

**LABOUR LAW REFORMS AT THE CROSSROADS OF ILO  
STANDARDS AND OECD AND WORLD BANK'S INDEXES:  
A GLOBAL REVIEW OF REGULATION ON COLLECTIVE REDUNDANCIES**

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July 2012

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Employment protection legislation (EPL) remains one of the controversial issues at the centre of policy and academic debate. National policy makers face different options for regulating labour market institutions. Some guidance is provided by comparative labour law and standards of the International Labour Organisation (ILO). On the other side, the labour law policies are defined with advice by the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the World Bank.

The objective of this paper is to examine global and regional trends in the regulation of collective dismissals for economic reasons in light of policy advice provided by the international institutions. This aspect of EPL is particularly topical in the context of the current economic crisis. Since 2008-2009, mass redundancies and restructuring have had a dramatic impact in many countries. It is obvious that the labour law cannot prevent job losses. However, the labour law can and does play an important regulatory role in guaranteeing fairness of processes at the workplace and mitigating the negative consequences of redundancies on workers, enterprises and communities.

The first part of the paper lists the main international sources of influence on EPL reforms, such as relevant ILO standards and the indicators of employment protection developed by the OECD and the World Bank. The second part presents some regional and global trends in regulation of collective dismissals for economic reasons. The variety of approaches is illustrated by examples of recent national labour law reforms. The third part summarises the legal analysis in the paper by putting in evidence several contradictions in approaches of different international institutions. The conclusions plead for more coherence and collaboration on policy advice and comparative research within the multilateral institutions system.

## **INFLUENCE OF INTERNATIONAL STANDARDS AND INDICATORS ON EPL REFORMS**

To clarify the terminology used in this comparative review, the term of collective dismissals for economic reasons refers to mass redundancies, retrenchment, downsizing, and layoffs.<sup>2</sup>

### ***Comparative law in light of ILO standards***

With the Termination of Employment Recommendation No. 119 of 1963, the ILO was the pioneer of international regulation in the field of collective dismissals for economic reasons. Currently Convention No. 158 and Recommendation No. 166 on Termination of Employment are the main ILO standards on the topic of dismissals at the initiative of the employer. These instruments, whose legitimacy is strengthened by the international tripartite consensus at their adoption in 1982, have influenced many national laws around the world. Moreover, Convention No. 158 has been used by

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<sup>2</sup> In this paper, all these terms are used interchangeably, despite slightly different meanings in various legislations. For instance, in some countries "lay-offs" mean a definitive termination of employment, while most frequently this term is related to a temporary suspension of an employment relationship.

lawyers and judges in domestic courts litigation, even in countries which have not ratified this instrument (ILO, 2011).

The Global Jobs Pact, which was unanimously adopted by the International Labour Conference in 2009, also mentioned ILO standards on termination of employment as relevant and of particular usefulness in times of crisis. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), in its general observation on Convention No. 158 in 2009, considered that the principles underlying the Convention constituted a carefully constructed balance between the interests of the employer and the workers, in particular as evidenced by its provisions relating to termination on grounds of operational requirements of the enterprise.

In a globalised economy, countries are particularly interested in the experience of other countries. In response to the increasing request for comparative information, the International Labour Office has developed EPLex, an online database on Employment Protection Legislation of more than 100 countries.<sup>3</sup>

This paper provides a comparative overview of regulation on mass redundancies and recent reforms worldwide. Global and regional trends are presented on the main issues of EPL concerning downsizing, such as: definition of collective dismissals, consultation with workers' representatives, notification to public authorities, criteria utilised to select workers for redundancies, employer's obligation to consider other options before dismissals, and priority right for re-employment. All these issues are reflected in ILO standards and considered by the OECD and the World Bank in their research on EPL.

### ***OECD Employment Protection Indicators***

The OECD methodology of measuring employment protection remains one of the most referred to by comparative researchers. The sources of regulation used are labour laws, although practice of enforcement and collective bargaining are taken into account where possible (Venn, 2009). The summary indicator of employment protection for each country is calculated through 21 items. The collected information is classified into three main areas: individual dismissals of workers with regular contracts, regulation of temporary employment, and specific requirements for collective dismissals.<sup>4</sup>

The part devoted to collective dismissals contains four items, which reflect specific requirements in addition to the regulation of individual redundancies. The item "Definition of collective dismissal" details specific regulations, which apply depending on the number of redundant workers (less or more than 10, 20 or 50). The item "Additional notification requirements" refers to the notification to works councils (or employee representatives) and to government authorities such as public

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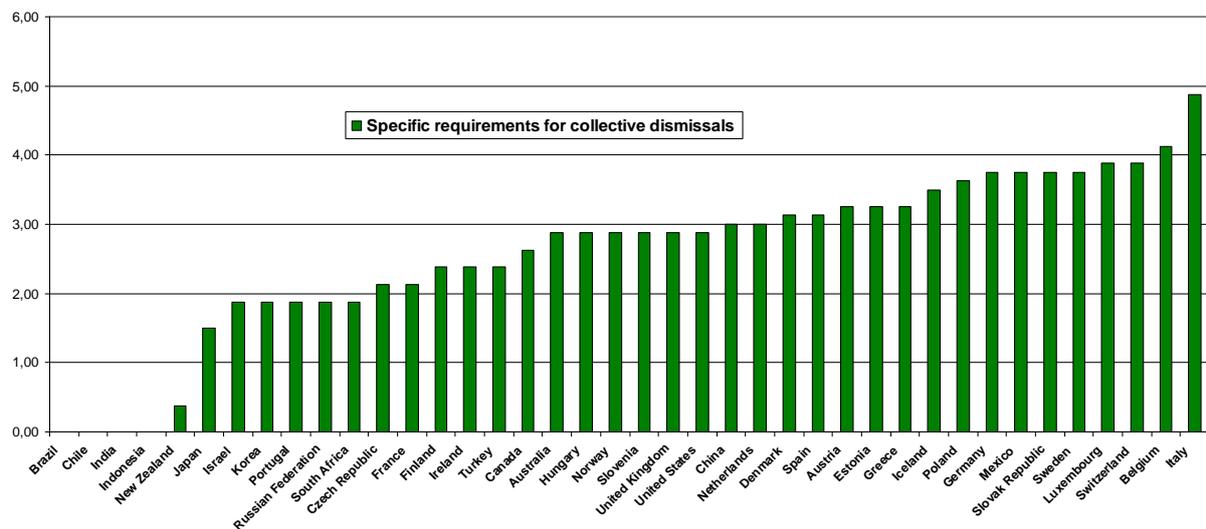
<sup>3</sup> Most legal information in this paper is taken from EPLex which may be accessed at: <http://www.ilo.org/dyn/eplex/termmain.home>

<sup>4</sup> OECD Employment Protection Indicators, 2008, may be found at: [http://www.oecd.org/document/11/0,3746,en\\_2649\\_37457\\_42695243\\_1\\_1\\_1\\_37457,00.html](http://www.oecd.org/document/11/0,3746,en_2649_37457_42695243_1_1_1_37457,00.html)

employment services. Different scores are assigned to countries if there are no additional requirements or when one or two more actors need to be notified. The item “Additional delays involved before notice can start” means delays in addition to those in the case of individual dismissal (from 0 to more than 90 days). The last item “Other special costs to employers” specifies whether there are additional severance pay requirements and whether social plans (measures of reemployment, retraining, outplacement) are mandatory or common practice.

