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Electronic version

URL: <http://journals.openedition.org/travailemloi/7626>

DOI: 10.4000/travailemloi.7626

ISSN: 1775-416X

Publisher

DARES - Ministère du Travail

Printed version

Date of publication: 30 December 2017

Number of pages: 55-75

ISSN: 0224-4365

Electronic reference

Raphaël Dalmasso, "Procedural Flexibilisation of Economic Redundancy in France and Italy", *Travail et Emploi* [Online], Hors-série | 2017, Online since 11 July 2019, connection on 13 April 2021. URL: <http://journals.openedition.org/travailemloi/7626> ; DOI: <https://doi.org/10.4000/travailemloi.7626>

Procedural Flexibilisation of Economic Redundancy in France and Italy

Diverging Reforms with a Common Objective*

Raphaël Dalmasso**

The law on economic redundancies has recently been greatly reformed in France and Italy. The changes have shared the same common goal of making contract termination easier and surer. But their content is very different. Indeed, through procedural reforms, legislation in the two countries attributes different, and even opposing, roles to judges and litigation. In doing so, the reforms demonstrate that the goals of flexibility and security are not in fact legally unambiguous as far as economic dismissal is concerned.

For 40 years, in about the same periods, France and Italy have pursued several reforms of their redundancy laws, especially concerning economic dismissals. Thus, France's Law of 1973¹ relating to redundancy procedures drew on Italy's reforms of 1966² of dismissals for fair subjective reasons and dismissals for fair objective reasons, as well as on the Workers' Statute of 1970.³ Also, in 1975,⁴ both sets of laws were evolving more or less similarly under the influence of European law. Lastly,

* Translation: Nicholas Sowels.

Article published in French in *Travail et Emploi*, no 142, avril-juin 2015.

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1. Law No 73-680 of 13 July 1973 changes the redundancy procedure, including preliminary steps of sending a letter of dismissal and the need to justify contract termination.
2. Law No 604/1966 of 15 July 1966 provides for the requirement to justify dismissals.
3. Law No 300/1970 of 14 May 1970 is commonly referred to as the "Workers' Statute". In particular, Article 18 of this Law organises the indemnity schemes of employees who are unfairly dismissed.
4. Directive No 75/129/CE of 17 February 1975 requires the introduction of a specific procedure for collective economic layoffs. The French Law of 3 January 1975 created a special legal regime for economic dismissals. In Italy, the parliament considered, incorrectly, that the Law of 1966 was in compliance with the Directive of 1975, and adapted its content minimally, only covering partial unemployment, in the Law No 164/1975 of 20 May 1975. After two convictions by the European Court of Justice (ECJ, 8 June 1982, case 91/81; ECJ, 6 November 1985, case 131/84), Italy fully transposed the Directive with Law No 223/1991 of 23 July 1991.

at the end of the 1980s and in the early 1990s, while France modified its economic redundancy procedures in 1989,⁵ creating social redundancy packages, economic redundancy in Italy still seemed to be entirely grounded in the Law of 1991.⁶

In Italy in 2012⁷ and in France in 2013,⁸ laws on economic redundancy were again strongly reformed. Despite some considerable nuances, the aim of these reforms was comparable, the point being to make redundancies for economic motives more flexible and safer for employers especially (Part I). However, if we look at the role of litigation and the power of control by judges, it is clear that these two countries have adopted opposing procedures. This indicates that the legal flexibilisation of work contracts may take different forms. Such plurality is explained by the differences in targets. In the case of French law, one set of actors –judges– are suspected of exercising too much control over redundancy procedures. In Italy, Article 18 of the Workers' Statute is held to be too favourable towards employees (Part II). Both reforms to flexibilise dismissals on economic grounds, however, risk leading to mixed results in the two countries. It is far from sure that litigation or judicial control will be less important in France in the future. In Italy, the 2012 reform has already been called into question since the end of 2014⁹ (Part III).

Procedural Flexibilisation

Recent reforms of economic redundancies have not taken place in the same way in France and Italy. In Italy, the Berlusconi and then Monti governments modified the labour law to make it more flexible, under pressure from the country's seriously worsened economic situation and in response to strong encouragement by the European Central bank. In France, the reasons for reform remain, even today, more ambiguous. However in both countries, legislators have chosen not to modify the definition of economic redundancy, but instead to concentrate on modifying procedures. These technical changes fundamentally alter the understanding and use of the law relating to economic redundancy.

5. Law No 89-549 of 2 August 1989 relating to the prevention of economic redundancies and the rights of job conversion.

6. Law No 223/1991 mentioned above.

7. Law No 92/2012 of 28 June 2012 relating to labour market reform from a growth perspective.

8. Law No 2013-504 of 14 June 2013 relating to the securing of employment, the translation of the National Interprofessional Agreement (NIA; *accord national interprofessionnel* – ANI) of the 11 January 2013 so that a new economic and social model supports company competitiveness and greater employment security, as well as career paths for employees.

9. Law No 183/2014 of 10 December 2014 (see the *Jobs Act*); Decree of the Law No 23/2015 of 4 March 2015.

Two Reforms on a Different Scale

Italy's reform in 2012 and France's in 2013 have very different legal fields of application. I will only examine here procedures relating to economic redundancy. Other aspects will be mentioned, but not in detail.

In Italy, the Law of 2012¹⁰ reforming the labour market mainly concerns redundancy law,¹¹ and its procedures.¹² Compared to French law, these changes relate not just to economic dismissals, because they also concern redundancies for individual reasons and discriminatory dismissals. The reform of the labour market was therefore designed as an overall reform of redundancy.

In France, the Law on safeguarding employment of 4 May 2013 is quite a faithful translation of the National Interprofessional Agreement of 11 January 2013, which aims at reforming the labour market. The text however has quite a different aim to its Italian equivalent. Apart from economic redundancies, the changes to legislation relate to a variety of areas: vocational training, part-time work, part-time activity, the development of "job retention" agreements, rights concerning unemployment insurance renewal, complimentary health insurance, etc. Economic redundancy and its procedures are therefore only one aspect of the 2013 reforms, even if for many commentators (for example, FABRE 2013) they are the most important and most expected changes. By contrast, personal dismissals were not changed.

For both legal systems, only looking at changes concerning economic redundancy would therefore appear to be a simplification, because it does not allow the overall logic of each measure, resulting from unprecedented compromises, to be taken into account. However, in terms of comparing rights, it is necessary to look at similar issues, in this case the law on economic redundancy which experienced changes in procedures in both countries. The comparison conducted here refers to the functional equivalence method presented by Konrad ZWEIGERT and Hein KÖTZ (1998). These authors start from the idea that modern legal systems face the same problems. They can solve these with procedures, types of standards, or even different legal categories.¹³ Accordingly, it is useful to compare laws by starting with one or several functions (the principle of functionality), in order to take into account all the sequencing norms of each function. French law refers to the notion of redundancy on economic grounds,

10. Law No 92/2012 of 28 June 2012, mentioned above.

11. The law also provides for important changes in the definition of certain contracts for special jobs; it also modifies the part-time unemployment regime and extends this to unemployment insurance for all employees.

12. The 2012 reform was completed and detailed by a « *decreto lavoro* » ("Labour decree") No 34 of 20 March 2014, notably for fixed term contracts.

