

## Employment Protection According to the European Union Law and International Labour Law

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**Abstract:** *The presented study deals with the sources of law of employment protection at the European as well as international levels. We researched the areas of termination of employment, collective dismissal and fixed-term employment, compared the European and international regulations and outlined further possible development.*

**Key Words:** *Labour Law; Employment Protection; Termination of Employment; Collective Dismissal; Fixed-term Employment; International Labour Organization; the European Union.*

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### Introduction

Protective function of labour law is significantly reflecting both in the international and the European law as well as in the national legislations.<sup>1</sup> In many labour law areas, there is not a greater controversy and the international community agrees on the need of protection (for example protection against forced labour, protection of children or protection against discrimination).<sup>2</sup> It does not apply in case of employment protection, which is quite controversial and often discussed topic. The term “employment protection” does not cover all labour standards of workers’ protection. Normally, it is used to denote only the rules and procedures related to the right of companies to hire and to dismiss workers.<sup>3</sup> Whereas the employment protection is considered as a fundamental part of the right to work, it is understandable that the International Labour Organization paid much attention to this issue throughout its history. Likewise,

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<sup>1</sup> See more in BARANCOVÁ, H. and R. SCHRONK. *Pracovné právo*. 2. preprac. a dopln. vyd. Bratislava: Sprint dva, 2013, p. 40. ISBN 978-80-89393-97-8.

<sup>2</sup> Author’s note: A real situation is a different issue, especially in the developing countries.

<sup>3</sup> See *European Semester Thematic Factsheet: Employment Protection Legislation* [online]. Brussels: European Commission, 2016. 16 p. [cit. 2017-07-20]. Available at: [https://ec.europa.eu/info/sites/info/files/european-semester\\_thematic-factsheet\\_employment-protection-legislation\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_employment-protection-legislation_en_0.pdf).

the European Union deals with the issue and harmonises certain specific fields through its directives.

It is not an easy task to precisely define boundaries of employment protection legislation. There are many studies and comparative analyses on this issue. Since this is a very complex topic, the scope of the studies varies. Some studies are focused on this topic in general and try to research it as a whole; other studies deal with specific questions of employment protection legislation, as are, for example, employment protection related to maternity, trade union membership or employment protection of disabled workers. Although we recognise that these areas may also be included into the pool of employment protection legislation, nevertheless, for reasons of consistency and because of limited scope of this paper, we are not going to analyse all of these areas; we are going to pay our attention merely to rules addressing a dismissal of employees in general, since it is the most substantial part of employment protection legislation.

In our paper we have been inspired by the Organisation for Economic Co-operation and Development comparative study from years 2012 – 2013, in which the Organisation for Economic Co-operation and Development compared national legislations in this area in the all Organisation for Economic Co-operation and Development countries as well as in many non-Organisation for Economic Co-operation and Development countries.<sup>4</sup> The above-mentioned study was based on 21 indicators from the area of national employment protection legislations of these countries. We have generalised these indicators and divided them into the following groups:

- ✚ legislation of individual dismissal (limitation of reasons for dismissal, existence and length of the notice period and severance pay), unfair dismissal and remedies (for example compensation following unfair dismissal, possibility of reinstatement following unfair dismissal);
- ✚ legislation of collective dismissal (for example definition of collective dismissal, procedure of collective dismissal and duties of the employer);

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<sup>4</sup> See OECD Indicators of Employment Protection. In: *Organisation for Economic Co-operation and Development* [online]. 2017 [cit. 2017-07-20]. Available at: <http://www.oecd.org/els/emp/oecdindicatorsofemploymentprotection.htm>.

- ✚ use of fixed-term contracts (valid cases for the use of fixed-term contracts, maximum number of successive fixed-term contracts, maximum cumulated duration of successive fixed-term contracts).