The OECD indicators measure the strictness of employment protection on a scale of 0-6, higher scores representing stricter regulation. Figure 1 presents the sub-indicator of collective dismissals in 40 countries. The lowest scores are in the group of non-OECD countries (Brazil, Chile, India and Indonesia) where there are no specific requirements for collective redundancies. Most countries are scored between 2 and 4. The least strict regulation on mass redundancies is in New Zealand (0,38) and the most stringent EPL on the same issue is in Italy (4,88).

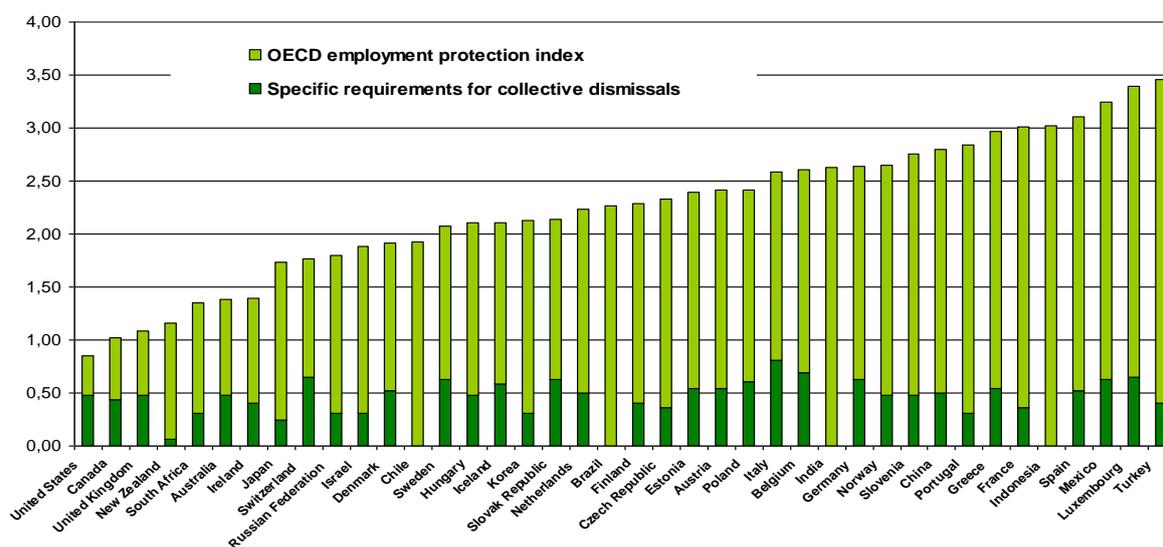
Figure 1. Sub-indicator of specific requirements for collective dismissals in OECD countries and selected non-OECD countries



Source: OECD, 2008.

Figure 2 shows that there is no direct correlation between the OECD index of employment protection strictness and the sub-indicator on collective redundancies. The countries with the least strict EPL (United States of America, Canada, United Kingdom) have comparable figures for the regulation of collective dismissals with the countries with the highest index of EPL strictness (Turkey, Luxembourg, Mexico). Most countries appear to have slight differences in weighted scores on regulation of collective dismissals (around 0,5).

Figure 2. OECD Index of Employment Protection Strictness with a sub-indicator on collective dismissals



Source: OECD, 2008.

The OECD methodology suggests that any additional procedures contribute to a higher score of EPL strictness. This rationale would not be in line with the spirit of ILO standards. This approach also shows some contradiction with the OECD Guidelines for Multinational Enterprises, which were revised in 2011. Among recommendations for responsible business conduct in a global context, the OECD encourages employers to engage in meaningful cooperation with workers' representatives and governmental authorities in considering changes in their operations which would have major employment effects upon the workforce, in particular in case of collective dismissals, so as to mitigate to the maximum extent practicable adverse effects. This document recognises that this important principle of cooperation is widely reflected in the law and practices of adhering countries, although the approaches of ensuring such opportunity for meaningful co-operation are not identical in all OECD countries (OECD, 2011).

### ***“Employing Workers” Indicators in the World Bank’s “Doing Business”***

Another reference for international comparison is the annual report “Doing Business” published since 2003 by the World Bank. The “Employing Workers” Indicator (EWI) measures the rigidity of employment index and the cost of redundancy. The difficulty of redundancy index, divided into 8 components, is a part of the rigidity of employment index.

In the face of criticism expressed by the ILO and by international trade unions, as well as controversy provoked in academic circles (Lee et al., 2008), the EWI was removed from the ranking and annexed to the Doing Business report of 2011. Already in 2009,

the World Bank declared that it would no longer refer to the EWI as a basis for policy advice. However, in some countries, in particular in Africa, Eastern Europe and Central Asia, intergovernmental committees have been established with a view to increasing the countries' positions in the Doing Business report. Several countries continue to refer to this ranking in their labour law reforms with the objective of improving the business climate for investors.

In Doing Business 2011, the World Bank reaffirms that its methodology is “fully consistent” with relevant ILO Conventions. However, the detailed analysis in the following part of the paper would show that several indicators on redundancy are promoting approaches opposite to ILO standards on termination of employment.

The rationale behind the methodology of the EWI also seems contradictory to the approach of the International Finance Corporation (IFC), a member of the World Bank Group, whose Performance Standard 2 on “Labour and Working Conditions” contains a “Good Practice Note: Managing Retrenchment”. In this document, for investment projects involving a significant number of job losses, a well-managed redundancy process is defined as achieving the commercial objectives through the respect of procedures aimed at mitigating the negative impact of job losses on workers and communities. The vocabulary and procedures have been inspired by Convention No. 158 and Recommendation No. 166 whose texts were entirely reproduced in these guidelines.

## **COMPARATIVE REVIEW OF REGULATION OF COLLECTIVE DISMISSALS FOR ECONOMIC REASONS**

While the main source of regulation under review is national labour laws, useful information on recent reforms may also be found in collective agreements, case law and codes of good practices.

### *Definition of collective dismissals for economic reasons*

Convention No. 158 recognizes the operational requirements of the enterprise as a valid reason for terminating the employment of a worker. The operational requirements are understood as reasons of an economic, technological, structural or similar nature.

Dismissals for such reasons may be individual or collective. Usually, collective dismissals, which meet some threshold numbers, trigger procedural requirements to consult with workers' representatives and to notify the public authorities.

Convention No. 158 authorises that the applicability of procedures of consultation and notification may be limited to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce. Convention No. 158 does not contain, however, any quantitative criterion or thresholds to determine collective dismissals.

The analysis of labour laws of 125 countries shows that the majority (51 per cent) have a statutory definition of collective dismissals with prescribed specific procedures. In a third of the reviewed countries (30 per cent), the law specifies the specific procedures in case of collective redundancies, without giving any quantitative definition of mass dismissals. Less than one-fifth of the countries reviewed (18 per cent) do not have any provisions related to collective dismissals for economic reasons.