13. For a similar approach, see also DAVID (1950, pp. 10-11): "The comparatist researcher—I mean here lawyers who wish to use a comparative methodology—must avoid these errors. He/she must recognise the theory of law sources accepted by lawyers of the country he/she wishes to study: he/she must study foreign law as a foreign lawyer would. The principles guiding the researcher [...] are those which should guide the historian of law. [...] The comparatist must drop her natural tendency, as a French researcher, to study foreign law using the methods applied to research of a French law. He/she should not consider that her usual technical research and interpretation processes have a universal value. Acting in a different way to this implies wanting to open all locks with the same key."

whereas Italian law refers to redundancy for objective reasons,¹⁴ and the collective redundancy of employees to reduce staff.¹⁵ The “economic redundancy” category is thus not constructed in the same way in France and Italy (DALMASSO, 2009). But both legal systems have a body of texts relating to the same function, namely organising economic redundancies.

Italy: Assumed Flexibilisation

A large part of Italian law on redundancies is not codified, resulting instead from scattered laws which are often old.¹⁶ As noted above, three principal laws passed in 1966, 1970 and 1991 are relevant to this study.

The Law No 604/1966 of 15 July 1966 defines individual redundancy. Its Article 1¹⁷ provides that a redundancy needs to be justified by the employer to be valid. According to this article, the motive required for contract termination is not the same for the employer as it is for the employee: an employee who wants to end a permanent contract (PC) needs no justification. Article 3 on the other hand defines what a “just reason” for redundancy is: “redundancy for a just reason with prior notice is determined by the clear failure by the employee to carry out the obligations stemming from the employment contract, and its regular operation.” This article also provides for two types of redundancy. In view of simplification, the Italian authors most frequently evoke, in the first case, redundancy “for a subjective just reason.” The second case involves redundancy “for an objective just reason.” This practice goes back to the creation of the law and is so established that the distinction between “objective” and “subjective” redundancies seems commonly accepted today. This “objective” just reason for redundancy may be assimilated, with only a few qualifications (DALMASSO, 2009, pp. 42 *et seq.*; pp. 203 *et seq.*), to redundancy for individual economic reasons in French law.

French law only provides a definition of economic dismissal,¹⁸ be it individual or collective. By contrast, Italian law provides a specific definition of collective economic redundancy in Article 24 of Law No 223/1991 of 23 July 1991. This article indicates that “the measures provided in Article 4, paras. 2 to 12 and para. 15a, and Article 5, paras. 1 to 5,¹⁹ apply to all companies with more than 15 employees which, following

14. Law No 604/1966 of 15 July 1966, mentioned above.

15. Law No 223/1991 of 23 July 1991, mentioned above.

16. There is no Labour Code in Italy, and the *Codice civile* is very limited as far as labour law is concerned.

17. « *Nel rapporto di lavoro a tempo indeterminato, intercedente con datori di lavoro privati o con enti pubblici, ove la stabilità non sia assicurata da norme di legge, di regolamento e di contratto collettivo o individuale, il licenziamento non può avvenire che per giusta causa ai sensi dell'articolo 2119 del Codice civile o per giustificato motivo* »; “for permanent contracts, signed by private employers or public bodies and where contractual stability is not insured by the law, by a rule, or by a collective or individual contract, an employee can only be made redundant for a just reason as defined by Article 2119 of the Civil Code or for a justified motive” (texts in Italian were translated into French by the author, and retranslated into English by the translator).

18. Art. L. 1233-3, France’s Labour Code (*Code du travail*).

19. This refers to the procedure for consulting with unions, which is obligatory for collective redundancies.

a reduction or a transformation in their business or work, plan to carry out at least five redundancies in a period of 120 days within the same establishment, or within the framework of several establishments situated in the same province. These measures are applied to any redundancy which, within the same time and framework, may be considered as the consequence of the same reduction or transformation of business. The measures of the first paragraph also apply when the employer wishes to cease activity.”²⁰ These are collective redundancies, resulting either from a reduction or a transformation of business and work or a cessation of the company’s activity.

Lastly, Italian law on redundancy is regulated by the “Workers’ Statute,” defined by Law No 300/1970 of 14 May 1970. This text is especially important, because in Article 18 it sets out the principle of reinstating an employee dismissed wrongfully, under certain circumstances. From the 1990s onwards, this law was at the centre of debate about making redundancies more flexible. During the last 20 years, reforms of economic redundancy and its attendant indemnity schemes have been desired by governments on several occasions, only to be postponed or cancelled *sine die*. In 2001, a White Paper in particular presented by the Minister of Labour, Roberto Maroni, and followed up by a draft law,²¹ sought to reform Article 18 of the Workers’ Statute, with the aim of ending the reinstatement of dismissed workers. Strong opposition from the unions however forced Italy’s legislators to drop this reform.

During the summer of 2011, Italy experienced a very deep economic crisis, with the country being on the brink of default. On 5 August 2011, the European Central bank (ECB) sent a letter to the government of Silvio Berlusconi signed by Jean-Claude Trichet and Mario Draghi,²² calling on it to modify without delay the “recruitment and redundancy standards” to make these more flexible. This letter was meant to remain confidential, but was published in the *Corriere della Sera* during the month of September 2011. Following the fall of the Berlusconi government, the Monti government announced that changes had to be made in Italy’s labour law. A project to reform the labour market was then put forward by the Minister, Elsa Fornero, who consulted the unions formally and rapidly. The Fornero reform of the labour market was pushed through quickly in the form of the Law No 92/2012 of 28 June 2012 and entitled « *Disposizioni in materia di riforma del mercato del lavoro in una*

20. « Le disposizioni di cui all’articolo 4, commi da 2 a 12 e 15bis, e all’articolo 5, commi da 1 a 5, si applicano alle imprese che occupano più di quindici dipendenti e che, in conseguenza di una riduzione o trasformazione di attività o di lavoro, intendano effettuare almeno cinque licenziamenti, nell’arco di centoventi giorni, in ciascuna unità produttiva, o in più unità produttive nell’ambito del territorio di una stessa provincia. Tali disposizioni si applicano per tutti i licenziamenti che, nello stesso arco di tempo e nello stesso ambito, siano comunque riconducibili alla medesima riduzione o trasformazione. Le disposizioni richiamate nel c. 1° si applicano anche quando le imprese di cui al medesimo comma intendano cessare l’attività. »

21. Draft Law No 848-S.

22. Successive presidents of the ECB in 2011.

prospettiva di crescita. »²³ Article 1²⁴ of the law sets out the general approach of the text, namely the implementation of a labour market that is more inclusive and dynamic. The term “inclusive” indicates that legislators wanted to promote the integration into the labour market of excluded populations, while the term “dynamic” referred to blockages observed in the labour law. More specifically, the law aims at redistributing job protection more fairly; favouring the hiring of excluded workers; but also and above all, reviewing laws protecting the dismissal of employees. Legislators did not hide their intent: this law aimed at facilitating contract termination, or making labour contracts more flexible (SPEZIALE, 2012). The way to achieve this was by reforming economic redundancy procedures. The Laws of 1966 and 1991, which defined economic redundancy, were not changed. Only the Workers’ Statute of 1970 was affected.

France: the Controversial Meaning of “Safeguarding”

In France too, the social partners and the legislature decided not to modify the legal definition of economic redundancies as set out in article L. 1233-3 of the Labour Code (*Code du travail*). In 2013, it was the procedure of collective economic layoffs that was changed profoundly.

