Academic contribution

Achieving flexibility and legal certainty through procedural dismissal law reforms: The German, Italian and Dutch solutions

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Abstract
This paper deals with the changes that were introduced in dismissal law in Germany, Italy and the Netherlands. The reforms in these countries all aimed at greater flexibility by reducing dismissal cost, making dismissal more predictable and shortening dismissal cases. In order to do so, the countries not only focused on changing the substantive dismissal rules, but also changed procedural rules. Moreover, Germany, Italy and the Netherlands shared the same objectives: the encouragement of early settlements between employer and employee and the introduction of a preliminary assessment procedure. This contribution compares and analyses these instruments in the countries of interest. It attempts to determine what adjustments are needed in the law to make the instruments successful and what drawbacks should be taken into account.

Keywords
Dismissal law, Germany, Italy, the Netherlands, flexibility, early settlements, preliminary assessment procedure

Introduction
In the recent decades European countries have moved towards deregulation, greater flexibility and efficiency in dismissal law. In 2006 the European Commission stated that in order to achieve greater flexibility, dismissal law reforms should address bureaucracy and length of procedure.

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while also improving the transparency of outcomes and making the process more reliable. These goals can be seen in various reforms of dismissal law that multiple European countries have undertaken in the past few years. What is remarkable is that several of these reforms focused on procedural rules rather than changing the substantive dismissal protection in order to achieve more flexibility in the dismissal system. Germany, Italy and the Netherlands all shared the same objective: the encouragement of early settlements between employer and employee to avoid lengthy dismissal cases. With an early settlement, time and money are saved, and legal certainty about the termination of the employment contract can be reached more quickly for both employer and employee. That raises the question of what makes a judicial system encouraging early settlements successful. What adjustment(s) to the law were introduced in these countries to prompt parties to reach an early settlement without judicial procedures? Are there some best practices to be drawn from the experiences in Germany, Italy and the Netherlands? Apart from the encouragement of early settlements, the countries studied also share the common experience of introducing or retaining a preliminary assessment procedure due to the reforms undertaken. This seems like a paradox. Does this not result in increased bureaucracy rather than flexibility?

This article compares and analyses these procedural features in Germany, Italy and the Netherlands. In what way can preliminary assessment procedures contribute to greater flexibility, and what adjustments to the law have been made in these countries to encourage early dismissal settlements between employer and employee? Are these adjustments smart enough or are there some drawbacks? What lessons can be learned from the experiences in Germany, Italy and the Netherlands? In this paper, ‘flexibility’ is understood as external numerical flexibility: the flexibility of hiring and firing in order to enable companies to deal with changing market situations and to control dismissal costs in favour of enhancing international competitiveness. The focus of this contribution is on procedural statutory changes relating to the standard termination of open-ended employment contracts by the employer. An assessment is made at the system level of whether the legislation is able to contribute to quick and effective dispute resolution in dismissal cases. Where possible, focus is placed on the actual impacts of the legislation, as far as known. The procedure of collective dismissal is not addressed.

In order to answer the above questions, section 2 details the framework for the dismissal law reforms in Germany, Italy and the Netherlands, while also taking account of the European rules on dismissal law, as all the countries discussed are Member States of the EU. Sections 3, 4 and 5 discuss the reforms in these individual countries, while sections 6 and 7 provide a comparative analysis together with some concluding remarks.

(European) framework

Dismissal law protects the employee against unfair unilateral termination by the employer. It typically includes formal requirements, such as the obligation to supply the employee with a
written declaration of notice and to state reasons for the termination, as well as substantive rules, such as protection against unjustified dismissal, which covers the standard of review used to determine whether a dismissal is justified and the consequences of an unjustified dismissal. Dismissal law takes effect through legal procedures that may provide special procedural rules for achieving substantive dismissal protection. These procedural rules are the topic of this article. With regard to the procedural rules, a distinction can be made between preliminary steps, which have to be followed by employers before they can dismiss an employee (control *ex ante*), and dismissal cases, which govern the dismissal afterwards (control *ex post*). Just like substantive rules, procedural rules can help protect against arbitrary dismissal. From the early twentieth century until the 1970s, dismissal protection in favour of the employee expanded throughout Europe. Protecting the employee against arbitrary dismissal obviously limits the employer’s freedom of enterprise. As stated already, in more recent decades there have been moves towards deregulation and greater flexibility and efficiency for the employer.

Dismissal protection is barely covered in EU law. Article 30 of the EU Charter of Fundamental Rights states that ‘Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices’. This provision makes it clear that dismissal protection is a value recognised by Union law. However, it does not bind the Member States unconditionally. According to Article 51, the Charter solely binds Member States ‘implementing Union law’. Article 153 (1)(d) Treaty on the Functioning of the European Union (TFEU) authorises the European Parliament and the Council to adopt minimum requirements as regards the protection of workers whose employment contract is terminated. However, this legal basis has not yet resulted in general European legislation on dismissal. This is probably because it is not very likely that all the Member States will agree on legislation in this area. Although there is some legislation regarding dismissal in specific situations, rules are provided for exceptional circumstances rather than standard protection against arbitrary dismissal.

As there is no general European dismissal law, Member States are free to decide on this for themselves. Continental European countries following the ‘Rhineland Model’, such as Germany, Italy and the Netherlands, traditionally have high standards of dismissal protection. This contrasts with the ‘Anglo-Saxon Model’, which is characterised by little protection against dismissal and allows employers to terminate employment contracts more or less at will (as, for example, in

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4. Robert Rebhahn, *Economic dismissals – a comparative look with a focus on significant changes since 2006*, 3 Eur. Lab. L. J., 234 (2012).
5. Hepple, *supra* note 4 at 208; Hendrickx, *supra* note 4 at 90.
6. Hepple, *supra* note 4 at 208-211; Hendrickx, *supra* note 4 at 90.
7. See Guus Heerma van Voss & Beryl ter Haar, *Common ground in European dismissal law*, 3 Eur. Lab. L. J., 215 (2012); Hendrickx, *supra* note 4 at 91.
8. Hendrickx, *supra* note 4 at 96.
9. Guus Heerma van Voss & Beryl ter Haar, *supra* note 8 at 215.
10. The Directives with respect to collective dismissals (Directive 98/59/EC of 20 July 1998, Official Journal of the European Union L 225), transfer of undertakings (Directive 2001/23/EC of 12 March 2001, Official Journal of the European Union L 082), insolvency of the employer (Directive 2008/94/EC of 22 October 2008, Official Journal of the European Union L 283), and equal treatment (Directive 2000/78/EC of 27 November 2000, Official Journal of the European Union L 303).
11. Guy Davidov, *In defence of (efficiently administered) ‘Just Cause’ dismissal laws*, 1 The International Journal of Comparative Labour Law and Industrial Relations, 118 (2007).
the United Kingdom and the United States). The prototype of strict employment protection in the Rhineland Model covers dismissal protection for just cause, with the protection achieved by means of an appropriate dismissal trial at three instances. At every instance the employee has a right of reinstatement if the court finds there to be a lack of just cause for the dismissal. The employee is then entitled to payment of wages from the date of the unjust dismissal. However, this strong dismissal protection in the Rhineland Model, achieved by a carefully constructed – and therefore lengthy – procedure, has come under attack. Resolving the question of whether an employment contract has actually been terminated can involve years of uncertainty, while the lengthy procedures mean wage claims can run high if the employee ultimately has to be reinstated. European policymakers increasingly regard this as a problematic issue, especially for small and medium-sized employers.

There is barely no dismissal legislation at EU level, but there is some European policy relating to dismissal law. Since the mid-2000s a key target of European employment policies has been the implementation of what the EU refers to as the concept of flexicurity, by which it means a combination of flexibility and security. Flexicurity is described as a policy strategy designed simultaneously to enhance the flexibility of labour markets, work organisations and labour relations on the one hand, and to maintain employment security and social security on the other. Member States can operationalise the desired flexicurity along a series of different pathways, depending on their starting positions. The first pathway addresses dismissal laws. This pathway, dubbed ‘Tackling contractual segmentation’, aims to reform dismissal law in order to achieve greater flexibility. According to the European Commission, dismissal law reforms should ‘address bureaucracy, length of procedure, improve the transparency of outcomes and make the process more reliable’. Based on analytical evidence of the OECD, the European Commission expects this to boost employment growth, given that firms – especially small enterprises – currently take account of the likelihood of incurring high dismissal costs when deciding whether to recruit new staff. In the next sections, the term ‘flexibility’ is used in the same sense as by the European Commission. It refers to less expensive dismissal costs, simpler and shorter dismissal cases and more predictable outcomes.

It is important to note that the flexicurity strategy linked to dismissal protection is only policy and has not yet resulted in any European dismissal legislation or legal proposals on dismissal protection.