Table 1. Statutory definition of collective dismissals for economic reasons with related procedures (125 countries)

<b>THE LAW DEFINES COLLECTIVE DISMISSALS FOR ECONOMIC REASONS AND PRESCRIBES SPECIFIC PROCEDURES (64 countries)</b>
<b>AFRICA (13):</b> Angola, Burkina Faso, Congo (Democratic Republic of), Côte d'Ivoire, Ethiopia, Gabon, Morocco, Mozambique, Niger, Senegal, South Africa, Uganda, Zimbabwe
<b>ASIA and the PACIFIC (3):</b> China, Korea (Republic of), Pakistan
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (11):</b> Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, Kyrgyzstan, Macedonia (FYR), Montenegro, Russian Federation, Serbia, Turkey
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (33):</b> Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark (with Greenland), Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States,
<b>LATIN AMERICA and the CARIBBEAN (4):</b> Argentina, Colombia, Peru, Venezuela
<b>MIDDLE EAST:</b> none
<b>THE LAW DOES NOT DEFINE COLLECTIVE DISMISSALS FOR ECONOMIC REASONS, BUT PRESCRIBES SPECIFIC PROCEDURES (38 countries)</b>
<b>AFRICA (15):</b> Algeria, Cameroon, Central African Republic, Comoros, Egypt, Ghana, Madagascar, Mauritius, Namibia, Nigeria, Rwanda, Seychelles, Tanzania, Tunisia, Zambia
<b>ASIA and the PACIFIC (9):</b> Afghanistan, Bangladesh, Cambodia, India, Mongolia, Philippines, Sri Lanka, Thailand, Viet Nam
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (5):</b> Azerbaijan, Kazakhstan, Moldova, Turkmenistan, Ukraine
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (1):</b> New Zealand
<b>LATIN AMERICA and the CARIBBEAN (4):</b> Honduras, Mexico, Panama, Paraguay
<b>MIDDLE EAST (4):</b> Iran, Jordan, Syrian Arab Republic, Yemen
<b>THE LAW DOES NOT DEFINE COLLECTIVE DISMISSALS FOR ECONOMIC REASONS AND DOES NOT PRESCRIBE ANY SPECIFIC PROCEDURES (23 countries)</b>
<b>AFRICA (3):</b> Lesotho, Libya, Malawi
<b>ASIA and the PACIFIC (4):</b> Indonesia, Malaysia, Maldives, Singapore
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (1):</b> Georgia
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (1):</b> Israel

**LATIN AMERICA and the CARIBBEAN (11):** Antigua and Barbuda, Brazil, Chile, Costa Rica, Cuba, El Salvador, Guatemala, Jamaica, Nicaragua, Saint Lucia, Uruguay

**MIDDLE EAST (3):** Kuwait, Saudi Arabia, United Arab Emirates

Source: Author's analysis of the data of EPLex, NATLEX and national labour laws, 2011.

Figure 3 reflects the regional trends in legal frameworks. In the group of developed economies and in the European Union, almost all countries have a legal definition of collective dismissals with two procedures of consultation and notification. There are two exceptions. In New Zealand, the law does not define collective dismissals, but provides for consultation with workers' representatives in case of mass redundancy. In Israel, in the absence of any legal provisions on the topic, the case law puts an obligation on the employer to consult with workers' representatives. Among reforms on this topic during the crisis in 2010 in the considered group, Greece increased the thresholds of collective dismissals. The reform of the labour law in Spain in 2010 provided a detailed definition of "negative economic situation".

In Africa, an almost equal number of countries provide legal rules for collective dismissals, some defining the quantitative thresholds, and some not. A rare exception is Libya whose new labour law of 2010 ignores this important topic of most modern legislations.

In Central and Eastern Europe and the Commonwealth of Independent States (CIS), countries with a definition of collective dismissals prevail. Georgia is the only country in the region which abolished all the requirements for redundancy in the Labour Code of 2006. On the contrary, the former Yugoslav Republic of Macedonia introduced in 2009 a quantitative definition of mass redundancies. In the Russian Federation, the definition of collective dismissals belongs to collective bargaining. In the absence of any collective agreements, the figures of the relevant governmental decree apply. Several regional collective agreements were revised in 2009-2010 by decreasing the thresholds in the existing definitions of collective dismissals. Belarus also slightly decreased the thresholds, although the trade unions remain unsatisfied by the figures as too high for the national economy. In Moldova, in 2009 the three social partners discussed the draft national agreement to give a quantitative definition of collective dismissals, but finally decided to postpone its adoption. In Kyrgyzstan, in 2009, the tripartite working group in charge of the Labour Code reform rejected the proposal of the World Bank to increase the thresholds from 15 to 51 per cent of the workforce to be dismissed.

In Asia and the Pacific, China, the Republic of Korea and Pakistan have legal definitions of collective dismissals and related procedures. However, the most important group is composed of countries with procedural requirements but without legal quantitative definition (e.g. Afghanistan, India, Philippines, Viet Nam). In the group without any specific rules on collective dismissals, Indonesia has procedural requirements of negotiation for any, even individual, termination of employment. While Singapore has no legal provisions on redundancy, the "Tripartite Guidelines on Managing Excess Manpower" were adopted in 2008 and revised in 2009. In Singapore, the Tripartite Upturn Strategy Teams (TRUST Teams) were created to promote effective implementation of the Guidelines by enterprises. The government

of Singapore also set up a managing-excess-manpower hotline to advise enterprise on retrenchment and downturn measures.<sup>5</sup>

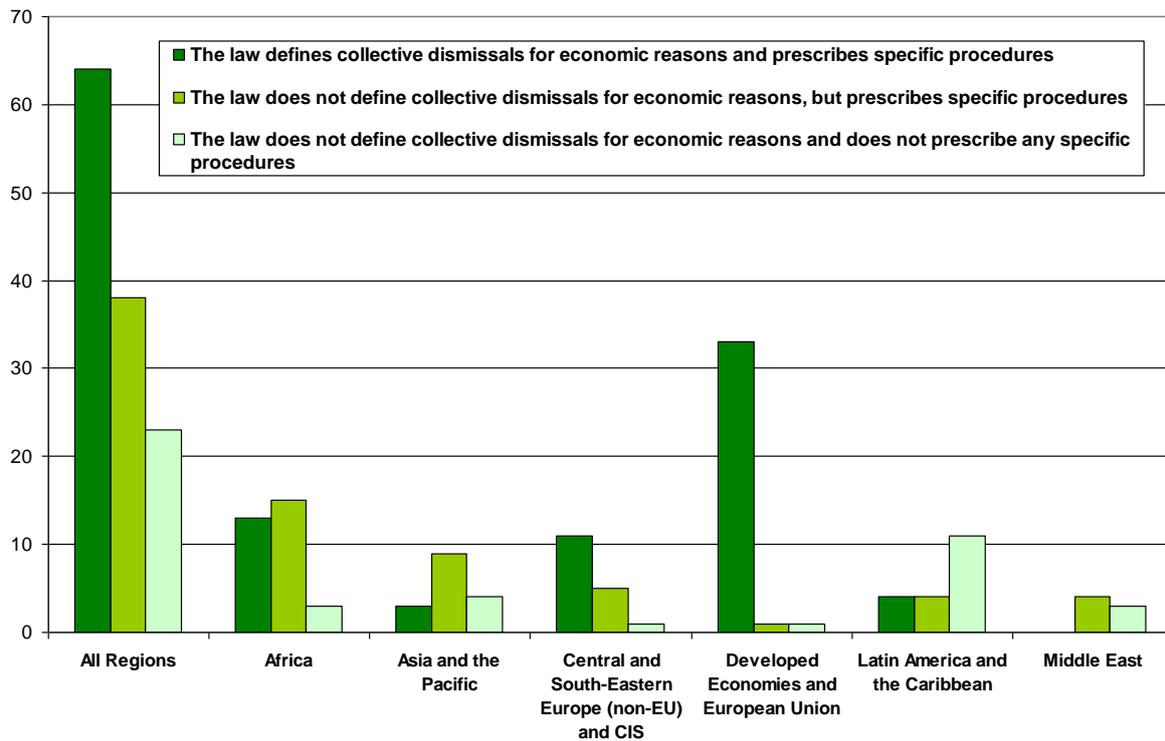
In Latin America and the Caribbean, there are two equal groups of countries regulating collective dismissals with the definition of collective dismissals (Argentina, Colombia, Venezuela) and without such a definition (Mexico, Panama, Paraguay). However, this region is characterised by the most important group without any legislation on the topic. In Chile in 2009, a draft amendment to the Labour Code was proposed by some parliamentarians to introduce a procedure of “previous information and consultation” with workers’ representatives concerning the contemplated collective dismissals for economic reasons. In Brazil, the jurisprudence “Embraer” became emblematic in 2009. In that case, the tribunal positively accepted the complaint of the trade union about lack of consultation on collective dismissals, even if from the legal point of view, the employer was not obliged to consult with the trade unions. Similar decisions of some regional courts have constituted important precedents, which cannot be ignored by companies considering mass redundancies. Although these decisions were being partly overturned in 2010, the Superior Labour Court of Brazil highlighted the importance of collective bargaining to avoid significant job losses.

