



# Termination of employment relationships

*Legal situation in the Member States of the  
European Union*





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**European Commission**  
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## EXECUTIVE SUMMARY

1. This synthesis report aims at providing an overview of the legal situation as regards termination of employment relationships in the 15 Member States of the pre-enlargement European Union<sup>1</sup>. The report updates the original 1997 Report which was the fruit of co-operation between the Commission and the Member States; the information set out in the original report was assembled on the basis of contributions from the Member States and they subsequently checked its accuracy. This updated report adheres to the format and structures of the original report and is based on the information provided by the national experts named in the introduction.

2. Labour law across the EU-15 has gradually introduced limits to *ad nutum* dismissal that is summary, unjustified dismissal in the context of a contract of indefinite duration.

### **Sources of law on dismissal**

3. *The main source of rules on individual dismissals in most Member States is the law in the broad sense.* Collective agreements are most frequently used to adjust the statutory provisions on periods of notice or dismissal on disciplinary grounds, for example. The role of judge-made law, especially in the interpretation of laws, is also important. The role of custom is, on the whole, relatively limited.

### **The Notice Period**

4. A first limit on freedom to dismiss is *the period of notice which applies in all the Member States.*

There are major differences in notice periods in the Member States as shown in table 3 of the report. The employer is

usually dispensed from giving notice in the event of dismissal on grounds attributable to the worker, summary dismissal or in the event of *force majeure* and during the probationary period.

The legal arrangements governing complete or partial failure to comply with the notice period also vary from one Member State to another: *the tendency in most Member States is to provide for payment of a sum equal to the remuneration the worker would have received during his or her notice period.*

### **Verification of grounds**

5. *In all the Member States the wish of the employer is no longer sufficient in itself to justify dismissal.* All the legal systems provide, through various means, for checks on the grounds underlying the decision to dismiss.

6. First, *dismissal on certain grounds is prohibited.* These grounds are set out in tables 1(a) to 1(c) in Appendix II to the report.

Another means of preventing arbitrary dismissal used by certain Member States is the so-called technique of *abuse of law* which the worker may invoke; consideration is then given to whether the grounds for the decision to dismiss were well founded. In practical terms this technique is really no different from the requirement to give notice or to justify dismissal.

7. In principle, the rule that any unjustified dismissal is unlawful is to be found in all Member States.

The Member States provide for exceptions to the need for grounds for certain groups of workers or during the probationary period. Some Member States have lists of

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<sup>1</sup> Studies on the legal situation in the Member States that joined the EU in 2004, as well as Bulgaria and Romania are on-going. A synthesis report will be published in the beginning of 2007.

reasons which can justify dismissal, but there are big differences in the scope for determining them. Most legal systems have opted for a general clause. A distinction is usually made between the types of grounds on the basis of the three types of dismissal outlined in the report<sup>1</sup>.

### ***The formal requirements***

8. The need to justify and provide grounds for dismissal is often linked to formal requirements in many Member States. *Written notice of dismissal is provided for in most Member States.* Similarly, provision is frequently made for the requirement to notify the grounds for dismissal in writing. The trend is to allow workers to know why they have been dismissed and to give them the right to be heard and express their views.

### ***Ultima ratio***

9. The *ultima ratio* rule plays a role in several Member States; dismissal becomes the employer's final solution. This presumes that alternatives to dismissal have been envisaged.

### ***Legal redress***

10. *All the Member States have rules on the right to take action against dismissal.*

Some Member States encourage *conciliation* and *arbitration*. In most Member States, trade unions may provide assistance to their members or act on behalf and in place of their members.

*Deadlines for challenging dismissal or for taking legal proceedings vary considerably from one Member State to another.*

### ***The burden of proof***

11. *In most Member States the burden of proof is incumbent on the employer, which is in line with the reasoning behind the arrangements for justification or grounds for the employer's decision to dismiss.*

### ***The effects of unlawful dismissal***

12. As for the effects of unlawful dismissal, the report illustrates the major disparities between the Member States. Reference should be made to tables 5(a), 5(b) and 5(c) for payments and benefits and also to table 6 on restoration of employment.

*In most Member States, violation of fundamental rights renders the dismissal null and void; the worker is then reinstated or the contract pursued.* Although some legal systems do provide for possible compensation, the Member States appear to agree that prohibited dismissal should not be translated directly into pecuniary terms.

### ***"Contrived resignation"***

13. Some legal orders recognise the concept of "contrived resignation" or constructive dismissal that is indirect dismissal based in particular on fraudulent moves by the employer obliging the worker to resign; by covering up the dismissal the employer evades the legal arrangements which should have applied.

This concept is unknown in a number of national systems and where it does exist the related legal arrangements are also somewhat disparate. It gives rise to major difficulties in relation to the burden or proof.

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<sup>1</sup> They are: dismissal based on misconduct by the worker (disciplinary dismissal), dismissal based on the worker's incapacity and dismissal based on objective grounds (economic dismissal).

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## **1. INTRODUCTION**

The termination of employment relationships in the Member States of the European Union has been under consideration within the European Commission for a number of years. In 1992 Professor Rodríguez –Piñero y Bravo Ferrer (University of Madrid) completed a report for the Commission on the advantages and difficulties of community action on individual dismissals. Subsequently the Commission decided it would be useful to have information not only on dismissals but also on other forms of termination of an employment relationship, such as resignation or termination by mutual agreement. It therefore decided to obtain supplementary information by sending a questionnaire to the governments of the Member States.

The Commission's evaluation of the replies to the questionnaire in respect of the individual Member States was contained in a report published in 1997. That report was prepared in collaboration with the following experts:

*Nikitas Aliprantis, Komotini, Greece*  
*Maria Vittoria Ballestero, Genova, Italy*  
*Ronnie Eklund, Stockholm, Sweden*  
*Françoise Favennec, Nantes, France*  
*María Fernanda Fernández, Huelva, Spain*  
*Michel de Gols, Bruxelles, Belgium*  
*Peter Hanau, Köln, Germany*  
*Anthony Kerr, Dublin, Ireland*  
*Furtado Martins, Lisbon, Portugal*  
*Alan Neal, Hallaton, United Kingdom*  
*Ruth Nielsen, Copenhagen, Denmark*  
*Willem Plessen, Utrecht, the Netherlands*  
*Rodríguez Piñero, Madrid, Spain*  
*Tore Sigeman, Uppsala, Sweden*  
*Rudolf Strasser, Linz, Austria*  
*Alain Supiot, Nantes, France*  
*Ken-Pekka Tiitinen, Helsinki, Finland*  
*Jean Zahlen, Luxembourg*

The European Commission decided in 2004 to update the original 1997 report and the relevant information was sought from the following national experts:

*Claire Bosse, Tilburg, the Netherlands*  
*Niklas Bruun, Helsinki, Finland*  
*Françoise Favennec-Héry, Paris, France*  
*António Monteiro Fernandes, Lisbon, Portugal*  
*Carmen Agut Garcia, Castellon, Spain*  
*Peter Hanau, Köln, Germany*  
*Patrick Humblet, Ghent, Belgium*  
*Anthony Kerr, Dublin, Ireland*  
*Jonas Malmberg, Stockholm, Sweden*  
*Gillian Morris, London, United Kingdom*  
*Ruth Nielsen, Copenhagen, Luxembourg*  
*Willem Plessen, Tilburg, the Netherlands*  
*Riccardo del Punta, Firenze, Italy*  
*Thomas Radner, Innsbruck, Austria*  
*Domenico Rief, Innsbruck, Austria*  
*Marielle Stevenot, Luxembourg*  
*Stamatina Yannakourou, Athens, Greece*

For the purpose of the report the following terminology is used:

- Dismissal: Termination of an employment relationship at the initiative of the employer;
- Resignation: Termination at the initiative of the employee;
- Summary dismissal/resignation: Dismissal/resignation by the employer or employee respectively without period of notice;
- Constructive dismissal: Resignation because of the conduct of the employer.

## 2. SOURCES OF LAW

### (1) Constitutional status of the rules on the right to work

In **Belgium** the right to work is guaranteed by Article 23 of the Constitution.

In **Denmark** the Constitution states that “all restrictions in the free and equal access to work which do not have their reason in the common good shall be abolished by law”. The provision is interpreted as a declaration of intent. The declaration does not provide basis for legal claims.

In **Greece** the right to work is acknowledged by Article 22(1) of the Constitution as a social right which concerns exclusively the dependent salary workers.

In **Spain** the right to work is acknowledged by Article 35.1 of the Constitution.

In **Finland** the right to work is guaranteed by section 18 of the Finnish Constitution which also specifically provides that no-one shall be dismissed from employment without a lawful reason.

In **France** the preamble of the Constitution 1946 acknowledges the right to work.

In **Ireland** the State is required to direct its policy toward ensuring that the citizens may through their occupations find the means of making reasonable provision for their domestic needs (Article 45.2.i of the Constitution). Moreover, the Irish Courts have held that one of the “personal rights” latent in the guarantee of Article 40.3 is the right to work or the right to earn a livelihood. The Courts have further held that the right to earn a livelihood carries with it the entitlement to be protected against any unlawful activity on the part of any other person which materially impairs or infringes that right.

The right to work has constitutional status in **Italy**. Under Italian law, the rules governing employment relationships are set out in Part I (Rights and obligations of citizens), Title III (Economic relations), Articles 35 *et seq.* of the Italian Constitution.

In **Luxembourg** Article II of the Constitution guarantees the right to work and gives an assurance that each citizen may exercise this right.

In **the Netherlands** stimulation of employment is a responsibility of the government. There is free choice of employment (Article 19 of the Constitution).

In **Portugal** the Constitution guarantees security of employment and prohibits dismissals without justified ground (Article 53) and the right to work (Article 58).

In **Sweden** the right to work is acknowledged by the Constitution (Chapter 1 Article 2) of the Instrument of Government (“*Regeringsformen*”). The provision is interpreted as a declaration of intent, which does not provide basis for legal claims.

In the other Member States the right to work has no constitutional status.

### (2) International Agreements and Conventions

ILO Convention 158 on the termination of employment relationships at the employer’s initiative has been ratified by **Finland** (1982), **Spain** (1985), **France**, **Portugal** (1994), **Sweden** (1983) and **Luxembourg** (2000).

ILO Convention 135 concerning protection and facilities to be afforded to workers’ representatives in the undertaking has been ratified by **Denmark** (1978), **Germany** (1973), **Greece** (1988), **Spain** (1972), **France** (1972), **Italy** (1981), **Luxembourg** (1979), **the**

**Netherlands** (1975), **Austria** (1973), **Portugal** (1976), **Finland** (1976), **Sweden** (1972) and **the United Kingdom** (1973).

ILO Convention 145 on the continuity of employment of seafarers has been ratified by **Spain** (1978), **France** (1978), **Italy** (1981), **the Netherlands** (1979), **Portugal** (1983) and **Sweden** (1981).

ILO Convention 151 concerning protection of the right to organise and procedures for determining conditions of employment in the public service has been ratified by **Belgium** (1991), **Denmark** (1981), **Greece** (1996), **Spain** (1984), **Italy** (1985), **Luxembourg** (2000), **the Netherlands** (1988), **Portugal** (1981), **Finland** (1980), **Sweden** (1979) and **the United Kingdom** (1980).

The original European Social Charter has been ratified in all Member States. The revised Charter had been ratified in **Finland, France, Ireland, Italy** and **Portugal**. It has also been ratified in **Belgium** and **Sweden** but in both Article 24 concerning termination of employment was excluded from the ratification. **Austria, Denmark** (with a reservation as to Article 24), **Greece, Luxembourg, the Netherlands, Spain** and **the United Kingdom** have signed the revised Charter but have not ratified it.

### **(3) Sources of law and their hierarchy**

Sources of law regarding the termination of employment relationships can be laws (in a broad sense), collective agreements, individual employment contracts, case law and custom. Listed below are the main sources.<sup>3</sup> In principle, departure from laws and collective agreements when this is to the advantage of employees is permitted.

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<sup>3</sup> The laws marked by (\*) are published in English in: Blanpain, Roger (editor), International Encyclopaedia for Labour Law and Industrial Relations, Kluwer, Deventer, Netherlands.

#### **Austria:**

- Special statutes for specific occupations (actors, state employees, journalists, household employees);
- Civil Code (“*Allgemeines Bürgerliches Gesetzbuch*”);
- Collective agreements (especially regarding period and date of notice);
- Works agreements;
- Individual employment contracts.

Departure from the legal rules and collective agreements by the individual contract is in general allowed if it is to the employee’s advantage. The legal period of notice for manual workers (2 weeks) does not have binding effect.

#### **Belgium**

- Civil Code;
- (\*) Act of 3 July 1978 on contracts of employment (“*loi relative aux contrats de travail*”);
- Law of 19 March 1991 (on the dismissal of workers’ representatives on Works Councils and on Health and Safety Committees);
- Law of 23 April 1998 (concerning the measures accompanying the establishment of a European Works Council);
- Collective agreements;
- Individual contracts.

#### **Germany**

- (\*) Civil Code (“*Bürgerliches Gesetzbuch*”);
- (\*) Protection against Dismissal Act – 1969 (“*Kündigungsschutzgesetz*”);

- (\*) Employee Representation Act – 1972 (“Betriebsverfassungsgesetz”);
- Act to simplify and expedite the procedure before the Labour Court – 2000 (“Gesetz zur Vereinfachung und Beschleunigung des Arbeitsgerichtsverfahrens”);
- Act relative to the reforms of the labour market – 2003 (“Gesetz zu Reformen am Arbeitsmarkt”);
- Collective agreements (especially regarding the period of notice). With regard to periods of notice, collective agreements may fix a shorter period than is provided by law.

#### Denmark:

- Main Agreement (“Hovedaftalen”) between the Danish Confederation of Trade Unions (“Landsorganisationen i Danmark”, LO) and the Danish Employers’ Confederation (“Dansk Arbejdsgiverforening”, DA). Collective agreements may depart from statutes to the extent that due provision has been made for this in the statutes. Statutes are imperative concerning, for instance, dismissal on grounds of pregnancy, childbirth, demanding equal pay or being called up for military service, dismissal contrary to the Freedom of Association Act or as a result of a corporate takeover;
- Act of Public Servants (“Tjenestemandssloven”);
- Salaried Employees Act (“Funktionærloven”);
- Act on certain employment relations in agriculture and in private households (“lov om visse arbejdsforhold i landbruget m.v.”);
- Merchant Shipping Act (“Sømandssloven”);
- Individual contracts;

- Labour market practice.

The order of sources is presented from a practical point of view. From a general legal point of view statutory law is superior to collective agreements as a source of law.

#### Greece:

- Civil Code (“Αστικός Κώδικας”) and other laws (including ordinances, law-decrees, presidential decrees);
- Court decisions. They are very important because the legislation on dismissals is somewhat fragmentary;
- Enterprise regulations. There are two kinds of such regulations;
  - Regulations of public law (based on a law, made by a public authority, containing rules on important aspects of dismissal, applicable to employees of public enterprises). The ordinary legal rules do not apply if there is an enterprise regulation approved by the State on the same subject;
  - Regulation of private law (internal rules of a contractual nature which may contain some rules on dismissals). They exclude the application of the law if they provide for at least the same level of protection as the law does;
- Individual employment contracts.

Departure from the legal rules is in general allowed if it is to the employee’s advantage, with some exceptions, e.g. compensation for dismissal cannot be higher than admitted by law. In some cases departure from the rules to the employee’s disadvantage is even allowed, e.g. the law allows the termination of a fixed-term contract only on important grounds, but the parties may determine other grounds.

**Spain:**

- Legislative Royal Decree 1/1995 of 24 March, text compiled on the Employees' Statute ("*Estatuto de los Trabajadores*");
- Legislative Royal Decree 2/1995 of 7 April, text compiled on the law of Labour Procedure ("*Ley de Procedimiento Laboral*");
- Organic Law 11/1985 of 2 August on Trade Union Freedom ("*Libertad Sindical*");
- Collective agreements.

With regard to procedures in court and to sufficient grounds, the laws have imperative effect. The social partners or the parties may determine the exact amount of severance payments (minimum severance payments are determined by law) and specify cases of serious and culpable breach of contract.

**Finland:**

- Employment Contracts Act (55/2001) ("*työsopimuslaki*" – TSL);
- Act on Public Servants Employed by the State (750/1994) ("*valtion virkamieslaki*");
- Act on Public Servants in the Municipalities (304/2003) ("*laki kunnallisesta viranhaltijasta*");
- Cooperation Within Undertakings Act (725/1978) ("*yhteistoimintalaki*");
- Collective agreements (usually time of notice, procedures etc).

**France:**

- (\*) *Labour Code* ("*Code du Travail*");
- Law of 18 January 2005 (on social cohesion) Law 2005-32;
- Law of 25 July 2005;

- *Collective agreements*.

The rules on dismissal on economic grounds are imperative. All other aspects may be determined freely by social partners or parties. But the employee may not renounce in advance the rights bestowed on him or her by law.

**Ireland:**

- (\*) Redundancy Payments Acts 1967 to 2003;
- (\*) Unfair Dismissals Acts 1977 to 2001;
- (\*) Minimum Notice and Terms of Employment Acts 1973 to 2001;
- (\*) Protection of Employment Act 1977

Remedies against wrongful dismissal form part of the Common Law. Statutory law overrides Common law.

**Italy:**

- Articles 3, 4, 35 and 41 of the Constitution;
- (\*) Civil Code ("*Codice Civile*");
- (\*) Act to issue rules for the dismissal of individual employees ("*Norme sui licenziamenti individuali*"), Law 15 July 1966, n. 604;
- Workers' Rights Statute Law 20 May 1970, n. 300 art.18;
- (\*) Laws on the regulation and granting of severance pay: Act No 297 of 2 May 1982, later incorporated into Article 2120 of the Civil Code which was amended accordingly;
- Act on individual dismissals ("*Disciplina dei licenziamenti individuali*"), Law 11 May 1990, n.108;

- Act on collective dismissals, Law 23 July 1991, n. 223;
- Collective agreements.

All aspects not fixed by law may be determined freely by social partners or parties,, e.g, extension of the period of notice.

Collective bargaining is no longer regarded as a source of law, as it was under the corporate system (in force until 1940s).

### **Luxembourg**

- Law of 24 May 1989 on the labour contract (“*sur le contrat de travail*”);
- Law of 23 July 1993;
- Collective agreements;
- Individual contracts.

### **The Netherlands**

- Constitution (“*Grondwet*”);
- Civil Code (“*Burgerlijk Wetboek*”), in particular Title 10, Book 7;
- Works Councils Act (“*Wet op de ondernemingsraden*”), 1971;
- Collective Redundancy (Notification) Act (“*Wet melding collectief ontslag*”), 1976;
- Bankruptcy Act (“*Faillissementswet*”), 1893;
- Extraordinary Decree on Labour Relations (“*Buitengewoon besluit arbeidsverhoudingen*”), 1945;
- Dismissals Decree (“*Ontslagbesluit*”), 1998
- Collective bargaining agreements;

- Individual employment contracts;
- Custom and practice;
- Case law.

### **Portugal**

- Constitution (Article 53);
- Labour Code (“*Código do Trabalho*”) approved by Law 99/2003 of 27 August and regulated by Law 35/2004 of 29 July;
- Code of Labour Procedure (“*Código de Processo do Trabalho*”) decree 480/99 of 9 November;
- Collective agreements (whose role in this area is limited by Article 383 of the Labour Code).

In **Sweden** there is the following hierarchy:

- Constitution (“*Regeringsformen*”);
- (\*) Employment Protection Act – 1982 (“*lag om anställningsskydd*” – LAS);
- Case Law;
- Collective agreements;
- Individual contracts;
- Labour market practice.

The legal rules concerning grounds for terminating employment relationships are mandatory. On the other hand, the order of dismissal, when employment relationships are terminated for reasons not relating to the individual employee, may be determined by collective agreement. In general, to a relatively large extent, it is permitted to deviate from the legislation by collective agreement.

In **the United Kingdom** there is a statutory right not being unfairly dismissed. Dismissals

may also contravene legislation prohibiting discrimination on grounds of sex, race, disability, religion or belief and sexual orientation, and legislation making it unlawful to dismiss for reasons relating to trade union membership and non-membership. There are also several legislative provisions dealing with specific areas that stipulate that it is automatically unfair to dismiss employees for seeking to exercise their rights guaranteed by those provisions (for example legislation dealing with maximum working time; the national minimum wage; the rights of part-time employees). A complete list of those provisions is given in paragraphs 3.3.1 (dismissals that are regarded as automatically unfair):

The main sources of law are:

- Employment Rights Act 1996, as amended: this contains the general provisions governing the law of unfair dismissal.
- Trade Union and Labour Relations (Consolidation) Act 1992, as amended: this covers collective labour relations but also contains safeguards against dismissal in specific contexts (grounds relating to trade union membership and activities or non-membership or attempts to move workers from collectively-agreed terms of employment; industrial action; the statutory recognition and derecognition procedures).
- Employment Act 2002: this Act specifies minimum procedures that must be followed in relation to dismissals.
- Employment Act 2002 (Dispute Resolution) Regulations 2004, SI 2004, No 752: these Regulations, made under the authority of the Employment Act 2002 specify the circumstances where the procedures in the 2002 Act apply and do not apply.

The general discrimination statutes:

- Sex Discrimination Act 1975, as amended;
- Race Relations Act 1976, as amended;

- Disability Discrimination Act 1995, as amended;
- Employment Equality (Religion or Belief) Regulations 2003, SI 2003 No. 1660;
- Employment Equality (Sexual Orientation) Regulations 2003, SI 2003 No. 1661.

In addition to these statutory rights, there is a remedy against wrongful dismissal (that is, dismissal in breach of contract) under the common law (although employees cannot recover twice in respect of the same loss). Employees may wish to seek damages at common law if they lack the 1-year period of continuous employment generally required to claim unfair dismissal or if their loss exceeds the statutory maximum that can (generally) be awarded for an unfair dismissal claim. In addition, there are circumstances where the common law courts will grant an order to restrain a dismissal taking effect pending completion of a contractual procedure relating to dismissal (usually a contractual disciplinary procedure), although such cases are generally confined to the public sector and this remedy is relatively rare.

Statute law overrides the common law.

There is provision for the Secretary of State to exempt from the unfair dismissal legislation employees covered by a collective 'dismissal procedure agreement' provided by the legislation, but this power has been exercised on only one occasion (in relation to the Joint Industry Board for the Electrical Contracting Industry) and that exemption was withdrawn in 2001.

Minimum notice periods to terminate the contract of employment are laid down by statute. There is nothing to prevent the parties to the employment contract agreeing longer notice periods.

The Employment Act 2002 lays down minimum procedures that must generally be followed in order for a dismissal not to be regarded as automatically unfair. There is

nothing to prevent the parties agreeing a contractual procedure, whilst it may give the employee a common law right of action for breach of contract, will not make the dismissal automatically unfair. It may be relevant when the employment tribunal is assessing whether the employer has acted reasonably or unreasonably in the circumstances as treating its reason for dismissal as sufficient, but the legislation now provides that failure to follow a procedure beyond the statutory minimum is not of itself to make an employer's action unreasonable if it shows that it would have decided to dismiss the employee if it had followed that procedure.

#### **(4) Role of Judge-made law and custom**

*Judge-made law* plays a role in the interpretation of laws in **Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, Finland and Sweden**, particularly in defining grounds for dismissal. In **Belgium** judge-made law is also important for the termination of employment relationships of employees earning more than €26,418 per year. In **Greece** judge-made law is very important because legislation on dismissals is very fragmentary. Moreover the Greek legislation has not imposed substantial restrictions on dismissals. This means that in principle the validity of the dismissal is not connected to

specific grounds. Case law has covered this vacuum by defining the restrictions on the exercise of the right to dismiss. In **Ireland and the United Kingdom** case law is characteristic of the legal system.

The role of *custom* is limited. In **Denmark** it plays a role as a source of law. It means that the employer has to give notice if he wants to change custom. Also case law plays a role. This is especially relevant in the case of dismissals. The Courts have ruled that every worker can demand a fair period of notice irrespective of whether this is stated in a law or a collective agreement. In **Spain** it is only applicable in terms of local and professional custom and serves to verify, in its field of use, whether a particular type of conduct deserves to be regarded as constituting sufficient grounds for termination. In **the United Kingdom** a custom may play a role if it is "reasonable, certain and notorious"; i.e. not arbitrary or capricious, clear, and widely known and observed. It is necessary to show, however that the parties implicitly contracted on the basis that norms derived from custom and practice would apply. The importance of custom and practice has diminished due to the formalisation of the employment relationship imposed by legislation, in particular the requirement on the employer to issue a written statement of employment terms which although not contractually binding, is strong evidence of what the parties have agreed.

### 3. ***SCOPE OF THE RULES GOVERNING THE TERMINATION OF AN EMPLOYMENT RELATIONSHIP, SPECIAL ARRANGEMENTS***

#### **(1) Ways of terminating an employment relationship**

An employment relationship may come to an end by operation of law without further action of the parties (see below 3.2(1)). Other ways of terminating a contract are in

##### **Austria:**

- mutual agreement;
- dismissal (with notice/premature dismissal for an important reason);
- resignation (with notice/premature resignation for an important reason);
- withdrawal from the contract (“*Rücktritt*”) in the case of insolvency of the employer, if the employee has not yet started work;
- request during a probationary period;
- conditions fixed in the contract (expiry of time in the case of fixed-term contracts).

##### **Belgium:**

- mutual agreement;
- termination with notice (dismissal and resignation);
- dismissal with proper cause.

##### **Germany:**

- dismissal (with notice, or without notice for cause);
- resignation (with notice, or without notice for cause);
- lapse of an employment contract entered into for a fixed term or to achieve a specific aim; occurrence of a dissolving condition;
- a contractually agreed age limit is reached;
- termination by mutual consent;

- rescission of the contract.

##### **Denmark**

- mutual agreement;
- dismissal (factors related to employee’s performance –such as illness, poor quality of work, cooperation difficulties, etc.);
- summary dismissal;
- resignation;
- condition fixed in the individual contract;
- redundancy, employer’s bankruptcy/liquidation;
- age limit according to law or collective agreement (in the Act of public servants the age limit is 70, in collective agreements limits are rare);
- request during a probationary period;
- constructive dismissal;
- retirement of the employee (67 years of age for old age pension, 59 years of age for early retirement allowance or part-time pension).

##### **Greece:**

- mutual agreement;
- dismissal;
- resignation.