The interpretation of this reform in France still varies considerably today according to the actors of the negotiations. As we will see below, for the CFDT union,²⁵ the whole reform is favourable both to employers and employees, including the measures relating to economic redundancy. However, for the Medef (*Mouvement des entreprises de France*, the employers’ association), as well as for unions²⁶ which did not sign the National Interprofessional Agreement of 11 January 2013 (*Accord national interprofessionnel du 11 janvier 2013*), the agreement contains two distinct parts: i) aspects

23. “Measures to reform the labour market in view of growth” (translations as above). For two presentations of the text see VIDIRI (2012) and SCOGNAMIGLIO (2012).

24. « La presente legge dispone misure e interventi intesi a realizzare un mercato del lavoro inclusivo e dinamico, in grado di contribuire alla creazione di occupazione, in quantità e qualità, alla crescita sociale ed economica e alla riduzione permanente del tasso di disoccupazione, in particolare [...] ridistribuendo in modo più equo le tutele dell’impiego, da un lato contrastando l’uso improprio e strumentale degli elementi di flessibilità progressivamente introdotti nell’ordinamento con riguardo alle tipologie contrattuali; dall’altro adeguando contestualmente alle esigenze del mutato contesto di riferimento la disciplina del licenziamento, con previsione altresì di un procedimento giudiziario specifico per accelerare la definizione delle relative controversie. » Translation summarised by the author (and translated into English by the translator): “The present law fixes measures aimed at implementing an inclusive and dynamic labour market, so as to contribute to job creation in terms of quantity and quality, to social and economic growth, and to the permanent reduction of the rate of unemployment, especially by redistributing job protection more equitably, on the one hand, by combating the incorrect use of certain flexibilities of particular types of contracts, and on the other hand, by adapting redundancy procedures to improve and accelerate the settling of disputes.”

25. *Confédération française démocratique du travail*.

26. This National Interprofessional Agreement was signed by the CFDT (*Confédération française démocratique du travail*), the CFTC (*Confédération française des travailleurs chrétiens*) and the CFE-CGC (*Confédération française de l’encadrement-Confédération générale des cadres*). For employers, it was signed by the Medef, the CGPME (*Confédération générale des petites et moyennes entreprises*) and the UPA (*Union professionnelle artisanale*). By contrast, the CGT (*Confédération générale du travail*) and the CGT-FO (*Force ouvrière*) did not sign the agreement.

which protect employees, and ii) above all a form of contract flexibilisation which benefits employers through the reform of economic redundancy procedures.

One of the main negotiators of the agreement on behalf of the Medef has indicated therefore that “the idea behind the agreement can be summarised in one word: competitiveness” (FOUCHER, 2013, p. 89). However, he also states that the agreement should be understood by distinguishing measures favourable to employees and those favourable to employers. He notes that employees benefit especially from complimentary collective health care insurance, rechargeable rights to unemployment insurance and an individual training account (FOUCHER, 2013, p. 91). He notes that employers for their part have “never had an agreement or a law which provides so much new flexibility” and identifies for example agreements on internal mobility, job maintenance, the reform of partial unemployment, the introduction of prefixed delays,²⁷ the reform of Labour Tribunal (*conseil de prud’hommes*) reconciliation, and the new rules framing job preservation schemes (FOUCHER, 2013, p. 92). Concerning all the measures linked to the law on economic dismissal, the author admits that they meet the employers’ demands and that the new standards facilitate economic redundancies by making them more flexible.

This reading of the agreement in terms of reciprocal concessions has been shared by one of the negotiators of the Force ouvrière union which did not sign the agreement. The excessive imbalance in concessions granted to employees and those given to the employers led this union to withhold its signature. The negotiator considered that the law on economic redundancy has become too flexible: “as part of the majority collective agreement, the National Interprofessional Agreement undermines the individual rights of employees” (LARDY, 2013, p. 103).

In contrast, in the CFDT magazine, Aurélie SEIGNE and Emmanuelle PIRAT start by noting that the French labour market is seriously ill, and that it has *de facto* become very flexible, especially in the systematic use of precarious contracts. The authors specify therefore that “the CFDT wanted to address this reality first and foremost, by changing the situation of persons who bear the burden of the unacknowledged hyper-flexibility of the labour market. The CFDT fought with the employers during three months of negotiation in order to obtain satisfaction on four of its fundamental demands: the taxation of short-term contracts, a limit on imposed part-time work, rechargeable insurance rights for jobseekers, and the extension of complimentary health-insurance to all employees” (SEIGNE, PIRAT, 2013, p. 14). The authors also indicate however that the “signed agreement [...] reviews collective redundancy procedures to prevent aberrations such as the cancellation of social redundancy schemes years after workers have been laid off [...]. Henceforth, the procedure and the content of job preservation packages will be negotiated on a majority basis, or controlled by

27. In civil litigation, this involves a “delay/time-limit which if not respected constitutes grounds for refusing a case, which in turn results in the loss of the right to take legal action. In this case, the court can decide that the request is not admissible, regardless of its merits.” Source: Braudo S. (1996-2015), *Dictionnaire du droit privé français*. Online <http://www.dictionnaire-juridique.com/definition/prefix.php> (accessed 26 August 2015).

public administrations. For the CFDT, this amounts to additional security for both employees and companies” (SEIGNE, PIRAT, 2013, p. 16).

Like the social partners, France’s legal profession and doctrine are also divided. Some commentators consider that the reform’s main objective was to facilitate collective redundancies (BONNECHÈRE, 2013; GÉA, 2013; FABRE, 2013; COUTURIER, 2013). Others seek more to examine the practical reality of this flexibility (JOLIVET, 2013; TARASEWICZ, 2013).

In summary, although everyone agrees that the French reform of economic redundancies seeks to provide greater security to employers, only some commentators believe that it also provides more safety for employees. This controversy already shows the contingent and ambiguous nature of the concept of security, which does not have the same meaning for employers and employees.

Both the French and Italian reforms strive to provide additional flexibility for economic dismissals, by making them safer, easier and more predictable for employers. However, the moves to greater flexibility in economic redundancies have not taken the same legal paths in France and Italy, as this comparison clearly shows. The role of tribunals in the new measures highlights these differences.

Opposing Procedural Choices

Both law systems have redesigned, directly and indirectly, the place of tribunals and judges in redundancies. In France, there has been a deliberate wish to reduce the involvement of the judiciary, and hence judges, in economic redundancies. Several tools have been mobilised jointly to this end. For their part, the reforms in Italy have centred on the question of reinstating laid-off workers.

France: Mistrust of Judges and Litigation

Several legislative changes have affected the role of judges in economic redundancies to varying degrees.

Mistrust for judges felt by legislators is reflected in two ways which should not be confused or compounded. First, the new legal framework strives to make procedures safer in order to avoid litigation. The idea here is that an employer, if worried about facing too much litigation in case of economic redundancy, could hesitate in hiring workers. The new standards however also seek to reduce, to a certain degree, the powers of judges in controlling procedures.

