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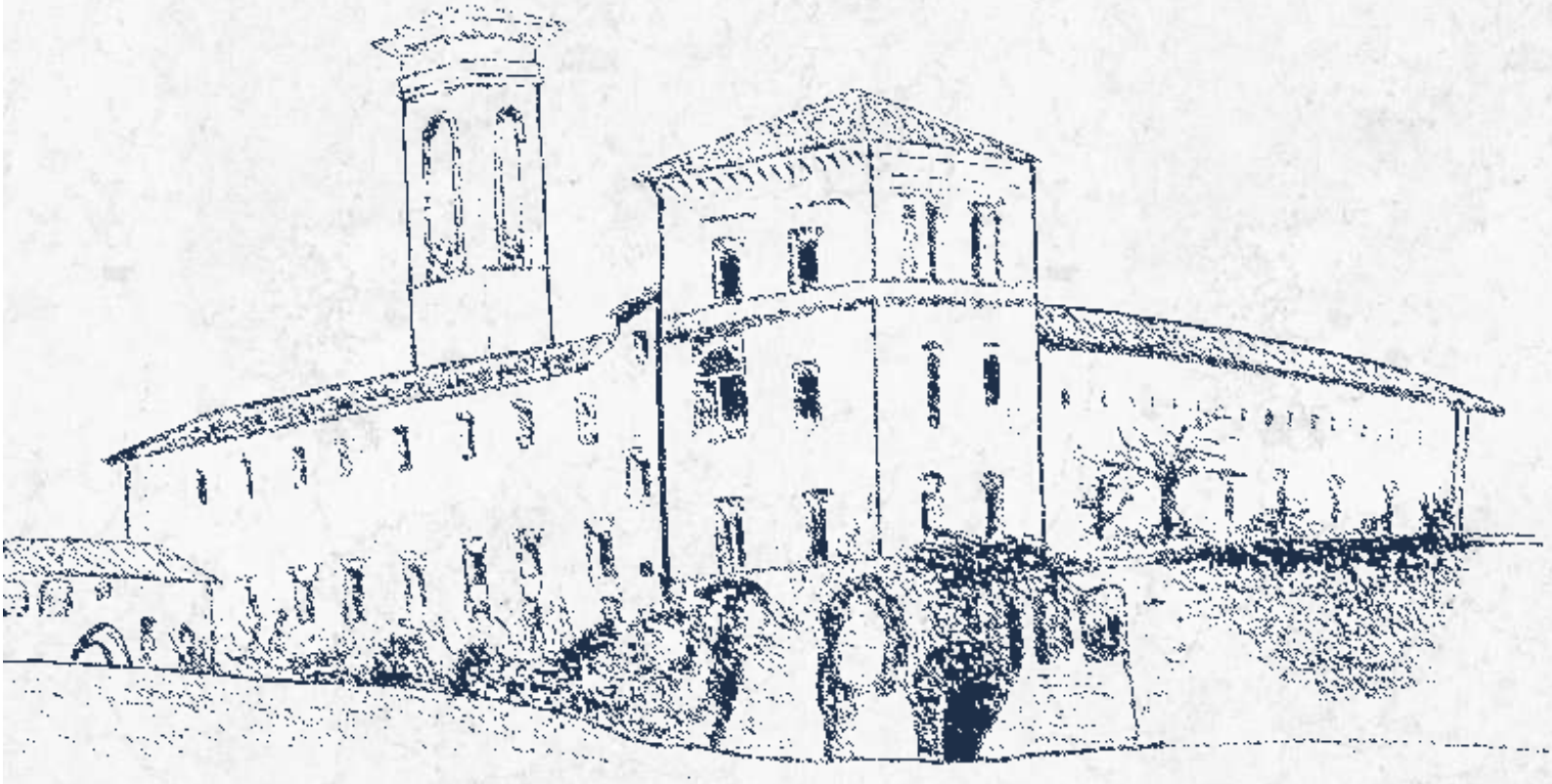

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Towards a European Concept of Protection against Unjustified Dismissal

Tatsiana Ushakova *

Abstract: The purpose of the study is to examine trends in protection against dismissal in the field of European Union law. It aims to analyse the latest instruments, such as the EPSR and Directives 2019/1152 and 2019/1158. In this regard, it considers to what extent the new legal acts contribute to the development of a European concept of dismissal and how new realities (teleworking or artificial intelligence) affect the protection of the worker against unjustified dismissal.
The technological factor, which has been accentuated in pandemic and post-pandemic situation, will dictate the new needs for protection against dismissal. It seems clear that Article 30 CFR provides a legal basis for the development of a common concept, oriented towards protection against unjustified dismissal at EU level. Furthermore, it is relevant that a certain coherence in the approaches of different legal systems, those of the European Union, the Council of Europe and the International Labour Organisation (ILO), is ensured through the links between the CFR, the ESC (Revised) and the ILO Convention No. 158 on Termination of Employment.

Keywords: *European Union; Social Policy of the European Union; Dismissal; Unjustified Dismissal; Protection against Unjustified Dismissal.*

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1. Introduction

The institution of dismissal is one of the central aspects of labour law; therefore, this makes it crucial that it is considered as an object of approximation of legal, regulatory and administrative provisions in the field of social policy in the European Union (EU). As pointed out by M. Weiss in his study on prospects, "legislation on social minimum standards is unsystematic and fragmentary. Important areas, for example protection against unfair dismissals, are still missing. This deficiency has become particularly evident when during the management of the financial crisis in the context of the austerity strategy Member States in Southern Europe were forced to reduce their standards of dismissal protection and of minimum wage and were also forced to dismantle their collective bargaining systems"[1].

