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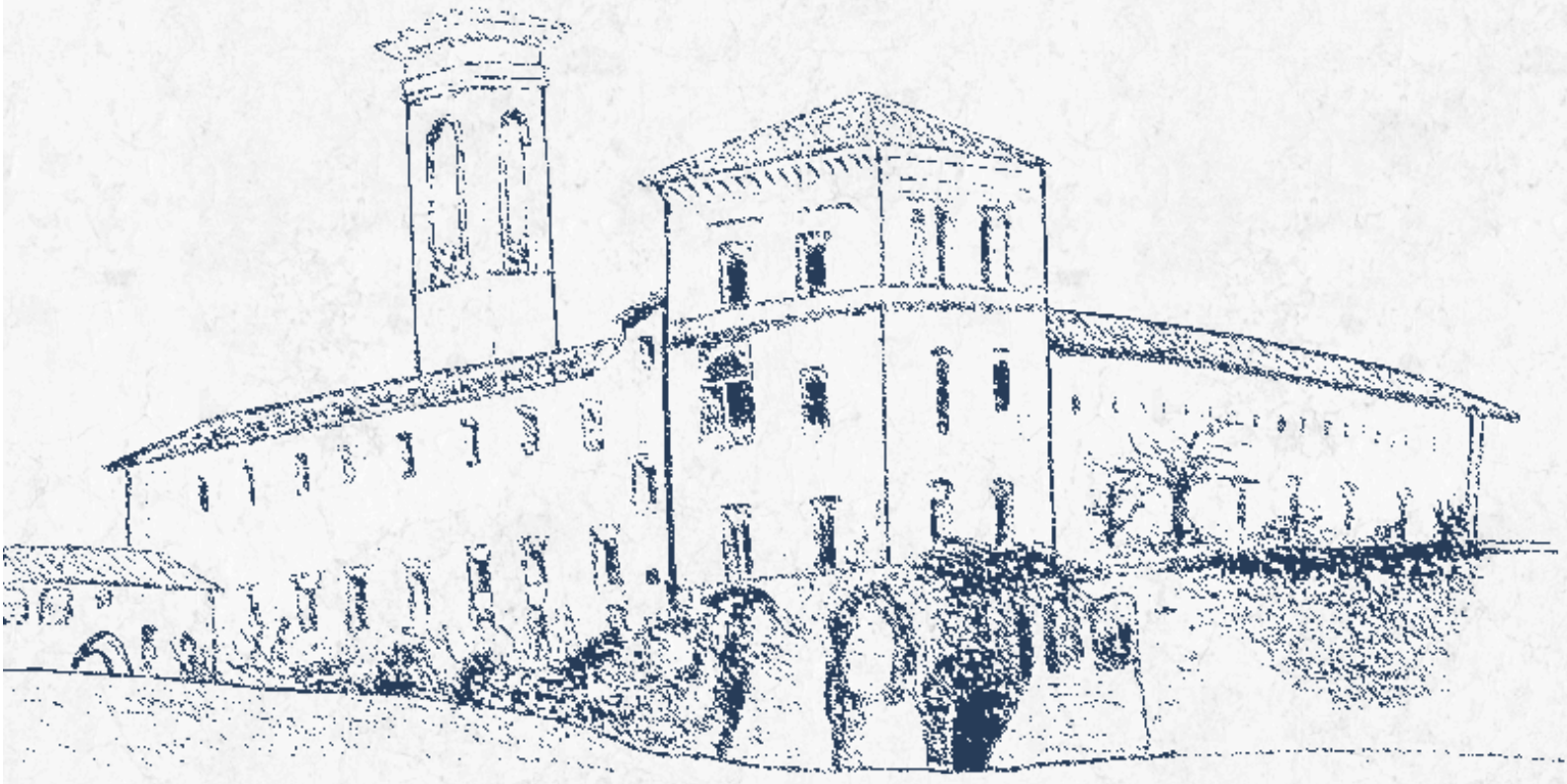

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Flexibilization of Labour in Kazakhstan: New Legal Framework and Institutional Decisions

Muslim Khassenov [*]

1. Introduction

Flexibility in labour regulation is one of the important constituents of investment climate. The "Labour market regulation" index is one of the key evaluation criteria of «Doing Business» international rating by the World Bank. Flexibilization of employment in this paper covers three aspects: the difficulties in labour relations existing before the adoption of the new Labour code, the new legal framework and its key elements, and the institutional decisions of possible challenges regarding labour liberalization reforms.