##### **Spain**

- common will of the parties (mutual agreement or specific grounds fixed in the contract in as far as there is no abuse of rights by the employer);
- unilateral termination (employer: dismissal, legally admissible objective grounds, employee, resignation, wish of the worker based on a breach of contract by the employer, by wish of a female employee

who is obliged to leave her job as a result of gender violence).

**Finland**

- mutual agreement;
- termination by giving notice;
- summary dismissal;
- redundancy;
- resignation.
- retirement.

**France**

- dismissal;
- resignation;
- mutual agreement;
- dissolution of the contract by court action;
- retirement;
- constructive dismissal.

**Ireland:**

- mutual agreement;
- resignation;
- dismissal;
- constructive dismissal.

**Italy**

- dismissal with notice (*ad nutum*/on justified grounds/because of obstacles to continuation of the contract);
- summary dismissal;
- collective dismissal;
- resignation (with or without prior notice);
- mutual agreement.

**Luxembourg:**

- dismissal (with and without notice);
- resignation;
- mutual agreement;
- retirement of the employee whether on grounds of age or ill health;.
- employer's death or bankruptcy;
- *force majeure*;
- *conditions fixed in the contract (expiry of time or completion of task in the case of fixed term or specified purpose contracts).*

**The Netherlands:**

- mutual agreement;
- dismissal;
- resignation;
- rescission by the court;
- summary dismissal.

**Portugal**

- expiry of fixed term or specified purpose contract;
- mutual agreement;
- dismissal with proper cause;
- collective dismissal;
- dismissal founded on elimination of the job or post;
- dismissal founded on the failure or inability to adapt to technological changes;
- termination by employee with proper cause;
- resignation by employee with notice;
- resignation or dismissal during a probationary period.

## Sweden:

- mutual agreement;
- request during a probationary period;
- dismissal (with notice) with proper cause;
- summary dismissal without notice in case of grave neglect;
- redundancy (with notice);
- resignation (with notice);
- resignation without notice where the employer has materially failed to fulfil its obligations to the employee;
- retirement of the employee.

## The United Kingdom

- dismissal;
- constructive dismissal;
- resignation;
- mutual agreement.

## (2) Exceptions or specific requirements for certain employers or sectors

In most Member States there are special rules for civil servants, the armed forces and the police; ordinary rules apply if a person is employed under an ordinary contract of employment. This applies also to members of religious communities. Unless otherwise indicated below, the reason for an exception is the existence of special rules. For features not mentioned below, the ordinary rules generally apply. However, there may still be some exceptions. With regard to managers and directors, see (5) below.

In **Austria** the ordinary rules do not apply to:

- civil servants and members of the armed forces and police;

- persons working for the government under ordinary contracts of employment;
- employees in public-sector corporations;
- domestic servants;
- farm labourers;
- teachers;
- actors and journalists.

In **Belgium** the ordinary rules do not apply to:

- civil servants and member of the armed forces and of the police;
- port workers (they have in general contracts for 1 day only);
- teachers;
- certain categories of employees (such as ferrymen and sailors).

In **Germany** the ordinary rules do not apply to civil servants (whose dismissal is regulated by the *Bundesbeamtengesetz* or members of the armed forces whose dismissal is regulated by the *Soldatengesetz*).

In **Denmark** the following groups are regulated in special laws:

- salaried employees who are defined as employees in offices and shops, employees performing technical or laboratory/medical services and supervisors,
- employees in agriculture and in private households who receive board and lodgings or board only from the employer;
- seafarers; and
- public servants in central and local government, including the national school system and the national church.

These laws give a special protection mainly concerning the period of notice and special procedures that are to be followed in the case of

dismissals. The groups in question, are however, like all other workers, generally protected against dismissal on the basis of pregnancy, childbirth, equal treatment and equal pay on the basis of sex, race, colour, religion, political opinion, sexual orientation, age, handicap or national, social and ethnical origin, freedom of association and compulsory military service.

In **Greece** the ordinary rules on dismissal do not apply to:

- civil servants, officials of public authorities and members of the armed forces and police, who are not qualified employees;
- those employed for government, or public authorities or local collectivities under ordinary contracts of employment (specific legislation);
- teachers in private schools (specific legislation);
- medical doctors who are employed with a dependant employment relationship (specific legislation);
- employees in hotel industry (specific legislation);
- domestic servants (in part – only 1920 law applies);
- employees in agriculture cooperatives enterprises (specific legislation);
- employees on board ship;
- farm labourers;
- employees of public sector corporations when there is an internal company regulation which, in case of dismissals provides for a level of protection at least equal or higher than ordinary rules.

In **Greece** the size of the undertaking only plays a role in connection with collective dismissals.

In **Spain** the ordinary rules do not apply to civil servants and members of the armed forces and police. There are special rules for domestic servants, disabled people, managers, artists in public shows, professional sportsmen and persons who take part in trading operations on behalf of one or more employers, without assuming the risk and chance associated with such operations.

In **Finland** the ordinary rules do not apply to managers and directors if they are not in an employment relationship. According to the prevailing opinion at least, top managers are usually not regarded to be in an employment relationship.

The period of notice is connected to the length of continuous service. Unless otherwise agreed the period to be observed by the employer varies from 14 days to 6 months. The corresponding periods to be observed by the employees are from 14 days to 1 month.

The ordinary rules do not apply to probationary employees. The employer and the employee may agreed on a probationary (trial) period of a maximum of 4 months starting from the beginning of the work. If the employer provides specific, work-related training for the employee, lasting for a continuous period for over 4 months, a trial period of no more than 6 months may be agreed upon.

The probationary period can be used both when the employment contract is for an indefinite period as well as when it is for a fixed-term. If a fixed-term employment relationship is shorter than 8 months, the trial period must not exceed 50 per cent of the duration of the employment period.

Termination during a probationary period is possible without ordinary grounds. Both parties can cancel (summary dismissal) the contract during the probationary period. The employment contract may not, however, be terminated on discriminatory or on grounds which are otherwise inappropriate with regard to the purpose of the probationary period. If a collective agreement applicable to the employer

contains a provision on a probationary period, the employer must inform the employee of the application of this provision at the time the contract is concluded. When the employer has neglected the obligation to inform the employee about the existence of this provision, the probationary period cannot justify a termination of the contract.

In **France** the ordinary rules do not apply to:

- civil servants and members of the armed forces and police;
- persons working on board ship.

In **Ireland** there is no general scope of application for ordinary rules. Each relevant law has its specific scope of application.

The *Redundancy Payments Acts* only apply to employees employed in employment which is insurable for all benefits under the Social Welfare legislation:

The *Minimum Notice Act* does not apply to:

- senior civil servants, members of the permanent defence forces and members of the gardai (police);
- seamen signing under the Merchant Shipping Act;
- the immediate family of the employer provided they live with him/her and are employed in the same private house or farm.

The *Unfair Dismissals Act* does not apply to:

- officers of health boards and vocational education committees, members of the permanent defence forces and the gardai;
- senior civil servants.

In **Italy** there is no legal system for the termination of employment relationships in general, but different concepts of dismissals. The following should be mentioned:

- for public servants and members of the armed forces and police there are specific rules (public servants' scheme, "*regime pubblico*");
- for domestic servants the rules on discriminatory dismissals apply (discriminatory dismissal is always null and void irrespective of the size of the undertaking);
- seamen, in accordance with the ruling of the Constitutional Court of 3 April 1987, are subject to the Workers' Rights Statute;
- for teachers in public schools there are specific rules. In private schools the ordinary rules apply, unless the school is a "tendency organisation" ("*organizzazione di tendenza*"). Tendency organisations are subject to Article 4 of Act No 108/90 and are therefore not covered by Article 18 of the Workers' Rights Statute;
- for professional sportsmen there are specific rules.

In **Luxembourg** the ordinary rules do not apply to state employees.

With regard to employees in public-sector corporations, there are no special categories of employees.

In **the Netherlands** the ordinary rules do not apply to:

- civil servants;
- teachers;
- members of the clergy;
- domestic servants working less than 3 days in the household of a natural person;
- company directors;
- disabled persons employed in specifically protected workplaces;
- employees during their probationary period.

The Commercial Code (“*Wetboek van Koophandel*”) contains special provisions on the termination of an employment contract between a maritime employer and a member of the crew.

In **Portugal** the ordinary rules do not apply to:

- civil servants and members of the armed forces and police;
- domestic servants;
- persons working on board ship (special legal rules for the merchant navy and collective agreements for fishermen and others).

In **Sweden** the ordinary rules do not apply to

- civil servants with a special appointment (“*fullmakt*”);
- domestic servants;
- employees who are members of the employer’s family;
- employees who are employed with a job creation subsidy or in “sheltered employment”.

In **the United Kingdom** the ordinary unfair dismissal law does not apply to members of the armed forces, the police and share fisherman (where the employee is remunerated only by a share in the profits or gross earnings of the vessel).

The ordinary redundancy provisions do not apply to:

- persons in Crown employment and holders of public office;
- the armed forces;
- the police;
- share fishermen (where the employee is remunerated only by a share in the profits or gross earnings of the vessel);

- domestic servants who are members of the employer’s immediate family;
- employees of the government of an overseas territory;
- staff of the House of Commons and House of Lords;
- apprentices whose service ends at the end of the apprenticeship contract.

### **(3) Exceptions or specific requirements for certain types of contract**

In most Member States premature termination of fixed-term and fixed-task contracts is limited to some extent. Job training contracts and apprentices’ contracts are often not considered to be working contracts. Certain forms of contracts do not exist in some of the Member States (e.g. intermittent work, work on call, solidarity contracts).

In **Austria** there are the following special features:

- in a fixed-term employment relationship the employer cannot give notice unless special allowance has been made by contract. The employee can always give 6 months’ notice on completion of a 5 year period. Premature termination for important reasons is possible for limited and unlimited employment relationship alike. However, this does not apply to fixed-task contracts. A fixed-task contract in the sense of a “*Werkvertrag*” (contract for work and services) is not an employment contract;
- the ordinary rules apply to part-time work. The ordinary rules are also applicable to white-collar workers working less than 8 hours a week (in this case the special provisions pursuant to the *Salaried Employees Act* do not apply);
- temporary work; special rules;
- homework: special rules;

- job training: in most cases a trainee has an employment contract. Training in certain occupational categories, especially in skilled trades, is done in the form of apprenticeship. An apprenticeship contract is a fixed-term contract for the duration of the apprenticeship and can be terminated only for reasons spelled out by law. Consensual premature termination of the apprenticeship contract must be done in writing. After the trial period there is a requirement of a certificate by a Court for Labour and Social Matters or by a Chamber of Labour, confirming that the apprenticeship has been duly informed about the provisions regulating premature termination of the apprenticeship.

In **Belgium** the party who terminates a fixed-term contract before the due date without proper cause has to pay compensation. There are special rules for temporary workers and apprentices' contracts. Contracts for intermittent work, work on call and solidarity contracts do not exist.

In **Germany** there are the following special features:

- under fixed-term contracts of employment, dismissal or resignation with notice is only possible if this is contractually provided for. Employers and employees may also terminate the contract with notice for cause;
- there are special rules for homeworking;
- apprenticeship contracts do not constitute contracts of employment and their termination is subject to special rules;
- there are special rules for the disabled.

In **Denmark**, fixed-term contracts, fixed-task contracts and apprentices' contracts can only be terminated in cases of breach of contract if nothing else is agreed. It will often be agreed that the contract can be terminated both by the employer and the worker with a defined period of notice.

In **Greece** there are the following special features:

- premature termination of fixed-term and fixed-task workers contracts is possible only if there is an important ground;
- ordinary rules apply to contracts of employment for part-time work;
- a 2001 law (2956/2001) regulated for the first time temporary agency work. Although it is not clearly stated, it appears that the law allows for both fixed term and open ended contracts of temporary agency work to be concluded between the worker and the agency. The law requires that the duration of employment for the same indirect employer must not exceed 8 months, and is renewable for another 8 months. In the event that the employee continues in the employment of the indirect employer after the contract with the direct employer expires and the contract is renewed for a period of over 2 months, the employee's contract of employment with the agency shall be deemed to have been converted *ipso facto* into an open-ended employment contract between the employee and the indirect employer. In all previous cases ordinary rules on dismissals apply;
- intermittent work is considered to be part-time work, see above;
- ordinary rules apply in principle to home workers except for those working in small cities with populations under 6,000 persons;
- contracts of employment for work on call are not regulated by either statutory law or collective agreement;
- ordinary rules do not apply to contracts for social integration of handicapped persons.
- "solidarity contracts" do not exist;

- ordinary rules do not apply to apprentices' contracts.

In **Spain** the ordinary rules apply to premature determination of all types of contract (fixed-term, part-time, hand-over, job-training, work experience, work on call). Solidarity contracts do not exist.

In **Finland** termination of fixed-term and fixed-task contracts is limited to summary dismissal. The ordinary rules apply to houseworking and job training if there is an employment contract. For apprentices' contracts there are special rules.

In **France** the ordinary rules do not apply to:

- fixed-term and fixed-task contracts;
- temporary work;
- contracts for periods of job training, because these are often fixed-term contracts;
- new recruits contracts ("*contrats de travail nouvelles embauches*");
- solidarity contracts;
- apprentices' contracts (special rules).

For work on call there are no specific legal rules (but there is case law).

In **Ireland** there are the following special features:

- the *Unfair Dismissals Act* does not apply to a dismissal consisting only of the expiry of the fixed term or of the completion of the specified purpose, provided that the contract is in writing, it was signed by both parties and it contains a clause that the Act shall not apply to such dismissal.
- persons performing work at home can be employees or self-employed, depending on the nature of their contract.
- apprentices who are dismissed by reason of redundancy within 1 month of the end of

the apprenticeship period do not qualify for statutory redundancy payment. The *Unfair Dismissal Act* does not apply to persons engaged under a statutory apprenticeship during the 6 months after commencement of the apprenticeship and a period of 1 month following the completion of the apprenticeship.

In **Italy**, fixed term and fixed-task contracts can only be terminated by dismissal/resignation with justified ground or by summary dismissal. For young workers, female workers living in an area with a low rate of female employment, long-term unemployed and older workers, there are training contracts ("*contratto di inserimento*") for between 9 and 18 months, but as they are not employment contracts they do not enjoy protection against dismissal.

In **Luxembourg** there are the following special features:

- a fixed-term contract cannot be terminated before its expiry, except for an important ground ("*motif grave*"). If the employer does not respect this, it is liable to pay damages;
- a contract for temporary work ("*contrat de travail intérimaire*") is subject to the rules on fixed-term contracts ;
- contracts of apprenticeship are not considered to be contracts of employment and are subject to specific legislation.

The rules on the employment of young persons are now contained in an outline law of 12 February 1999 ("*concernant la mise en oeuvre du plan d'action national en faveur de l'emploi*"). There are two systems of job training:

- the temporary assistant contract ("*le contrat d'auxiliaire temporaire*") which is treated as a fixed term contract subject to certain specific arrangements namely that the temporary assistant can terminate the contract at any time on 8 days notice if he or she secures employment and the employer can end the contract during the first 6 weeks or 8 days notice;

- “*le stage d’insertion*” which period comes to an end after an agreed period (maximum 12 months) or when the trainee finds appropriate employment.

In **the Netherlands** the ordinary rules do not apply to contracts concluded for a specified period or a specified task, unless the appointment has been renewed three times or is extended for more than 3 years with intervals of less than 3 months. Departure from this rule is only possible by means of a collective bargaining agreement or a regulation of a competent administrative authority.

In **Portugal** homeworkers are in general self-employed. Contracts for job training and apprentices’ contracts are not employment contracts. Therefore the ordinary rules do not apply. Intermittent work, work on call and solidarity contracts do not exist.

In **Sweden**, as a rule, fixed-term, fixed-task and seasonal contracts run for the whole of the agreed period. With regard to job training, solidarity contracts and apprentices, persons are covered in so far as they can be regarded as employees.

In **the United Kingdom** the normal rules on unfair dismissal and redundancy apply to employees employed under a contract of employment concluded for a specified period or for a specified task. Where such a contract terminates by virtue of one of the events without being renewed, the employee is regarded as ‘dismissed’ for the purposes of an unfair dismissal complaint and entitlements to a statutory redundancy payment (although there is not dismissal at common law). It is no longer possible to contract out of the rights to claim unfair dismissal or redundancy on expiry of the term.

Special reasons apart (see 3.3.1), an employee generally requires 1 year’s continuous employment with an employer in order to complain of unfair dismissal. For that reason temporary workers are often excluded from the right. 2 year’s continuous employment is required to claim a redundancy payment.

Where a contract of employment exists, the ordinary rules apply, including where the employee is disabled. Solidarity contracts do not exist, nor is there a separate category of contracts for the social integration of handicapped workers.

A contract of apprenticeship is normally for a fixed-term and cannot be terminated by either party before the term has expired. However once the agreed training period ends there is no obligation on the employer to continue employing the apprenticeship and failure to renew the contract will not fall within the statutory definition of ‘redundancy’.

#### **(4) Exceptions or specific requirements for certain categories of employer**

The size of the enterprise plays a role in connection with collective dismissals (see below 3.3.4 (3)). In addition, the following special features apply:

In **Austria** the general provisions concerning the protection against dismissal apply only in undertakings with no more than 5 employees. For domestic workers there is no protection against dismissal. However, according to case law a dismissal can also be challenged for being *contra bonos mores*.

In **Germany** the law on protection against dismissal for those employed after 31 December 2003 is applicable only in enterprises with more than 10 employees. For those employed before 31 December 2003 it applies where there are more than 5 employees. Nor does it apply to seasonal employees.

In **Denmark** a collective agreement is defined as follows: an agreement between on the one side, a workers’ organisation (a group of workers) and on the other side, an employers’ organisation of a single employer/enterprise on the wage and working conditions that shall apply for the type of work in question and in the relationship between the individual worker and his employer as well as in all other

relations between workers and employers including their organisations.

There is no lower limit as to how many workers in the single enterprise must be covered by the agreement.

Small undertakings are often no members of an employers' organisation. This does not mean that such undertakings are not covered by collective agreements. Many small enterprises conclude so-called accession agreements. This means that they accede to an agreement concluded by an employers' organisation. In that case they are bound by the agreement in the same way as the original parties to the agreement.

In **Greece** the size of the undertaking only plays a role in connection with collective dismissals.

In **France** the size of the undertaking is important in two respects. The first ordinance under the law of 25 July 2005 introduces a specific employment contract for new recruits ("*contrat de travail – nouvelles embauches*") to be used by small companies that employ up to 20 workers. The first 2 years of such employment is seen as a period of job consolidation and, during this time either the employer or the employee can terminate the contract in writing by means of a registered letter without having to state any reasons for this. Notice must be given calculated according to length of service. In the first 6 months it is 2 weeks, thereafter rising to 1 month. If the employer terminates the contract the employee is entitled to compensation of up to 8% of gross pay received since the employment began. This sum is not taxable and is not subject to social security contributions. Employers are also required to pay up to 2% of the gross pay to the unemployment agency ASSEDIL which sum is designed to finance activities by the public unemployment service to help employees return to work. Employees are entitled to appeal against their dismissal within 12 months in line with the normal Labour Code provisions and they must be informed of this right.

For enterprises with fewer than 1,000 employees the agreement on job reclassification ("*convention de reclassement personnalisé*" – CRP) applies. Employees with 2 years' service who are made redundant will be eligible for 8 months support receiving up to 80% of their previous pay during the first 3 months and up to 70% for the next 5 months while they are retraining. After this they will be eligible for normal unemployment benefit. Employees with shorter service and who are eligible to claim unemployment benefit are entitled to an alternative programme of assistance but will not receive any specific financial benefit. The agreement also sets out the procedure for informing such employees who are likely to be made redundant. They must be informed of the opportunity to participate in the job reclassification scheme both at a meeting and in writing, and they will have 14 days to decide whether to go ahead. If they do, their contract of employment will be terminated and they will enter into a new contract. The employer is obliged to pay to the unemployment fund the amount of notice the employees would have received (equivalent to 2 months pay) as well as a sum covering the hours the employee had accumulated through their individual right to training ("*droit individuel de formation*").

In **Greece** the size of the undertaking only plays a role in connection with collective dismissals.

In **Italy** the protection of employees against dismissal depends on the number of employees in the undertaking. For larger enterprises (those having more than 15 employees or 5 in the case of a farm enterprise) "*stabilità reale*" applies; for smaller firms a softer discipline ("*stabilità obbligatoria*") applies: see 3.3.2(6).

In **Luxembourg** an employer with at least 150 employees must consult the employee concerned before the dismissal. An employer with no more than 20 employees can opt either for payment of compensation or for extension of the period of notice.

In **Portugal** the *Labour Code* classifies employers according to the number of

employees. Article 91 distinguishes between micro-enterprises (less than 10), small enterprises (between 10 and 50), medium sized enterprises (51-200) and large enterprises (more than 200). For micro enterprises the dismissal procedure is simplified and reinstatement is not mandatory.

In **Sweden** employers are obliged to follow a strict seniority principle in case of redundancies (see 3.3.4.2). Employers with a maximum of 10 employees are allowed to exclude 2 of those from the priority order in case of redundancies.

In **the United Kingdom** employers with fewer than 6 employees are relieved of the obligation to take a woman back at the end of the full 40-week maternity absence period if it is not reasonably practicable for them to do so.

No exceptions are to be found in **Belgium, Spain, Finland, France, Ireland and the Netherlands**.

### **(5) Exceptions or specific requirements for certain categories of employees**

With regard to legislation on probationary periods, see also Appendix II.

In **Austria** there are the following special features;

- the ordinary rules do not apply to managers and directors;
- there are different rules concerning periods of notice for manual and white collar workers;
- the period of notice increases with the period of activity;
- in a probationary period either party can terminate the employment relationship without grounds and without notice;
- specific rules apply to teachers and actors and journalists, specific protection rules apply to employees' representatives.

In **Belgium** there are in general no exceptions. Periods of notice and severance payments may vary between manual (“*ouvrier*”) and white collar (“*employé*”) workers according to the time worked or the amount of salary. There is a shorter period of notice during the probationary period.

In **Germany** there are the following special features:

- directors, managers and employees in similar positions in the private sector who are empowered to take on and dismiss employees enjoy a limited degree of protection against dismissal. If these employees are dismissed in a socially unjustified way, they do not have any right of continued employment, but are merely entitled to compensation;
- longer periods of notice to be observed by employers apply to older employees who have worked for them for a long time;
- employment protection provisions only apply to employees who have been working for a firm or company for more than 6 months;
- shorter periods of notice apply during probationary periods, which may last for no longer than the first 6 months of employment.

In **Denmark** there are the following special features:

- managers are not covered by the ordinary rules;
- white collar workers are generally entitled to a longer period of notice;
- frequently, the rules on protection against dismissal only apply to employees who have been employed by that employer for a particular length of time, often 9 or 12 months. This applies to both legislation and collective agreements;

- shorter notice periods generally apply to probationary employment;
- the statutes often exclude civil servants and seamen. These groups will, however, often have approximately the same protection since the rules are merely adapted to the special conditions of the two groups.

In **Spain** there are special compensation arrangements for the dismissal of managers, domestic servants, professional sportsmen, artists and persons who take part in trading operations on behalf of one or more employers without assuming the risk associated with such operations. Special notice periods apply to domestic servants and artists. The parties to the contract are free to terminate the employment relationship within the probationary period.

In **Greece** there are the following special features:

- no specific requirements for managers and directors;
- compensation for dismissal is different for manual and white-collar workers. The legal distinction between white – collar and manual workers, set in the 1920 law, has remained extant. The latter have less favourable treatment with regard to the amount received as severance pay upon dismissal as well as the termination of their employment contracts without needing to follow notification deadlines;
- when it is agreed that the employment contract will be automatically dissolved when the employee reaches a certain age, the contract is deemed fixed term. If the parties have reserved the right to terminate the employment relationship before the age is reached, case law qualifies the contract as an open ended one;
- the worker's seniority (length of service) plays a role only in connection with the amount of severance pay and notice period;

- ordinary rules do not apply if the employee has not completed a service of 2 months. Nevertheless this kind of dismissal may be challenged before the courts for abuse of right. During the probationary period employment contract is deemed fixed term which can only be terminated if there is an important ground. If the employer has the right to terminate it even before the end of the term, ordinary rules on termination of open ended contracts apply. At the end of the fixed term period the relationship terminates automatically and no severance pay is due.

In **Finland** the ordinary rules do not apply to managers and directors if they are not in an employment relationship. Termination during a probationary period is possible without ground, but not on a discriminatory or inappropriate basis. The period of notice is connected to the length of continuous service. The period varies from 1 to 6 months.

In **France** the ordinary rules do not apply during a probationary period or to new recruits in enterprises with less than 1000 employees during the first 2 years of their employment. For employees with special protection (e.g. employees' representatives) the competent authority has to give authorisation for a dismissal.

In Ireland there are the following special features:

- employees who are below the age of 16 years or who are 66 years of age or more at the termination of employment do not qualify for statutory redundancy payment;
- an employee does not qualify for redundancy payment unless he or she has been employed by the same employer for at least 104 weeks. The *Unfair Dismissal Act* applies only to employees who have at least 1 year's continuous service with the same employer. The *Minimum Notice Act* applies only to employees who have at least 13 weeks' continuous service with the same employer;

- the *Unfair Dismissals Act* does not apply during a probationary period provided that the contract of employment is in writing and the period of probation is 1 year or less and is specified in the contract.

In **Italy** there is no legal system for the termination of employment relationships in general but different concepts of dismissals. Managers and directors are not covered by the same legislation as employees and therefore do not have the same status, nor the same protection against dismissal.

In **Luxembourg** there are special periods of notice for job-training contracts. For certain categories there is special protection against dismissal (see 3.3.1).

In **the Netherlands** pregnant and sick employees as well as employees' representatives are entitled to special protection against dismissal.

In **Portugal** there are the following special features:

- employees who perform functions presupposing a special relationship of trust can be employed either by a normal contract or by a specific contractual agreement. In the latter case they can be dismissed without grounds at 30 or 60 days' notice;
- on the 70<sup>th</sup> birthday of an employee the working contract changes into a fixed-term contract of 6 months which can be terminated by the employee at 15 days' notice and by the employer at 60 days' notice;
- time worked plays a role if workers have to be dismissed because of the elimination of the job or post and if the employer has to choose one of several workers to be dismissed;
- In a probationary period the contract may be terminated by each of the parties without notice and severance payments;

- pregnant employees or employees who have recently given birth or are breastfeeding are subject to special rules and their dismissal must be approved by the Commission for Equality in Work and Employment ("*Comissão para a Igualdade no Trabalho e no Emprego*").