At the time of this statement, the EU had several rules that, in a way, manifest a willingness to safeguard certain common values for all Member States. Undoubtedly, its most emblematic expression is articulated in the Charter of Fundamental Rights of the European Union (CFR), in Article 30, which aims to protect against "unjustified dismissal", and Article 33(2), which aims to prevent "discriminatory" dismissal in the context of reconciliation of private and professional life. In addition, several directives establish the typology of dismissal by referring to collective dismissal, dismissal in the case of transfer of undertakings, dismissal resulting from maternity or from the exercise of various rights related to work-life balance or other employment rights protected by European legislation.

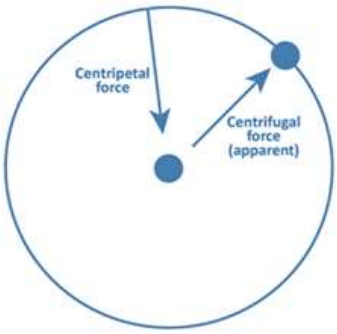
The European Pillar of Social Rights (EPSR) and the two recent directives, namely Directives 2019/1152 and 2019/1158, which have almost identical articles on the subject, provide an undeniable step towards a common model in the field of protection against unjustified dismissal. Indeed, the adoption and recent entry into force of these two instruments is one of the main *raisons d'être* of this study. Alongside this, the pandemic has accentuated the importance of the technological factor in the field of employment, including the institution of dismissal.

The key question is whether, despite these developments, M. Weiss's statement about the piecemeal and fragmentary nature of the institution in EU labour law is still relevant today. The answer to this question is

[1] Weiss, M. (2017), "The future of the labour law in Europe: rise or fall of the European social model?", *European Labour Law Journal*, vol. 8(4), p. 349.

provided by the methodological approach based on the analysis of centrifugal and centripetal forces (Fig. 1). The (simultaneous) action of both forces is articulated by reference to the four aspects of analysis into which the two parts of the paper are divided: EU objectives, competences of the institutions, legal acts, and common values. By culminating with the second set of arguments concerning centripetal forces, an optimistic and hopeful message is announced.

Figure 1. Centrifugal and centripetal forces



Source: Centripetal vs. centrifugal: what's the difference? In Busquet, M., Physics for Animators (2015), available at: https://physicsforanimators.com/centrifugal-force-useful-for-animation-but-not-really-a-thing/.

In this picture, the blue dot represents a common approach to the protection against unjustified dismissal and the arrows of centrifugal and centripetal forces, respectively the arguments against and in favour of the European conception of protection.

2. Centrifugal Forces

As shown in the image, although without claiming exact scientific explanation, the centrifugal forces are more "apparent" than real.

2.1 Objectives

The 1957 Treaty establishing the European Economic Community (TEEC) in its original version did not contain explicit references to the regulation of dismissal. In fact, European labour law was not in the

agenda of the Treaty at all. The focus was exclusively on the establishment of the common market between the founding States and the philosophy of the original Treaty was based on the assumption that social progress somehow will come by itself once the common market is established[2]. The first proposal in the social field appears in the Council Resolution of 21 January 1974 on a Social Action Programme, which provided for a directive on the approximation of the laws of the Member States relating to collective redundancies[3].

The legislative action was based on Article 100 TEC [now Article 115 of the Treaty on the Functioning of the European Union (TFEU)] and Article 117 TEC (now Article 151 TFEU). Article 100 referred to the competence of the Council to adopt, acting unanimously, directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market; and Article 117 agreed on the need to promote the development of the common market and to improve living and working conditions in order to achieve their harmonisation through progress, and considered that such developments would result from the very functioning of the common market, which would favour the harmonisation of social systems, as well as from the procedures provided for in the Treaties and the approximation of national laws.

Thus, and this is still true today, there is a clear link between the functioning of the common market (or the internal market in today's terms[4]) and the development of social policy. From this perspective, and ultimately, protection against dismissal remains dependent on the economic factor.

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[2] Weiss. M. (2015), "Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights". In: Schlachter, M. (ed), *EU Labour Law. A Commentary*, Wolters Kluwer, Alphen ann den Rijn, p. 4.

[3] *OJ* C 13, 12.2.1974.

[4] It should be noted that the present Article 151 TFEU is essentially identical to Article 136 TEC except for "Union" replacing "Community" and "internal market" replacing "common market". See, among others, "Commentary on Article 151 TFUE". In Ales, E., Bell, M., Deinert, O., Robin-Oliver, S. (eds), (2018), *International and European Labour Law. A Commentary,* Nomos, Baden-Baden; Beck, München; Hart, Oxford, and Jimena Quesada, L. (2016), *Social Rights and Policies in the European Union. New Challenges in a Context of Economic Crisis*, Tirant lo Blanch, Valencia, p. 24.

2.2 Competences

Article 153 TFEU can be regarded as a cornerstone of the EU hard law competence in the field of labour and social law. Its very complicated story dates back to 1986, when Article 118 A was introduced within the TEEC by the Single European Act (SEA), for the first time providing the European institutions with an explicit competence in relation to the working environment, as regards of the health and safety of workers[5]. Then, the Maastricht Treaty extended qualified majority voting to several areas (only through the Agreement appended to Protocol on Social Policy, with the opt-out of the UK). However, the Protocol kept the unanimity rule for other areas, including protection of workers where their employment contracts is terminated, as well as the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty did. This requirement remains in the current wording of Article 153 TFEU. In the area of "protection of workers in the event of termination of employment contracts" [Article 153(1)(d)], among others, the Council, acting unanimously after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, decides in accordance with a special legislative procedure [Article 153(2)(b)]. Immediately after the passage quoted above, however, it is given the opportunity to decide, again by unanimity, that the legislative procedure shall be the ordinary legislative procedure.

2.3 Legal acts

It is significant that the first piece of legislation on dismissal was conceived in the context of the approximation of national legislation in order to better achieve the objectives of the common market. Thus, in the search of greater clarity and rationality, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies[6] was adopted, as amended by Directive 92/56/EC[7], the successor to which is Directive 98/59/EC[8]. The latter

[5] See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 157 and Jimena Quesada, *op. cit.,* pp. 48 and ff.