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According to the evaluation of the World Economic Forum experts, one of the competitive advantages of Kazakhstan is the "Labour market efficiency" factor. Kazakhstan occupies the 15th position among 144 countries. This allows Kazakhstan to confidently join the group of the thirty leading countries in the international competitiveness rating.
However, Kazakhstan experiences the following problems in the field of labour relations:
1. Employers are burdened with numerous guarantees and compensatory payments. Employers bear considerable expenses during relocation and/or dismissal of employees, work under harmful conditions, work on week-ends, holidays, overtime work and down time. Moreover, as a consequence of the state budget deficit, the Government has implemented radical tax and social policy reforms which increase employer tax load three to sevenfold, as well as a new pension system (with 5% of employers' payments) and obligatory social medical insurance (2-5% of employers' payments).
2. Bureaucracy and abusive regulatory activities in procedures of hiring, dismissal, and relocation of employees.
3. Highly regulated norms of labour legislation, impossibility of temporary employment. In case of a labour contract conclusion and observance an employer cannot adapt his staff in accordance with the changing economic conditions.
4. Formal and informal employment. On average contributions to the pension fund are paid for a total of 7.5 – 8 months out of 12. Unofficial employment remains a widespread phenomenon. In Kazakhstan there exists a large unofficial economy in which about one third of self-employed people at the age from 15 to 64 years old work unofficially.
5. Instruments for collective agreement relations and social partnership are underdeveloped.

2. Premises of Labour Flexibilization in Kazakhstan

Jobs are mainly created by entrepreneurs who just start their activities, or by those who grow and develop, so it is necessary to keep the costs related to business creation and maintaining in a reasonable range.
If an employer is not able to react quickly and properly to the requirements of market conditions, rebuild his production system and business processes within a short time, and yet he has to bear considerable expenses to maintain inefficient jobs, it will be unprofitable for him to invest into the national economy.

Obviously, every step towards a higher labour flexibility meets interests of employers.

Businesses get rid of restrictions, managers improve performance by rotating and more efficiently using personnel, and firms gain higher profits. All expenses are recovered by the state — costly reforms and additional social security benefits. Therefore, such a flexibilization scenario turns out to be a long-running indirect governmental donation to firms. Since the state budget originates from taxpayers, the employees contribute considerably to the donation[1].

As it may be seen from the practice, the previous Labour Code of the Republic of Kazakhstan[2] (hereinafter – former Labour Code) did not encourage employers to create more jobs. This reason made it difficult to use legal regulation mechanisms of labour relations which are successfully used by the countries with a stable market economy.

In this regard in May 2015 the President of the Republic of Kazakhstan set a task to liberalize labour relations, in particular, to develop a new Labour Code in which the limits of state interference into the labour issues[3] shall be properly defined – this includes the role of the state would be limited through establishing minimum standards, "game rules" by which participants of labour and other associate relations enter into negotiations, conclude contracts and agreements. A minimum standard of "protective" norms related to the employees' life and health protection, support of certain employees' categories with limitations on the labour market (women, young people, disabled people, etc.) shall also be set.

Maximum permissible norms for labour conditions, rights and responsibilities of employees and employers (minimum permissible remuneration of labour, maximum number of working hours, minimum annual paid leave, labour safety requirements and standards, basic minimum social guarantees for employees in general and for certain categories) shall be legally established.