The first study area – employment protection in the field of individual dismissal – has formed the basis of this study. Provision of the effective employment protection in individual cases is important in terms of the whole society, since the fear of arbitrary dismissal may lead employees to waive rights related to trade union activities, maternity or education.<sup>5</sup>

In the second part, we have focused on related issues of collective dismissal, i.e. termination of employment contracts of a greater number of employees, for example for economic or technological reasons. In case of collective dismissal, the rules of individual dismissal plus special rules applying only to collective dismissal should be used. In comparison to individual dismissal, the impact of collective dismissal is more direct, since collective dismissal often immediately affects the economic situation in the entire regions.

The last analysed issue has been devoted to one type of non-standard forms of employment – to fixed-term employment. When using fixed-term contracts, there is a risk of their abusing, with the aim to avoid the protection granted to employees upon termination of employment. For that reason, legislation of fixed-term contracts, functionally viewed, is directly related to the first part.

In the presented paper, we are analysing conventions and recommendations of the International Labour Organization and legislation of the European Union in all these areas and comparing them. At the end of our study, we would like to find out which of the analysed indicators are covered by legislation on the international and European levels, how are they regulated at each level, what are the main differences between them and what trends of development may be observed.

### **Termination of employment, unfair dismissal and remedies**

As we have already mentioned, International Labour Organization focused on this topic for a long time. International Labour Organization

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<sup>5</sup> See more in De STEFANO, V. A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries. *Industrial Law Journal*. 2014, vol. 43, no. 3, pp. 253-285. ISSN 0305-9332.

started to address the issue in year 1950, when the International Labour Conference adopted resolution asking a report on national laws and practice. After careful analysing these questions and after elaborating many studies, International Labour Organization adopted the Recommendation concerning Termination of Employment at the Initiative of the Employer (No. 119) in year 1963 (hereinafter referred to as the “Recommendation No. 119”). The importance of the Recommendation No. 119 lies in the recognition of the idea of protection of workers against arbitrary and unjustified dismissals at the international level.<sup>6</sup>

Recommendations are sources of soft law; it means that they have only a non-binding nature and should serve as guidelines for national legislators.<sup>7</sup> Recommendation No. 119 constituted basis for later adoption of a binding convention. According to the Recommendation No. 119, a valid reason for termination of employment at the initiative of the employer should be given.<sup>8</sup> It means that employer should be limited in order to protect employees. Naturally, employees should be free to give notice for whatever reason or without reason. Valid reasons are not specified. However, there are examples pointing out which reasons cannot be considered as valid (for example union membership or discriminative reasons).<sup>9</sup> In case of unfair dismissal, the employee should be entitled to appeal, within a reasonable time, to a body established under collective agreement or to a neutral body, such as to a court or to an arbitrator. As remedies are mentioned reinstatement, payment of unpaid wages, adequate compensation or other relief which is consistent with national practice.<sup>10</sup> Although there is a valid reason given, the employee should be entitled to a reasonable period of notice, during which he/she should be allowed to seek a new employment, i.e. the employer should provide the

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<sup>6</sup> See *Termination of Employment Instruments: Background Paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166)*. 1<sup>st</sup> ed. Geneva: International Labour Office, 2011. 113 p. ISBN 978-92-2-124786-9.

<sup>7</sup> See Conventions and Recommendations. In: *International Labour Organization* [online]. 2017 [cit. 2017-07-20]. Available at: <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

<sup>8</sup> See Article 2 para. 1. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>9</sup> See Article 3. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>10</sup> See Article 4 and 6. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

employee with a time off without any loss in pay within reasonable limits.<sup>11</sup>

After termination of employment some form of income protection should be provided for the employee whose employment has been terminated, i.e. either unemployment insurance or severance allowance, alternatively both of them. In case of dismissal for serious misconduct, it is not necessary to protect employee through a notice period or severance allowance.<sup>12</sup>