In **Sweden** the situation is as follows:

- ordinary rules do not apply to managers and directors ("*employees who, taking account of their responsibilities and conditions of employment, are to be regarded as having a managerial or equivalent position*"). It is very often the case that such employees conclude relatively detailed employment agreements with their employers;
- no distinction is made between blue manual workers and white-collar workers. However, the two groups are generally covered by separate collective agreements and to the extent that collective agreements may provide for derogations from the ordinary rules, different rules may apply to manual and white-collar workers;
- employees who have reached the retirement age (67 years) but remained employed without retiring, are only entitled to a period of notice of 1 month;
- the ordinary rules do not apply to probationary employees. The probationary period may be no longer than 6 months.

In **the United Kingdom** there are the following special features:

- the ordinary rules apply to managers and directors if they are employed under a contract. But if they are office holders, they can be removed from office by a simple majority of votes cast at a general meeting of the company;
- employees having reached 65 years or the "*normal retirement age*" cannot in general claim unfair dismissal;

- the general right to claim unfair dismissal is subject to a qualifying period of 1 years' continuous service.

### 3.1 MUTUAL AGREEMENT

In **Ireland** the definition of dismissal focuses on the termination by either the employer or the employee. For instance, if the selection of workers to be made redundant is mutually agreed, the *Redundancy Payments Acts* apply. In case of a genuine agreement between the employer and the employee this is not regarded as dismissal.

In **Italy** the term mutual agreement may be misleading. Instead the term “dissolution of the employment relationship by mutual assent” (*“risoluzione consensuale del rapporto di lavoro”*) should be used.

#### (1) Substantive conditions

In all Member States the general rules on contracts apply also to a mutual agreement on termination of an employment relationship. There are no specific substantive conditions or clauses which are prohibited. However, there are the following exceptions:

In **Finland** the *Employment Contracts Act* must be respected. No agreement may be contrary to the legislation on job security or to collective agreements. But an employment relationship ends always after the end of the notice period. There is no automatic reinstatement without the employer’s consent. Therefore the invalidity of a termination agreement has no direct effects.

If in **France** a court establishes that a termination agreement is inadmissible, termination of employment is deemed to be a dismissal and the legislation on dismissal will apply.

In **Italy** judicial bodies recognise “*mutual assent*” only if there is an explicit declaration of the employees’ wishes. If not, the agreement is considered void.

In **Sweden** a termination by mutual agreement can be considered by the courts to be a concealed dismissal (contrived resignation), if

the agreement has been instigated by the employer whose behaviour was thus at odds with good labour market practice (see below 3.4.(7)).

In **the Netherlands** the employer has to investigate whether the employee has the will to conclude such an agreement, especially when one of the following categories of employees is involved: old, sick, over-strained or illiterate employees or employees with a foreign background who are not fluent in Dutch.

#### (2) Procedural requirements

In **Austria** no form is generally required. Exceptions:

- an agreement with a pregnant employee must be in writing;
- an agreement with a person called up for military or civil services must be in writing. An acknowledgement by the court for labour and social affairs or by an employees’ representative body must be attached;
- for an agreement with a trainee an attestation by the court that the trainee has been informed about the rules of the law on vocational training (*“Berufsausbildungsgesetz”*) is required

Otherwise the agreement is void. The employee has the right to discuss his case with employees’ representatives. If he or she has expressed such a wish, an agreement concluded within the 2 following days is void.

In **Germany** an agreement must be in writing and be signed by both parties otherwise it is void. The works council can under certain circumstances ask for a social plan.

In **Denmark** many unions have entered into special job security agreements whereby an

employer and an employee may agree special (favourable) terms in relation to the voluntary termination of employment. These agreements are used in connection with the restructuring or rationalisation etc. of firms and institutions with the aim of preventing an employee from being dismissed against his or her wishes. In such situations the employer may well have an obligation to notify the employee's union of such concrete agreements. In a given case it will often be the local union representative who is to be notified. If the employer fails to notify, the agreement is valid but it could receive a fine for breach of the collective agreement.

In **Greece** the agreement must be in writing if the conclusion of the employment contract had to be in writing. This is the case if the contract is with a public-law legal entity. Otherwise the agreement is void. The works council should be informed in advance of any decision to reduce staff. However, so far there are only very few works councils in Greece. If such information is not supplied, there are no practical consequences.

In **Spain** there are no legal requirements but the parties may lay down formal requirements in their contract. If such requirements are not fulfilled the agreement is deemed not to exist. There is no obligation to involve employees' representatives, although a degree of control is exercised indirectly. Employees' representatives must know how many documents of final settlement for the end of an employment relationship are drawn up in their company, if the request such information.

In **France** the employees' representatives must be consulted if a termination by mutual agreement is in connection with redundancy.

In **Italy** there are no legal requirements, but the judicial bodies stipulate that an agreement to terminate the contract must take the same form as for the conclusion of the contract. Example: an agreement for premature termination of a fixed-term contract must be in writing because the conclusion of the fixed-term contract by law has to be in writing.

In **Luxembourg** a mutual agreement must be in writing and in duplicate, signed by employer and employee. Otherwise it is void.

In **Portugal** a written document signed by both parties and specifying the date the agreement is entered into and the effective date of termination is required. An agreement which does not comply with these requirements is void. Article 396 of the *Labour Code* gives the employee the right to unilaterally revoke the agreement within 7 days of its conclusion save where the agreement is signed in the presence of a notary with certification of the date and the signatures.

In other Member States there are no procedural requirements.

### **(3) Effects of the agreement**

The employment relationship is terminated in consequence of the agreement.

#### **Severance Payments:**

In **Austria** there are severance payments ("*Abfertigung*") ranging from 2 months salary (after 3 years' work) to 12 months' salary (after 25 years' work); no severance payments if the period of activity is less than 3 years. An employee is not entitled to severance pay if he or she resigns, if he or she leaves prematurely without good cause, or when he or she is justifiably dismissed.

In **Germany** in undertakings with more than 20 employees the works council can ask for a social plan to alleviate the effects of changes in the undertaking (which include the termination by mutual agreement of a certain number of jobs as a result of changes in the undertaking). The social plan can provide for severance payments.

In **Greece** no severance payments are required by law in the case of mutual agreement. In effect, however, the agreement will be considered void if the employer does not pay at least the compensation it would have to pay in the event of dismissal (no circumvention of

rules on dismissal, which belong to the public order domain (“*ordre public*”).

In **Italy** in each case of termination of a contract a payment has to be made (“*trattamento di fine rapporto*”): 1 year’s salary divided by 13.5 + 1.5% for each year’s work + compensation for inflation.

In the other Member States there is no legal entitlement to severance payments unless agreed otherwise by the parties. If the sum due (by law or as fixed in the agreement) is not paid by the employer, this has no effect on the validity of the agreement. But the employer may be ordered to pay by the court.

### **Unemployment Benefits:**

Unemployment benefits are not payable in **Belgium, Greece, Spain and Luxembourg.**

In **Denmark** the employee is entitled to unemployment benefits if the employer is responsible for termination. If the employee is responsible there is a waiting period of 5 weeks.

In **France** unemployment benefit is available if an employee has had 6 months of employment out of the previous 22 weeks.

In **France** and **Portugal** there are in general no unemployment benefits, but the right to payments may be granted to the employee if, without that agreement, he or she would have been dismissed on economic grounds.

In **the Netherlands** the employee is entitled to unemployment benefits if the employer is responsible for termination.

There is a waiting period in **Italy** (30 days).

In **Finland** a person who has terminated the employment contract or caused the termination will not receive unemployment benefits before 90 days after the date on which the employment ended. If the mutual agreement is initiated by the employer and the employer agrees to pay compensation for being liable for unlawful

dismissal, the unemployment benefits for the corresponding period shall be deducted from the amount that covers compensation for loss of wages.

In **Germany** the Federal Labour Agency (“*Bundesagentur für Arbeit*”) may cut unemployment benefits for 12 weeks. At the same time the period during which such benefits are paid is reduced by at least a quarter.

In **Sweden** benefits can be cut for up to 45 benefit days.

In **Austria** unemployment benefits are not payable if the employee is responsible for termination.

In **the United Kingdom** if the employee leaves his or her job voluntarily without just cause, there will be no entitlement to jobseeker’s allowance for a period between 1 and 26 weeks.

### **Retirement Pensions:**

Termination normally has no effect on entitlements under public and private retirement pension schemes. Special features:

In **Austria** there is no effect on public pension schemes. Company pension schemes: entitlements to direct payment (employer to the employee) lapse if the employee resigns, if he or she leaves prematurely without good cause or when he or she is justifiably dismissed. They do not lapse if the employee pays contributions to a private insurance company. Then the company will pay the benefits later.

In **Germany** company pension rights are maintained, if

- the employee has completed the 30<sup>th</sup> year of his or her life: and
- the pension commitment has stood for at least 5 years.

In **Denmark** there is no effect on statutory pensions. Private pensions: Pension rights will normally also be maintained as such general

pension schemes are as a rule run by specialist companies. In the case of company pension schemes, there are few cases where pension rights are lost on leaving the firm in question and many where the accrued rights are maintained.

In **Greece** there are no proper company retirement pension schemes. Under Law 3029/2002 occupational pension schemes and funds were institutionalised for the first time. The Regulations governing that functioning in the framework of Law 3029 provide for the rights of employees in case of dismissals, resignation or other loss of the identity of the insured.

#### **Sickness insurance:**

There are no effects on entitlements under public or private sickness insurance schemes. Exceptions: in Germany the entitlement continues for the first month. In **Greece** there is no more entitlement under public systems following the first 3 months after dismissal. In **Luxembourg** there is no more entitlement under public and private systems. In **Spain**, where the employment relationship finishes and unemployment benefits are not payable, there is no further entitlement under public systems. However sickness insurance may be maintained in its limited form if the person provides that he or she does not have sufficient financial resources.

#### **(4) Remedies**

In all Member States there are judicial remedies or arbitration procedures if an employee thinks an agreement to be unlawful, irregular or invalid. Unless indicated otherwise below,

- there is no legal assistance for persons on a low income;
- there is no priority for remedy proceedings;
- the burden of proof is in general on the plaintiff.

In **Austria** proceedings may be brought before the court for labour and social affairs without any specific time limit. The works council has a right to take action if at least 3 employees are concerned by a matter.

In **Belgium** judicial remedies are not used in practice. The time limit is 1 year after the termination of the contract. Trade unions of employees' representatives may act on behalf of the employees.

In **Germany** an action may be brought before the Labour Court without any specific time limit. Priority is given to these proceedings. Trade unions may help their members. Low paid employees who are not trade union members may request the assistance of a lawyer if the employer is so represented. The employee's lawyer's fees will be paid by the *Land*.

In **Denmark** the employee has access to the general courts (if the case concerns the interpretation of law) or to industrial arbitration systems (if the employee is covered by a collective agreement). There is a general deadline of 5 years. Trade unions represent their members in such cases. A conciliation meeting should be held within 1 month. There is legal assistance for persons on low income.

In **Greece** proceedings may be brought before the general courts without any specific time limit. Trade unions may help their members. Labour cases have to be processed rapidly. The burden of proof depends on the substantive law. The employee contesting the validity of the agreement has to prove the existence of the employment relationship, its termination and the reason for contestation.

In **Spain** employees have recourse to the courts after a prior attempt to reach a settlement has been made before the Mediation, Arbitration and Conciliation Services. A claim must be brought within 20 working days of termination. This period is interrupted by the lodging of a conciliation paper. Trade unions may act on behalf of their members with authorisation of the member concerned. The labour courts have

to act rapidly. The burden of proof is on the plaintiff, except in cases of discrimination.

In **Finland** an infringement of the *Employment Contracts Act* may be contested in the District Court. Infringements of collective agreements may be contested in the Labour Court, after a mediation procedure if the agreement provides for it. The time limit is 2 years from the date the employment ended in both cases. There are shorter specific time limits in the legislation on public servants. At the Labour Court the employee is represented by his or her union. If the union refuses to bring an action, the right to do so rests with the employee himself or herself. If an action is brought within 6 months of termination it must be treated as urgent in all instances. With regard to the burden of proof, the general rules of civil law apply. The burden of proof is on the employer to demonstrate the existence of grounds for terminating the employment relationship.

In **France** an action in the Labour Court may be brought without any specific time limit. Trade unions may not act on behalf of their members.

In **Italy** a court action may be brought within 5 years in the case of annulment of the agreement. In the event of nullity there is no time limit. If the mutual agreement is in effect a concealed dismissal, the employee must contest it in writing within 60 days of notification of the dismissal. Once the contestation is made, the time limit for the action itself is 5 years. Trade unions may not act on behalf of their members.

In **Luxembourg** an employee may, without any specific time limit, approach the Labour Inspectorate (*“Inspection du Travail et des Mines”*), whose job it is to supervise the application of the relevant legislation. Proceedings before the Labour Court (*“Tribunal du Travail”*) are possible within 3 months of notification of the termination except where the application alleges improper dismissal (*“licenciement abusive”*). Trade unions can only act in court if they have a special legal status (*“association sans but*

*lucratif” or “établissement d'utilité publique”*). The purpose of any application to court would be to secure the nullification of the agreement for failure to observe the procedural requirements or where true consent was absent.

In **the Netherlands** the agreement may be contested on the grounds of mental disturbance, error, deceit and abuse of circumstances. If one of these grounds has been sufficiently substantiated, the Court will nullify the agreement or award compensation. The nullification has retrospective effect unless that would lead to unreasonable consequences. The time limit is 3 years. There is legal assistance for persons with a low income. Trade unions may act on behalf of their members. There are no special rules on speed or priority. In conformity with the general rules on the burden of proof, the employee contesting the validity of the agreement has to prove the existence of an employment relationship, its termination and the reason for contestation. The employer has to prove that the contract was terminated by mutual agreement.

In **Portugal** the employee has the right to unilaterally revoke the agreement within 7 days of its conclusion. Other legal action is possible within 1 year of termination. Trade unions may help the parties. They have the right to bring an action when the employer has taken measures against employees because they are shop stewards or hold any other trade union positions.

In **Sweden** an employee who seeks to have an agreement declared void can bring a case before the courts without any specific time limit. An employees' organisation has the statutory entitlement to institute and conduct cases before the Labour Court on behalf of its members - irrespective of whether this is sitting as a court of first instance or as the final court of appeal. This is the case where the employer has concluded a collective agreement and the employee involved in the dispute is carrying out duties covered by the collective agreement. If the union is not conducting the case, the employee has to initiate proceedings personally. Normally legal assistance is available through

the trade unions and there is legal assistance for persons on low income. In Sweden there is a priority for remedy proceedings since according to section 43 of the *Employment Protection Act* reinstatement issues should be conducted speedily.

Procedures specific to the termination of employment by mutual agreement do not apply in **the United Kingdom** context. Where an employee is pressurised into resigning this would be treated as a dismissal.

### **(5) Vitiating factors**

In this regard the general principles on contracts are applicable in all Member States.

### **(6) Penalties**

In **Denmark** a fine for breach of a collective agreement is possible if the employer does not involve the employees' representatives according to the agreement.

In **Spain** certain acts or omissions by the employer may be considered as administrative violations which may lead to a fine. In addition, according to Articles 311 and 312 of the *Penal Code* certain acts by the employer, violating the rights of workers enshrined by law, collective agreement or individual employment contracts, are criminalised.

### **(7) Collective agreements**

As far as mutually agreed terms are concerned, collective agreements play almost no role in the Member States.

### **(8) Relations to other forms of termination**

The question arises of whether termination by mutual agreement is possible in connection with a dismissal and, if so, under what conditions.

In **Austria, Germany, Greece, Italy and Sweden** the rules on mutual agreement apply also in the context of a dismissal.

In **Belgium** a termination process is regarded either as a mutual agreement or as a dismissal. It follows that mutual agreement in connection with a dismissal cannot occur.

In **Spain** during a trial the parties can conclude an agreement. The Courts often consider such agreements as a mutual agreement on the termination of the employment relationship, sometimes as resignation.

In **France** a mutual agreement concluded in connection with a dismissal is a settlement ("*transaction*") which is subject to the following conditions:

- the procedures for dismissal must be respected;
- the parties must have different opinions about the ground for the dismissal;
- the parties must make concessions to one another.

The termination of an employment relationship by conversion agreement ("*convention de conversion*") is considered as termination by mutual agreement (not as dismissal).

In **the Netherlands** termination by mutual agreement is possible during dismissal or rescission proceedings. Often payment of financial compensation by the employer leads to the end of the contract.

In **Portugal** a settlement is possible during the conciliation procedure according to conciliation procedure rules. It should also be noted that in redundancy cases employees are not normally dismissed but their contract is terminated by mutual agreement (with compensation).

In **the United Kingdom** where the employer has given notice to the employee to terminate the contract, the courts are reluctant to find that any subsequent agreement to end the

employment before the notice expires amounts to termination by consent. Categorising the termination as termination by consent or

resignation means that an employee cannot complain of unfair dismissal.

### **3.2 TERMINATION OTHERWISE THAN AT THE WISH OF THE PARTIES**

This part examines grounds for a contract to come to an end without further action of the parties. For other forms of termination see 2(1) above.

#### **(1) Grounds for a contract to come to an end by operation of law**

Unless indicated otherwise below, a contract of employment is terminated in the following situations:

- expiry of a fixed-term contract;
- completion of a specified task;
- death of the employee.

Other grounds are in

##### **Austria:**

- dissolution of the contract by the court.

##### **Belgium:**

- dissolution by the court;
- death of or employer (in the case of a personal contract)?
- *force majeure*;
- nullity.

##### **Germany:**

- nullity of the contract of employment in the event of e.g. non-compliance with a statutory ban, bad faith, non-compliance with required legal form, non-consent of the parent or guardian of minors;
- termination of the contract of employment by the courts at the request of the employer or employee, if, despite a court ruling to the

effect that dismissal by the employer is legally invalid, the parties cannot be reasonably expected to continue with their employment relationship because the basis of mutual trust has been destroyed;

- the lapse of a fixed-term contract or the completion of a contractually agreed task do not constitute grounds for termination other than at the wish of the parties. Instead, this type of termination must be agreed by the parties.

##### **Denmark:**

- extinction of the employer's legal personality;
- dissolution by court, only possible where the employee is a minor or is deemed incapable of managing his or her own affairs or in the event of bankruptcy proceedings.

##### **Greece:**

- death of the employer only if the contract relates to the specific person of the employer (very rare, e.g. private secretary);
- declaration by court of the undertaking's liquidation;
- attainment of the age limit fixed by enterprise regulation;
- achievement of 35 years of service if the employee is older than 56 years (only in the public sector);
- decision of a body legally having the power to terminate the contract, e.g. disciplinary body. This is provided for mostly in the regulations of public enterprises.

**Spain**

- retirement and disablement of the employee;
- retirement or incapacity of the employer, extinction of the employer's legal personality;
- bankruptcy of the employer if the trustee of the bankruptcy has decided that the activities of the employer are to be ceased;
- *force majeure* which makes it permanently impossible for the work to be carried out, provided that this has been duly proven to the labour authorities in a collective dismissal procedure.

**Finland:**

- retirement of the employee.

**France:**

- *force majeure* and closure of the business by judicial or administrative decision.

**Ireland:**

- frustration.

**Italy:**

- frustration.
- dissolution of the contract by court if not *impossible*, but it is difficult.

**Luxembourg:**

- award of old age pension;
- *force majeure*;
- incapacity for employment. Health and Safety legislation (law of 14 December 2001 modifying law of 17 June 1994) prescribes, that candidates for employment are required to undergo a medical examination either before or within 2 months of commencing employment to

determine their fitness for employment. Where there is a decision of incapacity and the employment has commenced, the contract automatically terminates;

- external placement decision ("*décision de reclassement externe*"). Under the law of 25 July 2002 ("*concernant l'incapacité de travail et la réinsertion professionnelle*"), employees who are not fit for their previous employment but who are not eligible for an invalidity pension can go before a committee which looks at the possibility of internal placement with the employer or to external placement in the labour market. An external placement decision automatically terminates the contract of employment.

**Netherlands:**

- lapse of time stipulated by contract, law or custom;
- death of the employer under special *conditions*.

**Portugal:**

- expiry of a fixed-term contract. However, the employer must inform the employee, in writing, at least 8 days prior to expiry of the time period, that it does not wish to renew the contract;
- absolute and definite impossibility of the employee performing the work or the employer receiving it;
- retirement of the employee.

**United Kingdom:**

- death of the employer;
- appointment of a receiver by the court;
- frustration (e.g. long-term sickness, *imprisonment* of the employee);

- (in certain circumstances) dissolution of a *partnership*.
- in Scotland bankruptcy is referred to as *sequestration*.

If it comes out (in court for example) that there is not such ground, the contract continues. In **Denmark** and **Finland** the employer may also be ordered to pay compensation. In **Sweden** the severance payment systems laid down by collective agreements apply even to insolvencies/bankruptcies if the employees affected are dismissed for redundancy.

## (2) Procedural requirements

Procedural requirements are very rare in this context. In general there are no specific rules on the involvement of *employees' representatives*. In **Denmark** collective agreements may impose such a duty on the employer. If it fails to comply with this duty, it could receive a fine for breach of the collective agreement. In **the United Kingdom** the employer must consult appropriate representatives of affected employees if the insolvency results in redundancies covered by the collective redundancies provisions (see 3.3.4(3));

In the case of insolvency *public authorities* are involved in **the United Kingdom** and in **Spain** (labour authorities).

## (3) Effects of the existence of a ground

If there is one of the grounds mentioned above (1) the employment relationship is terminated.

### Severance Payments:

In **Austria** in the case of death of the employee there is only half of the normal severance payment ("*Abfertigung*") for the successors.

In **Germany** employees are entitled to a severance payment if, despite a court ruling to the effect that dismissal by the employer is

legally invalid, the employment relationship is dissolved by the court at the employer's or employee's request on the grounds that the parties cannot be reasonably expected to continue with their employment relationship because the basis of mutual trust has been destroyed. The severance payment is equivalent to up to 18 months' salary depending on the employees' age and length of employment.

In **Finland** there are no severance payments in the case of individual dismissals. In some situation there are severance payments in the case of collective dismissals.

In **Spain** there are severance payment by law if retirement, death or disablement of the employer lead to the end of the contract ( 1 month's salary). There are also severance payments by law in the case of the closure of the employer's business for reasons of insolvency, *force majeure* or dissolution of the legal personality of the employer (20 days' salary).

In **Italy** in each case of termination of a contract a payment has to be made ("*trattamento di fine rapporto*"): 1 year's salary divided by 13.5 + 1.5% for each year of activity + compensation for inflation.

In **Luxembourg** the employee is entitled to compensation in the case of the closure of the employer's business: Salary for the month in which the closure occurs and for the following month + 50% of the salary he or she would have received during the period of notice to which her or she is entitled. The two may not exceed the compensation for dismissal with notice. In the case of the death of the employee, the employer is required to pay the balance of the month's salary and a further 3 month's salary to the surviving spouse or other dependants.

In **Portugal** the employee is entitled to severance payments in the following situations:

- death or winding up of the employer, in which case the employee is entitled to 1

month's basic remuneration for each year or part year of service;

- expiry of the time limit, in which case the employee is entitled to 2 days' basic remuneration for each completed month of the contract;
- termination of the contract due to the permanent closure of establishments or to destruction by natural causes or as a result of a decision by public authorities.

In **the United Kingdom** in case of insolvency there is a right to statutory redundancy pay if the employee has 2 years' continuous employment.

In **Sweden** there are no severance payments by statute. Severance pay is provided for by collective agreements and apply to insolvencies/bankruptcies if the employees are dismissed for lack of work.

In **Denmark** the spouse and children under the age of 18 are entitled to up to 3 months pay if a salaried employee dies.

In the other Member States there are no severance payments. If the sum due is *not paid* by the employer, this has no effect on the validity of the agreement. But the employer may be ordered to pay.

#### **Unemployment Benefits:**

Employees are entitled to unemployment benefits in the Member States subject to the following special features:

In **Spain** the benefits are limited to death, retirement or disablement and insolvency of the employer, *force majeure* and dissolution of the employer's legal personality.

In **the Netherlands** on the termination of a contract entered into for a specific term, unemployment benefit may be claimed if the normal requirements are fulfilled.

In **Portugal** employees who are involuntarily unemployed are entitled to benefits provided they have worked at least 540 days in the previous 2 years.

In **the United Kingdom** an employee who is unemployed as a result of the employer's insolvency is entitled to jobseeker's allowance.

#### **Retirement Pensions:**

Termination normally has no effect on entitlements under public and private retirement pension schemes. Special features:

In **Denmark** pension rights based on a collective agreement are maintained. Company pension rights are often lost but there are many cases where they are maintained.

In **the Netherlands** there are no effects on public pension schemes. Participation in a private pension scheme will be discontinued on termination of the contract of employment. The employee is given a proportionate pension entitlement.

#### **Sickness Insurance:**

Termination has no effect on entitlements under public and private sickness insurance schemes.

### **(4) Remedies**

In all Member States there are, if necessary, judicial remedies or arbitration procedures for the employees to pursue their claims. Unless indicated otherwise below:

- there is legal assistance for persons on a low income;
- there is no priority for remedy proceedings;
- the burden of proof is in general on the plaintiff;
- the court must be satisfied that there is a sufficient ground for the termination.

In **Austria** an action before the court for labour and social affairs may be brought without any specific time limit. The works council has a right to claim if at least 3 employees are concerned by a question.

In **Belgium** an action may be brought before the Labour Court within 1 year of the termination of the contract. Trade Unions or employees' representatives may act on behalf of the employees.

In **Germany** an action may be brought before the Labour Court without any specific time limit. Trade unions may help their members. Low paid employees who are not trade union members may request the assistance of a lawyer if the employer is so represented. The employee's lawyer's fees will be paid by the *Land*.

In **Denmark** the employee has access to the general courts (if the case concerns the interpretation of law) or to industrial arbitration systems (if the employee is covered by a collective agreement). There is a general deadline of 5 years. Trade unions represent their members in such cases. A conciliation meeting should be held within 1 month.

The burden of proof is on the employer if the dismissal is during pregnancy, childbirth or parental leave.

In **Greece** an action can be brought before the general courts within 5 (2 years for employees of the State and of public undertakings). Trade unions may help their members. Labour cases have to be processed rapidly. The burden of proof is on the employee (as far as the existence of the employment relationship is concerned) and on the employer (as far as termination other than at the wish of the parties is concerned).