[6] *OJ* L 48, 22. 2. 1975. It seems that Directive 75/129/EEC was agreed by the Council of Ministers as a part of the 1974-6 Social Action Programme, and, according to Blanpain, it had its origins in the conduct of AKZO, a Dutch-German multinational enterprise which wanted to make 5000 workers redundant. See Barnard, C. (2012), *EU Employment Law*, 4th Revised Edition, Oxford University Press, Oxford, p. 629.

[7] *OJ* L 245, 26.8.1992.

[8] *OJ* L 225, 12.8.1998.

states that "despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers"[9].

Moreover, the only specific Directive on dismissals merely lays down a set of procedural rules and does not require the existence of a justifiable cause for dismissals. Thus, it deals with a legal act that does not cover possible contractual terminations that merit the qualification of "unjustified dismissals"[10]. In the absence of such an explicit provision, this is left to the "national laws and practices" of the Member States. And, although European minimum requirements are very few, national legislations are obliged to establish a specific system of protection against "unjustified" dismissals[11].

Alongside the Directive on collective redundancies, and without being exhaustive, reference can be made to other directives which provide for protection against dismissal: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[12], Council

[9] *OJ* L 225, 12.8.1998, p. 16. See Tiraboschi, M. (2022), "The Origins of a New European and International Legal Culture". In *Manfred Weiss. A Legal Scholar without Borders. Selected Writings and Some Reflections on the Future of Labour Law*, ADAPT University Press, p. 27.
The diversity of approaches in the national legislation of the Member States can be illustrated by the example of the recent question referred for a preliminary ruling by the *Tribunal Superior de Justicia de Cataluña* (High Court of Justice of Catalonia) whether "the Spanish legislation (Article 49(1)(e) of *Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers' Statute) of 23 October 2015), which does not establish a period of consultation in situations where contracts of employment in excess of the number laid down in Article 1 of that directive are terminated as a result of the retirement of the natural person employer, compatible with Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies". Case C-196/23 lodged on 24 March 2023.

[10] Cruz Villalón, J. (2012), "La intervención de la Unión Europea en materia de despido". En: Cruz Villalón, J. (ed.), *La regulación del despido en Europa. Régimen formal y efectividad práctica*, Tirant lo Blanch, Valencia, p. 33.

[11] *Ibid.*

[12] *OJ* L 82, 22.3.2001. In the context of Directive 2001/23/EC, which recast Directives 77/187/EEC and 98/50/EC, it is noted that the lawfulness of dismissals on economic grounds may be called into question in the case of a transfer of business within the meaning of that Directive. The transfer does not in itself constitute grounds for

Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers, who have recently given birth or are breastfeeding[13], and the more recent Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[14], and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on reconciling family life and working life for parents and carers and repealing Council Directive 2010/18/EU[15].

Generally speaking, most of the provisions on dismissal are placed in two contexts: protection against unjustified dismissal, in particular in the process of collective redundancies and in the case of transfer of undertakings, and protection against dismissal in the area of reconciliation of family and working life. The distinction between "unjustified" dismissal in relation to "objective" dismissal and "discriminatory" dismissal makes it difficult to establish common criteria for protection. Thus, it follows from the case law of the CJ that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex[16], and thus requires enhanced protection[17].

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dismissal. Seifert, A. (2019), "Descentralización productiva y el derecho del trabajo alemán", *Doc. Labor.*, n.º 118, p. 120.

As Arastey Sahún states, the aim is to provide a double guarantee: that the workers affected by the change cannot be dismissed as a consequence or occasion of the change and also that their working conditions are not modified. Arastey Sahún, M. L. (2005), "La protección por despido en la Constitución Europea", *Revista del Ministerio de Trabajo y de Asuntos Sociales*, n.º 57, pp. 368-369.

[13] It deals with the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ* L 348, 28.11.1992, as amended by Directive 2007/30/EC, Directive 2014/27/EU and Regulation (EU)2019/1243. See, inter alia, Ushakova, T. (2015), "Protecting the Pregnant Women against Dismissal: Subjective and Objective Components in EU Law", In: Mella Méndez, L., Serrani, L. (eds.), *Work-Life Balance and the Economic Crisis. Some Insights from the Perspective of Comparative Law*, vol. II. ADAPT, Cambridge Scholars Publishing, Cambridge, pp. 93-121.

[14] *OJ* L 186, 11.7.2019.

[15] *OJ* L 188, 12.7.2019.

[16] See, Directive Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ* L 204, 26.7.2006. It states that "[i]t is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive" (Paragraph 23 of Directive 2006/54/EC).

In this regard, it should be noted that the directive has always been the most suitable instrument for operating in the field of shared competences [Article 4(2)(b) TFEU], in particular because of its legal nature: its binding force is based on the "result" element, while it is up to the national authorities to choose the "form and means". Thus, Article 153(2)(b) TFEU provides for the adoption of directives, minimum requirements to be applied progressively, taking into account the conditions and technical regulations of each Member State.

2.4 Common Values

Article 151 TFEU, which contains one of the fundamental precepts for the development of EU social policy, also provides that, in taking appropriate action, the Union and the Member States shall consider the diversity of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the economy.
As the study prepared by the European Commission shows, "Member States' regulations appear highly heterogeneous, even within groups of countries with similar socioeconomic characteristics. The biggest differences in employment protection legislation across the EU are in the regime for dismissing people on regular contracts. The differences relate not only to the legislation's stringency but also the instruments to protect workers against dismissal. The greatest differences concern the definition of fair and unfair dismissal and the related remedies"[18]. This being the

"For the purposes of this Directive, discrimination includes: [...] any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC" [Article 2(2)(c)].

[17] In this connection, one of the recent questions for a preliminary ruling concerns "whether the German national provisions of Paragraphs 4 and 5 of the Kündigungsschutzgesetz (Law on protection against dismissal; 'the KSchG'), according to which a woman who, as a pregnant woman, enjoys special protection against dismissal must also mandatorily bring an action within the time limits laid down in those provisions in order to retain that protection, are compatible with Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC". Case C-284/23, Request for a preliminary ruling lodged on 2 May 2023.