In year 1982, a binding agreement was adopted in the analysed field. It was based on the Recommendation No. 119 and it took into account the heightened global competition.<sup>13</sup> International Labour Conference adopted Convention concerning Termination of Employment at the Initiative of the Employer (No. 158) (hereinafter referred to as the “Convention No. 158”) and Recommendation concerning Termination of Employment at the Initiative of the Employer (No. 166) (hereinafter referred to as the “Recommendation No. 166”). Recommendation No. 166 replaced the Recommendation No. 119. Since that time, no International Labour Organization’s convention or recommendation which would address this issue has been adopted.<sup>14</sup> Convention No. 158 provides basis of employment protection at the international level, notwithstanding the fact that it has not been ratified by the majority of the biggest and most important countries (for example by the United States of America, Canada, Russia, United Kingdom, Germany, China, Japan, Brazil) so far.<sup>15</sup>

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<sup>11</sup> See Article 7. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>12</sup> See Article 9 and 11. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>13</sup> See *Employment Protection Legislation: Summary Indicators in the Area of Terminating Regular Contracts (Individual Dismissals)* [online]. 1<sup>st</sup> ed. Geneva: International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 2015. 104 p. [cit. 2017-07-20]. ISBN 978-92-2-129477-1. Available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_357390.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_357390.pdf).

<sup>14</sup> As mentioned, we do not deal with protection of employment of special groups of employees. There are some adopted conventions, for example *Convention concerning the Revision of the Maternity Protection Convention* [2000-06-15].

<sup>15</sup> See Ratifications of C158 – Termination of Employment Convention, 1982 (No. 158). In: *International Labour Organization* [online]. 2017 [cit. 2017-07-20]. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_I D:312303](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_I D:312303).

Nevertheless, almost none of the most important countries have ratified the above-mentioned convention up to these days, we have to admit that nearly all the developed countries have provisions in force at the national levels which are consistent with core requirements of the Convention No. 158.<sup>16</sup> A very special case is created by the United States of America. There is applied the employment-at-will doctrine. The rule says that the employer as well as the employee is able to terminate an employment contract of indefinite duration for any reason and without warning.<sup>17</sup> It means that no valid reason for a dismissal and no statutory notice are required when an employee is dismissed. However, in the last decades, the American courts have been carving out common law exceptions to employment-at-will (for example the public policy exception, the implied covenant of good faith and fair dealing and promises by employers).<sup>18</sup>

The scope of the Convention No. 158 is similar to the Recommendation No. 119. It allows the Members to exclude three groups of workers:<sup>19</sup>

-  fixed-term workers (regulation of protection of the fixed-term workers according to the Convention will be addressed later in the paper);
-  workers engaged on casual basis for a short period;
-  workers serving a period of probation or a qualifying period of employment, provided that the period was determined in advance and it has a reasonable duration.

If the prescribed conditions regarding the third group of workers are not met, it is necessary to apply protection according to the Convention No. 158 in their case too.

Convention No. 158 limits the discretion of the employer upon termination of employment. The employer is not allowed to terminate employment, unless there is given a valid reason for such termination. Valid reasons are defined either in positive or in negative ways. They are the

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<sup>16</sup> See more in FINKIN, M. W. and G. MUNDLAK, eds. *Comparative Labor Law*. 1<sup>st</sup> ed. Cheltenham, UK: Edward Elgar, 2015, p. 275. ISBN 978-1-78100-012-0.

<sup>17</sup> See more in TWOMEY, D. and M. JENNINGS. *Anderson's Business Law and the Legal Environment: Comprehensive Volume*. 22<sup>nd</sup> ed. Mason, OH: South-Western Cengage Learning, 2014, p. 848. ISBN 1-133-58758-5.

<sup>18</sup> See more in MALLOR, J. P., A. J. BARNES, Th. BOWERS and A. W. LANGVARDT. *Business Law: The Ethical, Global, and E-commerce Environment*. 15<sup>th</sup> ed. New York, NY: McGraw-Hill/Irwin, 2013, p. 1381. ISBN 978-0-07-352498-6.