In Kazakhstan it is proposed to form a legal framework for labour relations in accordance with the OECD labour standards through an

[1] Andranik Tangian, Flexibility–Flexicurity–Flexinsurance: Response to the European Commission's Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century" // WSI-Diskussionspapier Nr. 149, January 2007, http://www.boeckler.de/pdf/p_wsi_diskp_149_e.pdf (accessed on January 06, 2016).

[2] Labour Code of the Republic of Kazakhstan, dated 15 May, 2007 No. 251, http://adilet.zan.kz/eng/docs/K070000251_ (accessed on January 06, 2016).

[3] Plan of the nation - 100 concrete steps to implement the five institutional reforms of President Nursultan Nazarbayev, http://www.inform.kz/rus/article/2777943 (accessed on January 06, 2016).

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optimal compromise of state and agreement-based regulation of labour relations based on the transition[4]:
1) from rigid and excessive regulation to the minimization of state regulation of labour relations parties' rights and duties, with the concurrent increase of control over execution of labour legislation requirements;
2) towards local and individual regulation of labour relations based on self-regulation principles between employer and employees;
3) towards efficient balance between social protection, justice on the one hand and economic efficiency on the other.

3. Guiding International Practice

In late 2006 the European Commission published the Green Paper "Modernization of labour rights to solve the problems of the XXI century" in which it was noted that it was necessary to develop flexible labour relations and reform labour rights so that it would further the economic growth[5]. It was proposed to introduce a protected flexibility system as one of the mechanisms to reach that goal; this kind of system would allow increase adaptation skills of employees and organizations and make the labour market more flexible. The main idea of the document was to reach a "golden triangle": mobile labour force combined with a strong system of income protection with which the state would be able to implement a flexible labour market policy together with up-to-date and viable systems of social protection.
In order to develop a flexible labour market, each of the social partners' traditional role in the social state should be modified. To make employers create more jobs the state ensures possibilities for timely training of qualified staff. Employees should actively search for new forms of labour application.
The claims for flexibilization met stiff resistance, especially in countries with old traditions of struggle for labour rights. Wilthagen and Tros (2004: 179) reported[6] with a reference to Korver (2001) that the Green Paper:

[4] Guiding principles related to the international investments and multinational enterprises" approved by the OECD Council resolution dated June 21, 1976. http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf (accessed on January 06, 2016).
[5] Green Paper on Modernization of Labour Law, European Commission, 2006, p. 3.
[6] Wilthagen, T., and Tros, F. (2004) The concept of 'flexicurity': a new approach to regulating employment and labour markets, Transfer, 10 (2), 166–186.

Partnership for a New Organisation of Work of the European Commission (1997) "which promoted the idea of social partnership and balancing flexibility and security" got a very negative response from French and German trade unions, because 'the idea of partnership represents a threat to the independence of unions and a denial of the importance of worker's rights and positions, notably at the enterprise level'[7].

The ILO published a report, concluding that 'the flexibilization of the labour market has led to a significant erosion of worker's rights in fundamentally important areas which concern their employment and income security and (relative) stability of their working and living conditions' (Ozaki 1999: 116)[8].

The world economy trends have resulted in the replacement of the "welfare state" concept, introduced after the World War II, with the concept of the "workfare state". It actually means a gradual abandonment of those high social standards, which had been reached before, and a transition to a new policy that provides job for every unemployed person. Instead of the traditional concept of job security, i.e. "employment stability" or stability in provision of jobs, a new concept is being introduced into the labour relations legislation – employability which literally means employment potential, or person's ability to adapt and change profession and occupation at any age, in case if his/her former profession is not in demand anymore on the labour market.

In the Western European countries in order to maintain the economic efficiency and keep unemployment at low level, the so called flexicurity policy came into being. The idea of this policy is to increase the flexibility of legal regulation of labour on the one hand, including changing of working conditions and termination of labour relations on the initiative of employer, and a more active state policy to assist and support in the process of employment on the other.

"Flexicurity" here denotes an optimal configuration of labour market flexibility and social security (Keller and Seifert, 2002)[9].