Firstly, in order to clear out some litigation, deadlines for filing suits with tribunals have been reduced. The new Article L. 1471-1 of the French Labour Code henceforth stipulates that litigation relating to the execution or termination of a contract will be prescribed after two years from the day on which the party initiating litigation knew

or should have known about the facts on which litigation is based. For economic redundancies, the limitation period is even shorter: only one year. Within a few years, the time period for challenging redundancy has therefore fallen first from 30 years to 5 years, then to one or two years depending on the nature of contract termination. The prescription period in which employees can appeal has also been shortened, from five to three years (Art. L. 3245-1). It is this latter prescription period which, quite discreetly, risks having the greatest impact on litigation, and dissuading recourse to justice following redundancy. Indeed, very often employees do not dare to ask for payment of unpaid hours worked when their contracts are terminated. This is usually an ancillary claim coming on top of the main demand, for example, relating to challenging the real and serious motivation for dismissal. Shortening the prescription periods for appeal by employees from five to three years thus reduces their hope for winning litigation and may therefore dissuade them from taking cases to Labour Tribunals where procedures are always longer, more costly and uncertain. Shortening delays therefore seeks sometimes to neutralise and more often to dissuade litigation by employees before Labour Tribunals: why indeed go to court if the potential gain from the case has become so low? The new regime should therefore accelerate the fall in litigation before Labour Tribunals. This has already been observed since 2009: the number of new cases brought before Labour Tribunals fell by 23% between 2009 and 2012, dropping from 228,901 to 175,714 (GUILLONNEAU, SERVERIN, 2013, p. 7).

Secondly, judges at the High Court (*tribunal de grande instance* – TGI) have seen a substantial share of their competencies withdrawn, in favour of administrative tribunals. This apparently anodyne change in jurisdictional competency in fact hides a clear wish to tackle two former pieces of jurisprudence, without challenging them head-on, namely the *Samaritaine* and *Aleffa* rulings (see below). Such discreet challenging aims at limiting judicial control over redundancy schemes which are meant to safeguard employment too, so-called *plans de sauvegarde de l'emploi* in French or PSEs.

The High Court was traditionally responsible for collective labour litigation. It was therefore responsible for ruling on litigation concerning employment safeguard schemes, both in substance and summary form. Henceforth, administrative judges are competent to hear appeals against the decision to control the collective economic redundancy procedures carried out upstream by public administrations.²⁸

From now on, the content of a PSE is set following two possible procedures: either through a majority collective agreement (prior to information-consultation of the works council as set out in Article L. 1233-24-1); or by default, on the basis of a unilateral document published by the employer following the last meeting of the works council (Art. L. 1233-24-1 to L. 1233-24-4). The appropriate public administration²⁹ must

28. The TGI retains residual competence over litigation relating to collective agreements. It also keeps its competency over litigation relating to agreements to safeguard employment, in case these are incorrectly applied by employers.

29. This relates to the Regional Directorate for Companies, Competition, Consumption, Work and Employment (*Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi* – DIRECCTE).

be informed of the steps taken by the procedure even before the formal information-consultation of the works council (Art. L. 1233-57 et seq.). It will be responsible for evaluating the PSE via one or the other of the procedures selected, and the administration's decision can, if necessary, be challenged in an administrative tribunal (instead of before the High Court). At first sight, such administrative evaluation seems to offer an appropriate solution, similar to the previous administrative control over economic redundancies.³⁰ Yet, the scope of control set out in current law has led some commentators to state that the law "substantially modifies the mission of the administration, transforming it into a rubber stamp for PSEs" (GUIOMARD, SERVERIN, 2013, p. 197). Intervention by the administration is set out in Articles L. 1233-57-1 to L. 1233-57-8. According to the terms of Article L. 1233-57-1, this consists essentially of "validating the agreement." Alternatively, if there is no majority agreement, the administration "approves the unilateral document." To validate an agreement, the administrative authority only carries out checks for pure formal conformity (Art. L. 1233-57-2), with a short, 15-day time period. If there is no agreement, the approval of the unilateral document is not more thorough (Art. L. 1233-57-2): the delay is certainly longer, but remains intrinsically short (21 days).

The administrative decision may be challenged in the administrative tribunals. Administrative judges, however, only need to check that the administrative authority has respected Articles L. 1233-57-2 and L. 1233-57-3: *i.e.* check that the certification procedures have been correctly carried out. That said, one uncertainty remains concerning the exact scope of the control. We will return to this below.

This procedural change seeks therefore to avoid most of the legal risks linked to the *Samaritaine* and *Alefpa* jurisprudence, based on the following key principals. The *Samaritaine*³¹ ruling asserts that if a redundancy scheme³² is deemed to be nonconforming by the TGI, the redundancies carried out as part of the scheme may also be annulled. As a result, France's highest law court (*Cour de cassation*) ordered the judges of the TGI to scrutinise in detail the adequacy of the redundancy scheme in order to determine whether it was valid or not. If inadequate, the nullity of the scheme can be extended to all subsequent acts, especially dismissals undertaken by the employer.³³ In the *Samaritaine* case, the TGI ruled that the PSE was null and void. The Labour Tribunal, before which the case was finally brought individually by the employees, did not rule that the redundancy scheme was null and void, but only on the consequences of the nullity of the dismissals. This raises the question of what an employee can do believing a PSE to be null and void, and so her/his dismissal as well, in the case where litigation to establish nullity has not been lodged with the TGI. The *Cour de*

30. Administrative control of economic redundancies existed between 1975 and 1986.

31. Cour de cassation, chambre sociale, 13 February 1997, "Samaritaine", *Bulletin civil*, V^e partie, no 64.

32. The former name of redundancy schemes to safeguard jobs.

33. In law, nullity is a retroactive principle: a dismissal judged as null and void is deemed never to have taken place, entailing the reinstatement of the employee.

cassation pursued this reasoning to the end, by indicating, in its ruling on *Alefpa*,³⁴ that “employees dismissed on economic grounds have an individual right to claim that their dismissal is void in the light of the provisions in Article L. 321-4-1.” Thus, even though the works council has the function of defending employees collective interests during collective redundancy schemes, and in particular may point to possible deficiencies of a redundancy plan to safeguard employment, this does not deprive employees of their personal and legitimate interests to challenge their dismissal before the Labour Tribunal, on the grounds of the PSE’s insufficiencies.

The new procedure has consequences for individual and collective litigation over PSEs.

Concerning individual litigation, it blocks a large share of cases requesting the annulment of redundancy going to court, with redundancy schemes being controlled and validated by the administration *beforehand*. A redundancy scheme that has been validated can no longer be challenged by an employee before the Labour Tribunal. This makes the procedure safer for the employer.

The consequences are even more important for collective disputes. This is because now any challenge in interim proceedings –before the administration has controlled the redundancy scheme– is impossible. Previously, in the event of a manifest inadequacy by the company to provide for employment safeguards as part of its redundancy scheme, the employees’ representative bodies could lodge a case before the TGI without delay, in order to suspend the collective dismissal procedure. Such actions had the automatic effect of postponing indefinitely redundancy schemes, sometimes for years in cases where an employer repeatedly breached legal obligations, in particular regarding information and consultation of works councils, or if the scheme took inadequate steps to safeguard employment. Henceforth, collective actions to challenge a redundancy procedure can only take place once control by the administration has been carried out. The aim is to avoid sometimes lengthy litigation, as occurred for years when trade unions and employee representative bodies challenged *Goodyear*’s successive versions of a redundancy scheme aimed to safeguard employment (PSE).³⁵

These changes show that it has been possible to modify the law on economic redundancy without altering the definition of economic motivation, nor even deliberately censoring the jurisprudence of the *Samaritaine* and *Alefpa* cases, simply by seeking to reduce litigation or making preliminary proceedings impossible.