<sup>19</sup> See Article 2, para. 2. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

following: capacity or conduct of the worker and operational requirements of the undertaking, establishment or service.<sup>20</sup> On the contrary, union membership, representation of the workers, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, absence from work during maternity leave, temporary absence from work because of illness or injury or the filling of a complaint or participation in proceedings against an employer involving alleged illegal conduct may not constitute a valid reason for termination of employment.<sup>21</sup> If an employer claims that a valid reason for termination of employment related to a conduct of the employee or performance is given, the employment of a worker may be terminated for that reason only after the worker was provided with the opportunity to defend himself/herself against the allegations made.<sup>22</sup> The aim of the provision is to enable an examination on the informal level whether there is indeed a valid reason for such a termination of employment and thereby to eliminate possible disputes.

Recommendation No. 166 complements the Convention No. 158 and adds reasons which should not be considered as valid reasons, for example age, subject to national law and practice regarding retirement and absence from work due to compulsory military service or other civic obligations.<sup>23</sup>

Similarly to the Recommendation No. 119, Convention No. 158 grants the employee the right to reasonable period of notice or compensation in lieu thereof, provided that there was no serious misconduct of the employee.<sup>24</sup> The length of the notice period is not prescribed. The possibility to provide compensation instead of period of notice is important in cases of jobs that allow access to secret information. This provision is inconsistent with the traditional American employment-at-will doctrine and it shows a fundamental contradiction between the American and International Labour Organization's approaches.

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<sup>20</sup> See Article 4. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>21</sup> See Article 5. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>22</sup> See Article 7. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>23</sup> See Article 5. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>24</sup> See Article 11. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

Recommendation No. 166 develops the rules of the Convention No. 158 related to the procedure of termination of employment. These rules are reflected in many national legislations. For example, there are the rules requiring that the notice should be in a written form and the consultation with workers' representatives should precede the final decision in individual cases of termination of employment.

According to the Convention No. 158, besides the notice period, the employee is to be financially protected against the negative consequences of termination of employment by other legal means. Convention No. 158 allows states which ratified the Convention to choose the form of protection in accordance with the national law and practice. There are two options or combination of them. The first form means the right of employee to a severance allowance which may be paid directly by the employer or by a fund constituted by employer's contributions. The amount of severance allowance is not precisely specified. Convention No. 158 prescribes that the amount has to reflect the length of service and the level of wage. The second option has to provide the dismissed employee with benefits from unemployment insurance or with other forms of social security. Employees may be entitled to the combination of these forms of financial protection.<sup>25</sup>

Termination of employment without a valid reason should be regarded as unfair. If the employment was terminated unjustifiably, the employee has a possibility to defend himself/herself. Convention No. 158, taking into account different national judicial authorities, sets forth more alternative impartial bodies, as are courts, labour tribunals, arbitration committees or arbitrators, which may be allowed to examine reasons given for the termination and other circumstances relating to the case and to decide on the matter. The possibility of the employee to defend himself/herself before the competent authority may be limited by time.

Protection of the employee is reflected even in the proceedings in case of bearing the burden of proving the relevant facts. Either the competent authorities may be empowered to reach a conclusion on the reason for termination while they have to have regard to the evidence provided by the employee as well as employer, or there may be a reversed

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<sup>25</sup> See Article 12. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

burden of proof (i.e. employer is obliged to prove that the reason for dismissal was valid).<sup>26</sup>

According to the Convention No. 158, the remedy of reinstatement of the worker is not mandatory. Competent authorities are to be empowered to order payment of adequate compensation or other appropriate relief if there is not a remedy of reinstatement or the competent authorities do not find the remedy practicable.<sup>27</sup>

Convention No. 158 and the related Recommendation No. 166 are the last adopted documents by the International Labour Organization in this field, with the exception of sub-issues, as protection of mothers. Number of ratification states (35) does not indicate a willingness to be bound by international agreement on this issue in the international community. However, most of the countries react at the factual asymmetry of contractual rights between the employers and employees and we can find the employment protection legislation in countries that ratified the Convention as well as in states that have not ratified it so far.