In **Spain** employees have recourse to the courts after a prior attempt to reach a settlement before the Mediation, Arbitration and Conciliation Services. This period is interrupted by the lodging of a conciliation paper. Trade unions may act on behalf of their members with authorisation of the member concerned. The

Labour Courts have to act swiftly. The burden of proof is on the plaintiff, except in cases of discrimination. In those situations where the labour authorities intervene, i.e. insolvency of the employer, *force majeure* and the dissolution of the legal personality of the employer, the decision of the labour authorities can be contested through administrative court procedure.

In **Finland**, an infringement of the *Employment Contracts Act* may be contested in the District Court. Infringement of collective agreements may be contested in the Labour Court, after a mediation procedure if the agreement provides for it. The time limit is 2 years in both cases. Before the Labour Court the employee is represented by his or her trade union. If the union refuses to bring an action, the right to do so rests with the employee himself or herself. If an action is brought within 6 months of termination it must be treated as urgent in all instances. With regard to the burden of proof, the general rules of civil law apply. More especially, the burden of proof is on the employer to demonstrate the existence of grounds for terminating the employment relationship.

In **France** an action before the Labour Court may be brought without any specific time limit. Trade unions may not act on behalf of their members.

In **Italy** the employee must contest the dismissal in writing within 60 days of notification. Once the contestation has been made, the time limit for the action itself is 5 years. Trade unions may not act on behalf of their members with the exceptions of Article 28 of the *Workers' Rights Statute* which provides for the possibility of separate appeal by a trade union representative and Article 18(7) which provides for the possibility of joint appeal in the event of dismissal of a trade union representative.

In **Luxembourg** an action may be brought before the Labour Court within 3 months of the notification of dismissal or of its motivation.

In **the Netherlands** an action may be brought before a district court's cantonal section within 6 months. Trade unions may act on behalf of their members.

In **Portugal** is possible within 1 year of termination. Trade unions may help the parties. They have the right to bring actions when the employer has taken measures against employees because they are shop stewards or hold some other trade union position.

In **Sweden** the employee can bring a case before the courts. An employee organisation has a statutory entitlement to institute and conduct cases before the Labour Court on behalf of its members –irrespective of whether this is sitting as a court of first instance or as the final court of appeal. This is the case where the employer has concluded a collective agreement and the employee involved in the dispute is carrying out duties covered by the collective agreement. If the union is not conducting the case, the employee has to initiate proceedings personally.

In **the United Kingdom** employees of an insolvent employer may make a claim from the National Insurance Fund for certain payments, including certain arrears of wages for up to 8 weeks (subject to a maximum of £280 per week), holiday pay and any statutory redundancy payments. Where the fund fails to make a payment, or pays too little, the employee may complain to an employment tribunal within 3 months of the decision on the employee's application being communicated to him or her or such further period as the tribunal considers reasonable in a case where compliance with this time limit was not reasonable practical. An employee may appoint a representative, including a representative of a trade union.

If an employee considers that his or her dismissal is unlawful because inadequate notice has been given to terminate the contract, he or she may bring a claim for damages. If he or she considers that the dismissal is for an unfair reason, he or she may complain to an

employment tribunal that the dismissal is unfair. The employee must show that he or she has been dismissed; the employer must show the reason for dismissal and the tribunal must decide whether the employer acted reasonably in all the circumstances in deciding to dismiss. An employee may appoint a representative, including a representative of a trade union.

## (5) Penalties

There are no penalties except in **Denmark**, where a fine for breach of a collective agreement is possible if the employer does not involve the employees' representatives according to the agreement.

In **Spain** certain acts or omissions by the employer may be considered as administrative violations which may lead to a fine. In addition, according to Articles 311 and 312 of the Penal Code certain acts by the employer, violating the rights of workers enshrined by law, collective agreement or individual employment contract, are criminalised.

In **Portugal** non payment of compensation due to employees in cases such as expiry of fixed term contracts are administrative violations punishable by a fine. Failure to inform and consult employees representatives' in case of closure is a crime punishable by a term of imprisonment of up to 2 years.

## (6) Collective agreements

The role of collective agreements is limited. In **Spain** they may contain rules e.g. on severance payments. In **Greece** enterprise regulations in the public sector often contain rules fixing an age limit, which means that the employment relationship is terminated when the age limit is reached. In **the Netherlands** provisions laying down that contracts of employment entered into for a specific period are terminated by law on the death of the employee are common. By and large rules in collective agreements have the same substance as legal provisions.

### 3.3 DISMISSALS IN THE MEMBER STATES: OVERVIEW

In **Austria** there is a distinction between dismissal with notice and summary dismissal. If the employer respects the legal period of notice, no ground is required. For summary dismissal (premature termination of the employment relationship before the end of the notice period) the employer must have a substantial ground. If there is no substantial ground, the employment relationship is nevertheless terminated, but the employee is entitled to compensation.

The works council must be informed before a dismissal. Protest by the works council does not affect the validity of the dismissal, but enables an appeal to be made against the dismissal on the grounds that it is socially unacceptable.

A termination of contract must be contested in the Labour and Social Court if it is either held to derive from illicit motives (e.g. on the grounds of the employee's trade union activities) even though the works council has expressly approved it, or if the works council has not expressly approved the contemplated termination and the employee has worked for the firm concerned for at least 6 months. A termination of contract is socially unjustified if it prejudices vital interests of the employee and is not rooted either in the circumstances relating to the personal character of the employee which are contrary to the interests of the firm, or in the internal requirements of the firm which make further employment inadvisable.

In **Belgium** the employer can terminate an employment relationship in several ways:

- it gives notice ("*préavis*") and the employment relationship is then terminated at the end of the notice period;
- it does not give notice or it does not give sufficient notice and the employee is then entitled to compensation which is equal to

the pay the employee would have received until the end of the notice period;

- if there is a ground which makes further collaboration between employer and employee impossible, the employer can terminate the employment relationship without notice and compensation.

There is also case law to the effect that, where a unilateral and substantial change to an essential condition of employment is made by an employer, it is presumed it has the intention to terminate the contract.

In **Germany** there are two kinds of dismissal:

- ordinary dismissal ("*ordentliche Kündigung*") and the employment relationship is terminated at the end of the contractual or statutory period of notice;
- summary dismissal ("*außerordentliche Kündigung*"). If there is cause justifying termination of the employment relationship before the end of the period of notice, this period does not have to be observed.

In both cases the grounds for dismissal must be stated.

A dismissal is socially unjustified ("*sozial ungerechtfertigt*") if it is not conditioned by the behaviour or the person of the employee or by urgent reasons related to the undertaking. Any dismissal which is socially unjustified or which does not meet the other requirements is void. The employment relationship continues.

The works council must be heard before any dismissal. Otherwise the dismissal is void.

In **Denmark** there is no general statutory prohibition against unfair dismissal. In principle, the employer is free to dismiss an employee.

There is protection in the main agreement (“*Hovedaftalen*”) between the Danish Confederation of Trade Unions (“*Landsorganisationen i Danmark*”, LO) and the Danish Employers’ Confederation (“*Dansk Arbejdsgiverforening*”, DA): Dismissal must be fair and notice must be given. In a case of serious misconduct the employer can dismiss without notice. The employer is obliged to justify the dismissal before the employee. However, this is not a condition for the validity of the dismissal. The main remedy against a dismissal is the conciliation procedure. An employee covered by a collective agreement may afterwards apply to the Board of Dismissal (“*Afskedigelsesnævnet*”). The Board may declare the dismissal unlawful and order the reinstatement of the employee. This applies if the employer is covered by the agreement, irrespective of whether or not the employees are actually members of the union.

For salaried employees (office clerks, shop assistants and similar employees) there is equivalent protection in the *Salaried Employees’ Act*. However, for workers who are neither salaried employees nor covered by a collective agreement the main rule is no protection against unfair dismissal. There are however a number of laws that protect all workers against dismissal for specific reasons. There is a ban on dismissal on the grounds of race, colour, religion, political opinion, sexual orientation, age, handicap or national, social or ethnic origin, pregnancy, childbirth, demand for equal pay and treatment, compulsory military service, membership of an association and as a result or a corporate takeover.

In **Greece** there are two kinds of dismissal:

- ordinary dismissal. No ground is required. But the court can declare a dismissal void if it is improper (to be proved by the employee). A period of notice applies only to white collar workers, but instead of giving notice the employer may pay compensation. In effect notice is hardly ever given. The dismissed employee is entitled to compensation, except in certain exceptional cases;

- summary dismissal. For the premature termination of a fixed-term or fixed-task employment relationship, an important ground is necessary which makes it intolerable for the relationship to run until its end. In general the employee is not entitled to compensation. Only if the important ground is based on a change in the personal situation of the employer the court can order that an equitable compensation be paid.

In **Spain** three kinds of dismissal must be distinguished:

- dismissal on disciplinary grounds (“*despido disciplinario*”);
- dismissal on objective grounds (“*despido objetivo*”);
- collective dismissal on economic, technical, organisational or production-related grounds.

In the first and second cases the law provides an exhaustive list of grounds for dismissal. For collective dismissals there is only a general rule but it must be authorised by a State authority if no agreement is reached between the employer and the employees’ representatives.

There is a period of notice only for dismissal on objective grounds.

In the case of collective dismissal for economic, technical, organisational or production reasons in **Spain**, there is a specified period from the moment the employer gives notice of its intention to go ahead with a collective dismissal to the moment it actually takes place, due to the existence of a period of consultation with worker’s representatives and the need for the collective dismissal to be authorised by the public labour authorities (see section 3.3.4.3).

In **Finland** the employer can only give notice if it has a proper and weighty reason. The ground for dismissal may derive from the employee (individual ground) or the economic situation of the firm (economic ground). The specific

notice period must be observed. An employer which terminates an employment contract without observing the notice period shall pay the employee full pay for the period equivalent to the notice period as compensation. If the notice period has been observed in part only, the liability is limited to what is equivalent to the pay due for the non-observed part of the notice period.

Furthermore the employer is, upon an extremely weighty cause, entitled to cancel an employment contract with an immediate effect regardless of the applicable period of notice or the duration of the employment contract. Such a cause may be deemed to exist in case the employee commits a breach against or neglects duties based on the employment contract or the law and having an essential impact on the employment relationship in such a serious manner as to render it unreasonable to expect that the employer should continue the contractual relationship even for the period of notice.

In **France** for any dismissal a real and serious ground (“*cause réelle et sérieuse*”) is required. The employer may dismiss an employee either on economic grounds or on grounds related to the employee.

The employer must respect a specified period of notice. But it may also terminate the contract before the end of the notice period if it pays compensation equal to the salary the employee would have received until the end of the notice period.

In **Ireland** to justify a dismissal an employer must show that it either resulted from one or more of the following causes or that there were other substantial grounds for the dismissal:

- the capability, competence or qualifications of the employee for the work he or she was employed to do;
- the employee’s conduct;
- redundancy;

- the fact that continuation of the employment would contravene another statutory requirement.

In **Italy** there are the following kinds of dismissal:

- dismissal “*ad nutum*” (i.e free from restrictions): the employer must respect a specified period of notice. A ground is not required. The scope of application of this kind of dismissal is limited to:
  - dismissal during a trial period,
  - dismissal of domestic servants,
  - dismissal of an employee who is entitled to retire,
  - dismissal of directors;
- dismissal on important grounds: the employer must respect a period of notice depending on the job classification and the length of the employee’s service. To be eligible, the grounds must be related to the employee’s behaviour (except serious misconduct) or to the undertaking’s production or organisation;
- justified dismissal because of serious misconduct or because of other reasons which render the continuation of the employment relationship impossible. There is no period of notice.

In all cases the employer has to make a payment (“*trattamento di fine rapporto*”).

In **Luxembourg** a real and serious ground (“*motif réel et sérieux*”) is required. Notice must be given, except in the case of summary dismissal for an important ground (“*motif grave*”), which renders the maintenance of the employment relationship impossible. In case of improper (“*abusif*”) dismissal the employee is entitled to compensation. The court may also recommend the employer to reinstate the employee. If the employer does not agree it

may be ordered to pay supplementary compensation.

In undertakings with more than 150 employees there is a preliminary meeting between the employer and the employee which an employees' representative or trade union representative may attend if the employees so wish.

The employee is entitled to severance payments in all cases of termination of employment relationship except summary dismissal. In undertakings with more than 20 employees the employer can opt for a longer period of notice instead of severance payments.

**In the Netherlands** the employer can terminate the contract of employment:

- by requesting permission to do so from the Centre for Work and Income ("*Centrum voor werk en inkomen*" – CWI). The CWI will examine whether there is a reasonable ground. Once permission has been given the employer may dismiss by giving notice;
- by applying to a court in urgent cases or circumstances requiring a rapid termination of employment;

A particular feature of the Dutch labour law system is that in the case of termination of an open-ended employment contract the employer needs the prior consent of the CWI. An exception is made for particular categories of employees, such as civil servants, teachers, members of the clergy, domestic servants, company directors, etc. (Extraordinary Decree on Labour Relations). Furthermore, prior consent is not needed in the case of:

- dismissal during a probationary period;
- termination by mutual agreement;
- summary dismissal;
- bankruptcy;
- fixed term contracts;

- rescission by the court.

Before giving notice, the employer must address a written application to the local office of the CWI. The application must contain all the relevant information on the reason and circumstances of the case. A Dismissals Committee, consisting of employers' and union representatives, will consider whether there is a reasonable ground for dismissal. A permit is usually granted when the employer substantiates one of the following reasons:

- the employee's incompetence or misconduct;
- economic reasons (if the reason is not contested by the employee, accelerated proceedings are available);
- severe and prolonged disturbance of the labour relationship.

If the permit is granted, the employer can dismiss the employee within a period of 2 months. If not, the employer can try again or ask the court to rescind the employment contract. There is no appeal against a decision by the CWI. Termination of the employment contract without prior CWI consent is void.

Instead of following the CWI application procedure, either party may request the court to rescind the contract for substantial reasons. Substantial reasons are circumstances that would have constituted an urgent reason if the employment relationship had been immediately terminated and changes in circumstances that justify the termination of the employment relationship. Judicial rescission is considered to be faster but costlier than the CWI application procedure, as only the court can decide on severance pay and no appeal is possible against the court's decision to rescind the employment contract. The court also decides when the employment contract will end, as there is no period of notice.

The amount of the severance pay is calculated on the basis of a judicial formula, which is generally accepted by the judges of the cantonal

section of the district court. The formula consists in the multiplication of three factors, A, B and C, in which:

- A is the number of the weighed years of service. For the calculation of A, the years of service are rounded to the nearest whole number. This means that a period of 6 months and 1 day is treated as a whole year. Next, the years of service are weighed. This means that the older the employee is, the more important a year of service will be;
- B is the gross payment per month, consisting of several parts. Some of them are relevant for the calculation of the redundancy package and some are not;
- C is the correction factor, which is the variable part of the formula. The amount of severance pay can be adjusted because of special circumstances. Normally, C is fixed at 1, but when the employer is to blame for the redundancy, part C can be fixed at 1.5 or even 2. When the employee is to blame, C can be fixed at 0.5 or 0 when the employee decides to quit the job.

In **Portugal** the following types of dismissal exist:

- justified dismissal: this is based on serious unlawful conduct by the employee. A disciplinary procedure must be set in motion in which both the employee and employees' representative give evidence. The dismissed employee is not entitled to compensation;
- dismissal related to the employee's capacities: this is based on the employee's failure to adapt to changes arising from new manufacturing processes or new technology or equipment. The employer must have provided adequate vocational training for any changes introduced from which the employee has not sufficiently benefited. The dismissed employee is entitled to compensation according to basic remuneration and length of service;

- collective dismissal, based on structural, technological or other reasons. The employer must inform and meet employees' representatives so as to reach agreement on the scale and effects of the dismissal or other measures to reduce the number of potential redundancies. Dismissed employees are entitled to compensation according to basic remuneration and length of service;
- dismissal by reason of redundancy because of economic, technological or structural reasons. The employer must provide employees' representatives with information on the planned dismissal. The dismissed employee is entitled to compensation according to basic remuneration and length of service;
- dismissal of employees performing functions presupposing a special relationship of trust and having a specified contractual agreement: No ground required, only notice.

The dismissal must in theory be fair. The only exception is dismissal during the probationary period.

In **Sweden** an employer can terminate an employment relationship:

- by giving notice (dismissal). In this case an objective ground is needed ("*Centrum voor werk en inkomen*");
- without notice in case the employee has committed a serious breach of his or her contractual obligations (summary dismissal).

Where an employee is dismissed or summarily dismissed without objective grounds the dismissal shall be declared invalid on the employee's petition. The employee is also entitled to damages.

In **the United Kingdom** there are two forms of remedy for dismissal, common law and statutory.

At common law, an employer can terminate a contract without notice if the employee commits a fundamental breach of contract (summary dismissal). Otherwise the employer must give the appropriate period of notice to terminate the contract. If the employer fails to do this the employee may claim damages.

The statutory remedy of unfair dismissal is concerned with the reason for dismissal and can be brought even if the appropriate length of notice has been given. A complaint of unfair dismissal may be brought to an employment tribunal (a tripartite fact-finding body) which will decide if the dismissal was fair. There is a right of appeal on a question of law to a higher court. First it is for the employee to show that there has been a 'dismissal' within the meaning of the *Employment Rights Act 1996*. Then the employer must show:

- the reason, or principal reason, for the dismissal, and
- that this reason was:
  - related to the capability or qualifications of the employee for performing work or the kind which he or she was employed by the employer to do;
  - related to the conduct of the employee;
  - that the employee was redundant;

- that the employee could not continue to work in the position which he or she held without contravention by him or her or by the employer of a statutory duty or restriction;
- or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Finally the tribunal must decide whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. Since 1 October 1994, a dismissal is automatically unfair (exceptional circumstances apart) if the employer has failed to complete a statutory dismissal and disciplinary procedure and the compensation awarded to the employee can be increased. If non-completion is due to the employee's failure, compensation can be reduced.

Dismissal for certain reasons, listed in the following section, is automatically unfair. Employees do not require a minimum period of employment to complain of unfair dismissal in these circumstances.

### 3.3.1 Dismissal contrary to certain specified rights or civil liberties

A dismissal may be contrary to certain specified rights of the employee, for example if it is based on trade union activities, race or pregnancy. Member States prohibit such dismissals by law to a certain extent and/or establish specific dismissal procedures (e.g regarding employee's representatives). Dismissal because of the employee's gender is prohibited in all Member States. Grounds which are not prohibited by law are often taken into consideration when a court is asked to declare a dismissal unlawful.

In **Austria** dismissal cannot be based on unlawful motives such as :

- activity as an employees' representative, participation in a strike;
- race, colour, sex, marital status, sexual orientation, religion, political opinion, ideological conviction, nationality or social origin;
- absence as a consequence of military or civil service,
- activity as a member of a mediation board;
- activity as an employees' representatives responsible for occupational safety;
- leaving the workplace in case of serious and immediate danger for the employee's life or health.

Such dismissals will be declared void by the court. If this declaration is made before the end of the period of notice, the employment relationship continues. If the declaration is made after the end of the period of notice, the employee will be reinstated.

Dismissal of member of works councils, pregnant women, employees on maternity leave and persons called up for military service is allowed only with the consent of the court for

labour and social affairs. The Court will give its consent only in certain cases specified by law, for example, if the undertaking is closed down or if the employee agrees.

In **Belgium** dismissals, the reasons for which are the following, is forbidden:

- activity as employees' representatives (or as a candidate therefore);
- having lodged a complaint concerning equal treatment of men and women with regard to working conditions;
- gender, race, colour, ancestry, national or ethnic origin, sexual orientation, religious or philosophical conviction, age, disability;
- pregnancy and maternity (from the time when the employer is informed until 1 month after the end of the maternity leave);
- absence as a consequence of military, civil or political service;
- activity as a company physician;
- absence for educational leave;
- introduction of new technologies without having complied with the information obligations.

The employment relationship comes to an end, even if the dismissal is based on a prohibited ground. However, the termination is irregular and the employer has to pay compensation ("*indemnité compensatoire de préavis*") and specific protection compensation ("*indemnité forfaitaire de protection*").

Members of the works council and of the safety council are entitled to be reinstated. If they are not reinstated they are entitled to compensation of 2 to 8 years' salary.

If a member of the works council, of the safety council or of the trade union delegation is to be dismissed, there are specific proceedings:

- dismissal on economic grounds can only take place after it has been duly noted by the joint committee;
- where there is an important ground to do with the employee's person ("*motif grave*") a conciliation meeting will be held before the president of the labour court. Afterwards the employer may ask the labour court to recognise the important ground. The employer cannot be dismissed before the court has recognised the ground.

In **Germany** a dismissal cannot be based on:

- participation in (legal) trade union activities, participation in a strike;
- having lodged a complaint against the employer or having exercised one's right in a legal way;
- race, colour, sex, sexual orientation, religion, political opinion, etc.

Moreover,

- a member of the works council can only be dismissed on important grounds (summary dismissal) and with the consent of the works council;
- pregnant women, handicapped employees and persons on parental leave can only be dismissed with the consent of the competent authority;
- an employee doing military service can only be dismissed on an important ground.

Dismissals contrary to these requirements are void. The employment relationship continues.

In **Denmark** a dismissal cannot be based on:

- activity as an employees' representative, membership of a trade union, participation

in trade union activities. The courts have ruled that these cases do not constitute objective ground for dismissal;

- race, sex, colour, religion, political opinion etc.;
- pregnancy, parental leave;
- military or civil service;
- leave for educational purposes;
- demand for equal pay and treatment.

If the dismissal is wrongful, damages of a non-economic loss are awarded. The maximum damages vary according to the law in question. If e.g. the law on freedom of association is violated damages can go up to 104 weeks' pay.

Protection against dismissal on grounds of industrial action derives from collective agreements.

The dismissal terminates the employment relationship. However, a Board of Dismissal or Industrial Court may rule that the employee has to be reinstated provided that he or she has lodged a formal request. Otherwise, dismissal will result in financial compensation fixed by the Board or Court.

In **Greece** a dismissal is prohibited by law when it is based on:

- activity as an employees' representative. This includes special protection for the founders of the first union within the undertaking. Employees' representatives can only be dismissed on specific grounds listed in the law. The dismissal has to be approved by an administrative committee;

- having lodged a complaint against the employer;

- sex;

- pregnancy and absence during maternity leave. Such persons may only be dismissed

on grounds that have nothing to do with maternity;

- absence as a consequence of military service. Within 1 year of the resumption of work with the same employer as before, the employee can only be dismissed on a justified ground which has to be accepted by a special committee.

For the dismissal of handicapped employees the authorisation of an administrative committee is required.

Dismissals contrary to these requirements are void. The employment relationship continues. Exception: a dismissal within 1 year of completion of military service is valid, but the employer has to pay compensation of 6 months' salary.

The employer can be imprisoned (very rare) or sentenced to pay a penalty if it illegally dismisses an employees' representative or if it refuses to reinstate an employee whose dismissal had been declared void.

#### **In Spain:**

- dismissal may not be based on discrimination prohibited in the Constitution or by law on such grounds as origin, race, sex, religion, opinion, marital status, age, social condition, sexual orientation, language, being a member of a trade union or disablement;
- dismissal may not be based on grounds contrary to the employee's fundamental rights or public liberties (e.g. trade union freedom, right to strike);
- it is prohibited to dismiss:
  - employees during temporary absence from work on account of maternity, risks during pregnancy, adoption or fostering,
  - pregnant employees,

- employees who have the right to time off or to reduction of the working day for breast-feeding a child, or because of the legal care of a child or disabled person,
- employees who have the right to time off for taking care of a child or relative,
- female employees who are victims of gender violence exercising their employment rights.

The dismissal may be declared void by the court. Nullity requires immediate reinstatement. An administrative penalty of between €3,005 and €90,152 may be fixed. The burden of proof is on the employer.

Reasons such as "temporary absence from work on account of sickness or accident" or "the fact that having contracted a particularly serious form of communicable disease" are not fair or legitimate reasons for dismissal. Dismissal for such reasons would be either unfair (if it involved discrimination or violated basic rights) or unjustified (because it is not included in the breaches of the employee's contract justifying the employer's decision to dismiss an employee).

In **Finland** a dismissal cannot be based on:

- trade union membership;
- nationality, ethnic origin and race, religion or belief, disability, age, sexual orientation and gender and related grounds such as pregnancy and parental leave which are specifically regulated as prohibited grounds for dismissals which make the burden of proof especially heavy for the employer in these cases. Furthermore the *Employment Contracts Act* contains a general prohibition on discrimination that includes additional grounds such as political activities and opinions, language, state of health, etc;
- military and civil service. There is a specific Act dating back to 1961

(571/1961) on continuation of the employment and civil service contracts of persons liable for military service or called to service. According to that Act employers may not terminate the employment or civil service contract of Finnish citizens called to military service. Instead these persons are entitled to continue their employment relationship with their employer when returning from the military service;

- illness or an accident affecting the employee, unless working capacity is substantially reduced thereby for such a long time as to render it unreasonable to require that the employer continues the employment relationship;
- participation of the employee in industrial action arranged by an employee organisation;
- resort to means of legal protection available to employees.

In the private sector that is regulated by the *Employment Contracts Act* the contract ends if notice has been given, even if the grounds for the dismissal are unlawful or some of those mentioned above. The employment relationship continues only by an express separate decision by the employer. Compensation however, may be ordered. The employee is also entitled to receive pay during the notice period. In the public sector the situation is different: if the employee is given notice and contests the lawfulness of the dismissal the case must be taken up and handled in a fast procedure in order to let the employment relationship continue during the hearing of the case in order to guarantee that the employee might continue his or her employment if no lawful reason for the dismissal can be established.

Shop stewards and employees' representatives have a stronger protection against dismissals than other employees. This is justified by the difficult and sensitive position they might have when representing the interests of the

employees in relation to the employer. The employer shall be entitled to terminate the employment contract of a shop steward elected on the basis of a collective agreement or of an elected representative on the basis of individual grounds only if a majority of the employees whom the shop steward or the elected representative represents agree. The employer is entitled to terminate the employment contract of a shop steward or an elected representative on so called collective grounds only if the work of the shop steward or elected representative ceases completely and the employer is unable to arrange work that corresponds to the employee's professional skill or is otherwise suitable, or to train the person for some other work.

The special protection of workers' representatives against dismissal that has been presented above is also extended to employees' representatives in European Work Councils (EWC) or European Companies (SE).

An employer who does not respect the special protection of shop stewards and employees' representatives may be liable to pay compensation that is higher than in other cases of unjustified dismissals. The maximum compensation is usually equivalent to 24 months pay for the employee concerned, for shop stewards and employees' representatives the maximum amount is equivalent to the pay for 30 months.