The Middle East is a unique region under review without any country defining collective dismissals. The labour law of some countries (Iran, Jordan, Syria, Yemen) provides for consultative process through tripartite committees, which examine redundancy requests. In Syria, the labour law of 2010 has a new chapter (6 articles) on downsizing. By contrast, in other countries of the region (Saudi Arabia, United Arab Emirates), the law is silent on any regulation of mass dismissals for economic reasons. The new labour law of 2010 in Kuwait does not contain any provision on redundancies. In Iran in 2010 it was proposed to add “reduction of production and structural changes” to the list of valid reasons of dismissals.

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<sup>5</sup> See the website of the Ministry of Manpower of Singapore <http://www.mom.gov.sg/Documents/employment-practices/Guidelines/MEM%20Guidelines%20revised%20final.pdf>

Figure 3. Regional situation concerning statutory definition of collective dismissals for economic reasons with related procedures (125 countries)



Source: Author's analysis of the data of EPLex, NATLEX and national labour laws, 2011.

In the *Doing Business* report, in the difficulty of redundancy index the first question is whether redundancy is disallowed as a basis for terminating workers. The relevance of this item may be questioned, as it appears in comparative law that there are no countries whose legislation prohibits the termination of employment for economic reasons. However, in some national laws, redundancy is not explicitly cited as a reason for termination of employment. A salient example is Latin America with specific legal systems of dismissals with or without reasons, calling for different procedures. This question is important in *Doing Business*, as a positive reply to it gives a score of 10 and means that all other questions do not apply. In the report of 2011, only two countries - Bolivia and Venezuela - were counted with "no", while other countries of the continent with similar systems were scored with the opposite result. This example puts in evidence that the variety of national legal systems does not fit easily in a universal scheme and the methodology should aim at reducing differences in interpretation by different experts.

The quantitative definitions often refer to the number of the redundant workers (5, 10 or 20) or a certain percentage of the workforce during the period of two to three months. The OECD and the World Bank gather data on procedures concerning 10-20-50 and 9 workers respectively. Further analysis would be necessary to determine comparative trends in the thresholds used. Another methodological issue would be to clarify how to categorise the countries without any quantitative definition.

### ***Consultation with workers' representatives and notification to public authorities***

Convention No. 158 requires that an employer contemplating terminations of employment for reasons of an economic, technological, structural or similar nature, provide the workers' representatives concerned in good time with relevant information, including reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Convention No. 158 also provides for consultations to be held with the workers' representatives concerned, as early as possible, on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned, such as finding alternative employment.

In addition, Convention No. 158 requires an employer contemplating terminations of employment for reasons of an economic, technological, structural or similar nature, to notify the competent public authority as early as possible, with relevant information, including a written statement of the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Recommendation 166 details the role that the public authority may play to mitigate the impact of collective dismissals for economic reasons. It refers to the promotion of the placement of the workers affected in suitable alternative employment, or income protection during training and retraining.

The comparative analysis of countries under review shows that in most countries the law contains the requirements of both consultation and notification. The homogeneity of legal frameworks in Europe is explained by the European Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. The Directive, which contains the requirements of consultation and notification similar to those of Convention No. 158, has been transposed into national legislation of 27 countries.

The only notification to public authorities exists in Afghanistan, Chile, Honduras, Panama, Philippines, Rwanda, Seychelles, Sri Lanka, Thailand and Yemen. The law only stipulates the consultation with workers' representatives in Ethiopia, Indonesia, Nigeria, New Zealand, South Africa and Tanzania.

In Belarus and Kyrgyzstan, further to the amendments to the Labour Code in 2009, the employer has to notify the public employment service only in case of mass dismissals and not in case of individual dismissals, as it was the case before the reform. In Malaysia, the employer had to notify the department of Labour about all redundancy dismissals. A 2009 circular limited that requirement to the redundancy dismissal of 5 workers and more.

Another trend is observed in several countries under review, when the requirement to notify a trade union or a public authority exists even in case of one redundant worker. In 2009, the United Arab Emirates introduced by a ministerial decree an obligation for employers to notify the dismissal of each Emirati employee to the Ministry of Labour. In the Democratic Republic of Congo, the ministerial decree of 2010 imposed the obligation to inform the public authorities on any dismissals for any reason.

In the *Doing Business* report, the difficulty of redundancy index describes 4 hypotheses: if the employer has to notify a third party (such as the government agency) or obtain an approval to terminate 1 and 9 redundant workers. In case of a positive reply, a score of 1 is assigned, otherwise in case of no procedural requirements a score of 0 is given. The question on the need to obtain an approval to dismiss one worker, the positive reply gives a score of 2, which is considered the most restrictive regulation. Georgia is an illustration of the influence of the ranking on national policies. The liberal reform of the Labour Code in Georgia, adopted in 2006 without tripartite discussions and which abolished all the procedures for collective dismissals, was praised by the World Bank and Georgia proclaimed a champion of reforms in “Doing Business”.

The points of convergence of the ILO, OECD and World Bank are the issues of interference and approval of dismissals by other parties. Convention No. 158 does not limit the managerial power of the employer to dismiss workers, nor requires any authorisation to obtain from workers’ representatives or public authorities.<sup>6</sup>

In the limited number of countries under review, the employer has to obtain an authorisation from the public authorities to proceed with collective dismissals (Afghanistan, Colombia, Democratic Republic of Congo, Gabon, India, Netherlands, Panama, Seychelles, Spain, Zimbabwe). However, in some countries this authorisation is based on the decision elaborated by workers and employers concerned (Angola, Egypt, Iran, Jordan, Morocco, Pakistan). In Seychelles, the tripartite discussions on the reform of the labour law in 2011 concerned the suppression of the administrative approval. The figures provided confirmed that the Employment Department authorised collective dismissals in 100 per cent of requests. The Seychellois social partners recognised the important role of public authorities in ensuring the respect of labour law and genuine consultation of the employer with workers’ representatives.

In Central African Republic and Estonia, the new labour law of 2009 suppressed the authorisation by the labour inspection of collective dismissals. In Rwanda, the new employment law in 2009 suppressed consultation with workers representatives and kept only the notification to public authorities in case of workforce reduction.