12. Davidov, supra note 12 at 117.
13. See Davidov, supra note 12 at 119.
14. See Commission of the European Communities, Green Paper, Modernising labour law to meet the challenges of the 21st century, COM (2006) 708 final [‘Green Paper: Modernising Labour Law’]; Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, supra note 2. See Rebhahn, supra note 5 at 246; Hendrickx, supra note 4 at 102.
15. Towards Common Principles of Flexicurity, supra note 2 at 4. See also European Expert Group on Flexicurity, Flexicurity Pathways Turning hurdles into stepping stones, Brussels 2007, 11.
16. Towards Common Principles of Flexicurity, supra note 2 at 10. See also European Expert Group on Flexicurity, supra note 16 at 17.
17. Towards Common Principles of Flexicurity, supra note 2 at 13. See also Jobs, jobs, jobs: creating more employment in Europe. Report of the employment taskforce, 9 (Nov. 2003).
18. Towards Common Principles of Flexicurity, supra note 2 at 13. See also European Expert Group on Flexicurity, supra note 16 at 24.
19. OECD (2007) Employment Outlook, 69-72.
20. Towards Common Principles of Flexicurity, supra note 2 at 6.
21. See Mia Rönmar, Flexicurity, labour law and the notion of equal treatment, in Labour law, fundamental rights and social Europe, 164 (Rönmar (ed.), Hart Publishing 2011).
Nevertheless, it may have served as an incentive for the reforms of procedural dismissal law in several ‘Rhineland Model’ EU states, with those in Germany, Italy and the Netherlands being discussed below. Furthermore, it should be noted that this contribution only focusses on the objective of flexibility by reforms of dismissal law of the flexicurity strategy. The other objectives of flexicurity, employment security and social security for employees, are not addressed.

**Germany**

Of the three reforms to be discussed, the German reform dates back the furthest, to 2004, while also being the least radical. I first briefly discusses the German substantive dismissal law and the implementation proceedings that were not changed by the reform, and then address the reform itself.

*Termination by the employer*

German employers may unilaterally terminate an employment contract by giving written notice (*Kündigung*). Under Section 1 of the Protection against Dismissal Act (*Kündigungsschutzgesetz*, or KSchG), the termination is effective only if it is socially justified. The cases of social justification are exhaustively listed in paragraph 2 of this first section of the Act. Dismissals are regarded as socially justified only if they relate to: (i) the person of the employee, (ii) the employee’s behaviour, or (iii) economic reasons. Moreover, the employer has to prove that it is impossible to continue the employment, while the termination also has to comply with the principle of proportionality. That means that a balance of interests has to be drawn up in every dismissal case. Nevertheless, these strict requirements do not apply to small establishments, as under Section 23 KSchG, employees enjoy this dismissal protection only in establishments with more than ten employees.

*Preliminary procedural steps*

Before effectuating any dismissal, German employers are required under Section 102 of the Works Constitution Act (*Betriebsverfassungsgesetz*, or BetrVG) to consult the Works Council (if existing). Any notice of dismissal given without consulting, or not properly consulting, the Works Council, is void. The Works Council has one week to agree, to state any reservations or to object to the dismissal. However, none of these responses by the Works Council prevents the employer from dismissing the employee. The only response that may have any legal consequences is a declaration of objection, which is possible on five exclusive – mainly economic – grounds.

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22. Art. 623 *Bürgerliches Gesetzbuch* (BGB).
23. Klemens Dörner & Reinhard Vossen, *Kommentar zum KSchG*, in *Großkommentar zum gesamten Recht der Beendigung von Arbeitsverhältnissen*, § 1 KSchG marginal numbers 61, 65 and 74 (Reiner Ascheid, Ulrich Preis, Irene Schmidt (eds.), Beck 2012); Manfred Weiss, Marlene Schmidt, *Labour law and industrial relations in Germany*, 126-129 (Kluwer Law International 2008).
24. A different threshold applies to employees whose employment contracts date back to before 31 December 2003. These employees are protected by the KSchG if the establishment they are employed by has more than five employees (Art. 23 para. 1 KSchG).
25. Art. 102 para. 1 BetrVG.
26. *Id.* Art. 102 para. 2.
specified in Section 102, paragraph 3 BetrVG. If the Works Council objects to the dismissal and the employee takes a case against the dismissal (see below), the employer is obliged to continue the employee’s employment, at the employee’s request, until the end of the legal action, even after the period of notice has expired.27

**Dismissal proceedings and remedies**

Under the KSchG, the employee may bring a case before the Labour Court of First Instance (Arbeitsgericht) within three weeks after receiving the written notice of termination.28 If the dismissal is found to be socially unjustified and, therefore, void, the court will declare the employment relationship not to have been dissolved by the termination notice. The employer then has to reinstate the employee and retroactively pay the wages due.29 The KSchG aims to protect the employment contract, not merely the entitlement to a compensatory payment.30 However, Section 9 KSchG states that, in the event of an unlawful (i.e. socially unjustified) dismissal, the Labour Court may dissolve the employment contract at the request of one of the parties and instruct the employer to pay the employee fair compensation.31 Nevertheless, in light of the KSchG’s objective, the courts strictly interpret the requirements for dissolution of a contract requested by the employer.32 Under settled case law, there have to be clear reasons, related to the employee or his behaviour, why further fruitful cooperation between the employer and employee cannot be expected.33

In 2014 there were 206,486 dismissal cases launched at the Labour Court of First Instance. In the cases ended with a verdict (as will be seen further on is the case in only 5% of the claims, because most cases are settled), the decision was made within an average time of seven months.34 The judgment of the Labour Court may be appealed at the Regional Labour Court (Landesarbeitsgericht).35 Once appeals are lodged – (in 2014 in approximately 55% of the judgments of the Labour Court),36 the process becomes lengthier. Statistics show it takes an average time of

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27. Art. 102 para. 5 BetrVG.
28. Art. 4 KSchG.
29. Id. Art. 1 para. 1 and Art. 615 Civil Code. See also Dörner & Vossen, supra note 24 at § 1 KSchG marginal number 117.
30. Dörner & Vossen, supra note 24 at § 1 KSchG marginal number 1.
31. The fair compensation is generally fixed at a maximum of 12 months’ wages (Section 10 KSchG).
32. See Federal Labour Court, 23 October 2010, Neue Zeitschrift für Arbeitsrecht, 1123 (2010); Federal Labour Court, 10 July 2008, Neue Zeitschrift für Arbeitsrecht, 316 (2009). See Heinz J. Willemsen, Kündigungsschutz – vom ritual zur Rationalität – Gedanken zu einer grundlegenden Reform, Neue Juristische Wochenschrift, 2782 (2000).
33. See Federal Labour Court, 10 June 2010, Neue Juristische Wochenschrift, 3797 (2010); Federal Labour Court, 9 September 2010, Neue Juristische Wochenschrift, 3799 (2010); Federal Labour Court, 24 March 2011, Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report, 245 (2012). See Josef Biebl, Kommentar zum KSchG, in Großkommentar zum gesamten Recht der Beendigung von Arbeitsverhältnissen, § 9 KSchG marginal number 51 (Reiner Ascheid, Ulrich Preis, Irene Schmidt eds., Beck 2012); Dietrich Boewer, Beendung des Arbeitsverhältnisses, in Münchener AnwaltsHandbuch Arbeitsrecht, § 48 marginal number 340 (Wilhelm Moll eds., Beck 2012).
34. Statistisches Bundesamt [Federal Office of Statistics], special series 10, series 2, 8, 48 (2014), (available on https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflge/GerichtePersonal/Arbeitsgerichte2100280147004.pdf?__blob=publicationFile.
35. Section 64 para. 2c Arbeitsgerichtsgesetz. Manfred Weiss, Dispute resolution in German employment and labour law, 34 Comp. Lab. L. & Pol’y J., 802 (2013).
36. Statistisches Bundesamt, supra note 35 at 66.
16 months from the beginning of the appeal to deliver the judgment.\(^37\) An appeal on issues of law against the Regional Labour Court’s ruling can subsequently be lodged at the Federal Labour Court (\textit{Bundesarbeitsgericht}).\(^38\) Most of these cases are decided within one to two years.\(^39\)

Reform of 2004 – encouragement of early settlements with a fixed fee

According to German academic literature, the country’s dismissal system was unable to meet the demands for rapid legal certainty on the termination of employment contracts. This was seen as especially problematic for employers, who had to take account of the possibility of an employee taking legal action against the dismissal, and the fact that this could involve hearings before three courts, and result in a court declaring the dismissal as void. This exposed the employer to the substantial risk of a lengthy dismissal case that could end with the employer having to reinstate the employee and pay wages for two, three, or even five years.\(^40\) This made dismissal cases very stressful and, at worst, even a threat to the survival of the company, especially for smaller and medium-sized enterprises. Several authors referred to the ‘spectre’ (\textit{Schreckgespenst}) of a KSchG dismissal case,\(^41\) while German legal literature also considered it problematic that the dismissal system did not provide any opportunity to obtain quick legal certainty on the unilateral termination of an employment contract.\(^42\)