In determining the amount of compensation several factors can be taken into account depending naturally on the reason for termination: estimated time for the employee without employment and estimated loss of earnings, the remaining period of a fixed-term employment contract, the duration of the employment relationship, the employee's age and chances of finding employment corresponding to his or her vocation or education and training, the procedure of the employer in terminating the contract, any motive for termination originating in the employee, the general circumstances of the employee and the employer and other comparable matters.

When compensation is ordered as a consequence of a termination of employment contrary to the grounds laid down in the Act and the compensation cover loss of earnings, the following deductions shall be made:

- 75% of the daily earnings-related unemployment allowance as referred to in the *Act on Income Security for the Unemployed* paid to the employee for the period in question;
- 80% of the basic unemployment allowance referred to in the *Act on Income Security for the Unemployed* paid to the employee for the period; and
- the labour market subsidy paid to the employee for the period under the *Act on Labour Market Subsidy*.

In **France** a dismissal cannot be based on:

- activity as an employees' representative;
- race, colour, religion, political opinion, etc.;
- having lodged a complaint concerning equal treatment of men and women with regard to working conditions;
- pregnancy;
- absence as a consequence of civilian or political service.

In the case of military service the contract is terminated and the worker is entitled to priority treatment in terms of being awarded a new contract after completion of service. But collective agreements may instead provide just for a suspension of the contract.

Illness is in general no ground for dismissal. However, illness for a lengthy period or repeated illness can be a real and serious ground.

A dismissal based on a prohibited ground will be declared void by the court. The employee has to be reinstated. With regard to activity as

an employees' representative and pregnancy the employer will be sentenced to pay compensation equal to the salary the employee would have earned during the period of nullity.

A dismissal based on a ground which is contrary to the employees' fundamental rights but not prohibited by law may be declared incorrect ("*abusif*") the court. The court then may propose the employee's reinstatement. If the employer refuses he will be sentenced to pay compensation.

There are criminal penalties in respect of national service, pregnancy, maternity leave and employees' representatives.

In **Ireland** dismissal is deemed to be unfair if it is based on:

- participation in trade union activities;
- taking part in a strike, if one or more employees of the same employer who took part in the strike were not dismissed, or one or more other employees who were dismissed for so taking part were subsequently permitted to resume their employment;
- race, colour, sexual orientation, religion, political opinion, sex, marital status, national or social origin, membership of the Traveller community;
- age;
- pregnancy.

If a dismissal is found to be unfair the appropriate adjudicative body may at its discretion award reinstatement, reengagement or financial compensation (maximum 4 weeks' pay where no financial loss has been sustained, where loss is sustained maximum 104 weeks' pay).

There is specific protection against dismissal where an employee is a party to legal proceedings against the employer or is likely to be a witness in such proceedings.

In addition, a dismissal which results from the exercise or contemplated exercise of the right to adoptive leave will generally be regarded as an automatically unfair dismissal (see *Adoptive Leave Act 1995*).

With regard to care of dependants, illness or accident and serious disease the burden of proof that the dismissal was fair rests on the employer.

The *Employment Equality Act 1998* prohibits dismissals in circumstances amounting to “discrimination”, which term is defined as treating one person less favourably than another on the following nine grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race (including colour, nationality, ethnic or national origin) and membership of the Traveller community. In a discriminatory dismissal case, regard will be had, in measuring the appropriate *quantum* of compensation, to all the effects which flowed from the discrimination. This will include not only the financial loss suffered but also the distress and indignity suffered in consequence of the discrimination. So compensation over and above financial loss will be awarded to claimants who are deprived of their “fundamental right to equal treatment”.

As in the case of *Adoptive Leave Act 1995*, a dismissal which results from the exercise or contemplated exercise of the right to parental leave under the *Parental Leave Act 1998* or the right to carer’s leave under the *Carer’s Leave Act 2001* will be regarded as an unfair dismissal. Similarly section 26 of the *National Minimum Wage Act 2000* provides that the dismissal of an employee for exercising his or her rights under that Act is deemed to be an unfair dismissal.

In **Italy** a dismissal is considered to be discriminatory if it is based on:

- activity as an employees’ representative;
- political opinion, sex, religion, national origin;

- pregnancy;
- military service;
- absence as a consequence of illness;
- marriage.

Discriminatory dismissal is null and void irrespective of the size of the undertaking. The employee has to be reinstated. This also applies to managers and domestic servants. Moreover, under the general rules, any dismissal based on illegitimate motives is void.

In the case of pregnancy and marriage the dismissal will be considered void if the employer does not prove its justification. In other cases of discriminatory dismissal the burden of proof is on the employee. However, if in the case of discrimination based on sex the employee proved *prima facie* that there may be discrimination, it is up to the employer to prove the contrary.

There is an administrative sanction (max €1,000) if an employer dismisses a pregnant employee within the period in which such dismissal is prohibited (from the beginning of the pregnancy to the child’s first birthday).

The declaration of the nullity (for which there is no time limit) must be made by the judge. For the dismissal of pregnant women, see *Article 4(5) of Act No. 125*.

In **Luxembourg** the situation is as follows:

- employees’ representatives, their deputies, equality officers (“*délégué à l’égalité*”) and safety officers (“*délégué à la sécurité*”) cannot be dismissed, except in the case of serious misconduct (“*faute grave*”). For employees’ representatives this protection is extended to 6 months after the termination of their office. Applicants for the office of an employees’ representative cannot be dismissed for a period of 3 months after their application. A dismissed employee can, within 15 days, ask the

President of the Labour Court to declare that the employment relationship must continue;

- pregnant women and women who have recently given birth or who are breastfeeding cannot be dismissed if the pregnancy is medically confirmed and for a period of 12 weeks after the birth. A woman who has been dismissed may, within 15 days, ask the President of the Labour Court to declare that the employment relationship continues. The law of 1 August 2001 (“*concernant la protection des travailleuses enceintes, accouchées et allaitantes*”) allows the employer to lay off such workers who have seriously misconducted themselves pending a decision of the Labour Court;
- employees who are unable to work because of illness or accident cannot be dismissed within 26 weeks of the first appearance of the incapacity. Such a dismissal is considered to be improper (“*abusif*”);
- employees who have received an internal replacement decision pursuant to the law of 25 July 2002 cannot be:
- dismissed during the first year of their placement. Any such dismissal is void and the dismissed employee can ask the President of the Labour Court to decide that the employment relationship must continue;
- employees on parental or family leave;
- dismissals based on the employee’s gender, race, sexual orientation, disability, religion, trade union activity, *etc.* Such dismissals are void and employers are also subject to criminal sanctions (8 days to 2 years imprisonment and/or fines of between €251-€25,000);
- by Law of 26 May 2000, similar provisions apply to employers who have applied sexual harassment.

Any employer who dismisses an employee contrary to these provisions is liable to pay damages.

In **the Netherlands** a dismissal cannot be based on:

- activity as an employees’ representative;
- membership of and activities performed on behalf of a trade union, unless these activities are performed during working hours without the employer’s consent;
- religion, race, sex, ethnic origin, sexual orientation or marital status;
- pregnancy or parental leave;
- the employee having lodged an equal treatment complaint;
- military or alternative compulsory service;
- transfer of the enterprise;
- refusal to work on Sundays within the scope of the Working Hours Act (“*Arbeidstijdenwet*”);
- absence as a consequence of illness (maximum 2 years and only if the employee co-operates in resuming his or her own or other suitable work as soon as possible).

Nullity has to be invoked within 2 months and legal action has to be taken within 6 months. As the employment contract is supposed to continue, the employee cannot ask for compensation in addition to wages or salary.

The employer needs the prior consent of the court in the case of dismissal of an employee who is:

- a candidate for election to the Works Council;

- a former member of the Works Council of any of its committees who has served as such over the last 2 years;
- a member of a preparatory commission of the Works Council;
- a safety expert.

The court will only give its approval if the employer substantiates that the termination has nothing to do with any of the circumstances mentioned above.

In **Portugal** dismissals for political or ideological reasons of those founded on the employee having exercised his or her rights are forbidden (Articles 382 and 122 of the *Labour Code*). Dismissals for trade union membership or non affiliation or for exercising rights to participate in the collective representation structures are forbidden and considered void (Article 453). There is a presumption of absence of just cause where the dismissed employee was a candidate for trade union office or had been such within the last 3 years (Article 456). Dismissals for reasons of ancestry, age, gender, sexual orientation, family situation, disability, nationality, ethnic origin, religion and political opinion are expressly forbidden and are punishable by a fine of between €7,500 and €16,900 as are dismissals for participating in a strike. Pregnancy and maternity can never provide the reason for a dismissal.

A dismissal based on a prohibited ground is unlawful. The employee is entitled to reinstatement in the firm with the same category and seniority. The employee will not be reinstated where he or she opts to receive compensation instead.

In **Sweden** a dismissal cannot be based on:

- activity as an employees' representative, membership of a trade union, participation in trade union activities;
- race, sex, ethnic origin, religion or belief, disability or sexual orientation;

- pregnancy, parental leave;
- care for dependants (an employee is legally entitled to leave for this purpose to a certain extent and may not be dismissed simply because such leave has been requested);
- military or civilian service;
- leave for educational purposes.

Dismissal on these grounds can be declared void by the courts. In the case of a dispute the employment relationship continues to be in force until the dispute is finally settled by a court of last instance. The court may, however, at the request of the employer issue an interlocutory injunction to the opposite effect. And in cases where there has been a summary dismissal, the main rule is that the employment relationship does not continue to be in force (in these cases there is a possibility for the court to issue an interlocutory injunction to the opposite effect at the request of the employee). If the dismissal is wrongful, damages of a non-economic loss are awarded. Even compensatory damages may be awarded, but usually the employee remains in employment and is then entitled to regular wages while the dispute is being adjudicated.

In **the United Kingdom** some dismissals are regarded as automatically unfair. They are as follows:

- reasons related to the employee's membership or non-membership of an independent trade union, participation in the activities, or use of services, of such a union at the appropriate time or failure to accept an employer's offer that is designed to move workers away from collectively-agreed terms of employment;
- reasons related to leave for family reasons (maternity, paternity, adoption, parental leave, leave to care for dependants) or flexible working;
- the employee's assertion of certain statutory rights against the employer;

- the exercise of rights relating to the protection of part-time workers and employees on fixed term contracts;
- reasons relating to statutory working time standards, the enforcement of the national minimum wage and claims for employment-related tax credits;
- certain reasons concerned with health and safety at work;
- in the case of certain retail employees, the employee's refusal to work on Sundays;
- the making by an employee of a 'protected disclosure' under the 'whistle-blowing' provisions;
- jury service;
- taking part in specified circumstances in protected industrial action;
- performing the functions of an employee representative or candidate for such position;
- fulfilling specified representative roles or being a candidate for such positions, or engaging in specified activities in relation to information and consultation at national level or in relation to a European Public Limited-Liability Company;
- performing the functions of a trustee of an occupational pension scheme;
- specified acts relating to the statutory recognition and derecognition procedures.

It is also automatically unfair to dismiss an employee for the exercise of the right to be accompanied, or to accompany, at a grievance or disciplinary hearing or hearing relating to flexible working or in connection with a transfer of an undertaking, unless it is for an 'economic, technical or organisational reason entailing changes in the workforce of either the transferor or transferee'. In addition, a 'spent conviction' under the *Rehabilitation of Offenders Act 1974* is not a proper ground for dismissal.

No qualifying period of employment is needed in relation to dismissals for these reasons, with the exception of dismissal in connection with a transfer of the undertaking and a remedy for dismissal of a spent conviction.

Dismissals which are unlawful under the general discrimination statutes (dealing with discrimination on grounds of sex, race, disability, religion and belief and sexual orientation) will also be unfair. Here, however, the employee will require the normal 1-year qualifying period to complain of unfair dismissal, but as an employee who lacks that 1-year qualifying period will have a remedy under the discrimination statute itself this is not a difficulty.

The remedies for unfair dismissal are reinstatement, re-engagement and monetary compensation. Even if the employment tribunal awards reinstatement or re-engagement, if the employer refused to re-employ the employee the remedy is one of additional compensation; the employer cannot, ultimately, be required to re-employ the dismissed employee.

### 3.3.2 DISMISSAL ON 'DISCIPLINARY' GROUNDS

#### (1) Substantive conditions

In most Member States a dismissal can only take place if there is no justified ground and if notice is given. In some Member States no ground is required if notice is given (**Austria, Belgium**). Often notice does not have to be given if there is an important ground.

In **no** Member State is there a written rule that a dismissal must be '*ultima ratio*'. However, in some Member States the employer is required initially to consider other available penalties.

In **Austria** the employer can terminate an employment relationship by giving notice. The periods are:

- 14 days for manual workers. which period can be extended or shortened by collective agreement or individual contract;
- 6 weeks for white collar workers, which period increases with the length of service (after 2 years: 2 months, after 5 years: 3 months, after 15 years: 4 months, after 25 years: 5 months). Notice must take effect at the end of a calendar quarter.

If notice is given, no ground is required.

Summary dismissal (premature termination before the end of the notice period) is possible if the employer has a substantial ground. Such grounds are fixed by law, for instance offence, committing crimes, disclosure of secrets.

If the employer neither gives sufficient notice nor has a substantial ground, the employment relationship is nevertheless terminated, except for persons with special protection (i.e. persons doing military service). But the employee is entitled to compensation.

In **Belgium** the employer may terminate an employment relationship without notice or

compensation if there is an important ground ("*motif grave*"). An important ground is every failure which suddenly and definitely renders impossible any further professional collaboration between the parties. If there is no such ground the employer has to pay compensation for not having given notice.

In **Germany** an employee can be dismissed if he or she does not behave in a way which can be expected having regard to his or her position and duties in the undertaking (e.g. refusal to work, sexual harassment, and participation in an illegal strike). If there is no such ground the dismissal is void. However, the employee must within 3 weeks apply to the labour court for a ruling that the dismissal is invalid. If he or she fails to do this, dismissal will be considered valid unless the employee was not capable of making the application within the initial 3 week period.

There is a period of notice of 4 weeks, effective as of the middle or end of a month, which will be extended according to the length of the employee's service. If this period is not respected the dismissal is valid but will not take effect before the legal end of the notice period. There is no period of notice in the case of an important ground for terminating the contract before the end of the notice period (summary dismissal).

In **Denmark** there is no statutory protection against unfair dismissal and no statutory requirement to notice either. However, it has been held in case law that an employer has to give reasonable notice even without being required to do so by legislation.

In case of serious disciplinary misconduct the employer may cancel the contract without notice.

In **Denmark** the period of notice is regulated in the following laws:

- Salaried employees: 14 days (both the employer and the employee) in a probation period which can be no longer than 3 months). After the end of the probation period the notice is extended from 3 to 6 months according to the length of service (employer). The notice is 1 month for the employee after the probation period;
- Civil servants: 3 months (both the employer and the employee);
- Employees in agriculture and in private households: 1 month (both the employer and the employee), after 12 months' employment the employer's notice is 3 months.
- Seafarers: The *Merchant Shipping Act* lays down rules applying to persons recruited to serve on board a sea-going vessel.

With regard to ordinary seamen, the seaman as well as the ship-owner may terminate the employment relationship by giving 7 day's notice, unless otherwise agreed between the parties. In the absence of any agreement to the contrary, the employment relationship may only be terminated for retirement in a Danish port.

With regard to officers (the master of the ship, chief-stewards, engine officers, radio operators and chief officers and others with executive functions) the notice of dismissal is 3 months for both parties, unless otherwise agreed.

The duration of the notice of dismissal varies greatly in the sectors covered by collective agreements. Generally, there is no notice of dismissal during the initial period of the employment relationship. The notice of dismissal to be given by both the employee and the employer is increased in line with the duration of the employment relationship. Typically, the notice to be given by the employer is considerably longer than that of the employee. The main rule is that notice of dismissal may also be given during periods of sickness and holiday. Some collective agreements prohibit this. Only few collective

agreements provide that the notice of dismissal should be given in writing.

In **Greece** the list of grounds for dismissal applies only to employees' representatives and handicapped workers. For the dismissal of other persons no ground is required. But the court can declare a dismissal void if it is improper (to be proved by the employee).

With regard to the period of notice, a distinction has to be made between:

- manual workers: no period of notice, but compensation has to be paid (5-160 days' pay according to the length of service);
- white collar workers: 1-24 months' notice must be given, according to the length of service. If the employer does not give notice, it has to pay 1-24 months' salary compensation. If it gives notice, he has to pay half of this compensation at the end of the notice period.

In effect, then, notice is hardly ever given.

In **Spain** the law provides for a list of grounds for dismissal:

- repeated and unjustified failure to attend for work and to arrive punctually at the workplace;
- insubordination and disobedience at work;
- verbal or physical abuse directed at the employer or the persons working in the company or the members of their families;
- breach of contractual good faith and abuse of trust in carrying out the work;
- continued and voluntary deterioration in the performance of the normal and agreed work;
- continued and voluntary deterioration in the performance of the normal and agreed work;

- habitual use of alcohol or narcotics if this has negative effects on work;
- harassment for racial or ethnic reasons or because of religion or convictions, disability, age or sexual orientation directed at the employer or at persons working at the company.

If there is no such ground the judge may declare the dismissal wrongful (“*improcedente*”).

There is no period of notice.

In the private sector in **Finland** there are no formal disciplinary procedures in cases of misconduct on behalf of the employee. In the public sector there still are rules on the possibility to issue “warnings” to public servants and also to withhold them from performing their duties in certain situations.

The summary dismissal or rescission of the employment contract that terminates the contract immediately on notice can be seen as a “dismissal on disciplinary grounds”.

According to the *Employments Contracts Act* both an employment contract for a fixed-term and a contract for an indefinite period can be rescinded (or terminated) to take effect immediately if it is justified by “an especially weighty reason”. In this case summary dismissal can take place regardless of the applicable period of notice or the duration of the employment contract. The grounds for summary dismissal must always be weightier than for ordinary dismissal. Rescission requires especially weighty reasons. Such reasons have generally been defined in laws as the kind of neglect or behaviour of one of the parties or the kind of change in the conditions belonging to the risks of that party on account of which the employment relationship cannot reasonably be expected to continue on behalf of the other party, even for a period of notice. Such a reason may be deemed to exist in cases where the employee commits a breach against, or neglects duties based on, the employment contract or the law and having an essential impact on the

employment relationship in such a serious manner as to render it unreasonable to expect that the employer should continue the contractual relationship even for the period of notice. Also the employee might undertake a summary dismissal for example if the working conditions endanger health and safety or violence and harassment occur at the work place.

The *Employment Contracts Act* does not – unlike the previous Act – contain any descriptions of examples of the most typical situations where one of the parties may rescind the contract. The starting point is that the normal first solution on the employer’s side is to use the mechanism for dismissals on individual grounds.

Before an employment contract is rescinded by an employer or an employee, the other party must be given the opportunity to respond to the reasons for summary dismissal. The ‘penalty’ for illegal termination of the contract is the liability to pay damages. The right to summary dismissal lapses if the employment contract is not rescinded within 14 days of the date on which the contracting party is informed of the reasons for rescission.

In **France** a real and serious ground (“*motif réel et sérieux*”) is required. The behaviour of the employee can be such a ground. If the court considers the dismissal to be without real and serious ground the employer has to pay compensation of minimum 6 months’ salary.

There is an obligatory period of notice depending on the length of service (fixed by the *Labour Code* or by collective agreement). The employer can terminate the employment relationship before the end of the notice period in case of serious misconduct or if it pays a compensation equivalent to the salary the employee would have received during the period of notice.

In **Ireland** to justify a dismissal under the *Unfair Dismissals Acts* an employer must show that it either resulted from one or more of the

following causes or that there were other substantial grounds for dismissal:

- the capability, competence or qualifications of the employee for the work he or she was employed to do;
- the employee's conduct;
- redundancy;
- the fact that continuation of the employment would contravene another statutory requirement.

If a dismissal is found to be unfair the appropriate adjudicative body may at its discretion award reinstatement, reengagement or financial compensation (maximum 4 weeks' pay where no financial loss has been sustained; where loss is sustained, maximum 104 weeks' pay).

The employer must give an employee a minimum period of notice of 1 week (if the length of service is at least 13 weeks). The period increases with the length of service: 2 weeks (2-5 years' service), 4 weeks (5-10 years), 6 weeks (10-15 years), 8 weeks (15 years and more). The employee may waive his or her right to notice or accept payment in lieu of notice. The employer may, however, terminate the employment relationship without notice due to the employee's misconduct. Where it is found that an employee was dismissed without his or her entitlement to notice, the employee may be awarded his or her statutory entitlement, provided that financial loss has been sustained.

In **Italy** an employee can be dismissed on:

- a justified ground ("*giusta causa*" such as non-performance of his or her duties which is so important that it results in a loss of confidence), or
- a justified subjective ground (non-performance of duties which does not justify a "*justified ground*", but which is nevertheless important enough for the

employer to lose the interest to continue the employment relationship).

Collective agreements may list specific failures as grounds for dismissal. If a dismissal does not meet these requirements, the consequences depend on which regime is applicable (see (6)).

To dismiss managers, domestic servants, and employees during a probationary period or persons who are entitled to retire, no ground is required (dismissal "*ad nutum*").

Notice must be given only in the second case (subjective ground). The period of notice depends on the classification and the length of service. If the employer does not give sufficient notice the employment relationship will not come to an end before the end of the notice period. The employee is entitled to damages, at least equivalent to the salary he or she would have received until the end of the notice period.

In **Luxembourg** the employer may terminate an employment relationship without notice or compensation if there is an important ground ("*motif grave*"). An important ground is every failure which renders the maintenance of the employment relationship suddenly and definitely impossible. If there is no such ground the employer has to pay compensation. Notice must be given where the employer has a real and serious ground not amounting to *motif grave*. In the case of improper dismissal the judge may award compensation or recommend reinstatement.

In **the Netherlands** the employer can ask the Centre for Work and Income ("*Centrum voor werk en inkomen*" – CWI) for permission to terminate the contract. The CWI will give its permission if the dismissal is reasonable ("*redelijk*"). Grounds for the dismissal can be incapability of the worker, redundancy or other substantial reasons. Once permission has been granted the employer can give notice. The period of notice depends on the duration of the employee's service:

- 1 month: the first 5 years of service;

- 2 months; between 5 and 10 years of service;
- 3 months: between 10 and 15 years of service;
- 4 months: after 15 years of service.

These statutory periods of notice may be reduced by 1 month to compensate for the duration of the CWI application procedure, but the remaining period is not to be less than 1 month. If the statutory period is not respected, the employee can claim compensation.

Summary dismissal (without permission and notice) is possible if there is a serious ground (“*opzegging wegens dringende redden*”) but is not very common. To prevent continuation of the employment contract, the employer will generally ask the permission of the CWI or request the court to rescind the employment contract “insofar as is necessary”. The negative consequences of wrongful dismissal will then be limited in time.

In **Portugal** Article 396 of the *Labour Code* defines proper cause for a disciplinary dismissal as “*misconduct on the part of the employee, the seriousness and consequences of which render continuation of the employment relationship immediately and practically impossible*”. Examples include:

- unreasonable disobedience under orders from superiors;
- infringement of the rights and guarantees of employees of the firm;
- repeated disputes with the other employees in the firm;
- repeated negligence in performing functions;
- damage to the firm’s legitimate business interests;
- intentional performance of acts harmful to the national economy from within the firm;

- unjustified absence from work giving rise to serious damage or risks to the firm, or when absences total 5 consecutive days or 10 days in a year;
- culpable failure to respect health and safety regulations at work;
- physical violence, verbal abuse, imprisonment or other offences practised within the firm against employees, the employer, company officers or their representatives;
- failure to comply with or opposition to definitive and executive legal decisions or administrative acts;
- abnormal decreases in productivity;
- false declarations concerning absences from work.

A dismissal without proper cause is unlawful and void.

There is no period of notice.

In **Sweden** an objective ground (“*saklig grund*”) is required. It follows that the employer must state and give the circumstances on which the dismissal is based. The circumstances must be relevant to the employment relationship concerned. Objective grounds for dismissal do not exist where it is reasonable to require the employer to provide that work for the employee. Notice must be given, the period of which depends on the aggregated length of the employment with the employer, as follows:

- 1 month in the first 2 years;
- 2 months between 2 and 4 years;
- 3 months between 4 and 6 years;
- 4 months between 6 and 8 years;
- 5 months between 8 and 10 years;

- 6 months after 10 years.

For employment contracts entered into before 1997 the period of notice is mainly calculated on the basis of the employee's age.

In cases of grave neglect by the employee of his or her obligations towards the employer's summary dismissal is possible (without notice). No obligation to attempt to transfer an employee to other duties is due in the context of summary dismissals.

In the **United Kingdom** an employer can dismiss an employee if it has a ground to justify the dismissal. The ground can be related to the conduct of the employee. If the tribunal holds that a person was unfairly dismissed, it will either order the employer to reinstate or re-engage the employee or award the employee compensation (basic award of up to £8,400 and compensatory award of max £56,800, although the compensatory award may be increased by up to 50% if the employer fails to complete an applicable statutory dismissal and disciplinary procedure.

There is a statutory period of notice depending on the length of the employee's service (from 1 month to 2 years' service: 1 week, from 2 years to 12 years' service; 1 week for each complete year, subject to a maximum of 12 weeks). The court will award damages for the period of notice not given. No notice needs to be given in the case of gross misconduct.

## (2) Procedural requirements

The requirements to be observed in a dismissal process are examined below (including involvement of employees' representatives and public authorities, formal requirements).

In **Austria** the employer has to inform the works council before a dismissal. It has to discuss the matter if the works council so requires within 3 working days (3 working days in case of dismissal without notice). If the employer gives notice before the end of the 5 days' period or before the works council has

stated its reaction, the dismissal is void. After having given notice the works council must again be notified. Whether or not the works council has protested against the dismissal affects the possibility to lodge an appeal (see below "*remedies*").

Where there is special protection against dismissal (pregnancy, employees' representatives, parents on parental leave, handicapped persons and compulsory military service) the court of labour and social affairs has to formally approve the dismissal in advance.

In **Belgium** the employer must break the contract within 3 working days after it became aware of the important ground. It has to notify the ground by registered letter to the employer within 3 days of the breach of contract. In practice, breach of contract and notification are made together in one letter. If these requirements are not met, the dismissal is void.

There is in general no involvement of public authorities or employees' representatives. However, trade unions may help their members. With regard to specific procedures for the dismissal of employees' representatives and members of the safety council, see 3.3.1.