In 2009, the Russian Federation abandoned the authorisation by the trade union of dismissals of its members, while in other post-socialist countries such authorisation remains required (Azerbaijan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine).

In Europe, a trend has emerged to reduce the duration of consultation. In Spain the 2010 reform limited the time of consultation to 30 days (and 15 days in enterprises with less than 50 employees), while before the time framework was of 30 days minimum. In Albania, in 2010 the government proposed an amendment to the Labour Code to reduce the period of consultation with workers’ representatives from 20 to 15 days. In June 2010, the Confederation of British Industry (CBI) proposed a revision of

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<sup>6</sup> The only exception is a usual practice in many countries to subject to the control by some competent public authorities (labour inspection) the termination of employment of some protected categories of workers (trade union officials, pregnant women).

the UK employment law to reduce the statutory period from 90 to 30 days for consultation on redundancies affecting 100 and more employees. The objective is to “enable employers to restructure their workforces more quickly in response to falls in demand”. The Trade Union Congress (TUC) reacted that a shorter 30-day period for consultations with the trade union on collective dismissals would not allow elaborating alternatives.

An opposite example comes from Germany, when in 2010 the company Siemens renewed a collective agreement on restructuring. The enterprise committed to avoid dismissals by the use of internal mobility and work sharing. The employer agreed to go beyond legal requirements and obtain an approval by the trade union of any dismissals for economic reasons.

### ***Employer’s obligation to consider other options before dismissals***

Recommendation No. 166 provides guidance on examples of measures which could be adopted to avert or minimize dismissals for economic, technological or structural reasons, such as, among others, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

In more than half of the countries reviewed (54 per cent), the employer has a legal obligation to consider other options before proceeding with dismissals, such as retraining, internal and external transfers etc.

Table 2. Statutory obligation to use dismissals as the last resort (109 countries)

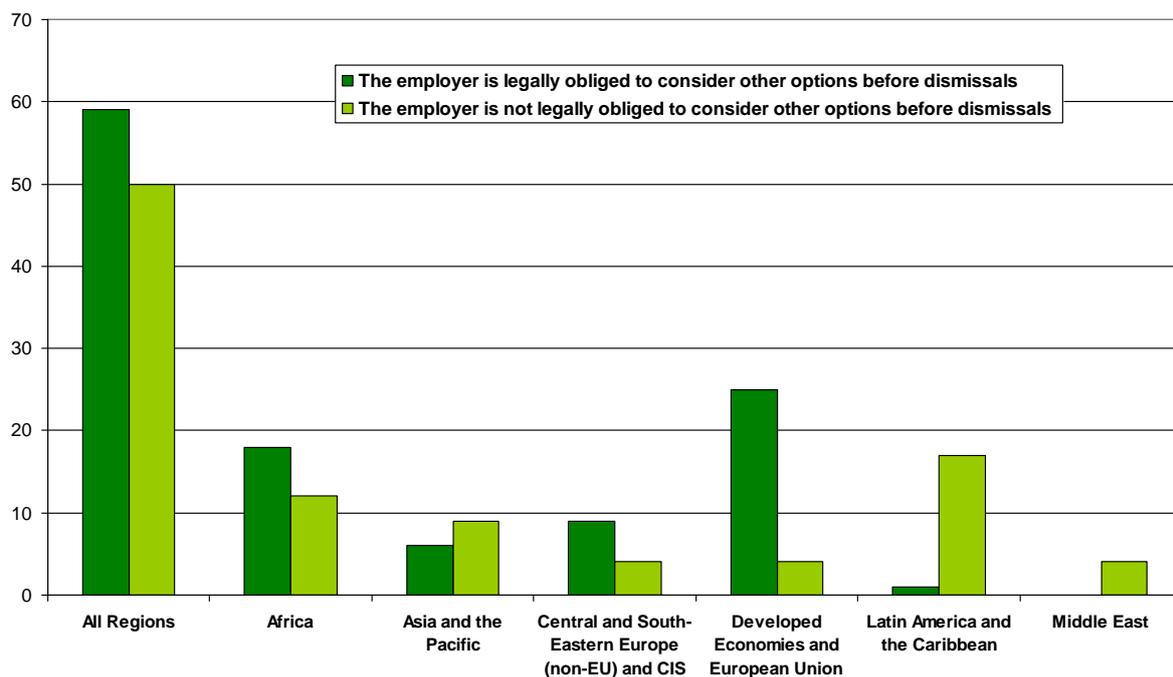
<b>The employer is legally obliged to consider other options before dismissals (59 countries)</b>
<b>AFRICA (18):</b> Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Gabon, Ghana, Mauritius, Morocco, Mozambique, Namibia, Senegal, South Africa, Seychelles, Tanzania, Tunisia, Zambia, Zimbabwe
<b>ASIA and the PACIFIC (6):</b> Afghanistan, Cambodia, China, Indonesia, Pakistan, Viet Nam
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (9):</b> Armenia, Belarus, Kyrgyzstan, Moldova, Montenegro, Russian Federation, Serbia, Turkey, Ukraine
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (25):</b> Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italia, Japan, Korea (Republic of), Luxembourg, Netherlands, Romania, Slovakia, Slovenia, Spain, Switzerland, United Kingdom
<b>LATIN AMERICA and the CARIBBEAN (1):</b> Peru
<b>MIDDLE EAST:</b> none
<b>The employer is not legally obliged to consider other options before dismissals (50 countries)</b>
<b>AFRICA (12):</b> Comoros, Congo (Democratic Republic of), Côte d'Ivoire, Egypt, Ethiopia, Lesotho, Libya, Madagascar, Malawi, Niger, Nigeria, Uganda
<b>ASIA and the PACIFIC (9):</b> Bangladesh, Iran, Malaysia, Maldives, Mongolia, Philippines, Singapore, Sri Lanka,

Thailand
CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (4): Azerbaijan, Georgia, Kazakhstan, Turkmenistan
DEVELOPED ECONOMIES and EUROPEAN UNION (4): Israel, New Zealand, Sweden, United States of America
LATIN AMERICA and the CARIBBEAN (17): Antigua and Barbuda, Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Saint Lucia, Uruguay, Venezuela
MIDDLE EAST (4): Jordan, Kuwait, Saudi Arabia, Syria

Source: Author’s analysis of the data of EPLex, NATLEX and national labour laws, 2011.

Most developed economies and European Union countries have legal provisions on the employer’s obligation to consider other options before dismissals. In Sweden, this issue is dealt with through collective bargaining. In Africa, Central and Eastern Europe, two thirds of the countries analysed provide for such an obligation of the employer. The tendency becomes opposite in Asia. In Latin America, most countries have no legal provisions to consider dismissals as the last resort, as it is the case for all countries reviewed of the Middle East. However, in some countries the redundancy project must be examined by a tripartite committee whose objective is, namely, to elaborate alternatives to dismissals (Egypt, Jordan, Niger, Syria, Venezuela).

Figure 4. Employer’s obligation to consider other options before dismissals



Source: Author’s analysis of the data of EPLex, NATLEX and national labour laws, 2011.

In the *Doing Business* report, the difficulty of redundancy index contains a question whether the law requires the employer to reassign or retrain a worker before making the worker redundant. The rigidity of labour law is considered increased in case of a positive reply. In the FYR of Macedonia, with a reform to improve country’s scoring

of EWI, the obligation to seek for other alternatives before dismissals was suppressed in 2009.