The last initiative of the International Labour Organization was creation of the Employment Protection Legislation Database EPLex which contains the key topics regularly examined in studies on employment termination legislation. It aims to facilitate and to support the research in this area as well as to be a basis for various comparative studies. This database will be regularly updated, so it should also facilitate analyses of trends over time.<sup>28</sup>

Protection against dismissal is recognised also at the European level. Article 30 of the European Union Charter of Fundamental Rights stipulates: *“Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.”*<sup>29</sup> According to the Article 9 of the Treaty on the Functioning of the European Union, the European Union endeavours to achieve high employment and

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<sup>26</sup> See Article 9 para. 2. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>27</sup> See Article 10. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>28</sup> See Employment Protection Legislation Database – EPLex. In: *International Labour Organization* [online]. 2017 [cit. 2017-07-20]. Available at: <http://www.ilo.org/dyn/epl/ex/termmain.home>.

<sup>29</sup> See Article 30. *European Union Charter on Fundamental Rights*.

strong social protection.<sup>30</sup> Besides that, according to the express wording of the Article 153.1.d of the Treaty on the Functioning of the European Union, the European Union has a legislative competence in the field of dismissal law what is the most substantial part of employment protection legislation. It means that the European Parliament and the Council may adopt directives prescribing minimum requirements regarding the protection of workers whose employment contract is terminated. However, there is no regulation or directive complexly unifying or harmonising the area of employment protection so far. The Council shall act unanimously after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.<sup>31</sup> Whereas there is no unanimity of opinions among countries in this field, it is not likely that the directive on termination of employment will be adopted in the near future.

Merely certain specific questions were harmonised. For example, according to the Directive on Parental Leave,<sup>32</sup> the Member States are required to take necessary measures to protect workers against dismissal on the grounds of application for, or taking of, parental leave.

Since there are only minimum requirements for employment protection stemming from the European Union legislation nowadays, the level and form of protection vary among the Member States. The greatest differences may be seen between the countries with civil law traditions and the common law countries. These differences are caused by different legal and institutional traditions.<sup>33</sup>

### **Legislation on collective dismissals**

Special attention is devoted to the issue of collective dismissal. Sometimes there are various economic or organisational reasons that lead the employer to a decision to dismiss a larger number of employees. Where-

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<sup>30</sup> See Article 9. *Consolidated Version of the Treaty on the Functioning of the European Union*. OJ EU C 326, 2012-10-26, pp. 47-390.

<sup>31</sup> See more in Van VOSS, G. H. and B. ter HAAR. Common Ground in European Dismissal Law. *European Labour Law Journal*. 2012, vol. 3, no. 3, pp. 215-229. ISSN 2031-9525.

<sup>32</sup> See *Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC*. OJ EC L 145, 1996-06-19, pp. 4-9.

<sup>33</sup> See *European Semester Thematic Factsheet: Employment Protection Legislation* [online]. Brussels: European Commission, 2016. 16 p. [cit. 2017-07-20]. Available at: [https://ec.europa.eu/info/sites/info/files/european-semester\\_thematic-factsheet\\_employment-protection-legislation\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_employment-protection-legislation_en_0.pdf).

as it causes negative consequences in terms of the whole society, there is an effort to prevent such a situation or, at least, to mitigate its consequences. Besides the protective mechanisms protecting the individual employees whose employment contract is terminated, there is a need to intervene by additional protective measures.