In practice, German employers tried to reach agreement to terminate an employment contract or to settle dismissal proceedings by awarding the employee a compensatory payment in order to avoid lengthy and uncertain dismissal proceedings and the substantial financial risks that these could entail.\(^43\) Employees meanwhile did not just agree, but used the KSchG dismissal case mainly as a way to maximise their compensatory payment.\(^44\) The higher the risk of a dismissal being declared void, the more employers are willing to reach a settlement. In addition, reaching a settlement during dismissal proceedings (judicial settlement) did, and does not, affect the employer’s unemployment benefits. He remained, and remains, entitled to his rights, however concluding a termination agreement outside a dismissal case (extrajudicial settlement) may have negative consequences for an employee’s unemployment benefits.\(^45\) The employee may only accept an

\(^37\) Statistisches Bundesamt, \textit{supra} note 35 at 90.
\(^38\) Art. 64 para. 1 Arbeitsgerichtsgesetz. \textit{See} also Wienhold Schulte, \textit{Kündigungsschutzprozess}, 88 (Berliner Wissenschafts-Verlag 2007); Günter Schaub, \textit{Handbuch Arbeitsgerichtsverfahren}, 431 (Beck 2001).
\(^39\) Statistisches Bundesamt, \textit{supra} note 35 at 110.
\(^40\) Willemsen, \textit{supra} note 33 at 2782; Winfried Boecken, Henning Topf, \textit{Kündigungsschutz: zurück zum Bestandsschutz durch Ausschluss des Annahmeverzuges}, Recht der Arbeit, 22 (2004); Manfred Löwisch, \textit{Die kündigungsgerechtlichen Vorschläge der Agenda 2010}, Neue Zeitschrift für Arbeitsrecht, 690 (2003).
\(^41\) Jobst-Hubertus Bauer, \textit{Ein Vorschlag für ein modernes und soziales Kündigungsschutzrecht}, Neue Zeitschrift für Arbeitsrecht, 529 (2002).
\(^42\) Willemsen, \textit{supra} note 33 at 2780, 2783; Wilfried Berkowsky, \textit{Allgemeiner und Besonderer Kündigungsschutz}, in \textit{Münchener Handbuch zum Arbeitsrecht} Vol. 1, § 126 marginal number 4 (Reinhard Richardi et al. eds. Beck 2009).
\(^43\) See Berkowsky, \textit{supra} note 43 at § 129 marginal number 1; Peter-Andreas Brand, \textit{Über den Sinn und Unsinne der Arbeitsgerichtsbarkeit – Ein Beitrag zur Diskussion über die Zusammenfassung von Arbeits- und ordentlicher Gerichtsbarkeit}, Zeitschrift für Rechtspolitik, 81 (2010); Jürgen Bauer, \textit{Abfindungsregelungen zur vermeidung der Kündigungsschutzklage. Eine systematische untersuchung unter besonderer berücksichtigung des § 1a KSchG}, 23-24 (dr. Kovac Verlag 2009); Armin Höland, Ute Kahl, Nadine Zeibig, \textit{Kündigungspraxis und Kündigungsschutz im Arbeitsverhältnis}, 151 (Nomos Verlagsgesellschaft 2007).
\(^44\) Weiss & Schmidt, \textit{supra} note 24 at 132; Willemsen, \textit{supra} note 33 at 2780; Bauer, \textit{supra} note 42 at 529.
\(^45\) Federal Labour Court, 18 December 2003, Neue Zeitschrift für Arbeitsrecht, 663 (2004).
extrajudicial settlement in cases taken on serious grounds, such as if a lawful termination by the employer is otherwise expected.46

In an attempt to address the above criticism of KSchG dismissal cases, the German legislator devised a reform in 2004 that aimed to add greater transparency and legal certainty to the KSchG.47 The threshold for excluding small businesses from the scope of the KSchG increased from more than five to more than ten employees.48 However, the real contribution to greater transparency and legal certainty was expected to result from the introduction of Section 1a KSchG, which states that, in the case of a dismissal for economic reasons, the employer can offer the employee a legally regulated compensatory payment, providing the employee does not bring a case before court to contest the termination of the employment. The payment in such circumstances amounts to half a month’s salary for each year of service.49 To encourage the working of § 1a KSchG the employee remains entitled to unemployment benefits if he accepts the offer of the employer.50

According to the German legislator, Section 1a KSchG established an ‘easy to handle, modern and non-bureaucratic alternative solution’ to the KSchG dismissal case.51 By applying Section 1a KSchG the employer would avoid a lengthy dismissal case and, therefore, the risk of having to reinstate the employee and retroactively having to pay wages.52

However, the flexibility that Section 1a KSchG was expected to create never materialised. The prevailing view in German legal literature is that the regulation barely changed anything.53 In legal practice section 1a KSchG is rarely used. Despite reformation of the law, the bottlenecks in German (procedural) dismissal law could not be addressed.54 Rather than adding anything new to the KSchG, Section 1a KSchG in effect served solely to legalise the existing practice of settlements, while also fixing compensatory payments at half a month’s salary for each year of service.55 Employees still have the option of taking a KSchG dismissal case, and in practice most of them still prefer this. Indeed, it is still usually more beneficial for an employee to refuse the employer’s offer under Section 1a KSchG and to take a KSchG dismissal case in order to negotiate a higher compensatory payment.56 This effect is reinforced by the fact that an employer’s offer of a compensatory payment in line with Section 1a KSchG can be seen as an expression of uncertainty

46. Or if the severance payment does not exceed the limit set in Section 1a KSchG. See below.
47. Labour Market Reform Bill of September 2, 2003, BT-Drucks 15/1509.
48. Art. 23 para. 1 KSchG.
49. Weiss & Schmidt, supra note 24 at 133.
50. Federal Labour Court, 12 July 2006, Neue Zeitschrift für Arbeitsrecht, 1361 (2006).
51. BT-Drucks 15/1204, 9.
52. Id.
53. See Dirk Hesse, Kommentar zum KSchG, in Großkommentar zum gesamten Recht der Beendigung von Arbeitsverhältnissen, § 1a KSchG marginal number 2 (Reinard Ascheid, Ulrich Preis, Irene Schmidt eds. Beck 2012); Wolfgang Hromadka, 25 Jahre Arbeitsrecht, Neue Zeitschrift für Arbeitsrecht, 588 (2012); Andreas Kögel, Der Abfindungsanspruch nach § 1a KSchG, Recht der Arbeit, 367 (2009); Bauer, supra note 42 at 209. However, section 1a KSchG asserts its influence in social security law, while according to the Federal Labour Court concluding a termination agreement outside a dismissal case and outside § 1a KSchG has no negative consequences for the employee’s unemployment benefits if the severance payment does not exceed the limit of § 1a KSchG. See Federal Labour Court, 12 July 2006, Neue Zeitschrift für Arbeitsrecht, 1361 (2006).
54. Id.
55. Bauer, supra note 44 at 204; Kögel, supra note 54 at, 367; Ulf Kortstock, Abfindung nach §1a KSchG und Betriebssübergang, Neue Zeitschrift für Arbeitsrecht, 297 (2007).
56. Kögel, supra note 54 at 367; Frank May, Horst-Manfred Schellhaß, Reform des Kündigungsschutzes: ein Weg zu mehr Beschäftigung?, Orientierungen zur Wirtschafts- und Gesellschaftspolitik, No. 122, 23 (2009).
on the employer’s part regarding the social justification of the termination. As said, in 2014, 206,486 dismissal claims were lodged at the Labour Court of First Instance. Statistics indicate that no fewer than 80% of these claims were settled within one to three months. Only 5% of the cases brought resulted in a judgment by the Labour Court (within an average time of seven months). Once appeals were lodged, half of the cases were settled. Thus, there were a lot of quick settlements, but not without judicial procedures, and not with a fixed fee but higher fees on – as expected – non-substantive grounds.

**Italy**

Italy reformed its procedural dismissal law in summer 2012. This reform, known as *Riforma Fornero*, after the relevant Minister of Labour Affairs, has been in force since 18 July 2012 and included, *inter alia*, some new preliminary procedural steps, a special fast-track dismissal case and reform of the remedies against unfair dismissal. In addition, the more recently approved Jobs Act (Act of 10 December 2014, No. 183; implemented by Law 23/2015) allowed the Italian government to introduce further modifications to the country’s dismissal law, based on legislative guidelines. Before addressing these reforms, I will discuss the Italian termination rules in general and explain which rules changed as a result of the reforms.

**Termination by the employer**

Like in Germany, Italian employers may unilaterally terminate an employment contract by giving notice to the employee. The employer’s legal competences, however, are substantially limited by Article 1 of Act 1966/604. Under this Act, the termination of open-ended employment contracts is permitted only for just cause or justified reasons. The latter are defined as: (i) a serious violation of the worker’s contractual obligations (‘subjective reasons’); or (ii) reasons concerning the productive activity, the organisation of work and its regular functioning (‘objective or economic reasons’). In addition, and unlike in Germany, the Italian employee is entitled to receive a special severance payment (known as *trattamento di fine rapporto*) from the employer, whatever method is used to terminate the employment contract. This payment amounts to one month’s salary for each year of service.