34. Cour de cassation, chambre sociale, 30 March 1999, “*Alefpa*”, *Bulletin civil*, V *partie*, no 144.

35. After seven years of litigation, the proceedings between certain unions and the management of Goodyear were brought to an end in January 2014 with the unions signing a protocol to end the dispute, accepting the final version of the PSE put forward by the employer. For more information about this case, see the Commission of enquiry by the French Parliament “relating to the causes of the project to close the *Goodyear* factory at Amiens-Nord and its economic, social and environmental consequences, and the lessons that can be learned linked to the representative nature of the case”: see the website of the *Assemblée nationale*: http://www.assemblee-nationale.fr/14/dossiers/fermeture_usine_goodyear.asp (accessed 16 June 2015).

According to certain authors, judges are seen as “obstacles” in applying this new law on economic dismissal (GREVY, HENRIOT, 2013), whereas their primary function under the rule of law is to rule on litigation, and hence resolve conflicts, thereby restoring a certain form of social peace via the law.

Italy: a –Provisional– Reassertion of the Role of Judges

In Italy, the reform of collective economic redundancies is based on Article 18 of the Workers’ Statute. The changes set out in 2012 give more power to judges in assessing the legitimacy of redundancy plans. To understand these, it is necessary to examine the situation beforehand.

When dismissal was shown to be unjustified, the impact on indemnities varied according to company size. Legislation provided for two types of possible “protection” (*tutela*) for an employee dismissed without reason, namely: real protection (*tutela reale*) and obligatory protection (*tutela obbligatoria*). Depending on the situation, they could lead to compensation, reinstatement or re-hiring. The indemnity regime was profoundly modified by the Fornero reforms.

Under Article 18 of the Workers’ Statute of 1970, real protection was based on the principle of an employee being reinstated in her/his job (*reintegrazione nel posto di lavoro*) in cases of unfair dismissal. Such real protection also made provision for the employer being sentenced to pay damages (*risarcimento del danno*) equal to at least five months’ salary, possibly even more in the case of wrongful behaviour by the employer, and for any other proven prejudicial action. Moreover, the employer had to pay wages during the period of breach of contract. An employee who did not want to return to her/his job had the possibility of asking for compensation equal to at least fifteen months’ pay. This real protection provided a strong guarantee against unfair dismissal, with a clear cost to employers. The real protection regime was applicable in the three following situations:³⁶ i) if the employer had more than 15 workers (or 5 in the case of an agricultural firm) in each production unit, or office or establishment (*ufficio*); ii) if the employer had more than 15 workers (or 5 in the case of an agricultural firm) in the same commune, even if they were spread across several production units or establishments; and iii) if the employer had more than 60 employees.

By contrast, the obligatory protection regime applies to situations not covered by real protection, and has not been changed.

Compulsory protection provides ordinary protection (*droit commun* in French) against unfair dismissals, under Article 8 of Law No 604/1966 amended by Article 2 of Law No 108/1990. In the event of a ruling declaring a dismissal as wrongful, the employer is obliged to re-employ (*riassumere*) the employee within three days or, if the employer considers it more desirable, to compensate the employee for her/his loss

36. Article 18, para 1, Law No 300/1970. This point was not changed by the 2012 reform, but relegated to the end of the Article.

by paying an indemnity of between two-and-a-half months to six months' salary. This is calculated on the basis of the number of employees in the company, the seniority of the dismissed employee and any errors committed. The employer therefore has a choice between paying compensation and re-employing the worker. The employee may also, if necessary, refuse to be reinstated, and prefer to receive compensation. But the employee does not have the possibility of seeking re-employment instead of compensation. Obligatory protection is therefore weaker for the employee, as he/she cannot refuse contract termination if the employer does not want to rehire him/her.

The 2012 Fornero reform changed Article 18 of the Workers' Statute profoundly, and reduced employees' "real protection" following dismissal. The reinstatement or indemnity depends on the nature of the dismissal.³⁷ For example, in the case of discriminatory dismissal, reinstatement remains possible. For economic redundancy, the new legal regime is hardly straightforward. In the case of individual economic dismissal (*giustificato motivo oggettivo*³⁸) deemed wrongful, the employer is in principle no longer bound to reinstate the employee but must pay an indemnity of between 15 and 24 months' salary. Legislators have thus clearly put an end to the real protection of the employee which involved reinstatement in the event of economic dismissal devoid of a "real and serious cause" (to drawn on French categories, perhaps incorrectly). By doing so, the legislation now meets longstanding employer demands³⁹ which criticized the reinstatement regime.

However, if it is established that the objective fact leading to dismissal is not only wrongful but also manifestly non-existent,⁴⁰ then the judge may still order the reinstatement of the employee.

The collective economic redundancy regime was also changed by the reform. In the case of dismissals being "ineffective"⁴¹ from a procedural point of view, *i.e.* if the employer has not respected the rules framing the procedures for collective redundancy for example, a judge may sentence the employer to paying compensation to the employees equal to between 6 and 12 months' wages.

The reform is most interesting concerning controls of motivations for individual economic dismissal. Although it deliberately makes contract termination more flexible, by ending the principle of systematic reinstatement in favour of compensation, the new

37. Article 18 of the Workers' Statute has had no less than seven paragraphs added to it, distinguishing the various modalities for sanctions, depending on the types of wrongful dismissal. See DE LUCA (2013).

38. As we have seen, dismissal for a just objective motive is not entirely the same as dismissal on economic grounds in French law. On this see, see DALMASSO, 2009, p. 32 *et seq.*

39. The former Director-general of the Cofindustria (Italy's employer organisation). Thus in 2003, S. Parisi wrote: « abolire l'art. 18 è un atto di civiltà » ("abolishing Article 18 is proof of civilisation"). See « L'affondo di Parisi : l'obiettivo è abolire l'art. 18 », *Corriere della sera*, 12 June 2003, p. 9.

40. In fact, legislators created two levels of wrongful economic dismissal, with different consequences for compensation. As we shall see, the difference between the two levels is largely a matter for judges to decide.

41. The Italian term « *inefficace* » cannot be translated by the word "ineffective", because dismissal takes place and has a legal impact (contract termination) without reinstating the employee. Thus, it seems fairer to translate the term using "irregular" (or « *irrégulier* » in French legal terminology) or indeed "inoperative", to stick as closely to the Italian as possible.

law leaves judges with unprecedented room for manoeuvre. The judge may order reinstatement in case he/she rules that the grounds for economic dismissal are *manifestly inexistent or unfounded*, though if the dismissal is merely judged as being wrongful, then the company pays compensation. Thus, in 2012, the judges acquired wide powers for adjusting sanctions against employers, powers that are far greater than in France. Flexibility has therefore been strengthened by using the judiciary. As we shall see below, however, this reform was only applied finally for two years.

