring system. The whole process of monitoring such a complex exchange of information saw an incredibly high turnover of experts which, according to M. Ferrera, E. Gualmini, *La strategia europea sull’occupazione e la governance domestica del mercato del lavoro: verso nuovi assetti organizzativi e decisionali*, 2002, ISFOL, Roma, was a sign of how unprepared the administration was to respond to OMC.

However, monitoring is an exercise which does not include a specific legal command. It is often the case that OMC brings about the adoption of a jargon, not always compatible with the legal style to be used in drafting legislation. See, for example, art. 17 of the Italian 2003/276 Decree on monitoring of employment policies. In this very long article it is difficult to distinguish measures of an administrative nature, from the indication of well defined legal responsibilities.


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


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.

See Section X.

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.


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 Seventies.


The Belgian Report, p. 39.

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 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, 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.

61 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’.

62 E.g. in Italy, art.20.5, 2003/276 Decree and in Greece, see: www.eiro.eurofound.ie/print/2001/11/feature/gr0111101f.html


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


68 Chapter 1 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.

69 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.

70 See Report, section 3.1.2. Collective agreements have also been very innovative in this field.


Some countries 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, referred to France, is offered by A. Perulli, "Lavoro, autonomo e dipendenza economica oggi", (2003) Rivista Giuridica del Lavoro, n. 2, p. 229.

Research was carried on under the auspices of the Federal Labour Agency, following a path-breaking academic analysis developed by W. Daubler, "Working People in Germany", (1999) 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’.


Decreto legislativo 6 September 2001, n. 368. Previous legislation from the Sixties with subsequent amendments in the Eighties, is explicitly abrogated.

Cour de Cassation 26 November 2003, mentioned in the French Report, sec 3-1-2

See M. Fuchs, “Recenti riforme del diritto del lavoro Tedesco”, forthcoming in Giornale di diritto del lavoro e di relazioni industriali.


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.


European Industrial Relations Review (1999), n. 309, pp. 10-11. The employer has an obligation to take into account requests to opt for part-time work and has to publicise part-time opportunities. In Ireland too the solution (in the 2001 Act which repeals previous legislation) is not to put an obligation on the employer. In addition the Labour Relations Commission carries out a study on the obstacles to the performance of part-time work.

See extensively, on the details of this legislation, the Greek Report, sec. III A.

See the Swedish report.


This expression is suggested by Ulrich Zachert.

Report, p.6.

Decree 8 April 2003, n.66.

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).

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 section VIII for a discussion of the Working time Directive.

Finnish Report 2.1.3.

Details are in European Industrial Relations Review, April 2003, p. 15 ff.


The Loi Fillion was voted in Parliament in a first reading on 6 January 2004.

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.


See section III.3 of this Report.


Corte Costituzionale 41/2000.


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. See supra note 96.

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.

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.

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).

Greek Reprt, p. 35 quote difficulties with the concrete enforcement of working time regulation.


See the Greek Report, section IIIA.1(d), IVA.1.

Decrees 9 July 2003, n. 215 and 216.


Monitoring the implementation of the Charter is the task carried on by a network of independent experts. See Report on the situation of fundamental rights in the European Union and its Member States in 2002, vol. 1, Luxembourg 2003, drafted upon request of the European Commission, Unit A5 of DG Justice and Home Affairs


M. Ferrera, A. Hemerijck, and M. Rhodes, *The Future of Social Europe: Recasting Work and Welfare in the New Economy*, 2000, Celta Editora, Oeiras, first presented at a conference organised by the Portuguese Presidency. Re-calibration is a concept implying that several initiatives need to be taken simultaneously in reforms affecting welfare states. Re-calibration policies address issues of social protection and of re-distribution of social risks among social groups, as well as normative issues, such as equality.

I am grateful to Marie-Ange Moreau for this observation

P. Davies and M. Freedland, "Labour Markets, Welfare and the Personal Scope of Employment Law", (1999) 21 *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 Seventies, mainly through the 1975 Employment Protection Act.