An opposite example occurred in Australia. Further to political changes, the Fair Work Act of 2009 and National Employment Standards of 2010 introduced the obligation for employers to consider the feasibility of reassigning a worker to another position before redundancy.

In 2010, France amended its labour code to precise that the offer of alternative employment abroad should be at the equivalent level of wages. This law was adopted in reaction to some collective dismissals when workers were offered employment in other countries with salaries several times inferior to the level of wages in France.

Voluntary departures, as one of possible alternatives, should be dealt with care, as some enterprises may face risks of disorganization and loss of competencies. The reform of 2010 in France allowed the possibility of terminating an employment relationship by common agreement between the employer and the worker. However, the Cour de Cassation decided in 2011 that such voluntary redundancies for economic reasons should be counted in the number of dismissals whose number would require the establishment of a social plan.

### *Selection criteria for redundancies*

Pursuant to Recommendation No. 166, in case of redundancy due to economic or similar reasons, the employer should select the workers to be dismissed according to criteria, established wherever possible in advance, which give due weight both to the interests of the enterprise and to the interests of the workers.

Table 3 shows that in more than half of the 110 countries reviewed, the law specifies criteria for selection of workers in case of redundancy. In some countries, such criteria are defined by collective agreements or codes of good practices.

Table 3. Legal provisions on selection criteria for redundancy (110 countries)

<b>The law provides criteria for selection of workers in case of redundancy or states that such criteria are to be defined in collective agreements (59 countries)</b>
<b>AFRICA (21):</b> Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Democratic Republic of), Côte d'Ivoire, Egypt, Ethiopia, Gabon, Lesotho, Madagascar, Morocco, Namibia, Niger, Nigeria, South Africa, Senegal, Tanzania, Tunisia
<b>ASIA and the PACIFIC (6):</b> Bangladesh, Cambodia, China, Malaysia, Pakistan, Viet Nam
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (7):</b> Belarus, Kyrgyzstan, Moldova, Montenegro, Russian Federation, Turkmenistan, Ukraine
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (21):</b> Austria, Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Korea (Republic of), Lithuania, Luxembourg, Netherlands, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, United Kingdom
<b>LATIN AMERICA and the CARIBBEAN (3):</b> Argentina, Mexico, Panama

MIDDLE EAST (1): Syria

**The law does not mention any criteria for selection of workers in case of redundancy (51 countries)**

AFRICA (8): Ghana, Libya, Malawi, Mozambique, Seychelles, Uganda, Zambia, Zimbabwe

ASIA and the PACIFIC (9): Afghanistan, Indonesia, Iran, Maldives, Mongolia, Philippines, Singapore, Sri Lanka, Thailand

CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (5): Armenia, Azerbaijan, Georgia, Kazakhstan, Turkey

DEVELOPED ECONOMIES and EUROPEAN UNION (10): Australia, Canada, Cyprus, Denmark, Finland, Israel, Japan, New Zealand, Switzerland, United States of America

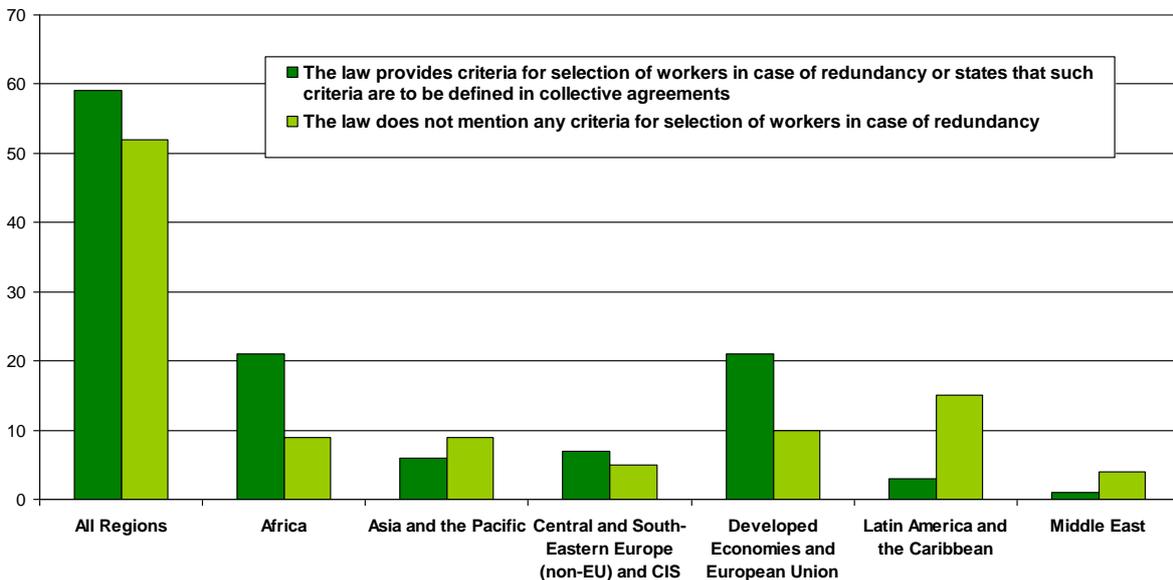
LATIN AMERICA and the CARIBBEAN (15): Antigua and Barbuda, Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Peru, Saint Lucia, Uruguay, Venezuela

MIDDLE EAST (4): Jordan, Kuwait, Saudi Arabia, Yemen

Source: Author's analysis of the data of EPLex, NATLEX and national labour laws, 2011.

The analysis by regions puts in evidence that the majority of developed countries, as well as in Africa and Central and Eastern Europe, the law provides indications on the criteria to take into account. Such legal criteria are less frequently found in Asia and the Pacific, Latin America and the Caribbean, and the Middle East.

Figure 5. Legal provisions on selection criteria for redundancy (110 countries)



Source: Author's analysis of the data of EPLex, NATLEX and national labour laws, 2011.

In Estonia, the new labour law in 2009 replaced the detailed list of criteria of selection by the general principle of non-discrimination. In Kyrgyzstan, the reform of 2009 also reduced the list of criteria to keep only those of productivity and qualification, the definition of other criteria was left to collective agreements. In Romania, the reform in 2011 added that criteria of selection should be applied after assessment of worker's performance. In Syria, the new Labour Code of 2010 stipulates that in case of absence

of collective agreement, the employer has to consult the Labour Directorate and trade unions on criteria, such as professional competency, tenure, family responsibilities and age.

In several countries (Argentina, Bangladesh, Malaysia, Mexico, Netherlands, Nigeria, Pakistan, Panama, Sweden, USA), the criterion “Last In, First Out” is still used as a main method of selection for redundancy. It means that the employer must retrench the worker who is the last person employed in that category. The rationale is to reward loyalty and maintain stable and most experienced workforce. However, entitlements varying with length of service may be challenged as indirect age discrimination, unless the scheme is justified. Progressively, such a criterion is abandoned as it puts younger workers at a particular disadvantage.

In Sweden, the only possible exemption from the seniority principle applies to companies with fewer than 10 employees, where the employer has his or her discretion to decide upon two employees to be exempted from this principle. In India, the Supreme Court stated in 2010 that the rule “first-come-last-go” “might be deviated by the employer in cases of lack of efficiency or loss of confidence, but burden remained on the employer to justify deviation”.