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57. Kögel, supra note 54 at 367; Bauer, supra note 44 at 209; Wolfgang Däubler, *Neues zur betriebsbedingten Kündigung*, Neue Zeitschrift für Arbeitsrecht, 180 (2004).
58. Statistisches Bundesamt, supra note 35 at 26 and 48.
59. Statistisches Bundesamt, supra note 35 at 66.
60. Tiziano Treu, *Labour law and industrial relations in Italy*, 119 (Kluwer Law International 2014).
61. Marco Biasi, *The effect of the global crisis on the labour market: report on Italy*, 3 Comp. Lab. L. & Pol’y J., 374 (2015).
62. Art. 3 Act 604 of 1966. See also Tiziano Treu, *Labour law in Italy*, 116 (Kluwer Law International 2011); Edoardo Ghera, *Diritto del Lavoro*, 198 (Cacucci 2013); Franco Carinci et al., *Diritto del Lavoro. 2. Il Rapporto di Lavoro Subordinato*, 388-390 (Utet Giuridica 2013).
63. Treu, supra note 60 at 126.
64. Art. 2120 para. 1 *Codice Civile*.
**Dismissal proceedings and remedies**

Italian employees who disagree with their dismissal must lodge an objection no later than sixty days after the date of notice. Thereafter the employee can bring a case to the Court of First Instance (Tribunale).\(^65\) Before the reforms, the available remedies against unjustified dismissal were largely based on Article 18 of the Workers Statute (Act 300/1979) and Article 8 of Act 604/1966, the applicability of which depended on the size of the company. The protection granted by Article 18 had limited coverage as it applied only to employees working in departments with more than 15 people or employers who employed more than sixty workers in total, irrespective of the size of the individual departments.\(^66\) The old Article 18 – before the reforms – provided strong protection for employees. In any case of unjustified dismissal, the employer had to reinstate the employee. The employee had the right to return to the job and to demand unpaid salary from the date of dismissal to the date of reinstatement.\(^67\)

Employees not falling within the above-mentioned scope of Article 18 were protected by Article 8 of Act 604/1966; this latter Article does not invalidate the effects of the unfair dismissal, but instead obliges the employer to choose either to re-hire the worker or to pay him compensation of between two and a half and six months of his last earned salary.\(^68\)

The first-instance judgment of the Tribunale could be appealed at the Court of Appeal (Corte di Appello),\(^69\) while the appeal judgment could be challenged before the Supreme Court (Corte di Cassazione).\(^70\) There are no statistics available on the length of dismissal cases, but statistics with respect to labour cases in general show that the duration of a first instance case lasted an average time of 782 days in 2006 (the last data available).\(^71\) The average length of an appeal was 697 days.\(^72\) Nevertheless, it should be noted that courts in northern cities are much faster than courts in the south of the country, varying from 239-443 days in first instance proceedings in Turin, Milan and Trento, to 1274 days in Taranto.\(^73\) From 2009 there have been some incentives by the courts to streamline and speed up the proceedings though protocols, for example the court of Milan.\(^74\) In 2011 the President of the labour section of this court noticed that the average length of the first labour instance procedure had decreased to 185 days.\(^75\) It is unclear how many claims are settled

\(^65\) Treu, *supra* note 63 at 117.

\(^66\) In cases of discriminatory dismissal, Art. 18 applied irrespective of the size of the department. Treu, *supra* note 61 at 122.

\(^67\) Art. 18 (old) Workers Statute. An employee who did not want to be reinstated could alternatively request the employer to pay him 15 months’ of salary in addition to the previously mentioned payment of back salary. See Treu, *supra* note 61 at 122.

\(^68\) Treu, *supra* note 63 at 117.

\(^69\) Art. 433 Codice di procedura civile. See also Gina Gioia, *Labor Process and Labour Alternative Dispute Resolution in the Italian System*, 34 *Comp. Lab. L. & Pol’y J.*, 823, 825 (2013).

\(^70\) Art. 360 Procedural Civil Code. See Gioia, *supra* note 70 at 825.

\(^71\) See Istituto Nazionale di Statistica, Tavola 1 - Procedimenti e durate medie (in giorni) in materia di lavoro, previdenza e assistenza. Primo grado, per Circondario. Anno 2006 (available on http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=p101-0010012000&an=2006&ig=2&ct=100&id=1A|12A).

\(^72\) Istituto Nazionale di Statistica, Tavola 2 - Procedimenti e durate medie (in giorni) in materia di lavoro, previdenza e assistenza. Grado di appello, per Distretto di Corte di Appello. Anno 2006 (available on http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=p102-0010011000&an=2006&ig=2&ct=101&id=1A|12A).

\(^73\) See Istituto Nazionale di Statistica, Tavola 1, *supra* note 72.

\(^74\) Osservatorio sulla giustizia del lavoro tribunale di Milano, Protocollo per I processi del lavoro, (available on http://www.osservatorigiustiziacivilefirenze.it/public/OGCALL_39_0_2.pdf).

\(^75\) Lettera di Pietro Martello (Presidente della Sezione Lavoro del Tribunale di Milano), pubblicata sul Corriere della Sera del 7 marzo 2012 (available on http://www.pietroichino.it/?p=20043).
early. The statistics on labour cases in general show that in 2007 (last data available) 46% of the 166,017 labour cases ended with a verdict.76 At appeal the percentage was around 75%.77

Fornero reform – preliminary assessment and fast-track cases

In 2012, the technocratic government led by Mario Monti announced plans to reform the Italian labour market, prompted by the main European and international financial institutions and in response to the financial crisis. This reform was seen as inevitable if the country was to secure the future of younger generations, particularly in terms of employment and pension entitlement.78 The bill was adopted in late June and became effective on 18 July 2012.79

The Fornero reform introduced some new rules on flexible contracts, as well as a new system of unemployment benefits, and improved employment activation policies. A key element of the reform was the changes it made to the procedures of dismissal law.80

The explanatory memorandum to the Act (relazione illustrativa) provides very little information on the aim of the changes in procedural dismissal law. It merely states, in general terms, that the regime of individual dismissal has to adapt to the needs of the changed economic environment and that dismissal cases should be accelerated.81 Italian academic literature is more specific on the rationale for the reform of the dismissal law. According to various authors, the main purpose of the reform was to create greater and faster legal certainty in the dismissal system, especially with regard to the financial consequences of an unfair dismissal.82 The previous dismissal law had resulted in considerable dissatisfaction in this respect. If a dismissed employee falling within the scope of Article 18 Workers Statute challenged his dismissal in court, there was a very long period of uncertainty about the termination of the employment contract and the considerable (financial) implications of an unfair dismissal. Moreover, the harsh sanctions provided for in Article 18 Workers Statute were aggravated by the slowness of Italian

76. Istituto Nazionale di Statistica, Tavola 4 - Indicatori di efficienza del processo del lavoro, previdenza e assistenza in primo grado presso il tribunale (valori assoluti e quozienti), per Circondario. Anno 2007 (available on http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=p104-0010012000&an=2007&ig=2&ct=104&id=1A|12A).
77. Istituto Nazionale di Statistica, Tavola 5 - Indicatori di efficienza del processo del lavoro, previdenza e assistenza in grado di appello presso la corte di appello (valori assoluti e quozienti), per Distretto di Corte di Appello. Anno 2007 (available on http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=p105-0010011000&an=2007&ig=2&ct=105&id=1A|12A).
78. Michele Tiraboschi, Labour Law And Industrial Relations In Recessionary Times, 39 (Adapt University Press 2012).
79. Act 92 of 28 June 2012, Italian Official Gazette No. 153 of 3 July 2012.
80. Sylvaine Laulom, Dismissal law under challenge: new risks for workers, 3-4 Eur. Lab. L. J., 237 (2014).
81. Relazione illustrativa del disegno di legge 'disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita’, 6 (available on http://www.lavoro.gov.it/Priorita/Documents/Relazioneillustrativa_Def_6aprile2009.pdf).
82. Franco Liso, Le norme in materia di flessibilità in uscita nel disegno di legge Fornero, 1, 3; Carlo Cester, Il progetto di riforma della disciplina dei licenziamenti: prime riflessioni, 6; Mario Meucci, La nuova disciplina dei licenziamenti: una legge malfatta, 4; Roberto Riverso, Alla ricerca del fatto nel licenziamento disciplinare, 11. To consult via http://csdle.lex.unict.it/docs/generic/Il-dibattito-sulla-ricompensa-italiana-del-mercato-dello-lavoro/3206.aspx. See also Luigi De Angelis, Art. 18 dello Statuto dei lavoratori e processo: prime considerazioni, Working Paper Centre for the Study of European Labour Law ‘Massimo D’Antona’ IT, No. 152, 2 (2012); Arturo Maresca, Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche dell’art. 18 Statuto dei lavoratori, Rivista italiana di diritto del lavoro, 419-420 (2012).
dismissal cases, especially in the southern cities.83 Given the possibility of a subsequent appeal, an unfair dismissal could easily cost an employer five years of wages. The dismissal law was seen as having discouraging effect on the labour market, on foreign investors and on the competitive position of Italian employers.84