[18] European Commission (2017), *Employment Protection Legislation*, European Semester Thematic Factsheet. European Commission, Brussels, 17.10.2017, p. 10.

case, protection against dismissal remains linked to the national legal systems and depends on the regulation of dismissal in each State.

It is important to note that the law on the protection against dismissal at the international level is quite recent. At the European regional level, the Community Charter of Fundamental Social Rights of Workers, of 1989, and the European Social Charter (ESC) of 1961 are silent on this issue. At the universal level, the first instrument specially dealing with termination of employment was the ILO Recommendation No. 119 of 1963 (now replaced by Recommendation No 166). The ILO Convention No. 158[19] and, particularly, Article 24 of the ESC (Revised), of 1996, still not ratified by all the Member States of the EU[20], served as sources of inspiration for Article 30 CFR[21].

The doctrine points certain obstacles to the application of Article 30 by the CJEU[22]. Firstly, the CFR does not bind States unless they are implementing EU Law. In this sense, Article 51 determines the scope of the Charter. It seeks to establish clearly that the CFR applies primarily to the institutions and bodies of the Union. As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law[23]. Article 51(2) also confirms that the Charter may not have the effect of extending the field of application of Union law[24].

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[19] The C 185, Termination of Employment Convention, adopted on 22 June 1982 and in force from the 23 November 1985, has been ratified by only 36 State, barely one third of the EU Member States. See, inter alia, Servais, J.-M. (2020), *International Labour Law*, Wolters Kluwer, Alphen ann Rijn, pp. 164 and ff.

[20] Not (yet) ratified by Croatia, Czech Republic, Denmark, Luxembourg and Poland. "Signatures and ratifications of Treaty 163" available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=163.

See about common principles of dismissal law found in Article 24 of the ESC (Revised) in Van Voss, G. H. and Ter Haar, B. (2012), "Common Ground in European Dismissal Law", *European Labour Law Journal*, vol. 3 (3), pp. 221-223.

[21] Explanation on Article 30 — Protection in the event of unjustified dismissal. "This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC". Explanations relating to the Charter of Fundamental Rights. *OJ* C 303, 14.12.2007, p. 26.

[22] See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* pp. 945-946.

[23] In its Explanations on Articles of the Charter, the Praesiduim quoted the following cases: Judgment of 13 July 1989, Case C-5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997,

Secondly, it deals with so called "justiciability" of certain rights. According to the well-known and broadly discussed Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013 in *AMS* case[25], there would be a strong presumption that the fundamental rights set out in Title IV "Solidarity" of the Charter belong to the category of "principles"[26]. This promotion and transformation can be carried out by acts of "implementation" to which Article 52(5) refers, i.e., "legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law". Therefore, a principle must be implemented through a secondary source of EU law[27]. In any case, the CJ concluded that those Articles (in that case, Article 27) could not be invoked in a dispute between individuals in order to disapply the national provision.

The Court also systematically excluded the application of Article 30[28], until the *AGET Iraklis* case[29]. In this case, the CJ reaffirms the idea of the

Case C-309/96 *Annibaldi* [1997] ECR I-7493. Explanations relating to the Charter of Fundamental Rights. *OJ* C 303, 14.12.2007, p. 32.

[24] *OJ* C 303, 14.12.2007, p. 32. In the same vein, Article 6(1) TEU confirms that "**[t]**he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[25] See Judgment of 15 January 2014, Case C-176/12 *AMS* and Opinion of Advocate General Cruz Villalón delivered on 18 July 2013 in *AMS* case.

[26] See Delfino, M. (2015), "The Court and the Charter. A "Consistent" Interpretation of Fundamental Social Rights and Principles", *European Labour Law Journal*, vol. 6(1), p. 89.

"There is also a systematic argument. The group of rights included under the title 'Solidarity' incorporates mainly rights regarded as social rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of 'principles'". Paragraph 55 of the Opinion.

"The authors of the Charter relied on the experience of some Member States, where a similar distinction had allowed full justiciability of 'rights' and a reduced, or in some cases, no justiciability of 'principles'". Paragraph 47 of the Opinion.

[27] Delfino, Loc. cit., p. 89.

[28] For example, in its judgment of 5 February 2015 in *Poclava* case, C-117/14, the Court states that "[i]t should be recalled that, so far as actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, under which the provisions of the Charter are addressed to the Member States only when they are implementing EU law" (Paragraph 28). More references are available at: Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 946.

[29] Judgment of 21 December 2015 (Grand Chamber), Case C-201/15.

exercise of the employer's power in its analysis of Article 30 in conjunction with Article 16 FDC, namely the protection against unjustified dismissal in relation to the freedom to conduct a business[30]. In this respect, it points out, inter alia, that, in the redundancy procedure, "the employer's freedom to carry out collective redundancies or not"[31] is not affected since the Directive does not specify "the circumstances in which the employer must consider making collective redundancies" and does not affect his freedom to decide whether and when to draw up a plan for collective redundancies[32]. However, it is noted that the conclusion could have been different if the application of national legislation, which in principle is not in conflict with Directive 98/59, had been to deprive that instrument of its useful effect.

3. Centripetal Forces

3.1 Objectives

Today, there is no doubt about a strong link between the functioning of the internal market and the development of social policy. As Scelle makes clear, the quarrel between the "economic" and the "social" is more theoretical than practical, and it must be resolved according to common sense[33]. The social aspect of the European integration process is reinforced in the famous passage of the CJ in the *Defrenne II* case, which emphasises the social objectives of the Community, describing it not merely as an economic union but, at the same time, as an engine for common action "to ensure social progress and seek the constant improvement of the living and working conditions of their peoples"[34].

[30] See the more detailed analysis of the case in García-Perrote, I. (2018), "La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho español", *Actualidad Jurídica Uría Menéndez*, n.º 49, pp. 172 and ff.