An Italian economist has pointed out, somewhat provocatively, that flexibility in labour relations is never enough (BRUNO, 1989, p. 33). This can indeed be seen in the French and Italian legal discourses on economic dismissal. Justifications are based on economics, namely that flexibility removes obstacles to hiring. But, in practice, flexibility takes varied, even contradictory forms. Here, we are faced with two similar legal and economic systems, marked by the same legal intention to make the labour market more flexible. But this has led to two opposing reforms concerning the role and usefulness of judges who are the central, legal actors. The point is not to determine which system is on the right or wrong track, but rather to underline the contingency of legal practices relating to the economic concept of flexibility, before we even move on to study the correlation between flexibility and employment.

These reforms need to be assessed, as far as possible, in terms of their results. It is still too early to fully analyse the application of these standards. It seems, however, that the Italian and French reforms are likely to generate side effects which were not foreseen by legislators; or “pockets of surprise” to use an expression coined by Gérard LYON-CAEN (2004). We can try to detect these.

Uncertain Results

Two different legal visions of flexibility correspond to two different sources of disagreement.

In Italy, the 2012 reform was considered as a failure by the Renzi government. The jurisprudence which had to be applied to the new Article 18 raised concerns about the legal uncertainty employers could face, and the development of jurisprudence that is too protective of employees. At the end of 2014 and in early 2015, the Renzi government therefore radically changed the procedure for economic redundancies. In France, the risk of failure also exists. It is not certain that litigation, particularly collective litigation, will actually decrease. Similarly, it is not clear that the administrative courts will be more lenient towards employers than the TGI. This would undermine the link between flexibility and security.

A New Reform in Italy

Overall, the 2012 reform has not been well received within Italy's legal profession and doctrine.⁴² Alberto VALENTI (2012, pp. 243 and 248) notes, for example, that this reform constitutes a departure from the previous evolution of Italian law, which sought to limit judges' powers in economic redundancies. He recalls that a decree of 2003⁴³ specifies how a judicial review cannot extend to the examination of assessments, nor to technical, organisational and production choices. The jurisprudence of Italy's Highest Court (the Supreme Court of Cassation) supports this view of the law, backing the idea that employers should not be controlled in their management practices (*insindacabilità delle scelte imprenditoriali*). In contrast, the 2012 Law requires judges to exercise narrower and deeper control over management choices, by imposing an obligation to differentiate between unfair economic dismissals and economic redundancies that clearly do not exist.

The distinction between unfair dismissals and economic redundancies that clearly do not exist is, according to legal doctrine, the main source of insecurity. Franco CARINCI (2012, p. 4) has even accused legislators of having fabricated a legal monster –à la Dr. Frankenstein– that is very difficult to understand and to apply. Some decisions by grass-roots judges⁴⁴ have begun to set out, in an imperfect manner, the assumptions on which judges may order reinstatement (MARINELLI, 2013, p. 2).

Faced with these uncertainties, legislators and the new government headed by Matteo Renzi undertook a new reform of the methods of control and compensation of the economic redundancies to be applied by judges. The Law of 10 December 2014,⁴⁵ commonly known as the “Jobs Act”,⁴⁶ led to a massive but brief general strike in December 2014.

Article 7c modifies the system of penalties for economic redundancies for persons hired as of the date of the Law's application. The purpose of this article is “to strengthen job opportunities in the world of work for persons looking for a job.”⁴⁷ In particular, for “permanent contracts” it provides for the creation of a new type of contract: a “contract with rising protection.”⁴⁸ This contract excludes the reinstatement of employees dismissed unfairly, but provides for guaranteed compensation, which increases with

42. For a critical view of changes in Italy's overall labour law, see especially PERULLI (2012).

43. Legislative decree No 276/2003.

44. In particular, the Milan tribunal (20 November 2012) has considered that non-respect of the obligation to retain (or relocate) an employee, as well as infringements of the redundancy procedure (lack of reconciliation procedures) make redundancy wrongful, leading to damages. In contrast, when judges have ruled that reinstatement is not possible, then the justification for redundancy is clearly inexistent.

45. Law No 183/2014 of 10 December 2014.

46. For a discussion of this law in French, see ICHINO, MARTELLONI (2015) and BINI (2015).

47. « Rafforzare le opportunità di ingresso nel mondo di lavoro da parte di coloro che sono in cerca di occupazione. » (Translations as above.)

48. « Contratto a tutele crescent. » (Translations as above.)

seniority.⁴⁹ The Legislative Decree of 04 March 2015 clarifies the content of this Law,⁵⁰ and in particular the regime of “increasing protection” (*tutesle crescent*), which applies to employees hired on permanent contracts as from 7 March 2015. In order to encourage hiring, legislators have designed a new dismissal regime. For dismissals that are discriminatory or only verbal, the sanction remains reinstatement for all employees. For dismissals for disciplinary reasons, reinstatement is possible only if the material reason for dismissal is shown to be non-existent. In all other situations, and especially for all unfair economic redundancies, the concept of wrongful dismissal stands. The evolution here is important: reinstatement is impossible, yet compensation will depend on the rate imposed by the judge. The latter is fixed by the decree, and is equal to two months’ salary per year of service, with a minimum of four months paid compensation, and a maximum of twenty-four months.⁵¹

Two systems of compensation and control of individual economic redundancies thus now coexist: i) for contracts of indefinite duration signed before 7 March 2015, the legal regime remains that of the 2012 Fornero reform (in which judges play an important role in the choice of sanctions and compensation); ii) for contracts signed after the entry into force of the new law, reinstatement will no longer be possible in the event of wrongful economic dismissal, since judges can only order financial damages.

This last development of Italian law therefore largely eliminates the principle of reinstatement contained in Article 18 of the Workers’ Statute, in the event of economic redundancy. In so doing, it limits the power of the courts in fixing the sanctions applicable as well as the amount of damages to be awarded. The Law’s control of the legitimacy of the economic grounds for dismissal should not, however, be affected.

France: Possible Resistance to Litigation?

It would be presumptuous to forecast how different actors (employees, unions, employers, administrations and judges) are likely to respond to the new redundancy procedure, and what its consequences will be, especially for litigation.

At the risk of being wrong, I nevertheless believe that the Law for securing employment could lead to some deceptions, for employees but especially for employers, and that it will not succeed entirely in its aims of reducing litigation over redundancies.

For employees, some of whom undertake individual legal action against economic redundancy, the main risk lies (as is already largely the case) in persons accepting economic redundancy without daring to challenge it in court. The reduction of limitation periods and the prior validation by the administration of economic redundancy

49. « Escludendo per i licenziamenti economici la possibilità della reintegrazione del lavoratore nel posto di lavoro, prevedendo un indennizzo economico certo e crescente con l’anzianità di servizio. » (Translations as above.)

50. Decree-Law No 23/2015 of 4 March 2015.

51. The idea of applying graded rates of indemnities for dismissals for no real or serious reason was adopted in France in July 2015, in the final version of the draft law on growth, activity and the equality of economic opportunities (see the following paragraph).

procedures are likely to dissuade employees from legal action. I therefore expect a further reduction in litigation in Labour Tribunals, at least for economic redundancies. In fact, numbers have already fallen sharply: the number of claims for compensation following contract termination on economic grounds dropped from 4,875 in 2009 to 2,497 in 2012 (*i.e.* –49%, compared to –23% for all cases going to Labour Tribunals).⁵² such cases now only account for 1.4% of all actions brought before these Tribunals⁵³ (GUILLONNEAU, SERVERIN, 2013, p. 8). This change is of course variously interpreted, depending on whether one looks at it from the standpoint of employees or employers. In the future for employers, it seems that economic redundancy will have little chance of being contested by employees. From this point of view, the legal safety of economic dismissal has been acquired, but this was already the case before the reforms of 2013. From the perspective of employees, does this mean that economic dismissal is henceforth better accepted? It is hard to answer this question. Let us simply note that an employee who gives up the possibility of going to court is likely to feel a certain degree of frustration vis-à-vis her/his employer, the redundancy law and even judges.