In **Germany** the employer must first ask the employee to refrain from a specific behaviour ("*Abmahnung*"). Only if the employee does not refrain may he or she be dismissed. The dismissal must be in writing and signed (fax or e-mail not sufficient). A dismissal without this procedure can be considered unjustified by the court.

The works council has to be heard before a dismissal. Otherwise the dismissal is void. The dismissed employee may protest against the dismissal to the works council. If the works council considers the protest well founded, it has to try to arrange an agreement between the employer and the employee.

The (summary) dismissal of members of a works council or other elected members of bodies representing employees requires the

prior consent of the works council or the labour court. The prior consent of the relevant public authority is required for the dismissal of pregnant women, employees on parental leave or disabled employees. The dismissal is invalid if the necessary consent is not given.

In **Denmark** there must normally be a warning before any dismissal. If an employer intends to dismiss the local trade union representative, his or her union has to be informed before notice is given and then has the right to initiate negotiations. Such negotiations must be held within 8 days. If these procedures are not respected the dismissal can be annulled by the court and the procedures will be repeated.

In **Greece** dismissal must be communicated in writing. There is no involvement of employees' representatives. The dismissal of employees' representatives, handicapped persons and apprentices has to be authorised by a State authority.

The law does not provide for any internal procedure. However, enterprise regulations often fix procedures.

- Regulations under public law (based on a law, made by a public authority, containing rules on important aspects of dismissal, applicable to employees of public enterprises): They often establish a committee which either gives advice or decides the question. Often there is a second instance within the undertaking. The ordinary legal rules do not apply if there is an enterprise regulation approved by the State on the same subject;
- Regulations under private law (internal rules of a contractual nature which may contain some rules on dismissals): They exclude the application of the law, if they provide for at least the same level of protection as the law does. They may fix procedural requirements.

If these requirements are not met, the dismissal is void.

In **Spain** a grave fault of the employee which may give rise to a disciplinary dismissal ceases to have effect unless the dismissal procedure has been initiated within 60 days of the date on which the employer became aware of the fault, and, in all circumstances, 6 months from when it occurred. Otherwise the dismissal is wrongful ("*improcedente*").

This announcement ("*carta del despido*") must be made in writing. The grounds for the dismissal and the date when it shall take effect must be stated. Otherwise the dismissal may be declared wrongful.

In the case of a member of an employees' representatives body ("*representantes unitarios o sindicales*") before the employer gives notice of a dismissal, it has to explain the grounds to the employee and to the other members of the body concerned ("*expediente contradictorio*"). The final decision of the employer and the "*carta del despido*" have to be notified to the employees' representatives concerned.

If a member of a trade union is to be dismissed, this trade union has to be heard beforehand. If these procedures are not obeyed the dismissal is wrongful.

In **Finland** the employee must have the opportunity to be heard on the matter. He or she may also turn to the shop steward who may ask for negotiations with the employer under collective agreement rules. Often there are specific company procedures. At the employee's request, the employer has to state in writing the main grounds for the dismissal and the date of termination. If the employer fails to follow these procedures, this may have an effect on the amount of compensation for unlawful dismissal.

In **France** the employer has to speak with the employee before any dismissal. The invitation to this meeting has to be made by registered letter or must be handed to the employee personally. The employee has to be informed about the dismissal by registered letter. The letter must not be sent earlier than 1 day after the meeting between employer and employee. Otherwise the employee can be awarded

compensation of 1 month's salary minimum. The judge can also order the employer to comply with the procedure.

The employee may bring to the meeting with the employer an employees' representative or, if there is no representative body within the undertaking, an adviser from the Prefet's list ("*conseiller du salarié*").

Public authorities (Labour Inspectorate) have to agree before one of the following persons is dismissed:

- union representatives;
- employees' representatives ("*délégué du personnel*");
- member of the works council;
- employees' adviser ("*conseiller du salarié*");
- lay member of the Labour Court ("*conseiller prud'homme*");
- company physician;
- social security administrator.

In **Ireland** an employee has the right:

- to know the reasons for the proposed dismissal;
- to reply to those reasons and have that reply and any other arguments or submissions listened to and evaluated before the decision to dismiss is taken;
- to be represented by an appropriate person, e.g. a trade union if he or she is represented;
- to an impartial hearing.

There must normally be a warning before the dismissal.

Failure to comply with these prerequisites would be taken into account by the adjudicative bodies when determining whether the dismissal was fair in all the circumstances.

In **Italy** the employer has to send the employee a written explanation of the facts on which the dismissal will be based. The employee must have the right to defend himself or herself. He or she may be assisted by his or her or her trade union. The employer has to wait for 5 days after the explanation before it dismisses the employee. If this procedure is not obeyed the dismissal is void.

In **Luxembourg** the notification of a dismissal for important grounds (without notice) must be by registered letter explaining exactly the facts on which the important ground is based. Without explanation of the grounds the dismissal will be considered improper ("*abusif*"). If the employer has at least 150 employees it must invite the employee concerned by registered letter to discuss the proposed dismissal. It must send a copy of the invitation to the main employees' representatives' body of the undertaking. If there is no such body, it has to be sent to the Labour Inspectorate. The employee may be assisted in the meeting by another employee, by an employee's representative or by a trade union representative. The meeting must take place at the latest on the second day after the dispatch of the invitation. If the employer does not respect these rules the judge may award compensation to the employee.

In the **Netherlands** there is no internal procedure or formal requirements. The CWI application for a permit to give notice must be in writing stating all relevant information such as a clear justification of the ground for dismissal. The employee then responds in writing and the matter is submitted to a dismissals committee. The CWI usually decides within 6 weeks. An accelerated procedure is possible in the case of economic reasons.

In **Portugal** the employer must ensure the following procedures:

- (\*) In the 60 days following the detection, by the employer, of evidence of a breach: the dispatch to the workers of a reprimand detailing the imputed misdeed accompanied by a declaration of intent to proceed with dismissal for proper cause.
- copies of this declaration and the written statement must be sent to the workers' committee ("*comissão de trabalhadores*", a structure representing a firm's employees); if the employee is a trade union representative ("*representante sindical*") these copies must be sent to the respective trade union;
- within 10 working days the employee may reply to the written statement, add further evidence and demand other measures with a view to gathering evidence;
- the employer must take the measures to gather the evidence as demanded by the employee;
- the employer must send a copy of the procedure to the workers' committee, if the employee is a trade union representative a copy must be sent to the relevant trade union;
- the workers' committee and the trade union, if applicable, may issue a report within 5 working days;
- (\*) In the 30 days subsequent to the time limit referred to in the previous paragraph the employer may effect the dismissal, explaining this in writing. The dismissal may not be based on facts not referred to in the written statement;
- (\*) a written copy of the decision must be sent to the employee, the workers' committee and, if applicable, the trade union.

In firms with up to the 10 employees the procedure is simplified.

If the procedures marked with (\*) are not obeyed the dismissal is unlawful. As can be seen, if the employer does not involve the workers' committee or the trade union, then such irregularities do not render the proceedings void. The employer, however, may be fined.

In **Sweden** at least 2 weeks before the proposed serving of notice, the employer should inform the employee of its intention to serve notice. If the employee is a member of a trade union the employer should at the same time advise the local union to which the employee belongs regardless of whether the employer is bound by a collective agreement or not. After notification and notice the employer is required to initiate talks within 1 week, if the trade union or the person concerned so requests. The notice cannot be served before an opportunity is given for talks. Where the notification relates to summary dismissal, it must be given at least 1 week in advance. If these rules are not respected, the employer can be ordered to pay damages. In general, no action can be taken by the employer if the ground referred to for the notice has occurred more than 2 months prior to the notification. A dismissal should be in writing, but the dismissal is not void if it is not. The notice should also state what action the employee may take according to the statute in cases the employee wishes to challenge the dismissal. If the employee so request, the employer's grounds for the dismissal should also be made in writing.

In the **United Kingdom** since 1 October 2004 employers have generally been required to follow a statutory dismissal and disciplinary procedure. The three-step 'standard' procedure requires the employer to set out in writing the employee's alleged conduct or characteristics or other circumstances which lead the employer to contemplate dismissing or taking disciplinary action against the employee. The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter. The employee must take all reasonable steps to attend the meeting (the second step), following which the employer must inform the employee of its

decision and of the right to appeal against it. If the employee wishes to appeal (the third step), he or she must inform the employer and the employer must invite him or her to attend a further meeting.

Under the standard procedure, the initial meeting must take place prior to disciplinary action. The two-step 'modified' procedure applies to certain cases of gross misconduct, and gives a right of appeal to an appeal to an employee who has already been dismissed.

If an employer fails to complete an applicable statutory dismissal or disciplinary procedure, the dismissal will be automatically unfair and the compensatory award can be increased by up to 50%. If an employee fails to complete the procedure (for example by failing to take the opportunity to appeal) the compensatory award can be reduced by up to 50%.

The ACAS Code of Practice on Disciplinary and Grievance Procedure 2004 which employment tribunals must take into account when assessing the fairness of dismissals, contains additional requirements, such as an obligation on employers to investigate the facts prior to dismissal. However the *Employment Rights Act 1996* now provides that failure to follow a procedure beyond the statutory minimum shall not of itself be regarded as making the employer's action unreasonable if he shows that it would still have decided to dismiss the employee if it had followed the procedure.

### **(3) Effects of the dismissal**

The employment relationship is terminated in consequence of the dismissal.

#### **Severance Payments:**

In **Austria** there are severance payments ("*Abfertigung*") ranging from 2 months' salary (after 3 years' work) to 12 months' salary (after 25 years' work): no severance payments if the period of activity is less than 3 years or if the employee is responsible for the summary

dismissal. In addition, the employee may be entitled to compensation for notice and holiday compensation or holiday pro rata indemnification.

In **Germany** employees are entitled to a severance payment if, despite a court ruling to the effect that dismissal by the employer is legally invalid, the employment relationship is dissolved by the court at the employer's or employee's request on the grounds that parties cannot be reasonably expected to continue with their employment relationship because the basis of mutual trust has been destroyed. The severance payment is equivalent to up to 18 month's salary depending on the employee's age and length of employment.

In **Denmark** salaried staff will often receive compensation of 1, 2 or 3 months' salary after 12, 15 or 18 years' service respectively. Any rights to severance payments are lost in cases of dismissal on grounds within the control of the employee (own fault). Where notice is given, a severance payment is paid:

Salaried employees are:

- employed for trade or office work, technical or clinical assistance, management;
- in the service of the employer for at least 15 hours a week;
- subject to the management and instruction of the employer;
- awarded salaried status in full or in part by agreement.

In **Greece** the dismissed employee is entitled to severance pay, irrespective of the reason for termination of employment contract (economic dismissal, dismissal related to the person or the conduct of the employee). Severance pay is a condition of validity of the dismissal. Severance pay is 5-160 days' pay for manual workers and 1-24 months' salary for white collar workers, according to the length of service. Law establishes a ceiling for those

employed with a dependent employment contract in public administration, local collectivities, public corporations and organisms funded by the State; their severance pay cannot exceed €15,000 maximum. This restriction serves the protection of public interests.

In some exceptional cases there is no entitlement to severance payment:

- when the dismissal is the effect of a complaint lodged against the employee who has committed a criminal offence;
- when the employee deliberately behaves in a way calculated to provoke termination of the employment contract, in order to receive severance pay; and
- when the dismissal is due to a disruption of the enterprise's operation because of an event of "*force majeure*".

In case of a premature termination of a fixed-term or fixed-task employment (with important ground) the employee is in general not entitled to compensation. Only if the important ground is based on a change in the personal situation of the employer, can the court order that an equitable compensation be paid.

In **Spain** there are severance payments only in the case of wrongful dismissal: 45 days' salary for each year of work, maximum 42 months' salary. Where the dismissal is declared justified by the Court i.e. where the employer is able to prove breach of contract by the worker, the contract may be terminated and the worker has no right to compensation.

In **France** the employee is entitled to compensation if he or she has been working in the undertaking for at least 2 years, except in cases of serious misconduct.

In **Italy** the employee is entitled to a payment in any case of termination of contract ("*trattamento di fine rapporto*"): 1 year's salary divided by 13.5 + 1.5% for each year of activity + compensation for inflation.

In **the Netherlands**, severance pay may be granted in the case of a judicial rescission on the ground of change in circumstances. The CWI is not in a position to impose severance pay on the employer. The fact, however, that severance pay is offered to the employee may play a role in considering the reasonableness of the application. The employer is liable for compensation if the employment contract is terminated without notice or without regard to the procedure to be followed.

In the other Member States there are no severance payments. If the sum due is not paid by the employer, this has no effect on the validity of the dismissal. But the employer may be ordered to pay. Exception: in **Greece** the payment of compensation is a condition for the validity of the dismissal.

#### **Unemployment Benefits:**

Employees are in general entitled to unemployment benefits without a waiting period in **Greece, France, Italy, Spain and in Portugal.**

There is in general no unemployment benefit entitlement in **Luxembourg.** Where an employee has been dismissed without notice he or she may ask the President of the Labour Court to authorise unemployment benefit pending judicial determination of whether the dismissal is improper.

There is a waiting period in case of justified dismissal in **Austria** (4 weeks). In **Germany** there is a waiting period of 12 weeks if the employee has caused unemployment wilfully or by gross negligence. At the same time the period during which such benefits are paid is reduced by at least a quarter. In **Denmark** there is a waiting period of 5 weeks if the employee himself has given reason for the dismissal. The waiting period in **Finland** can vary from 30-90 days depending on the situation. The main rule is that a person who has been dismissed on grounds to which the employee has given reason has a waiting period of 90 days. If the dismissal is justified by economic reasons the waiting period is 7 days.

Disqualification for unemployment benefit can be imposed in **Belgium, the Netherlands, Ireland** (up to 9 weeks), in the **United Kingdom** (up to 26 weeks where misconduct or voluntary leaving without just cause) and in **Sweden** (up to 60 days if the employee lost his or her job because of his or her own fault).

#### **Retirement Pensions:**

In **Austria** there is no effect on public pension schemes. Company pension schemes: entitlements to direct payment (employer to the employee) lapse if the employee resigns, if he or she leaves prematurely without good cause or when he or she is justifiably dismissed. No lapse if the employee pays contributions to a private insurance company. Then the company will pay the benefits later.

In **Germany** company pension rights are maintained if:

- the employee has completed the 30<sup>th</sup> year of his or her life; and
- the pension commitment has been in existence for at least 5 years.

In **Denmark** dismissal does not affect state pensions. Pension rights based on a collective agreement are maintained. Where pension rights are company-related, they are sometimes lost but there are many cases where they are maintained.

In the **United Kingdom** dismissal does not affect public pension schemes. With regard to occupational pension schemes the rights already acquired are preserved or transferred to another scheme.

In the **other** Member States dismissal has no effect on under public and private retirement pension schemes.

#### **Sickness Insurance:**

In **Luxembourg** there is no more entitlement under public and private sickness insurance schemes following the first 3 months after

dismissal. In the **other** Member States there are no effects.

#### **(4) Remedies**

In all Member States there are judicial remedies and/or arbitration procedures for employees to pursue their claims. Unless indicated otherwise below:

- there is legal assistance for persons on a low income;
- there is no priority for remedy proceedings;
- the burden of proof rests with the employer;
- the judge must be satisfied that the grounds are sufficient reason for termination.

In **Austria**, if the works council lodged a protest within 5 working days of the first notification, the works council or the employee who has been given notice can lodge an appeal against the dismissal on the grounds that the dismissal is socially unacceptable. The appeal will succeed if the employee's substantial interests are impaired by the notice and the notice is not due to facts about the employee's person which are detrimental to the establishment's interests, or by the establishment's economic requirements conflicting with the continued employment of the employee concerned. An appeal to the court for labour and social affairs may be brought either by the employee without any specific time limit or by the works council within 1 week. If the works council has not protested against the dismissal, the employee may appeal if he or she protested against the dismissal. The employee may appeal if he or she alleges an unlawful motive, e.g. dismissal because of activity as an employees' representative or for a trade union. In undertakings with more than 5 employees the dismissed employee has to establish facts from which it can be presumed that there has been an unlawful motive. The judge has to dismiss the appeal if there is a higher probability that the dismissal is not based on an unlawful ground.

In **Belgium** an action may be brought before the Labour Court within 1 year of termination of the contract. Trade unions or employees' representatives may act on behalf of the employee.

In **Germany** an action may be brought before the Labour Court within 3 weeks of receiving the dismissal. Trade unions may help their members. The case must be given priority treatment. Low paid employees who are not trade union members may request the assistance of a lawyer if the employer is so represented. The employee's lawyer's fees will be paid by the *Land*.

In **Denmark** the employee has access to the general courts (if the case concerns the interpretation of law) or to industrial arbitration systems (if the employee is covered by a collective agreement). There is a general deadline of 5 years. Trade unions represent their members in such cases. A conciliation meeting should be held within 1 month.

In **Greece** an action may be brought before the general courts. If the employee claims nullity of the dismissal the time limit is 3 months from termination. If he or she claims compensation, the time limit is 6 months for the date on which the compensation is due. The courts do not apply these limits to compensation based on enterprise regulations. The 3 month time limit applies also to fixed term contracts when the employee claims nullity of the dismissal. Trade unions may help their members. Labour cases have to be processed rapidly. The burden of proof is on the employee with regard to the existence of a valid employment contract. The employer has to prove that the dismissal had been in writing and that the compensation had been paid. If enterprise regulations list grounds for dismissal, their existence had to be proved by the employer.

Enterprise regulations often provide for internal appeal procedures. The judgments of internal committees can be verified by ordinary courts as follows: If the procedure is fixed by an enterprise regulation under public law, only the formal legality can be vetted. If the procedure

is fixed by an enterprise agreement under private law, the substance too can be vetted.

In **Spain** employees have recourse to the courts after a prior attempt to reach a settlement before the Mediation, Arbitration and Conciliation Services. A claim must be brought within 20 working days of termination. This period is interrupted by the lodging of a conciliation paper. Trade unions may act on behalf of their members with the authorization of the member concerned. The Labour Courts have to act with rapidity. The judge can analyse the importance of the grounds.

In **Finland** an infringement of the *Employment Contracts Act* may be contested in the District Court. Infringement of collective agreements may be contested in the Labour Court, after a mediation procedure if the agreement provides for it. The time limit is 2 years in both cases. Before the Labour Court the employee is represented by his or her trade union. If the union refuses to bring an action, the right to do so rests with the employee himself or herself if an action is brought within 6 months of termination it must be treated as urgent in all instances. Civil servants might also contest dismissals undertaken by the employer. These cases would be heard in the administrative courts with the Supreme Administrative Court as the last instance.

In **France** an action before the Labour Court may be brought without any specific time limit. Trade unions may help their members. With regard to the burden of proof, the judge forms his or her opinion according to the facts presented by the parties and after whatever investigation measures he or she considers necessary. If there is still some doubt, the employee has the advantage.

In **Ireland** a dismissed employee may appeal to a Rights Commissioner or the Employment Appeals Tribunal within 6 months of the date of dismissal. This limit may, however, be extended to up to 12 months in cases where exceptional circumstances have prevented the lodging of the claim within the initial 6 months. An employee who is dismissed on one

of the nine discriminatory grounds under the *Employment Equality Act 1998* can appeal to the Equality Tribunal within 6 months of the date of dismissal. This limit, however, may be extended to up to 12 months in cases where reasonable cause to do so exists. Although there is no legal aid in discriminatory dismissal cases, a claimant may seek the advice of, and assistance (including representation) from, the Equality Authority, a body established under the 1998 Act, whose general function is to work towards the elimination of discrimination in relation to employment. Occasionally claims may be made to the Labour Court (usually where the employee has less than 1 year's service) under the *Industrial Relations Acts* (decision not legally binding). The employee may alternatively bring an action for breach of the employment contract before the Civil Courts within 6 years ("wrongful dismissal"). There is no legal aid in unfair dismissal cases. It is common that trade unions initiate and maintain unfair dismissal cases on behalf of the employee.

In **Italy** the employee must contest the dismissal in writing within 60 days of the notification. Once the contestation is made, the time limit for the action itself is 5 years. Trade unions may not act on behalf of their members.

In **the Netherlands** an action may be brought before the court ("*kantonrechter*") within 6 months of the termination of the employment relationship if the employee pleads that the dismissal is manifestly unreasonable. If the plea is that the dismissal is void (only in case of prohibited dismissal) the period is 2 months. Trade unions may not act on behalf of their members. The burden of proof is on the employee, but the employer is required to offer as much information as possible.

In **Luxembourg** an action may be brought before the Labour Court within 3 months of notification of the dismissal or of its motivation.

In **Portugal** legal action is possible within 1 year of the dismissal. Trade unions may help the parties. They have the right to bring actions

(only) when the employer has taken measures against employee because they are shop stewards or hold any other trade union position. If an employees' representative has been dismissed, the matter must be given priority.

In **Sweden** an employee who intends to request that a notice of termination of employment or an immediate dismissal be declared void must advise the employer of his or her intention no later than 2 weeks after the date on which notice was served or dismissal notified. If the employer has not received the explanatory notes on appeals the time limit is extended to 1 month and is calculated with effect from the day on which the employment was terminated. If talks in connection with the dispute are requested under the *Co-determination at Work Act (MBL)* or with the support of a procedural collective agreement, the action must be initiated within 2 weeks of the date on which the talks ended. Otherwise the action must be initiated within 2 weeks of the final date for notification.

An employee who intends to seek *compensation* or lodge other claims based on the rules set out in the *Employment Protection Act* must advise the other party of this intention within 4 months of the date on which the injury was suffered, failing which no claim for settlement can be submitted. If the employee has not received the explanatory notes on claims describing procedures for compensation, the period is calculated with effect from the day on which the employment ceases. If talks in connection with the dispute are requested in accordance with MBL or with the support of a procedural collective agreement, the action must be initiated within 4 months of the date on which the talks ended. Otherwise the action must be initiated within 4 months of the final date for notification.

If negotiations are not conducted or an action brought within the prescribed time periods the employee loses his or her action.

An employee organization has a statutory entitlement to institute and conduct cases before the Labour Court on behalf of its members –

irrespective of whether this is sitting as a court of first instance or as the final court of appeal. This is the case where the employer has concluded a collective agreement and the employee involved in the dispute is carrying out duties covered by the collective agreement. If the union is not conducting the case, the employee has to initiate proceedings personally.

In the **United Kingdom** the employee may make a complaint of “*unfair dismissal*” to an employment tribunal within 3 months of the effective date of termination. The employee may also/alternatively bring an action for breach of the employment contract before the civil courts within 6 years (“*wrongful dismissal*”). There is no legal aid for proceedings before the employment tribunal. Parties in tribunals normally pay their own costs. Legal aid may be available for proceedings in the general civil courts. In a tribunal an employee may appoint a representative, including someone from a trade union. In cases of unfair dismissal the burden of proof is not placed formally on either party. The employee has to show that he or she was dismissed and the employer has to show the reason for dismissal.

### **(5) Suspension of the effects of the dismissal**

In **Greece** and **Sweden** suspension procedures are not necessary because the employment relationship does not terminate as long as a court case is going on.

In **Portugal** the employee may demand judicial suspension of dismissal within 5 working days of receiving the communication of dismissal. The procedure is regulated by the *Code of Labour Procedure* which envisages that the decision will be reached very quickly. The dismissal will be suspended if:

- the disciplinary procedure is not drawn up;
- the disciplinary procedure is void;

- the court concludes that there is probably no proper cause.

The suspension does not take effect if within 30 days of the dismissal the employee does not bring an action for judicial declaration of unlawful dismissal or if the latter is deemed to be groundless. The employer must provide the tribunal with monthly evidence of payment of remuneration during the period the dismissal is suspended.

In **Sweden** in some cases suspension procedures are necessary. The general rule is that the employment relationship continues to be in force. However, the court may at the request of the employer issue an interlocutory injunction to the opposite effect. And in cases where there has been a summary dismissal, the main rule is that the employment relationship does not continue to be in force (in these cases there is a possibility for the court to issue an interlocutory injunction to the opposite effect at the request of the employee).

In the **United Kingdom** there is no general suspension procedure, but employee who complains to an employment tribunal that their dismissal is for one of a limited number of specified reasons can claim the remedy of interim relief. These reasons are a reason relating to trade union membership or activities, or non-membership or a union; their position as a health and safety or employee representative or as a trustee of an occupational pension scheme, the making of a protected disclosure under the ‘whistle blowing’ provisions; the exercise of rights relating to the trade union recognition and derecognition procedures; and the exercise of the right to be accompanied (or the accompaniment of another worker) at the grievance or disciplinary hearing. Such an order requires the employer to re-employ the employee or, if it refuses to do this, the employee’s contract of employment continues in force for the purposes of the employee’s pay and benefits under the contract and for computing the employee’s continuity of employment.

In the **other** Member States there are no suspension procedures.

## (6) Restoration of employment

In **Austria** there is no reinstatement as such. If a dismissal is declared void before the end of the notice period the employment relationship continues. If this declaration is made after the end of the notice period the employment relationship starts again. In the latter case the employer has to pay the salary for the interim period.

In **Belgium** reinstatement is very much the exception. This possibility is reserved for employees' representatives and members of the safety council see 3.3.1. Also, according to the law of 7 May 1999 on equal treatment between men and women, an employee who is dismissed for opposing discrimination or harassment is entitled to be reinstated.

In **Germany** a dismissal which does not respect the substantial or procedural requirements is void. The employment relationship continues and reinstatement is therefore not necessary. However, the employment relationship may be dissolved by the court at the employer's or employee's request if the parties cannot be reasonably expected to continue with their employment relationship because the basis of mutual trust has been destroyed. In this case, the employee is entitled to a severance payment determined by the court and amounting to up to 18 months' salary depending on the employee's age and length of employment.

There are specific rules on the continuation of the employment relationship until the end of a court trial. If the works council has, based on legally specified grounds (e.g. employer has not taken the employee's social situation into account), objected to an ordinary dismissal and if the employee has brought an action against the dismissal, the employer is obliged to employ the employee until the end of the trial under unchanged conditions. The court can dispense the employer from this obligation (e.g.

if the employee's complaint will probably not be successful).

In **Denmark** the Main Agreement between LO and DA provides for reinstatement. A condition is that the Dismissal Board ("*Afskedigelsesnævnet*") does not find that co-operation between employer and employee has become impossible. There is no compensation in addition to the compensation for unlawful dismissal mentioned above. If the reason for dismissal was membership of an association (contrary to the law on dismissal) employees can demand reinstatement.