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[7] Korver, A. (2001) Rekindling adaptability. Working Papers on Social Quality (1). Amsterdam, European Foundation on Social Quality.

[8] Ozaki, M. (Ed.) (1999) Negotiating Flexibility. The Role of Social Partners and the State. Geneva, International Labour Office.

[9] Keller, B., & Seifert, H. (2002). Flexicurity: Wie lassen sich Flexibilität und soziale Sicherheit vereinbaren? (Flexicurity - how can flexibility and social security be reconciled?) Institute for Employment Research, Nuremberg, Germany, 35(1), 90-106.

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As concluded by Esping-Andersen (2000b: 99), «the link between labour market regulation and employment is hard to pin down»[10]. Under certain model assumptions, the same empirical evidence that unemployment is practically dependent on the strictness of employment protection legislation was also reported by OECD (1999: 47–132)[11].
Thus, it could be noted that flexible labour market is an issue open for discussion and should be implemented with a complex of measures aiming to achieve a balance of interests of employees and employers.

4. Key Elements of the Labour Liberalization Reforms in Kazakhstan

The new Labour Code of Kazakhstan (hereinafter – new Code) was adopted on 23 November 2015.
By means of the new Code Kazakhstan experts' community and legislative establishment tried to find a solution for the problem of flexibility of legal regulation of labour relations, and ensure a possibility to widely use not only standard labour contracts, but various contracts which regulate non-standard (non-typical) employment as well.
The new Code has been adapted to possible crisis phenomena; it contains mechanisms which promote the increased stability of enterprises at the times economic instability (temporary relocation of staff to another employer with suspension of the main labour contract, simplified introduction of part-time work, etc.).
Liberty of labour relations parties (employer and employees) has been extended considerably. A compulsory minimum of issues regulated by labour contract has been legally determined, and the issues which should not be its subject (such as violation of employees' rights or determined solely by a legislator); other than that the content of a labour contract shall be determined by the agreement of parties.
The content of a labour contract becomes fundamentally new, it states that the main obligation of an employee is not only execution of his/her functions and following the rules of internal procedures, but also reaching certain labour results required by the employer. Evaluation of work results of an employee becomes a ground for an employer to take decisions

[10] Esping-Andersen C. (2000b) Regulation and context: Reconsidering the correlates of unemployment. In: Esping-Andersen, G., and Regini, M. (Eds.) Why Deregulate Labour Markets? New York, Oxford University Press, 99–112.
[11] OECD (1999) Employment Outlook. Paris, OECD.

related to work promotion, remuneration, social benefits and guarantees, rewards or bringing to disciplinary responsibility (including dismissal).

The new Code provides simplification of procedures for changing the labour contract conditions on the ground of economic and technological factors. Inefficient, long-term, and expensive mechanisms of changing labour contract conditions by employer's initiative, especially in a crisis situation (including introduction of a part-time regime and temporary relocation of staff to another job) make the specified problems more aggravated for employers. The procedures of labour contract changes by the initiative of employer established by the former Labour Code were complicated and required employers to spend a considerable amount of time, material expenses, and additional justifications.

Due to this employers were not able to use more flexible forms of employment under conditions of already established labour relations: any possibilities of changing the working regime and other conditions of labour contract by the initiative of employer were strictly limited by the cases of modification in the working system structure and (or) reduction of workload (cl.48 the former Labour code).

As we see, legislators did not provide employers with an option to voluntarily change labour contract conditions determined by the parties. In order to enable employers to execute their rights, they must provide a proof that:

1) employee shall continue to work in accordance with the previous labour function, i.e. specialty, qualification and position as established by the employment contract shall remain unchanged;

2) changing of conditions established by the labour contract is caused by a verifiable necessity, namely modification in the working system structure and (or) reduction of workload, i.e. working reasons that make it impossible to preserve the conditions originally stipulated in the employment contract.