What changed in the Italian dismissal system with the Fornero reform?85 First of all, the reform introduced a new preliminary conciliation procedure, to be followed in the event of dismissal for justified objective and economic reasons in companies with more than 15 employees in the same department or more than sixty employees in total. The employer must communicate his intention to dismiss to the local Public Employment Service (Direzione Territoriale del lavoro, or DTL), and provide detailed reasons for the dismissal and the potential outplacement measures for the employee concerned. The DTL then summons both parties to a hearing before the local conciliation board. The procedure aims to encourage parties to settle the dispute, without going to court. However, the conciliation process cannot last more than twenty days, starting from the date of the summons. In order to encourage an early settlement, the reform entitles the employee to unemployment benefits if mutual agreement is reached during the conciliation procedure, while normally the employee may lose his unemployment benefits in the event of a termination agreement.86 Although failure to follow the mandatory conciliation procedure does not prevent the employer from dismissing the employee, the former is required in a later dismissal case to pay the latter compensation amounting to between six and twelve months of salary.

Second, changes were made to the remedies available to appeal against unfair dismissal. The new Article 18 of the Workers Statute provided for reinstatement only in the case of: (i) discriminatory or void dismissal; (ii) dismissal for subjective reasons, when the reasons given for the dismissal are non-existent, or because the violation is considered by the collective agreement to be punishable by a lesser sanction; or (iii) dismissal for objective reasons justified on the grounds of the employee’s physical or mental unfitness, or if the facts are manifestly non-existing. In all other cases, the only remedy against unfair dismissal was compensation, ranging from six to 24 months’ salary.87

Third, the Fornero reform established a special fast-track court procedure for Article 18 dismissal cases. The proceedings in first instance were split into two phases. The first phase was initiated by means of a complaint lodged at the Labour Court, followed by a judge’s order to schedule a summary hearing within forty days of the complaint, and ended with a preliminary – but enforceable – court order upholding or rejecting the claim. The second, optional, phase offered both parties the opportunity to oppose the preliminary rulings within thirty days of the initial judgment being notified; this culminated in a final, first-instance verdict.88 As under the old procedure, the parties could appeal the judgment at the Corte di Appello and afterwards at the Corte di Cassazione.

83. MariaTeresa Carinci, Il rapporto di lavoro al tempo della crisi, p. 31 (available on http://www.aidlass.it/convegni/archivio/congresso-2012); Elisa Cencig, Italy’s economy in the euro zone crisis and Monti’s reform agenda, Working Paper FG 1, SWP Berlin September, 42 (2012); De Angelis, supra note 82 at 2; Laulom, supra note 81 at 238.
84. See Tiraboschi, supra note 79 at 54; Biasi, supra note 62 at 371, 375-376; Cester, supra note 83 at 1.
85. See Act 92 of June 2012, Italian Official Gazette No. 153 of 3 July 2012.
86. Circolare Istituto Nazionale Previdenza Sociale (INPS) 20 October 2003, No. 163.
87. Biasi, supra note 62 at 377-378; Ghera, supra note 63 at 476-477.
88. See Laulom, supra note 81 at 238.
Reform of the Jobs Act – new system of encouragement of settlements

Some of the rules on unlawful dismissal introduced by the Fornero reform have since been revised because the reform did not achieve the desired results. In December 2014, the Italian Parliament adopted a new labour law reform proposed by Prime Minister Renzi and known as the ‘Jobs Act’. This Act is yet another measure seeking to make the Italian labour market more flexible by making dismissals less costly and less burdensome for employers, by encouraging employers to hire new employees and by providing more employment opportunities and social benefits for unemployed workers. Legislative Decree No. 23/2015, based on the Jobs Act, introduced some further modifications to Italian dismissal law. In order, however, to avoid unwarranted disruption, the new rules on dismissal set out in the Decree apply only to employees hired after the Decree took effect (7 March 2015). The rules on dismissal introduced by the Fornero reform remain applicable to open-ended employment contracts in force before the above date. As a result, a dual system of dismissal protection is now in force. Another new aspect is that the latest dismissal rules apply in principle regardless of the size of the company, although the compensatory payments have been reduced.

First, the Legislative Decree amended the remedies available for challenging unlawful dismissal. As pointed out by many scholars, the dismissal rules created by the Fornero reform did not solve the problems for employers regarding the uncertain and unpredictable costs of dismissals. Therefore, Legislative Decree 23/2015 further limited the right to reinstatement and made the monetary compensation dependent on the employee’s seniority. Reinstatement applies only to discriminatory, null or groundless disciplinary dismissals - the latter meaning the inexistence of the material fact of which the employee has been charged by the employer, and not a proportionality test by the judge (the above situations (i) and (ii), as created by the Fornero reform). In all other cases (including situation (iii), as created by the Fornero reform), the employee is entitled to compensatory damages of only two months’ wages for each year of service, with a minimum of four, and a maximum of 24, months’ salary.

Second, the Decree introduced the possibility of reaching a quick settlement after the dismissal. Within sixty days of the date of dismissal, the employer can offer the employee compensation – in

89. Mariella Magnani, Correzioni e persistenti aorie del regime sanzionatorio dei licenziamenti: il cd. contratto a tute crescenti, Working Paper Centre for the Study of European Labour Law ‘Massimo D’Antona’ IT, No. 256, 3 (2015).
90. Act 183 of December 10, 2014, Italian Official Gazette No. 290 of December 15, 2014.
91. Franco Scarpelli, La disciplina dei licenziamenti per i nuovi assunti: impianto ed effetti di sistema del d.lgs. n. 23/2015, Working Paper Centre for the Study of European Labour Law ‘Massimo D’Antona’ IT, No. 252, 5 (2015); Alberto Izzo ferrato, The Economic Crisis and Labour Law Reform in Italy, 2 The International Journal of Comparative Labour Law and Industrial Relations, 196 (2015).
92. Legislative Decree 23 of 4 March 2015, Italian Official Gazette No. 54 of 6 March 2015.
93. Art. 1 Legislative Decree 23/2015. Marco Maraza, Il regime sanzionatorio dei licenziamenti nel Jobs Act (un commento provvisorio, dallo schema al decreto), Working Paper Centre for the Study of European Labour Law ‘Massimo D’Antona’ IT, No. 236, 7 (2015).
94. Magnani, supra note 90 at 7-9.
95. Art. 1 Legislative Decree 23/2015.
96. See Meucci, supra note 83 at 3, 7; Cester, supra note 83 at 20; Biasi, supra note 62 at 379-381.
97. Art. 2 and 3 Legislative Decree 23/2015. See Magnani, supra note 91 at 4-5. For smaller firms, there is no requirement for reinstatement in the event of ungrounded disciplinary dismissal. Art. 9 Legislative Decree 23/2015.
98. Id. Art. 3. See Maraza, supra note 94 at 5; Scarpelli, supra note 92 at 9; Francesco Alvaro, I licenziamenti nel decreto attuativo del Jobs Act: questioni formali e sostanziali, http://www.altalex.com/index.php?idnot=69964. In smaller firms, the severance pay is halved, with a maximum of six months’ wages. Id. Art. 9.
form of a cashier’s check which is tax free – of one month’s salary for each year of service, with a maximum of 18 months’ salary. An employee accepting the offer waives all rights to take court proceedings against the dismissal.\textsuperscript{99} Such employees are also entitled to unemployment benefits, while unemployment benefits in the event of mutual agreement after termination by the employer (also during dismissal case) are normally granted only if the Institut Nazionale Previdenze Sociale considers the termination to meet the conditions set down in law.\textsuperscript{100} If the dismissal is not resolved by means of a quick settlement, it can be challenged in court proceedings.

Surprisingly, the special fast-track dismissal case created by the Fornero reform does not apply to dismissals under the new Legislative Decree.\textsuperscript{101} In addition, the mandatory preliminary conciliation procedure, which has to be followed in cases of dismissal for economically justified, objective reasons, does not apply to hearings after 7 March 2015.\textsuperscript{102} The special procedural rules created by the Fornero reform have been reversed. These special procedural rules caused considerable problems for lawyers and judges, while the costs of procedural complications outweighed the effectiveness of reducing the length of dismissal cases.\textsuperscript{103} Indeed, the splitting of the first-instance proceedings into two phases served to create a fourth instance, while some judges saw the imposition of procedural time limits as incompatible with their workloads. Another problem with the fast-track dismissal case was that employee claims often not only concerned the dismissals, which meant that lawyers re forced to write two different lawsuits, to address two different judges, resulting in increasing costs and confusion.\textsuperscript{104}

It is still too early to judge whether, in contrast to the Fornero reform, the measures introduced by the Jobs Act and implemented by Legislative Decree 23/2015 have achieved the goal of a more flexible labour market by making dismissals less costly and less burdensome for employers. Expectations about the contribution to flexibility and legal certainty are discussed in the comparative analysis at the end of this article.