International Labour Organization addressed the above-mentioned issue by the Recommendation No. 119. It recommends to take positive steps by all parties, with the aim to avert or to minimise possible reductions of the workforce by adoption of appropriate measures. The first step should be consultation with workers' representatives. The employer together with the representatives should seek to find acceptable solution for all parties that would be able to avoid or to mitigate the reduction of the workforce, measures for minimising the effects of reduction on the workers concerned as well as selection of workers to be affected by the reduction. In case of large-scale collective dismissals which may have significant impacts on the unemployment rate in the region or in the branch of the affected economic activity, the employer should notify the competent public authorities in advance of any such reduction.<sup>34</sup>

Recommendation No. 119 also deals with the way of selection of workers to be dismissed. It recommends to set objective criteria, as are the ability, experience, skills, length of service or family situation. When the employer engages workers again, the dismissed workers should have priority.<sup>35</sup>

Following the Recommendation No. 119, Convention No. 158 imposes a few special obligations to the employer in case of contemplation of termination of employment for economic, technological and structural reasons or reasons of similar nature. In relation to the employees' representatives, the employer has a duty to provide them with relevant information in time and to give them an opportunity for consultation on measures to be taken to avert or to minimise the terminations. In relation to the competent public authorities, the employer is also obliged to notify them and to provide them with relevant information.<sup>36</sup>

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<sup>34</sup> See Article 12 – 14. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>35</sup> See Article 15. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

<sup>36</sup> See Article 13 and 14. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

Regarding the determination of cases in which these duties should be imposed to employers, Convention No. 158 does not prescribe a precise number or percentage of employees who are to be dismissed and leaves this question to national laws and regulations.

Additionally, there is Recommendation No. 166 which complements the Convention No. 158. It emphasises that all parties (i.e. employer and employees' representatives, in certain cases with the assistance of the competent authority) should seek a solution which would be able to avert or to minimise possible termination of employment for reasons of economic, technological, structural or similar nature and to mitigate negative consequences. It also deals with consultations between employer and employees' representatives on major changes in the undertaking. It aims to provide the employees with the possibility to consult and thus to influence key decisions which adversely affect their jobs.<sup>37</sup>

When establishing the criteria for selection for termination, not only the interests of the employer, but also the interests of the workers should be taken into account. Similarly as the Recommendation No. 119, Recommendation No. 166 deals with the priority of rehiring of dismissed employees, while Recommendation No. 166 addresses this issue more detailed.<sup>38</sup>

Recommendation No. 166 proposes measures which could be taken to avert or to minimise termination of employments. In certain situations it reckons with financial intervention through the social security system. After executing a collective dismissal, the competent authority should help the dismissed workers to find suitable alternative employment as soon as possible. If it is necessary, training or retraining should be provided. If it is possible, competent authority should collaborate on mitigating the negative consequences of termination with the employer and the workers' representatives concerned.<sup>39</sup>

At the European level, there is a directive that addresses collective dismissal – Council Directive 98/59/EC of 20 July 1998 on the Approximation of the Laws of the Member States Relating to Collective Redun-

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<sup>37</sup> See Article 20. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>38</sup> See Article 23. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>39</sup> See Article 25. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

dancies. This directive defines the term collective redundancies as “*dismissals effected by an employer for one or more reasons which are not related to the individual workers*”,<sup>40</sup> while the number of employees whose employment contract is to be terminated exceeds a specified number or percentage of total employees in the specified term.<sup>41</sup> Exceptions from the application of the mentioned directive include (among other things) collective redundancies affected under fixed-term, provided that the redundancy did not take place prior to the date of expiry or completion of fixed-term contracts.

Pursuant to the above-mentioned directive, the employer is obliged to begin consultations with the workers’ representatives in time when there is a real chance to reach an agreement. It also stipulates ancillary obligations of employers which are to enable employees’ representatives to come to the negotiations with constructive proposals, including the duties to supply employees’ representatives with all relevant information and to notify them in writing of reasons for the upcoming redundancies, number of categories of workers to be made redundant and workers normally employed, criteria proposed for the selection of the workers to be made redundant etc. These consultations should aim to avoid collective redundancies or, at least, to reduce the number of workers affected and to mitigate negative consequences.

Employers have similar duties in relation to public authorities. If employers propose collective redundancies, they shall notify competent public authorities in writing of that fact and provide them with all relevant information about the proposal and consultations with workers’ representatives.