[31] Paragraph 30.

[32] Paragraph 31.

[33] "C'est également à la lumière du bon sens qu'il faut résudre le probléme, heureusment plus théorique que pratique, de la distinction entre le domaine social et le domaine économique". See Scelle, G. (2020), *L'organisation internationale du travail et le BIT*, Dalloz, Paris, pp. 86-87.

[34] Paragraph 10 of the Judgment of 8 April 1976, Case C-43/75 *Defrenne II*. It should be noted that there are three judgments related to the *Defrenne* case, namely: judgment of 25 May 1971, C-80/70; judgement of 8 April 1976, C-43/75, mentioned above, and judgment of 15 June 1978, C-149/77.

Article 153(1)(d), which refers to protection "in the event of termination of the employment contract", is located in Title X on social policy. Intervention in this area must be linked to Article 3(3) TEU, which promotes the objective of an internal market and, together with EU action to achieve a highly competitive social market economy, is aiming at full employment and social progress. The Lisbon Treaty highlights the so-called "horizontal clauses". In this sense, in the definition and implementation of EU policies, they call for taking into account equality between men and women (Article 8 TFEU) and the promotion of a high level of employment and the guarantee of adequate social protection (Article 9 TFEU). As Anderson points out, the "horizontal social clause" of Article 9 is one of the promising examples of recent development of primary legislation that "the future of the European social model may be based on stronger principle of social solidarity"[35].

3.2 Competences

As stressed above, a significant step to ensure common action was taken with the adoption of the SEA, which introduced Article 118 A within the TEEC, thus, for the first time providing the European institutions with an explicit competence in the employment field.
As is well known, the original Treaty of Rome only referred to the European Commission's task of promoting closer cooperation between Member States in certain social areas, "making studies, delivering opinions and arranging consultations" (Article 118 TEEC).
Article 118 A focused on "the working environment, as regards the health and safety of workers", which therefore was placed at the centre of the EEC's social commitment. In order to help to achieve this objective, the Council could act by a qualified majority adopting directives that include minimum requirements to be gradually implemented, having regard for conditions and technical rules present in each Member State.
The Maastricht and Amsterdam treaties opened the way for a wider material scope for intervention by the European institutions. Thus, the former Article 137 TEC [at present Article 153(1)(d) TFEU] for the first

Recently, the EU reinforced the commitment to the focal point of these landmark rulings on equality in the Directive 2023/970 of the European Parliament and the Council, of 10 May 2023, to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, *OJ* L 132, 17.5.2023.

[35] Anderson, C. (2015), *Social Policy in the European Union*, Palgrave, London, p. 220.

time expressly provided for the competence to adopt directives concerning "the protection of workers in the event of termination of employment contracts".
Although Article 153(2)(b) TFEU requires the decision under a special legislative procedure by unanimity in the area of workers' protection in the case of contract recession, it is also true that the Council can unanimously agree on the application of the ordinary legislative procedure in the same area.

3.3 Legal acts

Despite the unanimity required and the dispersion of protection against dismissal in different frameworks, the most recent directives point to a common approach in this respect by introducing horizontal provisions. In essence, it is "about brining rules closer together by defining common minimum standards"[36]. Thus, Directive 2019/1158 extends protection not only to pregnant workers, workers who have recently given birth or are breastfeeding, but also to workers exercising their right to take leave or flexible working arrangements[37]. In almost identical terms, Directive 2019/1152 also lays down horizontal protection provisions which, inter alia, require Member States to take the necessary measures to protect against dismissal or its equivalent, as well as any act preparatory to dismissal of workers for having exercised the rights set out in the Directive[38].

[36] See Tiraboschi, M. (2022), "The Origins of a New European and International Legal Culture", In *Manfred Weiss. A Legal Scholar without Borders. Selected Writings and Some Reflections on the Future of Labour Law*, ADAPT University Press, p. 27.
[37] See Ballester Pastor, M. A. (2019), "De los permisos parentales a la conciliación: Expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español", *Derecho de las Relaciones Laborales. Monográfico,* n.º 11, pp. 1129 and ff.
[38] Rodríguez-Piñero Royo, M. (2019), "La Directiva 2019/1152, relativa a las condiciones laborales transparentes y previsibles en la Unión Europea", *Derecho de las Relaciones Laborales, Monográfico,* n.º 11, pp. 1105-1106.

Table 1. Protection from dismissal and burden of proof

Article 12 (Directive 2019/1158)	Article 18 (Directive 2019/1152)
Protection from dismissal and burden of proof 1. Member States shall take the necessary measures to prohibit the dismissal and all preparations for the dismissal of workers, on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements referred to in Article 9. 2. Workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements as referred to in Article 9, may request the employer to provide duly substantiated reasons for their dismissal. With respect to the dismissal of a worker who has applied for, or has taken, leave provided for in Article 4, 5 or 6, the employer shall provide reasons for the dismissal in writing. 3. Member States shall take the measures necessary to ensure that where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it shall be for the employer to prove that the dismissal was based on other grounds. 4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers. 5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or competent body to investigate the facts of the case. 6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member States.	Protection from dismissal and burden of proof 1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive. 2. Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those grounds in writing. 3. Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the employer to prove that the dismissal was based on grounds other than those referred to in paragraph 1. 4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers. 5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case. 6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State.

Source: Author's Own Elaboration, 2024.

Firstly, protection is envisaged which refers not only to dismissal, but also to "its equivalent" and to the "preparatory act", "which should include terminations of contract on other grounds (temporary contracts, probationary period)"[39]. As advanced in recital 43, an "equivalent act" could consist of a worker no longer being assigned work on demand.

Secondly, as on other occasions, the European legislator continues to relay on "causal" dismissal, stating that the employer must provide information on "duly substantiated grounds". Thus, Continental European countries, in particular Germany, Italy and the Netherlands, following the "Rhineland Model", traditionally stand for high standards of dismissal protection. This contrasts with the "Anglo-Saxon Model", which is characterised by a weaker protection against dismissal and allows employers to terminate employment contracts more or less at will[40].