In the case law of the United Kingdom, the application of this criterion is admitted, provided it is not unique in the process of selection. In 2009, the Court of appeal ruled that the use of length of service might be admitted as one of the criteria in a redundancy selection matrix and it should be agreed in a collective agreement.

In Syria, the Labour Law of 2010 provides for the consultation of workers on the selection of workers to be dismissed for redundancy. It is stipulated that if a final decision is issued in favour of the employer’s request to partially shut down the firm, and if no objective criteria are prescribed in the collective labour agreement or the internal regulations for selecting the workers who would be dismissed, the employer must consult with the competent directorate and representatives of the trade union concerned to make the appropriate decision. Among others, seniority, family responsibilities, age, capacities and professional skills of workers may be considered.

The item of selection of employees for redundancy is also in the *Doing Business* report: the difficulty of redundancy index increases, if priority rules apply for redundancies. However, the legal practice in many countries pleads for clear, although flexible, regulation of this issue. After consultation with workers’ representatives, the employer should ensure that objective selection criteria be applied fairly and consistently. Criteria should be measurable, such as qualification and disciplinary records. During the assessment exercise, each manager should also be cautious in using the absence records, as the inclusion of disability or maternity related absences could result in a disability or sex discrimination claim respectively.

### ***Priority right for re-employment***

Recommendation No. 166 stipulates that workers dismissed for economic reasons should be given a certain priority of re-employment, if the employer re-hires workers

with comparable qualifications. This may be subject to some conditions, such as an explicit desire to be rehired which should be expressed within a given period of time.

The review of the laws of 169 countries demonstrates that around 40 per cent of countries have priority rules for re-employment.

Table 4. Priority rules for re-employment (169 countries)

<b>The law provides priority rules for re-employment (65 countries)</b>
<b>AFRICA (27):</b> Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Congo (Democratic Republic of), Côte d'Ivoire, Djibouti, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Mali, Mauritania, Morocco, Niger, Sao Tome and Principe, Senegal, Sierra Leone, Tanzania, Togo, Tunisia
<b>ASIA and the PACIFIC (11):</b> Afghanistan, Bangladesh, Cambodia, China, India, Korea (Republic of), Malaysia, Nepal, Pakistan, Sri Lanka, Taiwan (China)
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (4):</b> Kosovo, Serbia, Turkey, Ukraine
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (12):</b> Cyprus, Finland, France, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden
<b>LATIN AMERICA and the CARIBBEAN (8):</b> Ecuador, Dominica, Mexico, Paraguay, Peru, Puerto Rico, Saint Kitts and Nevis, Saint Vincent and the Grenadines
<b>MIDDLE EAST (3):</b> Jordan, Lebanon, Yemen
<b>The law does not provide priority rules for re-employment (104 countries)</b>
<b>AFRICA (22):</b> Algeria, Angola, Cape Verde, Egypt, Eritrea, Ethiopia, Ghana, Libya, Kenya, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Uganda, Zambia, Zimbabwe
<b>ASIA and the PACIFIC (19):</b> Fiji, Hong Kong (SAR China), Indonesia, Iran, Iraq, Kiribati, Lao PDR, Maldives, Marshall Islands, Mongolia, Papua New Guinea, Philippines, Singapore, Solomon Islands, Thailand, Timor-Leste, Vanuatu, Viet Nam
<b>CENTRAL and SOUTH-EASTERN EUROPE (non-EU) and CIS (13):</b> Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Macedonia (FYR), Moldova, Montenegro, Russian Federation, Tajikistan, Turkmenistan, Uzbekistan
<b>DEVELOPED ECONOMIES and EUROPEAN UNION (23):</b> Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Japan, Latvia, Lithuania, New Zealand, Slovakia, Spain, Switzerland, United Kingdom, United States of America
<b>LATIN AMERICA and the CARIBBEAN (22):</b> Antigua and Barbuda, Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay, Venezuela
<b>MIDDLE EAST (6):</b> Kuwait, Oman, Qatar, Syria, Saudi Arabia, United Arab Emirates

Source: Author's analysis of the data of EPLex and Doing Business, 2011.

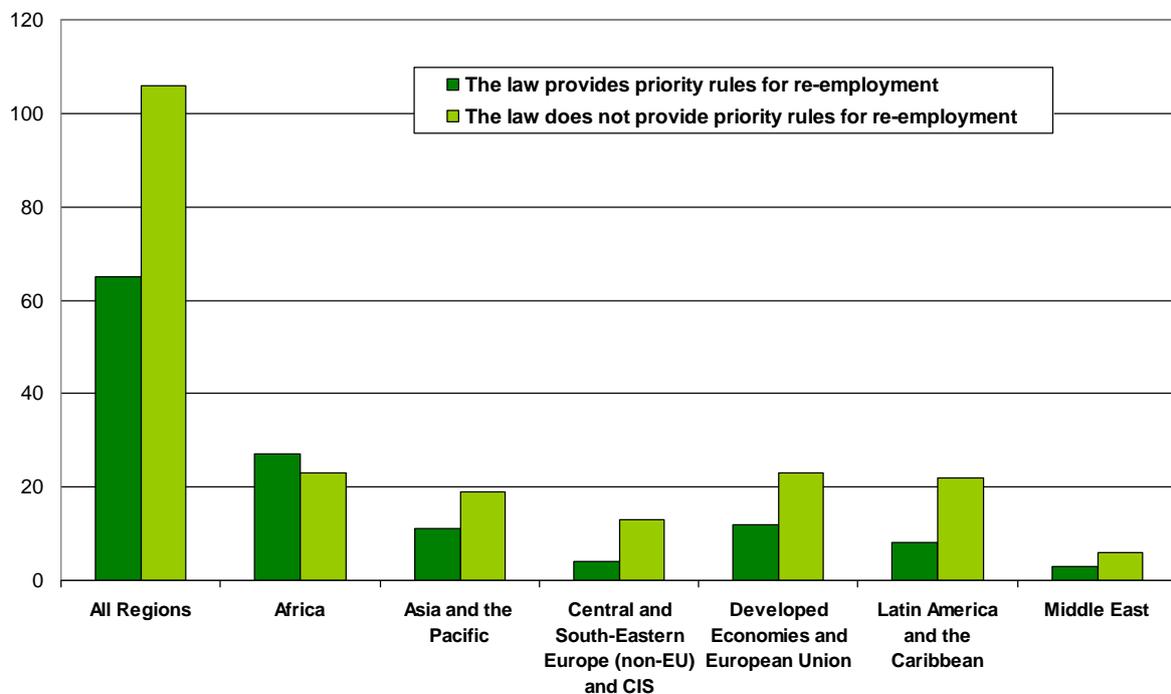
The duration of the period for possible re-hiring varies as follows:

- 1,5 month (Romania),
- 6 months (China, Netherlands, Serbia, Turkey),
- 8 months (Cyprus),
- 9 months (Finland, Sweden),

- 1 year (Bangladesh, RD of Congo, France, Gabon, Italy, Jordan, Luxembourg, Morocco, Pakistan, Peru, Slovenia, Tunisia, Ukraine),
- 2 years (Burkina Faso, Cambodia, Cameroon, Comoros, Niger, Senegal
- 3 years (Republic of Korea).

In some countries, the law states that such priority should be decided through collective bargaining (Côte d'Ivoire, Madagascar). In the USA, in absence of legal provisions, several collective agreements contain a clause to recall dismissed workers. Sometimes, this possibility is provided by codes of good practices (Lesotho, Malaysia, and Tanzania). In Afghanistan, Mexico, Sri Lanka and Yemen the law does not limit the period of time for such re-hiring.