Directive on Collective Redundancies contains rules similar to those which are contained in the already mentioned Recommendations and in the Convention of International Labour Organization, but the Directive on Collective Redundancies is more detailed.

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<sup>40</sup> See Article 1.1.a. *Council Directive 98/59/EC of 20 July 1998 on the Approximation of the Laws of the Member States Relating to Collective Redundancies*. OJ EC L 225, 1998-08-12, pp. 16-21.

<sup>41</sup> Notice: There are two options for calculation. The Member States are allowed to choose a more convenient alternative for them.

## Fixed-term contract

Fixed-term contract may be defined as “*contractual employment arrangement between one employer and one employee characterised by a limited duration or a pre-specified event to end the contract between them.*”<sup>42</sup> It is one of the special forms of temporary dependent employment. Whereas the application of the all above-mentioned rules could be avoided by use of successive fixed-term contracts, regulation of fixed-term contracts belongs to employment protection regulation. Their regulation is important inter alia because the fixed-term workers may be more reluctant to exercise the rights to organise and to bargain collectively, since the fixed-term workers are not protected so strong as employees for an indefinite period through legislation on termination of employment and they may have a fear of loss of their jobs.<sup>43</sup>

At the international level, International Labour Organization addresses the issue of fixed-term contracts in the Recommendation No. 119, Convention No. 158 and its accompanying Recommendation No. 166.

Regarding to the Recommendation No. 119, the issue of possible abusing is addressed only indirectly. According to one of the final Articles devoted to the scope of this Recommendation, the following “*workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration*”<sup>44</sup> may be excluded from the scope of the Recommendation No. 119 and, therefore, from the granted protection. Based on the argument a contrario, it may be inferred that fixed-term employees who perform the work of permanent nature should be protected.

According to the Article 2.2.a of the Convention No. 158, the Member States may exclude the application of the Convention if workers are en-

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<sup>42</sup> See more in ALEKSYNSKA, M. and A. MULLER. *Nothing more Permanent than Temporary? Understanding Fixed-term Contracts* [online]. 1<sup>st</sup> ed. Geneva: International Labour Office, 2015. 10 p. [cit. 2017-07-20]. Policy Brief, no. 6. ISSN 2313-5158. Available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_357403.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_357403.pdf).

<sup>43</sup> See more in EBISUI, M. *Non-standard Workers: Good Practices of Social Dialogue and Collective Bargaining*. 1<sup>st</sup> ed. Geneva: International Labour Office, Industrial and Employment Relations Department, 2012. 31 p. Dialogue Working Paper, no. 36. ISSN 2226-7840.

<sup>44</sup> See Article 18, para. 1.a. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1963-06-26].

gaged under a contract of employment for a specified period of time or a specified task, i.e. fixed-term contract.

Convention No. 158 takes into account the possibility of abuse and, therefore, it sets forth following general rule: *“Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.”*<sup>45</sup> Convention No. 158 does not prescribe safeguards which should be provided and leaves the solution to this issue to the consideration of each state which ratified Convention No. 158.

In the related Recommendation No. 166 we may find examples of adequate safeguards as:

- ✚ restrictions related to the nature of work to be effected or to the circumstances under which it is to be effected or to the interests of the workers;
- ✚ presumption of concluding a contract of indeterminate duration as a sanction for failure to comply with conditions and restrictions;
- ✚ presumption of concluding a contract of indeterminate duration in case of renewing a contract for definite period.<sup>46</sup>

At the European Union level, there is only one directive<sup>47</sup> through which the European Union Member States were bound to transpose the framework agreement on fixed-term work. This agreement was concluded by the major trade union organisation representing workers at the European level (*European Trade Union Confederation*) and by two European associations of industries and employers (*Union of Industrial and Employers' Confederations of Europe* and *European Centre of Employers and Enterprises Providing Public Services and Services of General Interest*). On the one side, it tries to provide enough flexibility to employers and, on the other side, it is supposed to protect employees by setting out general principles and minimum requirements for fixed-term employment contracts and employment relationships, in particular with the aim to prevent abuse arising from use of successive fixed-term employment con-

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<sup>45</sup> See Article 2, para. 2. *Convention concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>46</sup> See Article 3, para 2. *Recommendation concerning Termination of Employment at the Initiative of the Employer* [1982-06-22].