In **Greece**, if the dismissal is void, the contract is considered not to be broken (at least until a judgment at first instance). The law makes provision for an obligation on the employer to reinstate an employee whose dismissal has been declared void by the court.

In **Spain** in cases of nullity (dismissal based on discrimination prohibited by the Constitution or by law, dismissal violating the fundamental rights of the employee or dismissal in cases considered void by law) the employer has to reinstate. In cases of wrongful dismissal ("*despido improcedente*") the employer may opt either for reinstatement or compensation (45 days salary for each year's work with a maximum of 42 months' salary). If the dismissed employee is an employees' representative or a trade union representative, it is up to him or her to choose.

In **Finland** there is no reinstatement without the employer's consent. There is no specific compensation. The compensation for unlawful dismissal covers everything. Reinstatement or non-reinstatement may be taken into account when considering the amount. In the public sector the employment relationship continues during the period of legal procedure. If the dismissal is not justified, the employee is therefore entitled to keep his or her job.

In **France** the judge can impose the employee's reinstatement if there is no real and serious ground and if the employee had been dismissed contrary to public liberties (e.g. taking part in a

lawful strike), racial discrimination; in these cases the dismissal is void). If he holds that the employment relationship cannot be continued, he may fix a compensation sum instead of reinstatement.

In **Ireland** the Rights Commissioner or the Employment Appeals Tribunal may at their discretion award reinstatement, reengagement or financial compensation (maximum 4 weeks' pay where no financial loss has been sustained where loss is sustained, maximum 104 week's pay). The employer's agreement is not required for reinstatement. In case of reinstatement there is no compensation. However, all rights, benefits, and other privileges arising out of the employment are preserved by the order. Consequently a reinstated employee would be entitled to be paid for the period between dismissal and reinstatement. The Equality Tribunal, in a case of discriminatory dismissal, is empowered to order re-instatement or re-engagement with or without an order for compensation.

In **Italy** there is the following situation:

- undertakings with more than 15 employees; in agriculture more than 5 in the establishment or within the city or local authority area; in every case undertakings with more than 60 employees ("*stabilità reale*"): If the judge declares a dismissal void he or she orders reinstatement and payment of compensation (salary from the day of dismissal to the day of reinstatement, but not less than 5 months' salary).
- Other undertakings ("*stabilità obbligatoria*"): the employer can opt either for reinstatement or to pay compensation (2,5 to 6 months salary, depending on the number of employees and the period of activity).

In **Luxembourg** the court can, at the employee's request, propose that the employer reinstate the employee who has been unlawfully dismissed. Reinstatement depends always on the employer's consent. If the employer

reinstates the employee respecting all his or her acquired rights, it is no longer liable to any compensation for unlawful dismissal. If he does not agree with the proposed reinstatement, the court can award a supplementary compensation of 1 month's salary.

In **the Netherlands** in the case of manifestly unreasonable ("*kennelijk onredelijk*") dismissal the employee may demand reinstatement. But this claim can always be replaced by a lump sum compensation payment fixed by the judge. If the employer refuses to reinstate, the compensation may be increased.

In **Portugal** the employee is entitled to be reinstated (unless the employer is a micro enterprise in which case reinstatement is discretionary) and to receive compensation equal to the pay he stopped receiving from the date of dismissal until the court's finding. Instead of reinstatement the employee may opt for compensation corresponding to between 15 and 45 days remuneration for each year of service. In the case of a micro-enterprise, if reinstatement is refused, compensation of between 30 and 60 days remuneration for each year of service will be awarded.

In **Sweden** reinstatement is not an issue since the employment relationship does not come to an end if the employee is *dismissed*. The employee remains in the employer's employ until the dispute is finally settled by the court. The court may, however, at the request of the employer issue an interlocutory injunction to the opposite effect. If the employee is *summarily dismissed*, the employee can ask the court to be reinstated while the dispute is pending. If the employee loses the dismissal case in court, he or she does not have to repay the wages which the employer has paid while the dispute has been pending. If the court finds that the dismissal has been unlawful the employer may still opt to end the employment relationship. In this case it remains liable to pay additional damages, calculated on the basis of the employee's aggregate period of employment for the employer when the employment relationship is terminated and fixed at an amount corresponding to:

- 16 months' wages for periods of employment less than 5 years,
- 24 months' wages for periods of employment of at least 5 but less than 10 years,
- 32 months' wages for periods of employment of at least 10 years.

If the employee is 60 years of age the amount is increased to correspond to 24, 36 or 48 months' respectively. If the employee has been employed for less than 6 months the amount corresponds to 6 months. These rules are mandatory.

In the **United Kingdom** employment tribunals may order an unfairly dismissed individual to be reinstated in his or her original job or re-engaged in comparable or otherwise suitable employment. In practice, this is done in only a minority of cases. If no order is made for reinstatement or re-engagement, the tribunal will award the employee compensation (basic award up to £8,400 and compensatory award, to reflect the employee's loss, up to a maximum £56,800, although the compensatory award may be increased by up to 50% if the employer fails to complete an applicable statutory dismissal and disciplinary procedure. If reinstatement or re-engagement is ordered but the employer refused to comply with the order, the tribunal can award the employee an additional award of 26-52 weeks' pay (subject to a maximum of £280 per week), in addition to the basic and compensatory awards.

## (7) Penalties

In **Portugal** the employer may be fined in the event of:

- failure to send copies of the proposal to dismiss and the written statement to the workers' committee and, if the employee is a trade union representative, to the trade union,

- failure to send a copy of the proceedings to the workers' committee and, if the employee is a trade union representative, to the trade union.

In **Greece** the employer can be imprisoned (very rare) or sentenced to pay a penalty if it refuses to reinstate an employee whose dismissal had been declared void.

## (8) Collective agreements

In **Austria** collective agreements have a wide scope of application because they apply to all workers employed by an employer who is a member of the industry union, even if not all workers are members of the trade union. Collective agreements often provide for rules on periods of notice which differ from the letter of the law.

In **Belgium** there are no collective agreements specifically on the subject except those which concern employees' representatives. In certain sectors, agreements provide for an enhanced period of notice based on service.

In **Germany** most collective agreements provide for more favourable provisions on the period of notice. 90% of all workers in Germany are covered by such collective agreements.

In **Denmark** collective agreements are important for most employees. This is due to the fact that employers bound by a collective agreement must treat equally the organized and non-organised employees working in the same enterprise. In addition, many non-organised employers often concluded the so-called "*adhesion contracts*" under which they commit themselves to follow the appropriate collective agreement. Finally collective agreements set a norm within the fields covered by each of them. This means that the collective agreements are of importance to a much greater number of persons than those directly covered by them. Most of the employees who are not covered by a collective agreement are covered by provisions in laws e.g. Salaried Employees Act.

In **Greece** there are very few collective agreements on the subject but a number of enterprise regulations, which are of great importance. They normally set somewhat more advantageous terms, e.g. regarding compensation.

In **Spain** collective agreements contain rules specifying the legal grounds for dismissal.

In **Finland** collective agreements have in general the same substance as legal provisions.

In **France** most collective agreements provide for compensation arrangements which are very similar to the ones foreseen by law.

In **Ireland** there are no collective agreements specifically regarding dismissals but many would contain provisions setting out the procedure the employer will observe before and for the purpose of dismissing an employee.

In **Italy** collective agreements may specify justified grounds and the period of notice, provide for conciliation procedure or state that the notification of a dismissal must be accompanied by reasons.

In **the Netherlands** the statutory period of notice may be adjusted by a collective agreement. Some establish a procedure prior to a dismissal or provide specific requirements on the issue of suspension.

In **Portugal** collective agreements can depart from the law in favour of the employee only with regard to the amount of compensation and time limits for the disciplinary procedure.

In **Sweden** legislation can often be derogated from or supplemented by collective agreements, and such agreements can usually also be applied to employees who are not members of the organizations concluding the agreements. Some 85% of all employees are members of some employee organization and many employers are also members of employer organizations. The periods of notice are quite often set forth by means of collective agreements. Such statutory provisions are semi-mandatory in Sweden and may, therefore, be derogated from by means of collective agreements.

### **3.3.3 DISMISSAL AT THE INITIATIVE OF THE EMPLOYER FOR REASONS RELATED TO THE CAPACITIES OR PERSONAL ATTRIBUTES OF THE EMPLOYEE, EXCLUDING THOSE RELATED TO MISCONDUCT**

A distinction between dismissal on disciplinary grounds, dismissal on grounds related to the employee's capacities and redundancy is not made in all the Member States. Often the same rule applies to all forms of dismissal. In many cases, then, reference can be made to part 3.3.2.

#### **(1) Substantive conditions**

In deciding whether there are justified grounds, consideration may be given as to whether the employer has sought alternative solutions. This situation is regulated for in **Germany, Spain, France, Finland, Italy, Portugal and Sweden,**

**Austria, Denmark, the Netherlands and Sweden:** see 3.3.2.

In **Belgium** the employment relationship can be terminated by giving notice or paying compensation for the period of notice not given. The compensation is equivalent to the salary the employee would have received until the end of the notice period. In this case no ground is required. The period of notice is:

- for manual workers: 28 days if the person has been employed for less than 20 years, 56 days if he or she has been employed for more than 20 years;
- for white collar workers: 3 months if the person earns € 26,418 or less ("*employés inférieurs*") and if he or she has been employed for at least 5 years (for each new period of 5 years, 3 months are added). If the person earns more than €26,418 ("*employés supérieurs*") the period of notice is fixed by agreement or by the court.

In **Germany** an employee can be dismissed if there is an objective ground which may affect

the employee's work. Regular illness or illness for a lengthy period may constitute such a ground if it results in a considerable burden for the employer. If there is no such ground the dismissal is void. The employer must take all appropriate measures to avoid dismissals, such as considering alternative employment or by reducing the employee's obligations. However, the employee must within 3 weeks apply to the courts for a ruling that the dismissal is invalid. If he or she fails to do this, the dismissal will be considered valid. With regard to the period of notice see 3.3.2.

**Greece:** see 3.3.2. Enterprise regulations may provide for a list of grounds.

In **Spain** the law provides for an exhaustive list of grounds for dismissal ("*despido objetivo*"):

- inaptitude of the employee;
- employee's failure to adapt to technical change;
- need (based on technical, organizational, economic or production-related grounds) to terminate one or more employment contracts, if the dismissal is not part of a pattern of collective dismissal;
- failure to report for work, even where justified, but where such cases are intermittent and account for 20% of working days in 2 consecutive months, or 25% in any 4 months within a 12-month period, provided that the level of absenteeism for the entire staff in the place of employment is lower than 5% over the same periods (excluding strike action, employees' representatives' activities, occupational accidents, maternity, vacation, temporary absence for work of more than

20 consecutive days on account of sickness or non-employment-related accident, based on the physical or psychological situation deriving from gender violence).

If there is no such ground the judge may declare the dismissal wrongful (“*improcedente*”).

There is a period of notice of 30 days. The dismissal is valid even where this period has not been adhered to, but the employee receives the salary corresponding to the period of notice.

**Finland:** see 3.3.2.

The *Employment Contracts Act* specifically provides that illness, disability or accident affecting the employee cannot be regarded as a proper reason for dismissal unless the employee’s working capacity is substantially reduced thereby for such a long term as to render it unreasonable to require that the employer continue the relationship. A condition for lawful dismissal is therefore that the work disability is long lasting, usually at least 1 year. In the public sector the condition for lawful dismissal in cases of work disability is that the employee is entitled to a disability pension.

In **France** a real and serious ground (“*motif réel et sérieux*”) is required. Such grounds can be:

- insufficient performance at work;
- inability to perform because of illness, if the illness is acknowledged by the company physician;
- lengthy absence if the functioning of the firm is disturbed and compensation is paid.

If the court considers the dismissal to be without real and serious ground the employer has to pay compensation of at least 6 months’ salary.

There is an obligatory period of notice depending on the length of service (fixed by the *Labour Code* or by collective agreements). The employer can terminate the employment

relationship before the end of the notice period if it pays compensation equivalent to the salary the employee would have received during the period of notice. If the ground is an occupational accident or disease, no notice is required.

In **Ireland** dismissal relating to the employee’s capacities comes mainly within the scope of the *Unfair Dismissals Acts* (see 3.3.2). However, this can also be a cause of redundancy (see 3.3.4).

In **Italy** dismissal because of illness is prohibited for a period specified by collective agreements (“*periodo di comporta*”). If this period is over and the employee does not start to work again, this is considered to be a justified ground for dismissal. Any dismissal which does not meet with these requirements is void. In general see Article 7 of the *Workers’ Rights Statute* (dismissal on disciplinary grounds). With regard to notice see 3.3.2.

In **Luxembourg** there must be a real and serious ground (“*motif réel et sérieux*”). The periods of notice are: 2 months (up to 5 years service), 4 months (5-10 years’ service), 6 months (more than 10 years’ service). The period of notice is longer if the employer opts for not paying severance pay (see below (3)). In the case of improper dismissal the judge may award compensation or recommend reinstatement.

In **Portugal** an employee may be dismissed by reason of failure or inability to adapt to technological changes (“*despedimento por inadaptação*”). The grounds for dismissal are that continuation of the employment relationship is rendered impossible as a result of the employee’s inability to adapt to changes arising from new manufacturing processes or new technology or equipment. The employer must have provided adequate vocational training from which the employee has not sufficiently benefited after an appropriate period of adaptation (not less than 30 days). There must also not be an alternative position for which the employee is qualified. A

dismissal which does not comply with these requirements is unlawful and void.

**United Kingdom:** see 3.3 for general principles.

## (2) Procedural requirements

In **Belgium** the employer must notify the dismissal to the employee by registered letter before the period of notice starts. If the employer pays compensation instead of giving notice, there is no form required for the notification. If these requirements are not met the dismissal is void.

There is no involvement of public authorities or employees' representatives. However, trade unions may help their members. With regard to specific procedures for the dismissal of employees' representatives and members of the safety council, see 3.3.1.

In **Spain** the employer must notify to the employee the grounds for the dismissal and the date for the end of the contract in writing. In the case of dismissal on objective grounds ("*despido objetivo*"), the severance payment has to be paid at the same time as the written notification is given (exception: economic grounds for dismissal). If these requirements are not fulfilled, the dismissal may be declared void.

In **Germany** the employer must inform the employee in writing.

In **Italy** there is a compulsory procedure prior to referral to the court (which is a condition for bringing a lawsuit). Before beginning to examine the merits of the case, the court must attempt to bring about a conciliation.

In **Luxembourg** the employee can, by registered letter within 1 month after the notification of the dismissal, ask the employer to communicate the grounds. In this case the employer has to give an exact explanation of the grounds by registered letter within 1 month of receipt of the request. Otherwise the

dismissal will be considered improper ("*abusif*"). With regard to undertakings with more than 150 employees: see 3.3.2.

In **Portugal** the law requires special procedures for dismissal of an employee on grounds related to the employee's capacities:

- the employer must inform the employee and employees' representatives in writing of the need to dismiss, the changes made in the place of work, the results in training and the adaptation period the employee is allowed, and the lack of another compatible place of work;
- employees' representatives may issue a report and the employee may contest the dismissal within 10 days;
- when 5 days have elapsed the employer may determine the dismissal. In such cases it must be explained in writing, specifying the date on which it will take place, the grounds, the changes made in the place of work, the vocational training and adaptation period granted to the employee, the lack of another compatible place of work, the amount of compensation payable to the employee and the place and means of payment;
- the employer must send a copy of the decision to the employee, the employees' representatives and the *Inspecção do Trabalho*.

If the first procedure is not complied with the dismissal is unlawful.

Other Member States: see 3.3.2

## (3) Effects of the dismissal

The employment relationship is terminated as a consequence of the dismissal.

### Severance Payments:

There are no severance payments in **Belgium, Finland, Sweden, Ireland** and the **United Kingdom**.

In **Spain**, where the “*objective*” dismissal is justified, i.e. where the employer is able to prove the reasons for the dismissal, the employee is entitled to compensation of 20 days’ pay for each year of service, up to a maximum of 12 months’ salary. Where the dismissal is unjustified, i.e. where the employer cannot provide sufficient evidence or the reasons for dismissal, the employer may choose to reinstate the employee (the employee must pay back any compensation received) or to pay compensation of 45 days’ pay for each year of service, up to a maximum of 42 months’ salary (with deduction of the amount of compensation already received).

In **France** the employee is entitled to compensation if he or she has been working in the undertaking for at least 2 years, except in case of serious misconduct. In the case of occupational disease or accident there is double compensation.

In **Portugal** the employee is entitled to compensation of 1 month’s basic remuneration for each complete year of service, with a minimum of 3 months.

In **Luxembourg** there are severance payments (“*indemnité de départ*”), except in the case of dismissal on important grounds. If the employee has completed at least 5 years’ service and if he or she is not yet entitled to a retirement pension the minimum sums are 1 months’ salary (after 10 years), 3 months’ salary (after 15 years). A private-sector white-collar employee is entitled to 6 months salary (after 20 years), 9 months’ salary (after 25 years), 12 months’ salary (after 30 years). An employer with at least 20 employees may opt for a prolonged period of notice instead of severance payments. In this case the periods of notice are 5 months (after 5 year’ uninterrupted service), 8 months (after 10 years), 9 months (after 15 years), 12 months (after 20 years), 15

months (after 25 years) and 18 months (after 30 years).

With regard to **Austria, Germany, Denmark, Greece, the Netherlands** and **Luxembourg** see 3.3.2. With regard to **Italy** see 3.3.2 and Article 2120 of the Civil Code.

If a sum is not paid by the employer, this has no effect on the validity of the dismissal. But the employer may be ordered to pay, exception, in **Greece** the payment of compensation is a condition for the validity of the dismissal.

### Unemployment Benefits:

There is an entitlement to unemployment benefits in **all** Member states. In **Ireland** the dismissal may result in a disqualification from unemployment payments for up to 9 weeks.

**Retirement Pensions:** see 3.3.2

### Sickness Insurance:

In all Member States there are no effects.

## (4) Remedies

In **Belgium** an action may be brought before the Labour Court within 1 year of the termination of the contract. Trade unions or employees’ representatives may act on behalf of the employees. The burden of proof is on the employee.

For **Greece** see 3.3.2. In addition, enterprise regulations often provide for a special committee. In this case the dismissal is suspended.

In **Italy** a court action may be brought within 60 days. A previous conciliation procedure is obligatory in the case of “*stabilità obbligatoria*” (fewer than 15 employees, in agriculture fewer than 5 in the establishment or within the city or local authority area). The justification for the dismissal has to be proved by the employer. Trade unions may not act on behalf of their members except in the case of

trade union representatives pursuant to Article 18 of the *Workers' Rights Statute*.

**Other Member States** see 3.3.2.

### **(5) Suspension of the effects of the dismissal**

If, in **Greece**, the employee appeals to the internal medical committee, the dismissal is suspended.

For **Portugal** see 3.3.2. The dismissal will be suspended if:

- the employer does not justify its absence from the conciliation procedure;
- the rules of the procedure are not respected;
- the courts conclude that there is probably no proper cause.

**Other Member States:** see 3.3.2.

### **(6) Restoration of employment**

In **Spain**, in the case of nullity ("*despido nulo*", that is when the employer fails to comply with procedural requirements and when the dismissal is based on discrimination, prohibited by the Constitution or by law, dismissal, violating the fundamental rights of the employee or dismissal in cases considered by law) the employer must reinstate. In cases of

wrongful dismissal ("*despido improcedente*") the employer may opt either for reinstatement or compensation (45 days salary for each year's work with a maximum of 42 months salary). If the dismissed employee is a trade union or employees' representatives, it is up to him or her to choose.

### **(7) Penalties**

There are administrative sanctions only in **Portugal**. The employer may be fined if:

- it does not inform the workers' committee (and, if the employee is a trade union representative, the trade union) of the proposal to dismiss;
- the decision is not explained in writing;
- it does not send a copy of the decision to the Inspeccao do Trabalho.

### **(8) Collective agreements**

In the **Netherlands** collective agreements sometimes contain provisions to establish whether insufficient competence or unfitness or unlawful absence constitute valid reasons for dismissal.

In **Luxembourg** collective agreements sometimes set out certain actions as amounting to a real and serious ground for dismissal.

**Other Member States:** see 3.3.2.

### 3.3.4 DISMISSAL FOR ECONOMIC REASONS

This chapter examines the termination of an employment contract at the initiative of the employer for reasons not related to the individual employee. Such dismissals often concerns a great number of employees (collective dismissals). Some Member States have specific rules on collective dismissals. These rules, however, do not relate to the substantive conditions below (1)) but only to the procedural requirements (below (2) and (3)).

#### (1) Substantive conditions

In all Member States except **Belgium** and **Greece** dismissal because of redundancy is deemed to be *ultima ratio*. There are no explicit legal rules, although this may be taken into consideration in connection with the justified ground.

In no Member State other than **Spain** do the courts have the power to check the employer's economic decision on which the redundancy is based. In **Spain** in non-collective dismissal for economic reasons (*despido objetivo*) the Employment Court Judge has the power to check the employer's financial decision on which the dismissal is based. In collective dismissal, the Administrative Court Judge has the power to check the employer's financial decision on which the dismissals are based.

**Austria:** As a basic rule no ground is required for ordinary dismissal. In undertakings with more than 5 employees an appeal can be brought before the court. If the worker lodges a protest the court will review whether the employer has chosen the employee who is likely to suffer least from the dismissal. See also 3.3.2.

**Belgium:** see 3.3.3.

In **Germany**, in undertakings with more than 5 employees, an employee can be dismissed if there are urgent reasons for this relating to the

running of the enterprise (*dringende betriebliche Erfordernisse*). The employer is obliged to try to avoid the dismissal beforehand, for example by offering the employee another position. If there are several employees doing the same job who could be dismissed, the employer must make the necessary choice (*Sozialauswahl*) by dismissing the employee who has the least need of protection from a social point of view. The employer must decide on the basis of age, length of employment, number of dependants and disability. Employees whose continued employment (either because of their qualifications or work performance, or in order to ensure a balanced staff structure) may be excluded from this selection by the employer. The employee must within 3 weeks apply to the courts for a ruling that the dismissal is invalid. If he or she fails to do this, the dismissal will be considered valid.

If the employer and the works council (in enterprises with more than 20 employees) have concluded a reconciliation of interests (*Interessenausgleich*) in which the employees to be dismissed are listed (*Namensliste*) it is legally presumed that the dismissed is justified by economic motives.

For all employees, there is a period of notice of 4 weeks, effective as of the middle or end of a month, which will be extended according to the length of the employee's service. If this period is not respected the dismissal is valid but will not take effect before the legal end of the notice period.

In **Denmark** industrial tribunal and court practice has developed the concept of lack of work (*arbejdsmangel*). The employer must prove that there are economic, technical, structural or similar circumstances which necessitate the dismissal of the employee in question. In practice no great demands are made for such proof. For the dismissal of a union representative there must be compelling

reasons (“*tvingende årsager*”). Notice must be given as required under the individual contract or collective agreement (up to 6 months). Otherwise compensation may be demanded by the employee but the dismissal is valid. The upper limit is around 6 months’ pay, but in practice, rarely more than 3 to 4 month’s pay is awarded.

For **Greece** see 3.3.2. The court will declare the dismissal improper and void if it is only a pretext, e.g. if a short time later another person is employed for the same job. The court can also check the casual link between the economic measures taken by the employer and the dismissal as well as the choice of who is to be dismissed. In this respect, priority is given to the professional skills of the employee. Only if the choice has to be made between several equally skilled persons will social criteria apply.

With regard to “*ultima ratio*” the employer cannot dismiss a person if there is a vacant job to where the employee could be transferred. But there is no general obligation to look for less drastic alternatives.

In **Spain** economic dismissal can be based on economic, technological/production – related or organisational reasons, on the extinction of the employer’s legal personality and on *force majeure*.

In non-collective dismissal for economic reasons (“*despido objetivo*”), dismissal for economic reasons should contribute to overcoming the negative financial situation of the business, and dismissal based on economic, technological/production-related or organisational reasons should serve to overcome the difficulties impeding the successful operation of the business, whether through its competitive position in the market or because of demand, through better organisation of resources.

In **Finland** the proper and weighty reason for economic or production related termination of the employment contract is separately defined in the *Employment Contracts Act*. An essential

and long-term reduction of work in general is sufficient ground for termination except in the case where an employee with appropriate work skills and abilities could reasonably be relocated or retrained for other available work. It is the duty of the employer to offer work where proper training and adequate experience would enable the employee, with pertinent education, general skills and experience to carry out the work. The point of departure is the employees shall be offered other work equivalent to their training, professional skill or experience. A general provision gives specific guidance concerning the requirements and employer must meet in exercising the right to issue a termination.

The Act also contains a provision giving examples of situations where the employer is not considered to have a proper and weighty reason for dismissal. The purpose for giving these examples is to describe the situations where the economic grounds do not constitute sufficient reason and to avoid a situation where the individual reasons are circumvented or hidden by a reference to economic reasons or reasons related to the production. A proper and weighty reason for dismissal on economic grounds is not at hand when the employer hires someone for similar work before or after giving notice or when a re-organisation of the work has not caused any factual decrease in the amount of work.

In **France** a real and serious ground (“*motif réel et sérieux*”) is required. In the case of economic dismissal (“*licenciement économique*”) such grounds are acknowledged by the courts if:

- there are economic difficulties or technical changes;
- thereby the job will cease to exist; and
- the employee is not going to be replaced.

If the court considers the dismissal to be without real and serious ground the employer has to pay compensation of 6 months’ salary minimum.

There is an obligatory period of notice depending on the length of service (fixed by the Labour Code or by collective agreements). The employer can terminate the employment relationship before the end of the notice period if it pays compensation equivalent to the salary the employee would have received during the period of notice.

The courts have established that the employer has an obligation to adapt employees to changes in their jobs. An employer who has failed to train an employee to cope with new technology cannot dismiss him or her on the grounds that he or she is no longer fit for the job. The employer also has to seek alternative solutions (“*obligation de reclassement*”). There are also accompanying measures such as:

- a social plan (if the employer fails to establish a social plan, the dismissal is void);
- agreements on pre-retirement;
- conversion agreements (“*conventions de conversion*”) on reinstatement and benefits.

Where the dismissal is void the judge can order the employee to be reinstated unless this is impossible (such as where site has closed).

In **Ireland** an employee is taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

- the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was employed, or
- the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he or she was so employed have ceased or diminished or are expected to cease or diminish, or

- the fact that the employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee has been employed (or had been doing before the dismissal) to be done by other employees or otherwise, or
- the fact that the employer has decided that the work for which the employee had been employed (or had been doing before the dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or
- the fact that the employer has decided that the work for which the employee had been employed (or had been doing before the dismissal) should henceforward be done by a person who is capable of doing other work for which the employee is not sufficiently qualified or trained.