Although the actual risks of individual litigation are low, legislators have once more acted to make redundancies “safer”. Echoing Italian law, and so again indicating the strong interdependence between the law systems, the French government finally set a ceiling on indemnities. After two failed attempts in 2015⁵⁴ and 2016,⁵⁵ it fixed a ceiling by Decree (*Ordonnance*) in 2017⁵⁶ on the compensation paid by employers in cases where Labour Tribunals ruled that redundancy is unfair (*i.e.* with no real or serious basis). Prior to this reform, French labour law did not set a limit on compensation: judges ruled on the level of damages suffered by the employee following unfair dismissal, applying the general principle of full compensation for damages. Minimal compensation of six months pay did exist however for employees working in companies with eleven or more staff and with more than two years seniority.

Henceforth, the Decree caps compensation for unfair dismissal. For example, this ranges from one to twenty months pay, depending on seniority. The clearly-stated aim by the government is to limit costs for companies, and to encourage recruitment on open-ended contracts, even if the employer is not sure of being able to retain the

52. A change partly due to the development during the period of approved terminations of collective agreements (*ruptures conventionnelles homologuées*), which have been in force since 2008.

53. This sharp drop is difficult to interpret. It may partly be due to the strong success of terminating approved collective agreements. In a certain number of cases, this could substitute for individual economic redundancies. Another, older factor for the drop stems from the fact that when dismissed on economic grounds, the employee may have subscribed to a contract providing professional security (*contrat de sécurisation professionnelle*), which gives him/her a number of advantages in job search. If the employee accepts this contract of professional security, then economic redundancy is qualified, somewhat artificially, by the Labour Code as a termination of contract “by mutual agreement”. This may (incorrectly) suggest that any legal challenge of the dismissal is not possible.

54. The Macron Law No 2015-990 of 6 August 2015, on growth, activity and the equality of economic opportunities.

55. The El Khomri Law No 2016-1088 of 8 August 2016 relating to work, the modernisation of social dialogue and the safeguarding of professional pathways.

56. Decree (*Ordonnance*) No 2017-1387 of 22 September 2017 relating to predictability and security of labour relations. The article was completed on 12 October 2017.

employee for a long time. The ceiling on compensation for dismissal without a real or serious cause meets two objectives: i) to allow employers to know better in advance the legal risks linked to redundancy and ii) by limiting compensation, to dissuade employees from litigating when the prospects of reward are too low. As economic redundancy is little contested, this reform will certainly impact most litigation for dismissals on personal grounds. It is still not sure that it will make the law more predictable and limit litigation. In fact, judges retain their full powers over compensation in certain cases (*i.e.* without a rate scale), especially when dismissal is ruled as discriminatory, in the event of an infringement of the right to strike or of some fundamental freedom. There is no doubt that specialised lawyers will frequently raise these exceptions in an attempt to obtain better compensation for their clients... leading to unprecedented forms of litigation.

However, according to the Law on securing employment, it was mainly collective litigation challenging redundancy schemes (the so-called employment safeguard schemes, or PSEs, see above) which was the most problematic. As already indicated here, such preliminary litigation has ended, as unions and employee representative bodies can only file lawsuits before an administrative tribunal, once the administration has ruled on the scheme. So what will be the reaction of unions or works councils? An initial assessment of the Law on safeguarding employment established on 3 April 2015 by the Ministry of Labour⁵⁷ identifies a “significant fall in the judicialisation of redundancy schemes” (p. 66 *et seq.*). The document states that there is an 8% rate for bringing PSE cases before the administrative tribunal, compared to the 25% rate of cases which went to the High Court prior to the Law on safeguarding employment. In cases of a majority agreement on the redundancy scheme (between the employer and employees), litigation is even less likely, with a rate of referral to the administrative tribunal of 5%. These figures seem to indicate that the aim of legislators has been achieved, at least partially. They should however be examined with some care. First, the law on safeguarding employment is still recent: the 1,142⁵⁸ redundancy schemes which have been undertaken since the Law came into force do not yet allow final conclusions to be drawn about the appropriation of this text by the various actors concerned (employers, employee representatives and employees themselves). Moreover and above all, comparing litigation before the administrative tribunal and the High Court is delicate, as previously there were two types of litigation (summary and substantive) before civil judges. Now there is only one type –substantive– before the administrative judge. To be fully relevant, a comparison therefore needs to look only at substantive litigation. But, the distribution between substantive and summary litigation before the High Court is not specified in the assessment.

57. *Bilan de la loi de sécurisation de l'emploi du 14 juin 2013*, France's Ministry of Labour (*ministère du Travail, de l'Emploi, de la Formation professionnelle et du Dialogue social*). Online http://travail-emploi.gouv.fr/IMG/pdf/CONFERENCE_THEMATIQUE_DU_3_AVRIL_2015_-_Bilan_de_la_loi_de_securisation_de_l_emploi.pdf (accessed 17 June 2015).

58. 2016 figures when the first version of this text was achieved for its publication in French.

In order to predict possible risks of litigation, it is surely necessary to distinguish between situations when there is a majority company agreement and when there is not, as indeed the assessment by the Ministry of Labour does.

In the absence of an agreement, with a document that has been unilaterally drafted by the employer, unions are unlikely to be satisfied with the application and content of the procedure, especially during the design of the PSE. They will tend to challenge the redundancy scheme in administrative tribunals. In this case, it may be considered that the employer has not sought to negotiate effectively (or faced unions unwilling to negotiate, etc.). The employer risks seeing the restructuring scheme challenged in court. The risk of litigation is therefore important given the worsening of industrial relations.

Legislators certainly consider that, in the case of a majority agreement, litigation would be weak, if not non-existent. To be sure, unions which are signatories of an agreement would be inconsistent were they then to challenge in court issues previously negotiated. However, unions not party to the agreement, possibly representing nearly half of all employees in a company, could still challenge the procedure. Significant litigation is therefore not to be ruled out. It would depend also and above all on the jurisprudence assembled before the administrative jurisdictions. In particular, if administrative tribunals seek to draw on previous jurisprudence developed by the High Court, which seems probable, it is likely that the efforts by the scheme to safeguard employment will be better controlled by administrative judges than by the administration itself. This could be a powerful incentive for unions to go before tribunals systematically.⁵⁹ In this situation, the ideal of the de-judicialisation of economic redundancy procedures will not have got very far.