<sup>47</sup> See *Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work Concluded by ETUC, UNICE and CEEP*. OJ EC L 175, 1999-07-10, pp. 43-48.

tracts or relationships. As the naming implies, the mentioned directive provides only a basic framework and, thus, it provides enough space for national legislators to address this issue according to local needs. It highlights the principle of non-discrimination in order to ensure that fixed-term contract will not be a reason for discrimination of fixed-term workers in comparison with permanent workers unless different treatment is justified on objective grounds.

As we have already mentioned, use of fixed-term contracts brings a risk of abuse. For that reason the above-mentioned directive requires the Member States, after consultation with social partners, to introduce at least one of the following protective measures:

- ✚ objective reasons justifying renewal of such contracts or relationships;
- ✚ maximum total duration of successive fixed-term employment contracts or relationships;
- ✚ number of renewals of such contracts or relationships.

At the same time, the Member States are required to determine under what conditions fixed-term employment contracts or relationships shall be regarded as “successive” and shall be deemed to be contracts or relationships of indefinite duration.

As we can see, at the European as well as international levels there are only very general sources of regulation. Rather it may be understood as an expression of the need to regulate the fixed-term contract while states are left free to choose appropriate measures according to specificities of their conditions and legal systems.

## **Conclusions**

Employment protection belongs to often discussed topics of labour law. However, there is still no consensus both at the international and European level on how the employment protection legislation should look like.

Until today, International Labour Organization adopted two recommendations and one convention on termination of employment. These documents address all analysed topics, although rather in general terms. As we have already mentioned, recommendations are only non-binding documents and Convention No. 158 has been ratified merely by the 35 International Labour Organization Member States, while almost none

of the countries with the biggest and most important economies in the world has ratified it up to these days.

Some minimum requirements concerning collective redundancies, information and consultation, fixed-term work and temporary work are set within the legal environment of the European Union. However, the European Union law does not contain comprehensive regulation of employment protection (rules that address termination of employment are missing at the European Union level). We may see significant differences in approach to this legal area even among the European Union Member States, especially between the civil law countries and the United Kingdom as a common law country.

We could notice a common pattern at the international as well as European Union levels. Both the international and European Union law leaves a considerable space for collective bargaining. It means that significant measures enhancing employment protection may be agreed in collective labour contracts, while these measures are able to be prepared exactly for a need of a particular employer or a branch of economic activity in a particular country.

The need to protect employees is appropriately recognised, however, there are strengthening very serious arguments that employment protection may be counterproductive.

Nowadays, labour law copes with rapidly changing socio-economic conditions. In order to ensure a good position in global competition, there is not a tendency to increase the protection of workers as regards protection against dismissal. On the contrary, a need of flexibility of employers comes into prominence. In this context, the term “flexicurity” is mentioned very often at the European Union level. Flexicurity is defined as “*an integrated strategy for enhancing, at the same time, flexibility and security.*”<sup>48</sup> The European Union is looking for solutions to reconcile different needs of employees and employers – workers’ need for security with employers’ need for flexibility. Enhancing of flexibility has to be inextricably linked to comprehensive lifelong learning strategies, effective active labour market policies and modern social security systems.

We would like to emphasise that there is evident a very positive initiative of the International Labour Organization – also through creation

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<sup>48</sup> See Flexicurity. In: *European Commission* [online]. 2017 [cit. 2017-07-20]. Available at: <http://ec.europa.eu/social/main.jsp?catId=102>.

of the Employment Protection Legislation Database EPLex. Besides that there is a notable effort of the International Labour Organization to support research in the employment protection area, instead of preparation of new binding or non-binding international documents.

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