The Netherlands

After many years of debate, the Dutch employment legislation, and specifically dismissal legislation, recently underwent substantial change in the shape of the Work and Security Act (Wet werk en zekerheid), which was approved by the Senate on 10 June 2014.\textsuperscript{105} Besides a change in procedural dismissal law, the Act provided measures to strengthen the legal position of flexible employment, as well as changes to the laws on unemployment benefits, and several other reform

\textsuperscript{99} Id. Art. 6.
\textsuperscript{100} Giuseppe Pellacani, Luisa Galantino, Licenziamenti: forma e procedura, 325 (Giuffrè Editore 2011).
\textsuperscript{101} Art. 11 Legislative Decree 23/2015.
\textsuperscript{102} Id. Art. 11.
\textsuperscript{103} Luigi de Angelis, Il contratto a tutele crescenti. Il giudizio, Working Paper Centre for the Study of European Labour Law ‘Massimo D’Antona’ IT, No. 250, 2-3 (2015); Magnani, supra note 84 at 10; Domenico Borghesi, Aspetti processuali del contratto a tutele crescenti, Judicium.it, 5 (2015).
\textsuperscript{104} Maresca, supra note 83 at 457; Avvocati e giudici contro il rito Fornero, 23 April 2014, Ilsole24ore. See Tribunale of Bari 17 October 2012, No. 10157 and the guidelines from Tribunale of Florence at https://labor tre.files.wordpress.com/2013/03/decisioni-tribunale-processo-celere.pdf; A. Danilo De Santis, ‘Eutanasia’ del rito specifico accelerato per l’impugnativa dei licenziamenti individuali (available on http://www.eclegal.it/it/rito-accel erato-licenziamenti-individuali); Giuseppe Bulgarini d’Elci, Jobs Act/Cancellazione per il rito fornero (available on Ilsole24ore).
\textsuperscript{105} Act of 14 June 2014, Dutch Official Gazette, 216 (2014).
measures. This reform became effective on 1 July 2015. The next section describes the country’s previous dismissal system, followed by a discussion of the reform. As will be seen, one of the goals of the Dutch reform was to speed up dismissal procedures. Surprisingly, and despite the experiences in Italy and Germany, it was decided to extend the judicial procedure.

**Termination by the employer: preliminary steps, proceedings and remedies**

Under the system applying before 1 July 2015, the employer could freely choose between two ways of terminating an open-ended employment contract, regardless of whether the termination was for economic reasons or for reasons relating to the employee’s person. The employer could choose either to give notice or to request a court to dissolve the contract. In both cases, the reasonable grounds for termination were assessed in advance by an independent third party (i.e. a priori control of dismissals).

An employer who wished to dismiss an employee by giving notice, on the basis of the Extraordinary Decree on Labour Relations 1945 (Buitengewoon Besluit Arbeidsverhoudingen 1945), needed the prior permission of the Employee Insurance Agency (Uitvoeringsinstituut werknemersverzekeringen, or UWV). Termination given by notice without the prior permission of the UWV was annulable. The employer was permitted to terminate the employment contract if the UWV granted permission. Although there was no right of administrative appeal against the decision of the UWV (public authority), an employee whose contract was terminated by notice could turn to the civil court (in three instances) and claim compensation for the ‘manifest unreasonableness’ of the dismissal or, in the case of a legally prohibited dismissal, claim that the dismissal should be annulled. If the latter claim was accepted, the employer had to reinstate the employee and pay wages from the date of the unjust dismissal.

The alternative way of terminating an employment contract was dissolution by the District Court. The dissolution procedure was a quick and certain way to terminate the employment contract, as the District Court issued judgment within an average time of two months, and its decision was final. In contrast to the possibility of a civil court appeal in the previously mentioned route of notice with the UWV’s prior permission, it was not possible to appeal against a dissolution
decision. Additionally, and unlike the UWV, the District Court could award the employee a compensatory payment (‘kantonrechtersformule’).

Owing to the rapid legal certainty it provided, most Dutch legal practitioners considered the dissolution procedure – despite the compensatory payment – an attractive way for employers to terminate employment contracts. The unappealability of the decision meant the termination of employment was immediately final, as was the amount of any compensation payable by the employer. The situation was more complex if an employer opted to seek the permission of the UWV. However statistics show the permission was granted in an average time of six weeks, as mentioned earlier, and despite the impossibility of an administrative appeal against the UWV’s decision, there were still some legal procedures (at three levels) available to the employee after the employer gave notice. There could, therefore, be years of uncertainty, for both the employer and employee, as to whether the employment contract had been terminated. Although data about the length of these specific judicial cases do not exist, there are some statistics about the length of procedure in the District Court and the Court of appeal in general (which handle other lawsuits than labour or dismissal claims). In 2014 the average duration of procedure in the District Court was 43 weeks. At appeal the procedure took an average of 53 weeks. According to Dutch literature, wage claims amounting to two years or more were no exception if the employee had to be reinstated due to an unjust dismissal. In practice, however, the uncertainty about whether or not the employment contract had been terminated by the dismissal was largely resolved by the possibility of conducting a conditional dissolution procedure. This meant that an employer who had given notice of termination could also request dissolution by the court, just in case the employment contract was ruled still to exist (if, for instance, the dismissal by notice was later annulled). This possibility guaranteed the employer a quick and legally certain way to terminate the employment contract, even during the proceedings that could follow after the employer gave notice.

There are no statistics on the number of extrajudicial and judicial settlements. As a result of a change in the law on unemployment benefits in 2006, the employee may accept an extrajudicial settlement (and also a judicial settlement), without losing entitlement to unemployment benefits. Before 2006, a similar situation occurred as in Germany and Italy. Accepting an extrajudicial settlement without losing unemployment benefits, was only possible in the event of a lawful termination, which was hard to predict in advance for the employee. As a consequence, in order to save his entitlement to unemployment benefits, the employee would bring a dismissal case, instead of accepting the extrajudicial settlement.

118. Art. 7:685 para. 11 old Civil Code. See Bouwens & Duk, supra note 111 at 463; Jacobs, supra note 108 at 105.
119. Id. Art. 7:685 para. 8.
120. Jacobs, supra note 108 at 105; Ministry of Social Affairs and Employment, Onderzoek ontslagrecht ervaren door werkgevers, 43 (2006); Gerrard Boot, Over (verkapt) hoger beroep in de ontbindingsprocedure ex artikel 7:685 BW, in Rolf Hansma et al, De ontbinding van de arbeidsovereenkomst in tienvoud, 21 (Rolf Hansma ed. Boom Juridische uitgevers, 2005).
121. See Jaarverslag UWV 2014, 11 (available on http://jaarverslag.uwv.nl/FbContent.ashx/pub_1000/Downloads/ UWV_JAARVERSLAG_2014.pdf).
122. See Jaarverslag Rechtspraak 2014, supra note 118 at 61.
123. Jacobs, supra note 108 at 102.
124. Supreme Court, 21 October 1983, NJ 296 (1984). See Bouwens & Duk, supra note 111 at 452.
125. Bouwens & Duk, supra note 111, at 452.
126. Art. 24, paras. 2 and 6 Werkloosheidswet.
127. F.J. van der Poel, De WW gewijzigd. Einde pro-formaprocédure?, ArbeidsRecht 2006/52.
Work and Security Act – encouragement of early settlements

The Work and Security Bill was submitted to the Dutch Parliament on 29 November 2013. This built mainly on an agreement reached by the ‘social partners’ in spring 2013 and was approved by the House of Representatives on February 18 2014, and by the Senate on 10 June 2014, with the changes taking effect on 1 July 2015.

This reform of dismissal law was initiated in response to some shortcomings of the Dutch dismissal system. The fact that the employer was free to choose between the two main options for terminating an employee’s contract was seen as the main problem. The employer determined the procedure that had to be followed and any compensatory payment the employee received. The new Act was intended to redress the resultant inequality of these options. Importantly, in light of the subject of this paper, the explanatory memorandum to the Act also states that the reform intended to make the dismissal system easier, quicker and less costly for employers.

In contrast to many previous attempts to change the Dutch dismissal law, the a priori assessment of the reasonableness of the dismissal has remained in force. Under the new legislation, the options for termination with the prior permission of the UWV or dissolution by the District Court both still exist. However, the employer is now no longer able to choose between these two options. The route of giving notice with the UWV’s prior permission is reserved for termination on economic grounds or the employee’s long-term disability. In the case of dismissal on grounds relating to the employee or his behaviour, the only way to terminate the employment is through the dissolution procedure at the District Court. In addition, the fact that the reasonable grounds for termination available under the new legislation are exhaustively stated in the Dutch Civil Code (Article 7:669, paragraph 3 a-h) should create more legal certainty.