The reform in Italy was modified after two years, and the reform in France is likely to generate litigation as redundancy schemes safeguarding employment are challenged before administrative tribunals. Both examples therefore indicate the difficulties of transcribing into law the political will to make redundancy schemes more flexible while safeguarding employment. The aim of this article is not to judge such highly difficult, if not rash, undertakings which have sometimes been courageously led by legislators and the social partners. Instead it is to underline the inherent problems of designing, in legal terms, legislation promoting more flexibility and plasticity in terms of economic

59. The draft law “on growth, activity and the equality of economic opportunities” may have anticipated this possible rise in litigation. Article 92 of the text adopted 9 July 2015 by the National Assembly aims to limit, in certain situations, the effects of annulment by the administrative tribunal of a decision to validate a PSE by the administration: “in case of annulment of a decision of validation mentioned in Article L. 1233-57-2 or approval mentioned in Article L. 1233-57-3 due to insufficient reasons, the administrative authority will reach a new decision that is sufficiently reasoned, within a period of 15 days from the notification of the ruling by the administration. This decision is passed on by the employer to the dismissed employees, following the first decision of validation or approval, by all means which indicate a specific date for the information being passed on. Once the administrative authority has issued a new decision, the annulment only on the grounds of insufficient motives for the first decision by the administrative authority has no impact on the validity of the redundancy, and provides neither for reinstatement nor the payment of compensation by the employer.”

redundancy. The legal contingency of this notion should lead to the utmost caution. Before any reform, it seems necessary to assess more than 20 years of strengthening flexibility in industrial relations. Such flexibility has indeed worn away the protection granted to employees with permanent contracts, especially in terms of contract termination. But, has it really encouraged more hiring? While economists have in fact already challenged this link (PUCCI, VALENTIN, 2008), the idea that greater flexibility of labour law will help bring down unemployment has clearly been the leitmotif of these reforms. However, the difficulty, if not impossibility, of clearly formulating in law what flexible legislation actually is in reality should be enough to challenge this automatic link, “this scientific evidence”, that greater flexibility to terminate contracts will reduce constraints on hiring.

REFERENCES:

- BONNECHÈRE, M. (2013). « Pour un autre modèle ? » In G. Couturier, J.-F. Akandji-Kombé (Eds.), *Compétitivité des entreprises et sécurisation de l'emploi : le passage de l'accord à la loi* (pp. 145-152). Paris: IRJS éd.
- BINI, S. (2015). « Les licenciements disciplinaires après le *Job's act*. » *Revue de droit du travail*, 6, 420-425.
- BRUNO, S. (1989). « La flexibilité, un concept contingent. » In M. Maruani, E. Reynaud & C. Romani, *La Flexibilité en Italie : débats sur l'emploi* (pp. 33-50). Paris: Syros Alternatives.
- CARINCI, F. (2012). « Complimenti, dottor Frankenstein : il disegno di legge governativo in materia di riforma del mercato del lavoro. » *Il lavoro nella giurisprudenza*, 6, 1-39.
- COUTURIER, G. (2013). « Un nouveau droit des (grands) licenciements collectifs pour motif économique. » *Droit social*, 10, 814-826.
- DALMASSO, R. (2009). *Essai sur le concept de licenciement économique, étude comparée des droits français et italien*. Paris: LGDJ-Lextenso éd.
- DAVID, R. (1950). *Traité élémentaire de droit civil comparé, introduction à l'étude des droits étrangers et à la méthode comparative*. Paris: LGDJ.
- DE LUCA, M. (2013). « Riforma della tutela reale contro i licenziamenti al tempo delle larghe intese : riflessioni su un compromesso necessario. » *Rivista italiana di diritto del lavoro*, 1, 3-38.
- FABRE, A. (2013). « Le licenciement économique et l'objectif de sécurisation. » *Revue de droit du travail*, 3, 184-191.
- FOUCHER, A. (2013). « La France entre démocratie politique et démocratie sociale : l'héritage d'une nation stato-centrée. » In G. Couturier, J.-F. Akandji-Kombé (Eds.), *Compétitivité des entreprises et sécurisation de l'emploi : le passage de l'accord à la loi* (pp. 89-95). Paris: IRJS éd.
- GÉA, F. (2013). « Le droit du licenciement économique à l'épreuve de la sécurisation de l'emploi. » *Droit social*, 3, 210-222.

- GRÉVY, M., HENRIOT, P. (2013). « Le juge, ce gêneur. » *Revue de droit du travail*, 3, 173-178.
- GUILLONNEAU, M., SERVERIN, É. (2013). *L'Activité des conseils de prud'hommes de 2004 à 2012 : continuité et changements*. Paris: Ministère de la Justice, Direction des Affaires civiles et du Sceau, Pôle évaluations de la justice civile.
- GUIOMARD, F., SERVERIN, É. (2013). « Les voies de contestation des décisions unilatérales des employeurs, à l'horizon de la loi sur la sécurisation de l'emploi. » *Revue de droit du travail*, 3, 197-201.
- ICHINO, P., MARTELLONI, F. (2015). « Le “Jobs Act” italien : quelles inspirations ? » *Revue de droit du travail*, 5, 299-308.
- JOLIVET, G. (2013). « La loi de sécurisation de l'emploi : de la flexisécurité à la pseudo-sécurité ? » *JCPS*, 44-45, 1-6.
- LARDY, S. (2013). « Accord national interprofessionnel du 11 janvier 2013 : dérégulation du droit du travail et logique sacrificielle. » In G. Couturier, J.-F. Akandji-Kombé (Eds.), *Compétitivité des entreprises et sécurisation de l'emploi : le passage de l'accord à la loi* (pp. 101-104). Paris : IRJS éd.
- LYON-CAEN, G. (2004). « Les pochettes surprises de la chambre sociale, l'arrêt Aventis Pharma. » *Semaine sociale Lamy*, 1154, 6-11.
- MARINELLI, F. (2013). « Il licenziamento per giustificato motivo oggettivo un anno dopo la riforma Fornero. » *Bollettinoadapt.it*, 10th July. Online http://www.bollettinoadapt.it/old/files/document/22538marinelli_10_7_1.pdf (accessed 23 October 2017).
- PERULLI, A. (2012). « Il diritto del lavoro tra libertà e sicurezza. » *Rivista italiana di diritto del lavoro*, 2, 247-288.
- PUCCI, M., VALENTIN, J. (2008). « Flexibiliser l'emploi pour réduire le chômage, une évidence scientifique ? » *Connaissance de l'emploi*, 50. Noisy-le-Grand: Centre d'études de l'emploi.
- SCOGNAMIGLIO, R. (2013). « Commento alla legge 28 giugno 2012, n.92 sulla riforma del diritto del lavoro. » *Rivista italiana del diritto del lavoro*, 4, 783-826.
- SEIGNE, A., PIRAT, E. (2013). « La CFDT signe un accord pour l'emploi. » *CFDT magazine*, February, 12-17.
- SPEZIALE, V. (2012). « La riforma del licenziamento individuale tra diritto ed economia. » *Rivista italiana di diritto del lavoro*, 3, 521-566.
- TARASEWICZ, Y. (2013). « À propos de la nouvelle procédure de licenciement collectif pour motif économique. » *Semaine sociale Lamy*, 1592, 61-64.
- VALENTI, A. (2012). « Le ragioni del licenziamento per motivi economici in tempo di crisi. Il “regolare funzionamento” dell'organizzazione del lavoro : ipotesi di ricerca. » *Ianus*, 7, 239-264.
- VIDIRI, G. (2012). « La riforma Fornero : la (in)certezza del diritto e le tutele differenziate del licenziamento illegittimo. » *Rivista italiana di diritto del lavoro*, 4, 617-650.
- ZWEIGERT, K., KÖTZ, H. (1998). *Introduction to comparative law*, translated from the German by Tony Weir, 3rd revised edition. Oxford: Clarendon Press.