Sometimes, national legislation emphasises this commitment even when European legislation does not explicitly mention it. This fact is highlighted in the judgment of 22 June 2022[41]. The CJ ruled on the question of whether the GDPR allows for the applicability of the German provisions governing the termination of a data protection officer's (DPO) employment and decided that the provisions, under which a DPO's employment may only be terminated for just cause, even if the termination is not related to the performance of his or her duties, in principle do not conflict with EU law.

Furthermore, Article 10(2) of Directive 92/85 refers to the need for "justified reasons" provided in writing. In the *Porras Guisado* case[42], unlike

[39] Rodríguez-Piñero Royo, Loc. cit., p. 1106.

[40] See Bij de Vaate, V. (2016), "Achieving flexibility and legal certainty through procedural dismissal law reforms: The German, Italian and Dutch solutions", *European Labour Law Journal*, vol. 8(1), pp. 7-8.

[41] Judgment of 22 June 2022, in Case C-534/20. The CJ ruled on the question of whether the second sentence of Article 38(3) of Regulation (EU) 2016/679 (GDPR) allows for the applicability of the German provisions governing the termination of a data protection officer's (DPO) employment pursuant to Paragraph 38 (2) and Paragraph 6 (4) sentence 2 Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG). According to the CJ, the German provisions, under which a DPO's employment may only be terminated for just cause, even if the termination is not related to the performance of his or her duties, in principle do not conflict with EU law. See a more dilated analysis by Niemann, F., Albermann, T. (2022), "ECJ ruling: German provisions governing the termination of a data protection officer's employment are compatible with EU law, but subject to restrictions", available at: https://www.twobirds.com/en/insights/2022/germany/deutscher-kuendigungsschutz-fuer-datenschutzbeauftragte-ist-grundsaetzlich-mit-eu-recht-vereinbar [Accessed 20 July 2022].

[42] Judgment of 20 February 2018, *Porras Guisado* Case C-103/16.

its very abundant judicial practice on the protection of pregnant women, the CJ has not interpreted Directive 92/85 together with Directive 2006/54. Rather, it looked at the criteria applied by the company (Bankia) to carry out the collective redundancy. It was the result of the assessment process carried out in the entity, which was specified during the consultation, and in which the assessment of the worker in question, who was among those with the lowest scores, was incorporated as part of the agreement[43].

Thirdly, the burden of proof is distributed and not reversed, as would have been desirable[44], indicating that the employee has to provide facts that allow the assumption of unjustified dismissal or an equivalent act and, consequently, the employer is obliged to record the causes that are different from the exercise of the rights protected by the Directive. In this respect, the Member States are allowed to establish a more favourable evidentiary regime for the employee, for example by admitting prima facie evidence (indications). Thus, if the investigation of the facts is the responsibility of the courts or other competent bodies, the provision on the burden of proof does not apply. Moreover, criminal proceedings are excluded from the evidentiary scope.

A hopeful message in this respect is also conveyed by Article 23 "Protection from dismissal or termination of contract" of the Proposal for a Directive on improving working conditions in platform work, which consolidates the purpose of moving towards a horizontal arrangement of protection[45].

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[43] Paragraph 21.

[44] Miranda Boto, J. M. (2019), "Algo de ruido. ¿Cuántas nueces? La nueva directiva (UE) 2019/1152, relativa a relativa a unas condiciones laborales transparentes y previsibles en la Unión Europea y su impacto en el derecho español", *Temas Laborales,* n.º 149, p. 99.

[45] Proposal for a Directive of the European Parliament nad of the Council on improving working conditions in platform work, submitted by the Commission on 9 December 2021 [COM(2021) 762 final]. According to the text as contained in the European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work [COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)]. Its Article 23 "Protection from dismissal" reads:

"1. Member States shall take the necessary measures to prohibit the dismissal, termination of contract or their equivalent and all preparations for dismissal, termination of contract or their equivalent of persons performing platform work, on the grounds that they have exercised the rights provided for in this Directive.

2. Persons performing platform work who consider that they have been dismissed, their contract has been terminated or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the digital labour platform to provide duly substantiated grounds for the

The proposal for a Directive on the right to disconnect[46], which provides for protection against dismissal and other unfavourable measures by employers on the grounds that workers have exercised or attempted to exercise their rights (Article 5), points in the same direction. In line with Directives 2019/1152 and 2019/1158, it calls on States to safeguard the interests of workers in the sense that "where ... they consider that they have been dismissed ... because they have exercised or attempted to exercise their right to disconnect, they establish, before a court or other competent authority, facts from which it may be presumed that they have been dismissed or have suffered unfavourable treatment, it shall be for the employer to prove that the dismissal or unfavourable treatment was based on other grounds".

In analogous way, the impact of artificial intelligence (AI) may be of interest. In this regard, the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules in the field of artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts warns about the "high risk of AI systems" for

dismissal, termination of contract or any equivalent measures. The digital labour platform shall provide those grounds in writing without undue delay.

3. Member States shall take the necessary measures to ensure that, when persons performing platform work referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal, termination of contract or equivalent measures, it shall be for the digital labour platform to prove that the dismissal, termination of contract or equivalent measures were based on grounds other than those referred to in paragraph 4. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case.

5. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State".

[46] Cited by European Parliament Resolution of 21 January 2021 calling on the Commission to prepare a directive "that enables those who work digitally to disconnect outside their working hours". [2019/2181(INL)], available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_ES.html#title1 [Accessed 15 May 2024]. See, inter alia, a critical analysis on the resolution by Rojo Torrecilla, E. (2021), "Sobre el derecho a la desconexión digital en el trabajo … y sobre los intentos de devaluar la importancia del diálogo social europeo y su trascendencia jurídica. A propósito de la Resolución del Parlamento Europeo de 21 de enero de 2021 (y unas notas sobre las conclusiones del abogado general del TJUE en el asunto C-928/19)", of 1 February 2021, available at: http://www.eduardorojotorrecilla.es/2021/02/sobre-el-derecho-la-desconexion-digital.html [Accessed 22 July 2022].

recruitment and selection of staff and for making decisions on promotion and termination of contracts[47].