After the employer has terminated the employment contract by giving notice (with prior permission of the UWV), the employee may bring a case (in three instances) and claim reinstatement. Another new aspect is that the dissolution decision can also be appealed in three instances. This means that the termination route via the UWV can involve up to four instances: (i) UWV, (ii) appeal at the District Court, (iii) appeal at the Court of Appeal, and (iv) appeal at the Supreme Court. The dissolution route, too, can involve up to three instances: (i) District Court, (ii) Court of

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128. Work and Security Bill, Kamerstukken II 2013/14, 33 818, Nos. 1-2.
129. Bouwens & Duk, supra note 108 at 328.
130. Work and Security Bill, Kamerstukken I 2013/14, 33 818, No. A.
131. Work and Security Bill, Handelingen I 2013/14, Nos. 33 and 9, 1.
132. Kamerstukken II 2013/14, 33 818, Nos. 3, 5, 24. See also Gundt, supra note 107, 367.
133. Bouwens & Duk, supra note 108 at 399.
134. Art. 7:671a Civil Code. See Bouwens & Duk, supra note 108 at 409.
135. Id. Art. 7:671b.
136. These are: (a) economic reasons, (b) long-term (104 weeks) disability, (c) frequent and disruptive sickness absence, (d) dysfunction, (e) serious misbehaviour, (f) refusal to perform contractual obligations due to reasons of conscience, (g) disturbed employment relationship, (h) other reasons that mean a continued relationship cannot be expected. Reasonable grounds (a)-(b) are assessed by the UWV, while grounds (c)-(h) are assessed by the District Court. See Bouwens & Duk, supra note 108 at 404-405.
137. Kamerstukken II 2013/14, 33 818, No. 3, 43.
138. Arts. 7:681 and 7:682 Civil Code. See Bouwens & Duk, supra note 108 at 425; Gundt, supra note 107 at 368.
Appeal, and (iii) Supreme Court, with the employer being at risk of having to reinstate the employee at each instance.

Lastly, the Act abolished the (costly) compensatory payment of the dissolution procedure, and instead introduced a right to a fixed compensation, the so-called ‘transitionary compensation’ for all employees whose employment ends involuntarily, providing that the employment contract lasted for at least two years. The employee receives compensation amounting to one third of the monthly salary for each year in the first ten years of service, and half of the gross monthly salary for every subsequent year of service. However, the remuneration is subject to a maximum of €75,000, or one annual salary for employees earning more than €75,000 a year.

The idea behind the law is that when faced with notice of dismissal, the vast majority of employees will agree to terminate their contract without going to court because the grounds for reasonable dismissal are – according to the legislator – clearly specified in the Civil Code, and because of the availability of the legally regulated transitionary compensation. This is how the Dutch legislator intends to achieve the reform’s goals of speeding up dismissal cases and making dismissals less costly.

Analysis

One of the main goals of the reforms in all three countries was to make dismissals less costly and more predictable for employers, not only by changing the substantive dismissal rules, but especially by introducing new procedural rules. This section analyses and compares these reforms in order to explain in what way procedural dismissal rules can contribute to greater flexibility and legal certainty. Are preliminary assessment procedures and the adjustments made to encourage early settlements without going to court smart enough to achieve the desired flexibility, or are there some drawbacks?

Preliminary assessment

All of the countries discussed either introduced or retained a preliminary assessment procedure by an administrative authority: Italy introduced a new preliminary conciliation procedure, involving an administrative authority (DTL) in its reform of 2012, while, in contrast to many previous draft reforms of dismissal law, the Dutch Work and Security Act retained the a priori assessment of the reasonableness of dismissal. Under the new dismissal law, Dutch employers need the prior permission of the UWV (administrative authority) to effectuate dismissal on economic grounds or on the grounds of an employee’s long-term disability, while the District Court may dissolve the employment contract if the dismissal is for reasons relating to the person of the employee or his

139. Vivian Bij de Vaate, Bijzonder Ontslagprocesrecht, 373 (Kluwer 2015).
140. Bouwens & Duk, supra note 108 at 519.
141. Id. Art. 7:673-673d.
142. Art. 7:673, para. 1 Civil Code. See Bouwens & Duk, supra note 108 at 495.
143. Id. Art. 7:673, para. 2.
144. Kamerstukken II 2013/14, 33 818, No. 3, 43. Rogier Duk, Art. 7:669 Wetsvoorstel Werk en Zekerheid: de rechter als bureaucraat, 26 Tijdschrift Recht en Arbeid (2014); M. Fruytier, Wet werk en zekerheid: en nu vooruit! Of Achteruit?, 227 Tijdschrift Arbeidsrecht Praktijk (2015).
behaviour. Germany already made provision for preliminary assessment by the Works Council, and this has not been criticised in new legislative proposals. Are these procedures helpful to achieve greater flexibility in the dismissal system?

Italy’s aim in introducing the preliminary process was to encourage parties to settle their disputes without going to court, as there was a hearing by a special conciliation board and the employee remained entitled to unemployment benefits when a settlement was reached. Unfortunately, the new process did not work. The 2015 Jobs Act reform consequently reversed this measure, which had failed to create the expected degree of flexibility and caused considerable problems for lawyers. The 2015 reform introduced a new measure, whereby the employer could offer a compensatory payment in return for the employee’s waiver of a dismissal case (see the next section). The preliminary conciliation procedure remains applicable only to employment contracts entered into before the Legislative Decree 23/2015 came into force, and does not apply to hirings after that date.

The Dutch preliminary assessment procedure by the UWV or the District Court is not aimed at mediation to encourage early settlement. Nevertheless, the previous Dutch system of a priori assessment of dismissal provided for a quick procedure for termination of the employment agreement. From a flexibility perspective, in terms of speed and legal certainty, it was a success story. Before 1 July 2015, the employer could use dissolution by the District Court as a way to avoid lengthy dismissal proceedings. The dissolution decision was made within an average time of two months and there was no right to appeal. Moreover, if the employer chose to terminate the contract by giving notice (with the prior permission of the UWV), the risk that the employee might succeed in having the termination of the employment annulled could also largely be mitigated by initiating a conditional dissolution procedure. In this case, too, final certainty on the termination of the employment contract would be obtained within about two months. Paradoxically, the old Dutch dismissal system featured – even though it was a system of a priori control – precisely the elements referred to by the European Commission, as it was a quick, non-bureaucratic and legally certain way to terminate an employment contract. The Work and Security Act, however, abolished this provision for fast-track, unilateral termination of the employment contract, as this new legislation allows every judgment on dismissal to be appealed, including during the dissolution procedure. At every instance, therefore, the employer is at risk of having to reinstate the employee and to pay compensation for lost wages. However, this general possibility of appeal and judicial review has enhanced the legal protection for the employer and employee, but it involves a considerably longer period of uncertainty as to whether or not the employment contract has been terminated. This constitutes a movement away from the EU policy of seeking to achieve greater flexibility through dismissal law reforms that should, inter alia, address the length of procedure. Moreover, it is a movement in the opposite direction to the reforms in Germany and Italy. The fact that the dismissal systems in both countries did (Italy) and do (Germany) not provide a quick and legally certain way to achieve unilateral termination of employment contracts is seen as problematic, whereas the Netherlands had such a system, but abolished it. The Dutch decision to use the a priori assessment of dismissals according to the reform does not contribute to greater flexibility and legal certainty.

A similar situation exists in Germany, where the preliminary procedure involving the Works Council is not aimed at mediation and the settlement of the dispute, and where approval by the Works Council does not prevent the latter’s notice of dismissal being annulled by the Labour Courts afterwards. The duty to consult the Works Council has been criticised by several German
authors from this point of view. It could lead to a stumbling block even for material socially justified dismissals.145

In conclusion, the preliminary assessment procedures, in the way they currently exist in the countries discussed, do not increase flexibility and legal certainty. A preliminary assessment procedure of this nature will only result in more flexibility and less bureaucracy if it is capable of encouraging early settlement between employee and employer (see the next section) or if it involves a fast-track procedure without the possibility of *ex post* control in which the preliminary decision can be reversed (like the previous Dutch *ex ante* control). Nevertheless, it should be noted that a preliminary assessment can help to prevent (Germany and Italy) the termination of the contract by the employer if there is no just cause for it, as the employer is forced to explain and state the case for the justification of the termination at the Works Council or an administrative authority.146