Here employers should have a possibility to unilaterally solve the issue of revision of labour contract conditions by economic reasons (crises, weak periods, sales slowdown, introduction of new technologies, introduction of innovative work methods, etc.): it is necessary to work out efficient mechanisms for adoption of such decisions. At this in such periods the employees shall be paid allowances from special crisis funds formed under terms of state-private partnership.

It should be noted that the ILO (2006:106) report finds: "Unemployment benefits have been one of the main pillars of the social insurance systems of industrialized countries. But they have been withering almost everywhere, and have scarcely spread to developing countries, even

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though they were proposed for a number of East Asian countries in the wake of the 1997–98 Asian crisis, and were introduced in the Republic of Korea." Although unemployment benefit schemes have been under strain, more countries currently have such schemes than in the 1980s, mainly because many Eastern European countries introduced them after the fall of communism when open unemployment emerged (ILO, 2006)[12].

In this regard it is proposed to:

- provide employers with the right to terminate a labour contract for costs-related reasons with an obligatory notification of employees, stating reasons, and a compensation payment to the amount of two months salary.
- specify classification of grounds for contract termination with extended costs-related reasons.

In order to prevent mass staff discharge and unemployment increase, as well as abuse by employers, provisions should be made for:

- elaboration of an exact list of costs-related grounds which determines justification and legitimacy of dismissal.
- development of a new employment law which provides enforcement of labour market institutions, increase of payments from the state fund of social protection in case of job loss.
- enforcement of social protection from unemployment through instruments of the 2020 Employment Roadmap (increase of micro-loans, retraining, reorientation to the services sector)
- strengthening of state control and enforcement of punitive sanctions for violation of labour legislation.

4.1 Considerable Extension of Grounds for Fixed-Term Employment Contracts

The former Labour code restricted possibilities of fixed-term employment specifying only a limited range of cases of a fixed-term employment contract (cl.29), thus decreasing the accessibility of labour market for youth, women with family obligations, disabled people, retired people, and other categories.

We insisted that the Labour Code should not have strict bans and limitations in regards of fixed-term employment contracts. Lists of cases of such employment contracts should be developed by the participants of

[12] ILO (2006). ILO (International Labour Organization) 2006: Economic security for a better world. Geneva: ILO.

labour relations – employers and employees – and specified in collective contracts and other acts of social partnership.
That's exactly why the new Code provides fixed-term employment contract to be concluded when labour relations cannot be established for an uncertain term taking into account the character of future work or its conditions.

4.2. Issues on Labour Payment, in Particular Simplification of Salary Revision During Economic Instability of Enterprises

Labour payment issues in the new Labour Code have been solved from a fundamentally new perspective. First of all, a system of minimum hourly rates was legally established which plays the role of a minimum labour payment standard. Employers should be given a right to individually solve issues regarding the selection of forms, mechanisms, and amount of payment for staff's labour by accepting local normative acts or with participation of staff representatives through conclusion of a collective contract. Employers have also been enabled to introduce mechanisms of individual reward for encouragement of higher labour efficiency and apply other encouragement methods.

4.3. Modification of Working and Rest Time Structure

First of all it is necessary to revise the norms related to regulation of working time, extending possibilities to employ staff beyond the established 8 hours working day. This would increase employer's authorities to regulate working time issues. Employers should be given possibilities to create more jobs with flexible working schedule.
In this regard for Kazakhstan it is proposed to:
- extend possibilities to apply accumulated working time,
- revise amount of overtime work for each employee,
- introduce the "scheduled overtime work" concept,
- simplify procedures for changing working time including the possibility of part-time work, in particular;
- provide possibilities to introduce part-time work by employer's initiative.