3.4 Common values

One of the most important effects of the Lisbon reform is to make the CFR legally binding. The Charter refers to protection in the event of unjustified dismissal (Article 30) and in the context of reconciliation of family and professional life [Article 33(2)], which, in a way, reflects the dual configuration of protection against dismissal in the EU. In Bercusson's words, European labour law embodied in the Charter potentially acquires a constitutional character[48], and the CJEU's legitimate and challenging function will be to interpret and clarify the vague notions of the Charter, thereby acting as a true Constitutional Court[49].
In this sense, we can observe a certain similarity in the intention to make visible the common values of the Union in the Charter and the most recent initiative, the EPSR. The latter was also solemnly proclaimed, as was the CDF in 2000. Among its twenty principles, the European Pillar incorporates Principle 7 "Information on working conditions and protection in the event of dismissal". However, unlike in the case of the Charter, protection in the event of dismissal is not an independent principle, but a shared one under the same umbrella as the right to information of workers. It thus points to the future development, concerning transparent and predictable working conditions, brought about by Directive 2019/1152.

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[47] "AI systems used in employment, workers management and access to self-employment, in particular for the recruitment and selection of persons, for making decisions *affecting terms of the work related relationship* promotion and termination *of work-related contractual relationships for allocating tasks on the basis of individual behaviour, personal traits or characteristics and for* monitoring or evaluation of persons in work-related contractual relationships, should also be classified as high-risk, since those systems may have an appreciable impact on future career prospects, livelihoods of those persons *and workers' rights*". Cited by the Position of the European Parliament adopted at first reading on 13 March 2024 with a view to the adoption of Regulation (EU) 2024/… of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Paragraph 57.
[48] Bercusson, B. (2012), *European Labour Law*, 2nd Edition, Cambridge University Press, Cambridge, p. 11.
[49] Weiss, "Introduction to European Labour Law …", p. 17.

It is worth recalling Hepple's visionary message in relation to Article 30 CFR, which, in the context of the financial and economic crisis, conveyed hope for future Commission proposals on the subject. "In the longer term, it has the potential to contribute to a change in the culture of European labour law, from a defence against market fundamentalism into a pillar of social and labour rights"[50].

4. Final Considerations

In line with the ideas put forward at the beginning of this study, the centripetal forces, which ensure the construction of a European model of protection against unjustified dismissal, need to be privileged.
Centrifugal forces undoubtedly hinder this objective, although, as Figure 1 shows, these forces are more "apparent" or, if you like, more formal than real. Among the factors preventing the development of a common approach are: the opposition between economic and social interests, which often tips the balance in favour of the former; the difficulties involved in the distribution of competences between the EU and its Member States in the area of shared competences; the requirement for unanimity of decision in the area of workers' protection in the case of the recession of the employment contract; the differences in the configuration and typology of dismissal in the national legislation.
It is clear that protection against dismissal depends on the concept of dismissal in each legal system, as the European Commission demonstrates in its study. It is worth noting that the definition of dismissal can have different connotations even within one legal system. For example, in Spain, dismissal is approached from the perspective of the exercise of the employer's power[51], but admits the range of precisions from the act of private self-tutelage (*el acto de la autotutela privada)*, according to Gil Gil[52], to

[50] Hepple, B. (2012), "Dismissal Law in Context", *European Labour Law Journal*, vol. 3(3), p. 154.
[51] Desdentado Bonete, A. (2017), " Resolución del contrato de trabajo y concurso. Un recorrido por la jurisprudencia", *Revista Española de Derecho del Trabajo,* n.º 196, pp. 55-82.
[52] Gil y Gil, J. L. (1994), *Autotutela privada y poder disciplinario en la empresa*, Centro de Publicaciones del Ministerio de Justicia, Madrid, pp. 33 and ff., and Gil y Gil, J. L. (2011), "El concepto de despido disciplinario", Capítulo VII. En: Sempere Navarro, A. V. (dir.) y Martín Jiménez, R. (coord.), *El contrato de trabajo*, vol. IV, Aranzadi, Cizur Menor, pp. 278 and ff.

the violence of private power (*la violencia del poder privado*) noted by Baylos and Pérez Rey[53].

In any case, at international (ILO) and European (Council of Europe, EU) level, the doctrine generally assumes that dismissal is a termination of employment at the initiative of the employer. Moreover, the design of protection is based on the premise that such a decision must be justified. It thus adopts the predominant European model of dismissal based on cause, in contrast to the US model of termination of employment at will. In this sense, Article 30 CFR ensures, dare we say, in general, protection against unjustified dismissal[54].

The directives, in particular Article 18 of the Directive 2019/1152 and Article 12 of the Directive 2019/1158 (See Table 1), transpose the horizontal provisions on the prohibition of dismissal on grounds related to the exercise of rights into their relevant spheres. Thus, employees "may request the employer to duly substantiate the grounds for dismissal". Thus, the requirement to state the reasons for dismissal applies both in the area of "objective" dismissal (e.g., in the case of collective dismissal, indicating the selection criteria) and in the area of "discriminatory" dismissal (e.g., dismissal of the pregnant woman, to show that it is not related to the fact of pregnancy).

Moreover, and this is particularly true in individual cases, the aim is to protect not only against unjustified dismissal, but also against any preparation for dismissal. Such preparatory acts can manifest themselves in different ways, for example, in the non-assignment of work to an employee on demand.