**Encouragement of extrajudicial settlement with a fixed fee**

A common feature of the reforms in the three countries is that they all seek to encourage early settlement with a legally fixed compensation fee. The idea behind legally fixing reasonable grounds for dismissal and allowing legally regulated compensation payment in the Netherlands is that the majority of employees will agree to a termination agreement, without going to court. Both Germany and Italy introduced the possibility for employers to offer employees a legally regulated compensatory payment in return for the employee’s agreement not to initiate court proceedings to contest the termination of employment. Accepting the termination agreement does not invalidate the employee’s unemployment benefits. The encouragement of settlements was intended to make dismissal on economic grounds less bureaucratic, to avoid lengthy dismissal cases and to improve the transparency of outcomes in terms of dismissal costs for the employer. The flexibility expected to be created in Germany by Section 1a KSchG, however, was never achieved, and German employees still prefer to bring a dismissal case because it is usually more beneficial to them. Rather than accepting the employer’s offer under Section 1a KSchG, employees generally prefer to bring a case in order to negotiate a higher compensatory payment than the payment legally regulated in Section 1a KSchG. The substantial risk of a dismissal case, which can involve three instances and result in annullment of the dismissal, together with the non-transparent dismissal standards, means German employers are also willing to offer these higher compensatory payments. No less than 80% of the German dismissal cases end with a settlement within an average time of one to three months. Thus it is quite quick, but has its price. Dismissal cases are not avoided, there is no transparency of outcome for the employer in terms of dismissal costs, and the fees paid by the employer are higher on – probably – non-substantive grounds. In addition, this effect of employees’ negotiating in a dismissal case to get a higher compensatory payment is reinforced by the German social security law. The employee accepting a judicial settlement

145. Bernd Schiefer, ‘Kündigungsschutz und Unternehmensfreiheit – Auswirkungen des Kündigungsschutzes auf die betriebliche Praxis’, Neue Zeitschrift für Arbeitsrecht, 771 (2002); Ulrich Preis, Reform des Bestandsschutzrechts im Arbeitsverhältnis, Recht der Arbeit, 73 (2003).

146. See, for example, Ulrich Preis, *Kommentar zum KSchG*, in Großkommentar zum gesamten Recht der Beendigung von Arbeitsverhältnissen, G marginal number 10 (Reiner Ascheid, Ulrich Preis, Irene Schmidt eds., Beck 2012); G. Thüsing, *Kommentar zum BetrVG*, in Betriebsverfassungsgesetz mit Wahldnung, § 102 BetrVG Rn. 14 (Richardi, Thüsing, Annuß eds., Beck 2014).
remains entitled to unemployment benefits, while the employee accepting an extrajudicial settlement (outside of a dismissal case) of a higher fee than the legally regulated one in Section 1a KSchG is at risk of losing unemployment benefits.

This German practice is also conceivable under the new Dutch dismissal law. The Dutch Work and Security Act means that, as in Germany, dismissal proceedings will be lengthy, with the risk that the employer will have to reinstate the employee. Like their German counterparts, Dutch employees may use the dismissal case and the threat of mandatory reinstatement as a way of negotiating higher compensatory payments than the so-called legal ‘transitionary compensation’. Even though the reasonable grounds for dismissal have been set out in the Dutch Civil Code, they do not prevent dismissal cases, as they are not entirely clear and there is still scope for interpretation.147

The first studies confirm this argument.148 Moreover, unlike their German counterparts, the Dutch employees have nothing to lose by not accepting a first monetary offer of the employer for a termination agreement, because if they do not accept, and the employer has to bring a dismissal case to the UWV or the District Court, they are still entitled to the legal transition payment. Nonetheless, it should be noted that although the settlement payments are (quite) above the legal ‘transitionary’ payment, they are supposed to be lower than the previous compensation payment in the dissolution procedure.149 There is also a difference with Germany. In the Netherlands, it is much easier for the employee to except an extrajudicial settlement. It has no influence on his entitlement to unemployment benefits. That means – in contrast to Germany – it is easier to avoid a judicial dismissal case and reach a termination agreement under the condition that the compensation by the employer is acceptable to the employee.

As a result of the above, the effectiveness of the quick settlement agreements introduced by Italy in the form of the Jobs Act can also be questioned. It is similar to its German counterpart in Section 1a KSchG, which in practice is barely used by the employer. It should be noted, however, that there are some interesting differences between the German and Dutch systems on the one hand, and the Italian system on the other hand, and these may make the introduction of Italy’s legally regulated compensatory payments work. Firstly, the compensatory payments regulated in Italy are higher: a month’s salary for each year of service (with a maximum of 18 months’ salary), as opposed to half a month’s salary for each year of service in Germany, and one third of a month’s salary for each year of service in the first ten years and half of the monthly salary for each year of service above ten years in the Netherlands. However, secondly, and more importantly, the consequences of unjustified dismissal in Italy have been softened. Under the Jobs Act, reinstatement applies only to discriminatory, null or groundless disciplinary dismissals. In all other cases – mainly dismissals on economic grounds – the employee receives only compensatory damages, whose level is dependent on the years of service. This increases predictability and reduces the constraints and regulatory costs for employers. In Germany, all unjustified dismissals result in the reinstatement of the employee, while Dutch employers are always at risk of having to reinstate an employee if the latter so wishes in case of an unjustified dismissal. Another important note is that in

147. See Duk, supra note 145; Fruytier, supra note 145.
148. Nieuw ontslagrecht stelt zwaar teleur, Financieel Dagblad 2 december 2015 (available on http://fd.nl/economie-politiek/1129729/nieuw-ontslagrecht-stelt-zwaar-teleur); Werkgevers schikken vaker bij ontslag, Financieel Dagblad 24 januari 2016 (available on http://fd.nl/economie-politiek/1136578/werkgevers-schikken-vaker-bij-ontslag).
149. Ruben Houweling, Max Keulaers & Pascal Kruit, VAAN-VvA Evaluatieonderzoek WWZ, 11 (Boom juridisch 2016).
both Germany and the Netherlands, the ability to enter into termination agreements during the dismissal case (judicial settlement) is more beneficial with regard to employees’ unemployment benefits as, unlike in Italy, reaching agreement during a dismissal case does not affect German or Dutch employees’ entitlement to these benefits. Italian employees receive unemployment benefits only in the event of a lawful termination, and this can be difficult for the employee to predict in advance. This possibly also explains why in Italy a lot more labour cases ended with a judgment instead of a settlement, as the statistics on labour cases generally show. Around 50% of the general labour cases ended with a verdict (2007), which seems to be a lot more than the 5% of dismissal cases in Germany (2014).

Concluding remarks

This comparative analysis of the dismissal law reforms in Germany, Italy and the Netherlands shows that it is difficult for procedural rules to contribute to greater flexibility and legal certainty, without a change in substantive dismissal protection or a change in unemployment laws. Introducing a procedure that aims to encourage early settlement with a fixed compensation fee without going to court will probably not work if it is more beneficial for employees to bring a dismissal case. This is the case—as we have seen for Germany and it is also conceivable for the Netherlands—if employees can negotiate higher compensatory payments without losing unemployment benefits because of the threat that they may have to be reinstated at the end of the lawsuit. In order to successfully introduce a system of encouragement of early settlements without additional compensatory payments and without going to court, a reduction in substantive dismissal protection seems to be required. Employees unable to use the threat of a harsh sanction being imposed in the event of an unjustified dismissal in dismissal proceedings seem to be more likely to accept an early settlement with a legally regulated compensatory payment (Jobs Act, Italy). Putting employees at risk of losing unemployment benefits if they wait for a dismissal case to accept a settlement seems to be another way of making a system of early settlements work (Jobs Act, Italy). Preliminary assessment procedures in the countries discussed do not increase flexibility, because it is an extra procedure which does not lead to a quick and final decision about the termination of the agreement. Nevertheless, it should be noted that the previous Dutch preliminary assessment system – before the reform – was successful in creating flexibility, because of the special procedural dismissal rules it applied. It provided a quick ex ante dissolution procedure within an average time of two months, and no right to appeal. Considering the aim of the Dutch reform, it is rather surprising that the new Work and Security Act brought an end to these special procedural rules. Every dismissal judgment can now be appealed at three levels. This general possibility of appeal and judicial review enhanced the legal protection for the employer and employee, but involves a considerably longer period of uncertainty as to whether or not the employment contract has been terminated. Despite the abolishing of the costly compensation in the dissolution procedure, this represents a movement in the opposite direction to the elements referred to by the European Commission with regard to the implementation of the EU flexicurity policy and to the choices made in Germany and Italy. In both these countries, the lack of a fast-track, unilateral termination procedure is, or was, seen as a problem, as it has led in Germany to—although quick—settlements with higher fees on probably non-substantive grounds, which is perceived unsatisfactory; and in Italy has led to reforms of the dismissal system.

To conclude, you cannot have the champagne taste on a beer budget. If the goal is to create greater flexibility in the dismissal system by the encouragement of extrajudicial settlements and/or
a preliminary assessment procedures, someone has to pay for it. It can be the individual employee if the desired flexibility leads to softening the sanctions in the case of unjustified dismissal and/or lessening legal protection (Italy and the previous Dutch system). Or it can be passed on to the collective of employees, which is the case when accepting an extrajudicial settlement without a check on the lawfulness of the termination – in contrast to a judicial settlement – does not affect the employee’s entitlement to unemployment benefits.

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