4.4. Differentiation of Labour Legislation

Social (protective) role of the Labour Code may not be performed in its entirety without a certain differentiation in labour regulation. This task has been not resolved yet. Currently there is a need for legitimization of a

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large number of employment contract variants. It is necessary to establish differentiation by health condition, climatic and working conditions and other parameters related to staff life and health.
Currently the key task is to create necessary conditions and prerequisites to support small and medium business in the country; therefore, the current labour legislation should contain a revised concept of the subjective differentiation.
Small business, being a key economy sector and a new jobs generator, needs to have special features for regulation of labour relations (simplification of staff dismissal by employer initiative during economic difficulties; reduction of the period of notification on dismissals or change of working conditions; decrease of discharge allowances; replacement of workplace assessment with certification, fundamental simplification of human resources record management; complete transfer of issues of training and other long-term leaves to employer's discretion, etc.). There should be an obligatory differentiation related to the business scale: it is impossible to impose the same requirements on micro-, small, medium business, and large industrial companies.
In the Labour Code there should be laid out provisions expressing labour regulation specifics of employees with professional peculiarities.
In this regard for Kazakhstan it is proposed to:
- extend the subjective differentiation in labour regulation of some staff categories, including business scale differentiation;
- provide a simplified mechanism of labour regulation for micro- and small business entities.

4.5. Social Partnership and Regulation of Collective Relations

In the new Code there should be revised and amended norms on social partnership. In the section "Social partnership and collective relations in labour field" there should be established improved mechanisms to solve the tasks set before the labour legislation. This section should be based on the following principles:
I. Social obligations should be accepted by the parties on a voluntary basis taking into account interests of parties and feasibility of obligations. In this regard, the Code should exclude a possibility of employers being forced to follow numerous agreements of various types and levels which make employers assume numerous social obligations towards their staff under conditions when those obligations become impossible to satisfy.
II. Expertise of authorities in charge of republican and regional-level agreements (including industry-specific) shall be separated in the part

related to quantity and content of additional social benefits, guarantees and compensations for staff.
If there are republican and regional agreements on additional benefits, guaranties and compensations for staff exceeding financial potential of an employer, such employer should be given a possibility to only perform core-level obligations.
III. The Code should provide that social partnership parties are obliged to enter collective negotiations (agreements) if these obligations cannot be realized due to external factors (including the cost related ones).

5. Conclusion

One of the possible ways to reach the balance between interests of employers and employees is to make maximum use of the social partnership mechanism, gradually legitimize flexibility of legal labor regulation through its specification in collective contracts based on agreements of social partnership parties and introduce obligatory record of legal interest of employees and trade unions. This is exactly the way that was chosen by countries striving for an optimal balance between economic efficiency and interests of employees and their labor protection.
Therefore, the liberalization of labor legislation should be developed along the following directions:
On the part of state:
1) Establish minimal guarantees and compensations to staff;
2) determine basic rights and duties of employers and staff;
3) establish necessary requirements in the field of labor safety;
4) ensure state control of labor legislation observation;
5) judicial resolution of labor disputes;
6) adoption of necessary social protection measures in case of job loss.
On the part of employers:
1) Extend rights and duties of employers on the issues of:
- hiring and discharging, staff relocation and dismissal;
- establishing of staff working time and rest;
- regulation of payment system and staff labor rate setting;
2) increase employer's interest in collective-contractual mechanisms of regulation of social-labor relations, including issues of granting of additional guarantees compensations, and salary increase;
3) optimize employer's costs through various types of guarantees and compensations;
4) strengthen employer's motivation to advance staff qualification;

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5) increase employer's responsibility on observation of requirements, guaranties, including the issues of labor safety.

On the part of staff:

1) Strengthen the institution of individual-contractual relations with employers;

2) Extend staff rights and duties (employee's representatives) during concluding collective contracts and agreements, including the issues of:

- wage indexation;
- additional types of compensations and guarantees;
- additional types of leaves, etc.

3) Increase of staff (employee's representatives) interest in concluding collective contracts and agreements and regulation of labor relations within individual-contractual mechanisms.

4) Strengthen employee's motivation in qualification advancement, including his/her participation in development of professional standards, dual training.

5) Increase employee's responsibility in performing of individual labor contracts, as well as collective contracts and agreements.

Thus, the main purpose is to form a fundamentally new model of labor relations which combines support of entrepreneurship and takes into account interests of employees.

ADAPT International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

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