The directives also refer to the burden of proof, stating that, if the employee establishes the facts relating to the dismissal due to the exercise of his or her rights, the employer must prove the duly justified reasons. In this sense, the burden of proof can vary, from the more moderate approach of distribution, to the more extreme one of inversion, as is the case in some national systems, in order to protect against "discriminatory" dismissal. This is even more so as the directives do not preclude the evidentiary regime more favourable to the employee.

Undoubtedly, all of the above presupposes the existence of an effective remedy for unjustified dismissal, which, if it has been found as such by the

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[53] Baylos, A., Pérez Rey, J. (2009), *El despido o la violencia del poder privado,* Editorial Trotta, Madrid.

[54] Article 30 has potentially a much broader scope then that which is attributed to it in the Explanatory report drafted by the Praesidium of the European Convention. See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 945.

competent administrative or jurisdictional body, implies reparation measures. In this respect, Principle 7 of the EPSR adds the requirement of a reasonable period of notice, the right to access to effective and impartial dispute resolution and, in the event of unjustified dismissal, the right to redress, including compensation.

In order to make further progress in shaping a common model of protection against unjustified dismissal, first and foremost, the European legislator has to continue to transpose horizontal provisions in this respect into employment or employment-related legislation. Such a dynamic stems from Article 9 TFEU and Principle 7 of the EPSR and has had its precedents in Directives 2019/1152 and 2019/1158. In addition, the yet undiscovered potential of Article 30 CFR needs to be explored.

Similarly, the social dimension of the EU needs to be strengthened, in particular by overcoming the contradictions surrounding the adjective "social"[55] and unanimity voting in the area of dismissal. At least in the sense of the horizontal clause of Article 9 TFEU, the social dimension of the Union puts under the same roof the fight against social exclusion, which involves shared competences and the ordinary legislative procedure with decision-making by qualified majority; social protection subject to the special legislative procedure with unanimous decision-making and training which falls within the scope of complementary competences [Article 6(e) TFEU].

Finally, the shaping of the common model of protection against unjustified dismissal in the EU contributes to greater coherence of European and international labour law, with the notable precedents of ILO Convention No. 158 and Article 24 of the ESC (Revised).

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[55] See Jimena Quesada, *op. cit.,* p. 49.

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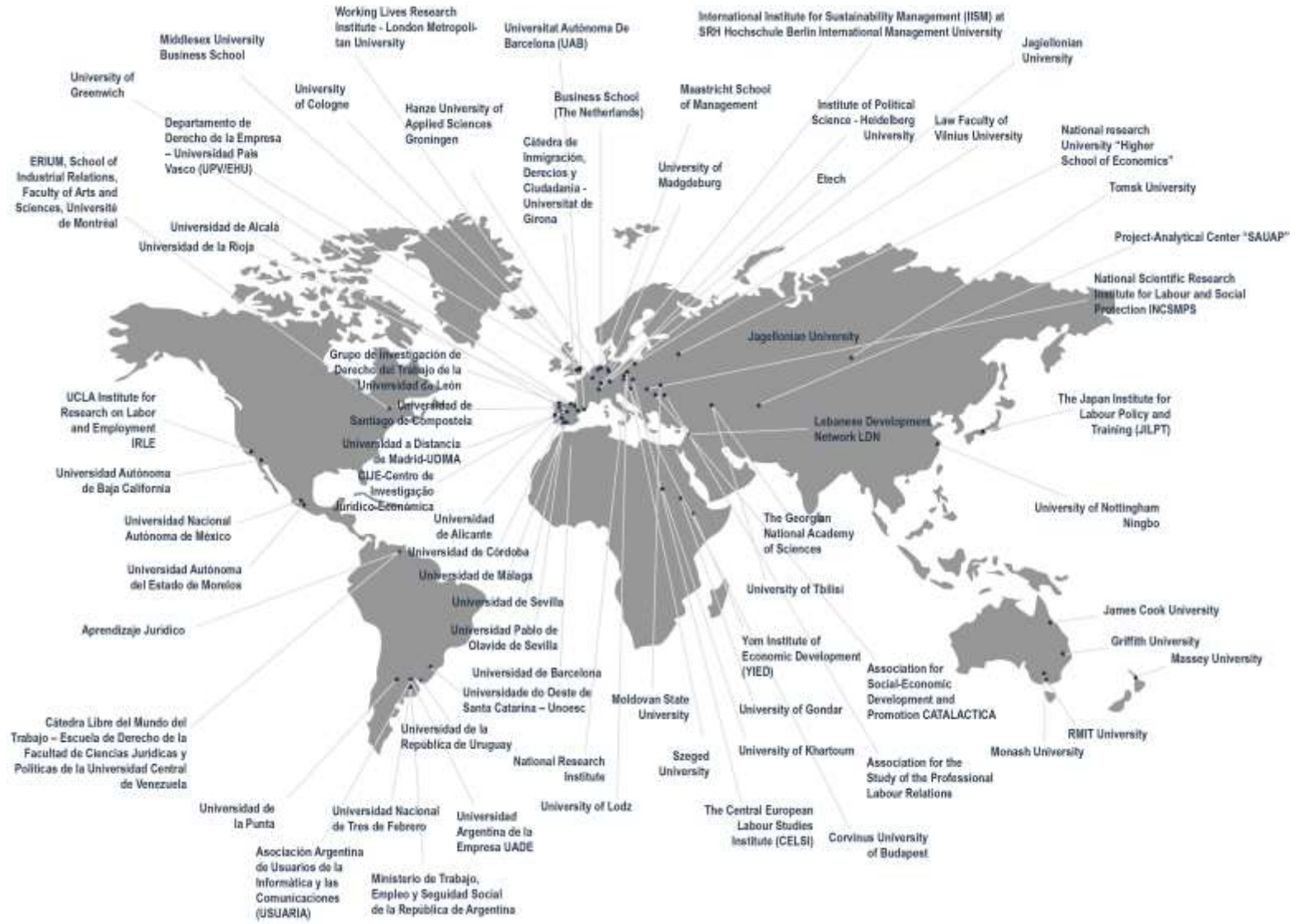

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