Figure 6. Priority rules for re-employment (169 countries)



Source: Author's analysis of the data of EPLex and Doing Business, 2011.

In the Doing Business report, the difficulty of redundancy index increases when priority rules apply for reemployment. In 2009, Estonia and the FYR of Macedonia suppressed the priority of re-hiring of 6 months and one year respectively.

Similar reforms have been observed in Central Europe. In 2011, Romania proposed to delete this priority for re-employment and finally reduced it from 9 months to 45 calendar days. In 2011, Slovakia has been amending its Labour Code to reduce this period from 3 to 2 months for enterprises employing less than 20 workers.

As an opposite example, in Antigua and Barbuda, in 2010 an amendment was proposed to introduce such priority of re-employment for workers dismissed for economic reasons. In Brazil, in the 2009 Embraer case, the court ordered preference to the dismissed workers for any job opportunities if re-open during two years.

## **FROM DISSONANCE TO COLLABORATION IN POLICY ADVICE ON EPL**

With an observed return to “business as usual”, debates on EPL are as vivacious as before the crisis. The elaboration of an optimum and universal model of EPL remains a doubly challenging exercise. It is expected to be applicable in countries with different legal systems and levels of development, as well as constantly adapted to changing economic realities.

The global review of legal regulation of collective dismissals for economic reasons suggests some paths for labour law reforms and points out the need for more coherence in the multilateral policy advice system.

### ***Need of multilateral collaboration on comparative references and indicators***

The review of legal regulation of collective dismissals in this paper refers to the main international benchmarks for EPL: the OECD’s index of strictness of EPL and the indicator “Employing workers” of the World Bank’s “Doing Business”. Despite some recent methodological changes, most requirements for collective dismissals are still considered by both organisations as additional costs and procedural inconvenience which increase the rigidity of EPL. On that basis, countries willing to make their EPL less rigid should suppress most procedures for collective dismissals. Obviously, such approach does not take into account positive consequences of having transparent and fair process concerning redundancies. This appears in contradiction with ILO’s standards and policy documents of these institutions, such as the OECD Guidelines for Multinational Enterprises and the IFC Guidelines on managing retrenchment. The ILO CEACR insists that social dialogue is the core procedural response to collective dismissals to search for means to avoid or minimize the social and economic impact of terminations of employment for workers.

At the era of globalisation, policy makers need cross-countries comparison, which explains the growing influence of international rankings on national labour law reforms and programmes. Dissonant and contradictory policy advice by international institutions is prejudicial to their authority and leads to confusion for national stakeholders. Better collaboration on multidisciplinary research would contribute to increasing coherence in the multilateral advisory system for more efficient regulation of labour markets.

The paper has found some discrepancies in approaches to assess EPL, but also identified several points common to the ILO, OECD and World Bank, such as the

need of simplification of procedural formalities for redundancies and restructuring (e.g. approval of dismissals by a third party).

Bertola et al. (2000) identified some tracks to improve the OECD employment protection index. Despite the understanding that any interpretation of legislation for entering it in a standard format is a challenging exercise, some methodological issues should be clarified to avoid obtaining different results when calculated by different experts. Some items, such as additional delays to start the notice period, require a subjective evaluation in case of lack of explicit legal rules. Several authors also observed difficulties to apply the methodology to non-OECD countries (Muravyev, 2010).

Similarly, in the *Doing Business* report, the rationale of 4 out of 8 questions to measure the difficulty of redundancy index suggests deleting notification and consultation procedures in case of collective dismissals, and not using the termination of employment as a last resort. The first question of the questionnaire might also be removed, as no country in the world prohibits the termination of employment for economic reasons. The only three remaining issues related to obtaining an approval of dismissals by a third party would be consistent with the letter and spirit of ILO standards.

The collaboration between the ILO and the OECD in 2008 on the interpretation of national labour laws and calculation by the economists of OECD and labour lawyers of the ILO should be pursued more systematically. A memorandum of understanding for enforced collaboration signed by the OECD and ILO in 2011 would serve as a basis for a more systematic approach in compilation and analysis of legal information. Another positive example of inter-institutional collaboration between the World Bank and the ILO is a working group in charge of reviewing the methodology of *Doing Business* in 2010-2011.

The ILO, OECD and World Bank gather similar legal information on multiple facets of EPL. The synergy of joint efforts by economists and lawyers in collecting and analysing data would lead to multi-disciplinary collaboration for better consistency in international policy advice. The objectives and mandates of the ILO, OECD and World Bank are interrelated and complementary. Decent work and better policies are important means of alleviating poverty and driving to better lives. The commitment and collaboration of all is indispensable for promoting social justice and economic prosperity worldwide.

### ***Comparative research for guiding labour law reforms***

This paper presents some findings of the initial stage of comparative research on legal regulation of collective dismissals worldwide. It is encouraging to observe that the laws of over two thirds of the countries analysed contain rules on collective dismissals. The legal review puts in evidence that most industrialised countries have detailed regulation of collective redundancies. Nevertheless, many developing countries still lack or have incomplete regulation. Of particular importance is that the emerging economies, such as Brazil, India, Indonesia, move in the direction adopted by the international community. In case of collective dismissals and restructuring, the

principle of good faith in industrial relations and a common sense plead for the necessity of consultation with workers' representatives and notification to public authorities. Even if the influence of legal traditions cannot be overestimated, labour legislations in Asia, Latin America and the Middle East should be modernised to be more in line with ILO standards and comparative trends worldwide. For instance, the Caribbean Community (CARICOM) adopted in 1995 the Model Harmonisation Act on Termination of Employment, which explicitly referred to Convention No. 158. Although some of the 13 CARICOM countries have undertaken the revision of their labour law, further reforms are necessary to bring their legislation in conformity with the model law.

Large-scale job losses potentially threaten the recovery of countries from recession. Enterprises, which protect their workers at times of crisis and restructuring, would be better prepared to meet market opportunities at the recovery. A strong correlation exists between redundancies and disengagement of the workforce. Fair procedures, in which workers are given a voice, are paramount to avoid de-motivation and reduced morale among the staff. Policy makers cannot leave this matter for deregulation, as negative consequences affect the whole societies causing economic problems and psychological inter-generational trauma (Uchitelle, 2006). Labour law has proven its primary role in encouraging the socially responsible human resources management for redundancies which includes adequate consultation, objective selection criteria and consideration of alternatives to dismissals.

The comparative and multidisciplinary research has a promising potential to guide national labour law reforms. The review of legal changes in the regulation of economic dismissals also suggests that comparative research should be pursued on other aspects of EPL, such as fixed-term contracts, probationary periods, notice period and severance allowances (Muller, 2011).

A dissonance in policy advice appears confusing for countries and prejudicial to the authority of the international institutions. There is also a growing risk of promoting the labour law deregulation, instead of harmonising and raising labour standards worldwide. Supiot (2010) points out that a freedom to choose the most convenient legal system ("law shopping") is incompatible with the rule of law and potentially dangerous in the globalised market where national labour laws are subject to global competition. Controversial arguments are advanced in discussions on the optimum extent of EPL in its potential impact on labour markets. However, in various circles, there is a growing understanding that the economic growth could not be sustainable if it is not accompanied by social progress, and that flexibility for employers should go hand in hand with job security for workers.

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