If the tribunal finds that the employee was not dismissed by reason of redundancy the purported redundancy would be invalid as would any purported redundancy compensation paid. If the tribunal finds (under the Unfair Dismissals Acts) that an employee was unfairly selected for redundancy or was not made redundant but dismissed unfairly it could order re-engagement or re-instatement of the employee and consequently re-payment to the employer by the employee of any redundancy compensation received. In the event of an award of monetary compensation under the Unfair Dismissal Acts for unfair selection for redundancy (maximum 4 weeks’ pay where no financial loss has been sustained; where loss is sustained, maximum 104 weeks’s pay), the employee would be entitled to retain any redundancy payment received. However, in the event of a award of monetary compensation to the employee for unfair dismissal other than unfair selection for redundancy, any redundancy payment received by the employee would have to be offset against the unfair dismissal award.

The employer must give an employee a minimum period of notice of 2 weeks. The period increases with the length of service (up to 8 weeks after 15 years' service). Notice must be given in writing. The redundancy is valid even if the employer fails to give notice. However, it is guilty of an offence (see "penalties").

In **Italy** collective redundancies must be on justifiable objective grounds. Multiple individual dismissals are a collective dismissal for undertakings with fewer than 15 employees. The employer's economic or organisational decision cannot be reviewed by the court. The judge is restricted to checking whether there is causality between the economic grounds and the dismissal. A dismissal must be *ultima ratio*. With regard to notice and non-compliance with the requirements, see 3.3.3.

In **Luxembourg**: the courts have established that the worker must advise the worker of the economic reasons justifying his or her redundancy and a description of any rationalisation measures and their impact on the employee. In determining who is to be made redundant account should be taken of the employee's seniority, qualifications and social/family situation.

In **the Netherlands** a permit must be applied for from the Centre for Work and Income (see 3.3.2). Under the reasonableness test, the CWI checks whether the employer has sought alternative solutions. The following rules are applicable:

- workers taken on last must be dismissed first, at least in jobs which are comparable (last in, first out);
- exceptions only for workers with special knowledge or skills;
- if an employee with a weaker labour market position is to be dismissed under the first rule, as an exception another one in a stronger position must be chosen;

- the employer has to demonstrate its attempts to find alternative jobs for workers who are party unable to work as a consequence of illness (if longer than 6 months);
- following a reduction of 10 or more employees, the work force must reflect the average age distribution in the company;
- special attention is paid to the prevention of discrimination;
- the *Dismissals Decree* provides special rules for dismissal in the temporary employment sector and in cleaning services.

In **Portugal** the conditions for such a dismissal ("*despedimento por extinção do posto de trabalho*") are as follows:

- the reason must not be related to the fault of the employer;
- continuation of the employment relationship is impossible from the employer's perspective;
- there are no employees in the enterprise on fixed-term contracts for positions similar to those being abolished;
- it concerns a single employee, or a number less than the threshold for collective dismissals;
- compensation is paid to the employee.

The dismissal also depends on the redundancy rendering continuation of the employment relationship impossible. The alternatives enabling collective dismissal to be reduced or avoided may be:

- temporary suspension of work for all or some employees;
- temporary reduction in working hours for all or some employees;

- retraining of employees for other functions;
- early and pre-retirement;
- termination of the contract by mutual agreement with payment of compensation to employees of an agreed amount.

A dismissal which does not meet these requirements is unlawful and void.

The employee is entitled to a minimum of 60 days' notice. If the employer does not give this notice, it must pay the employee the sum equal to the amount of pay for the period of notice not given.

For **Sweden** see 3.3.2. An objective ground does not exist where it is reasonable to require the employer to provide other work for the employee. The employer ought also to consider other means available to achieve structural change without redundancies but, in the final analysis, the employer's assessment of the need to cut back and the effects of this measure on the labour force must be the deciding factor in terms of redundancy. Thus, it is not normally appropriate for a court to investigate whether structural changes are economically justified or whether they should take the form intended by the firm.

The employer is not free to choose which employees are to be made redundant. The legislation requires the employees involved to be assigned to various so-called "*seniority units*" ("*turordningskretsar*") one feature being that manual and white-collar workers normally belong to different seniority units. Within each "*seniority unit*" the principle is then that the first to be made redundant are the most recently appointed employees, in line with a strict seniority rule. The employer's interest in ensuring that the firm can be run effectively after downsizing is taken account of only to the extent that the remaining employees must be "*sufficiently qualified*" to deal with the required tasks, which means that the employees must be able to learn to cope with the tasks after a reasonable training period. An employer with at most 10 employees may exempt from

the priority order 2 employees who, in the employer's opinion, are of particular importance for future activities.

It is usual for the employer and the organisations concerned to conclude a collective agreement defining which employees are to be made redundant. The employer may apply such a seniority collective agreement to employees who are not members of the organisations concluding the seniority agreements, if such employees perform work of the same kind as those employees who are members of the organisations. Such seniority agreements may not be applied in a discriminatory manner.

If the employer is in breach of the seniority rules, the dismissal cannot be declared invalid. However, an employee may be awarded compensation.

The **United Kingdom**: See 3.3 and 3.3.2. In order for a dismissal for an economic reason to be 'fair' the employer must show either that the employee was redundant according to the narrow statutory definition or that the dismissal was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The courts have held that this requires the employer to show a sound good business reason for dismissal.

## (2) Procedural requirements

Some Member States have specific procedural rules if a dismissal on economic grounds is a collective dismissal. For such specific requirements on collective dismissal see below (3).

**Austria, Denmark, Greece, Italy**: see 3.3.2., **Luxembourg**: see 3.3.3.

In **Belgium** the employer must notify the dismissal to the employee by registered letter before the period of notice starts. If the employer pays compensation instead of giving notice, there is no form required for the

notification. If these requirements are not met the dismissal is void.

There is no involvement of public authorities or employees' representatives. However, trade unions may help their members. With regard to specific procedures for the dismissal of employees' representatives and members of the safety council, see 3.3.1.

In **Germany** the works council has to be heard before a dismissal. Otherwise the dismissal is void. The dismissed employee may protest against the dismissal to the works council. If the works council thinks the protest to be well founded, it has to try to arrange an agreement between the employer and the employee. Under certain circumstances the works council can ask for a social plan (see below (4)). The dismissal must be in writing.

The employer has to inform the local labour office if it intends to dismiss a specific number of employees within 30 days. The labour office can decide that the dismissals will not take effect before the end of a maximum period of 2 months. If the employer fails to inform the labour office the employee can claim the nullity of the dismissal.

The dismissal of a handicapped person is void without the prior consent of the competent authority.

In **Spain** dismissal for economic reasons can be an objective dismissal ("*despido objetivo*") or a collective dismissal ("*despido colectivo*"). For objective dismissals see above 3.3.3., for collective dismissals see below (3).

In **Finland**, before the employer terminates an employment contract on the basis of the *Employment Contracts Act* it has a general obligation to as early as possible explain to the employee to be given notice the ground for and alternatives to termination. If the termination concerns more than one employee, the explanation may be given to a representative of the employees or, if no such representatives have been elected, to the employees jointly.

In the new Finnish Act there is also a special provision referring to a so called re-organisation procedure (see *Act on Re-organisation of Companies*, 47/1993). This provision states that the employer shall be entitled to terminate the employment contract regardless of its duration at a notice of 2 months, if:

- the termination derives from an arrangement or measure to be carried out during the re-organisation procedure which is necessary to avoid bankruptcy which causes the work to cease or decrease; or
- the termination derives from a procedure in accordance with a confirmed re-organisation plan that causes the work to cease or it the termination derives from an arrangement in accordance with the plan, which is attributed to financial grounds established in the confirmed re-organisation plan, and call for a reduction in personnel resources.

In undertakings with more than 30 employees (or more than 20 employees as regards collective redundancy) there is an obligation to inform and consult and to enter into negotiations with employees' representatives. This so called co-operation procedure is obligatory for the employer to undertake in accordance with the *Act on Co-operation Within Undertakings* (725/1978). Before the employer takes a decision on matters such as the closure of the undertaking, its relocation and any ensuing lay offs or termination of employment, it shall negotiate the reasons for the action envisaged, its effects and possible alternatives with the wage-earners or salaried employees concerned or with their representatives.

In **France** the employer has to speak with the employee before a dismissal. The invitation to this meeting has to be made by registered letter or must be given to the employee personally. The employee may bring to the meeting an employees' representative or, if there is no representative body within the undertaking, an adviser from the Prefet's list ("*conseiller du*

*salarié*”). The dismissal has to be notified to the employee by registered letter. The letter must be sent sooner than 7 days after the meeting between employer and employee. This procedure applies to individual dismissals. Dismissals of 2 or more employees count as a collective dismissal (see below (3)).

In **Ireland** the employer is obliged to forward a copy of the written notice to the Minister for Enterprise, Trade and Employment at the same time as the notice is given to the employee. On or before the date of dismissal the employer must give the employee a Redundancy Certificate which shows him or her how the statutory redundancy payment was calculated.

The redundancy is valid even if the employer fails to forward the copy to the Minister. However, it is guilty of an offence (see “*penalties*”). Failure to provide a redundancy certificate has effects in the case of the employer’s inability to pay redundancy payment. In such cases, the Social Insurance Fund pays for the employer. If there is no redundancy certificate, the employee cannot be paid from the Fund, unless he or she receives a favourable decision from the Employment Appeals Tribunal.

In **the Netherlands** an employer is required to notify the employees’ organisations if the dismissal comprises at least 20 employees within a period of 3 months. In specific cases there is also a consultation. The CWI has to authorise individual dismissals. Until such time as the notification and consultation of the employees’ representatives has taken place, the application for permission to terminate the employment relationship will not be taken into consideration. Where the employee does not object to a dismissal for economic reasons an accelerated CWI procedure is available.

In **Portugal** dismissal for economic reasons can be by reason of redundancy (“*despedimento por extinção de posto de trabalho*”) or collective dismissal (“*despedimento colectivo*”, see below (3)). In the case of dismissal by redundancy the procedure is as follows:

- the employer must inform the employee and employees’ representatives in writing of the need to declare the redundancy and therefore to dismiss the employees concerned;
- in the next 10 days the employees and employees’ representatives may issue their opinion on the grounds invoked by the employer and to specify alternatives to dismissal;
- the employee and employees’ representatives may request the *Inspecção do Trabalho* to ensure that the procedure is correct. *The Inspecção do Trabalho* must inform the applicant and employer of its findings within 7 days;
- the employer may carry out the dismissal 60 days after the end of the procedure. The decision must be explained in writing. The employee and employees’ representatives and *the Inspecção do Trabalho* must be informed of the decision.

In **Sweden** there are the following procedural requirements:

- before making a decision about redundancy, the employer must initiate negotiations with the appropriate employees’ organisations and give them the necessary information. If the employer is – or usually is – bound by a collective agreement, it is required to negotiate only with the employees’ organisations specified in this collective agreement; if it is not bound by a collective agreement of any kind it must negotiate with all employees’ organisations affected. If so required by the local employees’ organisation with which the employer negotiates first, the employer must also negotiate with a national employees’ organisation before making a decision. If the employer does not comply with this duty, the organisation (not the employees who have been dismissed) can be awarded damages;

- notice must be given by the employer in writing. In the communication giving notice of dismissal, the employer must state the procedure to be followed by the employee should the employee wish to allege that the dismissal is invalid or claim damages occasioned by the dismissal. It must also state whether the employee has priority concerning the re-employment. If the employee has priority and notification is required for the employee to assert this right, this too must be stated. The communication giving notice must be delivered to the employee in person. If this cannot reasonably be required, the communication may instead be sent by registered letter to the employee's last known address. The employer must, at the employee's request, state the circumstances on which the dismissal with notice is based. This statement must be in writing if the employee so requests.
- These provisions are, in the private sector, formal requirements and non-compliance simply entitles the employee to damages. In the state sector, on the other hand, notice must be given in writing in order to be valid.

In the **United Kingdom** the employee must be given a written explanation of the way in which his or her statutory redundancy payment was calculated.

### **(3) Specific requirements for collective dismissals**

In the case of collective redundancies, Council Directive 98/59/EC of 20 July 1998 provides for employees' representatives to be informed and consulted in good time with a view to reaching an agreement. These consultations must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and or mitigating the consequences by recourse to accompanying social measures. The employer has to notify the competent public authority in writing of any projected collective

redundancies. Such redundancies may take effect not earlier than 30 days after the notification. These procedures do not apply to:

- state authorities and public institutions;
- employees with a fixed-term contract;
- persons working on ships.

With regard to the definition of 'collective redundancy' Member States have a certain discretion. Set out below are the definitions applicable in Member States and specific requirements going beyond the Directives.

**Austria:** within 30 days:

- at least 5 employees in undertakings with 20-99 employees;
- at least 5% of the employees in undertakings with 100-599 employees;
- at least 30 employees in undertakings with more than 600 employees;
- at least 5 employees older than 50 years.

**Belgium:** within 60 days:

- more than 10 employees in enterprises with 20-99 employees;
- more than 10% in enterprises with 100-300 employees;
- more than 30 in enterprises with more than 300 employees.

**Germany:** within 30 days:

- more than 5 employees in enterprises with 21-59 employees;
- 10% or more than 25 employees in enterprises with 60-499 employees;
- at least 30 employees in enterprise with at least 500 employees.

**Denmark:** within 30 days:

- at least 10 employees in undertakings with 21-100 employees;
- at least 10% of the total number of employees in undertakings with 101-299 employees;
- at least 30 employees in undertakings with 300 or more employees.

**Finland:**

- at least 10 employees in undertakings with at least 20 employees.

**Greece:**

- more than 5 employees per month in undertakings with 20-50 employees;
- 2-3% of the total number of employees per 6-month period of undertakings with more than 50 employees (maximum 30). The exact percentage is fixed by the Ministry of Labour every 6 months. It is not possible to dismiss more than 30 employees per month.

In case of a collective dismissal a collective agreement has to be concluded to solve problems arising from the dismissal. Collective dismissals must be authorised by the State authority. Authorisation can be refused if no collective agreement has been reached.

**Spain:** within 90 days:

- at least 10 employees in enterprises with fewer than 100 employees;
- at least 10% of the employees in enterprises with 100-299 employees;
- at least 30 employees in enterprises with 300 or more employees.

The rules also apply to enterprises with more than 5 employees if the business is closed. Dismissals not covered by this definition are

considered as objective dismissal (see above 3.3.3).

The employer must give all necessary information to the employees' representatives and to consult them. The beginning of this period ("*periodo de consulta*") must be notified to the Employment Administration. In enterprises with more than 50 employees, the employer attaches a plan concerning the measures to be adopted. If the parties reach an agreement within 30 days (15 days in an enterprise with fewer than 50 employees), the Employment Administration must authorise the termination; except when it considers the agreement is void, when the Administration remits it to a judge. If the parties do not reach an agreement by the deadline, the Employment Authority has to decide (within 15 days) whether the dismissals are to be authorised. The termination of the contracts must be authorised by the Employment Administration, but it is determined by the employer's decision.

In the case of *force majeure*, whatever the size of the company or the number of employees affected, the Employment Authority must decide (within 5 days) whether the dismissals are to be authorised. It is not necessary to consult employees' representatives, but they should be notified at the start of the procedure. The termination takes effect from when the *force majeure* occurred.

If a business is bankrupt the Commercial Court Judge may exceptionally agree the cessation or total or partial suspension of the business's activity, when the bankruptcy administrators so request, after consulting the representatives of the workers at the business.

If the termination, suspension or modification of individual employment contracts is involved, the procedure established under employment law will continue. If the termination, suspension or modification of collective contracts is involved bankruptcy procedures will continue before the Commercial Court Judge.

In **France** there are two kinds of collective dismissal:

- 2 to 9 employees within 30 days. The dismissal must be notified to the regional Labour office (“*directeur départemental du travail et de l’emploi*”);
- 10 or more employees within 30 days. The Labour Office has to verify whether law and collective agreements are respected with regard to the information and consultation of employees’ representatives and to the establishment of social plans.

In both cases the employer has to speak with the employee. The invitation to this meeting has to be made by registered letter or must be given to the employee personally. Employees’ representatives must be consulted. The dismissal has to be notified to the employer by registered letter. The letter must not be sent earlier than:

- 7 days after the meeting between employer and employee (dismissal of an individual or collective dismissal of less than 10 employees);
- 30-60 days, depending on the number of people dismissed, after the notification to the Labour Office (collective dismissal of 10 persons or more).

If this is not obeyed, the employee can be awarded compensation of 1 month’s salary minimum. The judge can also order the employer to fulfil the procedure.

**Ireland:** within 30 days:

- 5 employees in establishments with 21-49 employees;
- 10 employees in establishments with 50-99 employees;
- 10% of the number of employees in establishments with 100-299 employees;
- 30 employees in establishments with 300 or more employees.

The employer must initiate consultations with employees’ representatives at least 30 days before the first dismissal takes effect. For the purpose of these consultations the employer must supply the employees’ representatives with certain information in writing.

**Italy:** The rules on collective dismissal apply in undertakings with at least 15 employees if more than 5 employees are dismissed within 120 days in one establishment or in several establishments in the same province by reason of a reduction in, or transformation of, the undertaking’s activity or by the end of the undertaking’s activity.

Conciliation may take place with trade union representatives and the provincial labour authority at the request of the trade union representative within 7 days. If there is no agreement within 45 days, the President of the Provincial Labour Authority (“*ULPMO*”) makes proposals to the parties. This procedure has to be terminated within 30 days. The employer can dismiss after he has signed an agreement or after an administrative decision has been taken. Criteria for dismissal are the number of children, the length of activity and the firm’s production needs.

**Luxembourg:** Collective dismissals are dismissals which have nothing to do with the employee’s person and which affect:

- at least 7 employees within 30 days or;
- at least 15 employees within 90 days.

The employer must enter into negotiations with employees’ representatives in order to avoid to reduce the number of dismissals or to establish a social plan to mitigate the adverse effects of the dismissals. If there is not agreement within 15 days, the National Conciliation Board (“*Office National de Conciliation*”) and the parity commission becomes involved. Collective dismissal takes effect only after a period of 90 days.

In **the Netherlands**, under the *Collective Redundancy (Notification) Act*, the employer

intending to terminate the employment contracts of at least 20 employees within a period of 3 months is required to give written notification to the CWI. The employer's notification must contain the reason for the intended collective dismissal and the number of employees involved, their positions, ages and sex.

The CWI is only allowed to deal with the employer's application for a permit to dismiss the employees after the lapse of 1 month. During this period, the parties try to reach an agreement on the consequences of the dismissal. They will also inform the trade unions and prepare the ground for retraining or redeployment if the redundant labour force. This period does not have to be observed when the enterprise is bankrupt or when the waiting period would jeopardise the employment situation of the enterprise as a whole.

The *Collective Redundancy (Notification) Act* also obliges the employer to inform and consult the trade unions about an intended collective dismissal. Rules on information and consultation are laid down in the *Works Councils Act*. According to Article 25, the works council will be asked for its advice in the event of a termination of the business or a major part of it. The employer is to inform the works council of his intentions in writing at a time when the works council is still able to influence the decision of the employer. The works council will be informed about the motives for the decision, the consequences of the decision for the employees and the proposed measures. It will discuss the issue at least once at a consultation meeting. After receiving the advice, the employer will communicate its final decision to the works council as soon as possible.

The employer's decision will be postponed for 1 month unless it is in line with the advice of the works council. During this period, the works council can appeal to the Enterprise Section "*Ondernemingskamer*" of the Amsterdam Court of Appeal on the ground that the decision is not reasonable, taking into consideration the interests involved (Article 26

of the Works Council Act). If the appeal is justified, the Enterprise Section can take measures at the request of the works council.

**Portugal:** The law describes the grounds for collective dismissal as follows: "*definitive closure of the firm, closure of one or more sections or a reduction in personnel for structural, technical or other reasons*". Collective dismissal must also involve at least 2 or 5 employees, according to whether the firm has up to more than 50 employees respectively.

The procedure for collective dismissal is as follows:

-(\*) The employer must inform the employees' representatives in writing of the proposal to carry out of the dismissal, providing the following information: the grounds for dismissal, the personnel concerned (broken down into sectors of the firm), the criteria for selecting employees to be dismissed and the respective number and occupational category. If there are no employees' representatives this notification must be sent to the employees.

- The employer must send a copy of the notification and accompanying information to the authorities responsible for employment;
- In the next 10 days the employer must instigate an information and negotiation procedure with the employees' representatives to seek other measures to reduce the number of employees to be dismissed or avoid such dismissals;
- The authorities responsible for employment monitor the information and negotiation procedure to ensure that it is correct, provide information and broker meetings between the parties;
- (\*) failing an agreement with the employees' representatives, the employer may carry out the dismissal 20 days after the initial notification;

- the decision must be explained and sent to the employees concerned at least 60 days before the date it comes into effect;
- at the same time the employer must inform the public authorities and employees' representatives of the identify of the employees dismissed.

If the procedure marked with (\*) are not obeyed the dismissal is unlawful.

**Sweden:** The 1974 *Act on Various Employment Promotion Measures* (amended in 1994) provides that the County Labour Board should be notified if the collective dismissal affects either at least 5 employees or at least 20 employees over a period of 90 days. The Act makes no exception for the public sector and crews on sea-going vessels. It also applies to lay-offs.

In the **United Kingdom** the employer must consult appropriate representatives of affected employees in advance if the redundancy concerns 20 or more employees at one establishment within a period of 90 days or less. If the employees are of a description in respect of which an independent trade union is recognised by the employer, the employer must consult representatives of that union, irrespective of whether the affected employees are union members. If there is no independent recognised union, the employer must consult 'employee representatives'. These are either (at the employer's choice) persons elected specifically for the purpose of the consultation exercise in question or persons elected or appointed by the affected employees for another purpose who have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf. Consultations must be at least 30 days in advance where the number to be dismissed is between 20 and 99, or 90 days in advance where the number is 100 or more. If this obligation is not complied with, the union or employee representative, as appropriate, may present a complaint to a tribunal which may award compensation to the employees (up to a maximum of 90 days' pay). The employee may

also bring a claim for a statutory redundancy payment and for unfair dismissal if he or she qualifies for these rights. An employee who receives a statutory redundancy payment must be given a written statement explaining how the payment has been calculated. If an employer is proposing to dismiss as redundant 20 or more employees at one establishment within 90 days or less the Department of Trade and Industry must be notified, failing which the employer may be fined.

#### (4) Effects of the dismissal

The employment relationship is terminated as a consequence of the dismissal.

#### Severance Payments:

In **Belgium** specific severance payments are given to employees who are entitled to only a short period of notice. This payment represents the difference between basic pay and unemployment benefit and is paid for the 4 months following dismissal. If the notice period is more than 3 months, the period of payment is reduced accordingly.

In **Germany** in undertakings with more than 20 employees the works council can ask for a social plan to mitigate the effects of redundancy. The social plan can provide for severance payments. The employee has 3 weeks within which to institute a challenge and if he or she does not the dismissal is deemed to be valid. The amount of severance payment depends on the length of service: 2 weeks pay for each year of service.

In **Spain** there are severance payments of 20 days' salary for each year of activity, maximum 12 months' salary.

In **Ireland** an employee is entitled to a statutory lump-sum payment if he or she:

- is between the age of 16 and 66 at the date of termination of employment;

- has been continuously employed by the same employer for a least 104 weeks; and
- was in employment which is fully insurable under the Social Welfare Acts at any time in the 4 years prior to redundancy.

The statutory redundancy lump sum is calculated as follows:

- 2 weeks' pay for each year of employment;
- in addition, the equivalent of 1 week's normal pay.

There is a ceiling of €600 per week. The employee may lose this entitlement if the employer makes an offer of suitable alternative employment which the employee unreasonably refuses.

An employer is entitled to be paid from the Social Insurance Fund a rebate of 60% of the statutory lump sum paid to a qualified employee.

**Luxembourg:** see 3.3.3.

In the **Netherlands** compensation may play a role in the CWI application procedure, in considering the reasonableness of the application. In rescission proceedings, the court may pay compensation but only if changes in circumstances are sufficiently substantiated by the regulating party. The amount of the severance pay is calculated on the basis of a judicial formula (see 3.3).

In **Portugal** the employee is entitled to compensation of 1 month's basic remuneration for each complete year of service, with a minimum of 3 months. If the employer does not make available this compensation to the employee before the end of the notice period, the redundancy is unlawful.

In **Sweden** there are no statutory severance payments. On the other hand, almost all sectors of the Swedish labour market are covered by severance payment schemes laid down by collective agreements. Such schemes vary both

in scope and content. They are all administered by joint bodies of the social partners.

In the **United Kingdom** an employee who is redundant is entitled to a statutory lump sum redundancy payment calculated by reference to the employee's age, earnings and length of service: 1, 5 week's pay for each year's service in which the employee was 41 or above; 1 week's pay for each year between 22 and below 41; a half week's pay 18 and over and below 22; subject to a maximum of £280 per week and 20 year's service. No payment is made where the employee is 65 or over at the date of dismissal and there is a reduction of 1/12<sup>th</sup> for each month over the age of 64. The employee may lose this entitlement if the employment makes an offer of suitable alternative employment which the employee unreasonably refuses.

For **other** Member States see 3.3.2.

If the sum due is not paid by the employer, this has no effect on the validity of the dismissal. But the employer may be ordered to pay. Exception: The payment of compensation is a condition for the validity of the dismissal in **Greece** and in **Spain** (for objective dismissal).

#### **Unemployment Benefits:**

Dismissed employees are entitled to unemployment benefits if they meet the conditions.

**Retirement Pensions:** see 3.3.2

#### **Sickness Insurance:**

There are no effects on entitlements under public or private sickness insurance schemes.

### **(5) Remedies**

In all Member States there are judicial remedies and/or arbitration procedures for employees to pursue their claims. Unless indicated otherwise below:

- there is legal assistance for persons on a low income;
- there is no priority for remedy proceedings;
- the burden of proof is on the plaintiff;
- the judge must be satisfied that the ground is sufficient reason for termination.

In **Belgium** an action must be brought before the Labour Court within 1 year of the termination of the contract. Trade unions or employees' representatives may act on behalf of the employees. The burden of proof is on the employee.

In **Denmark** those employed under collective agreements will often have the option of having a special Board of Dismissal assess whether dismissal on the grounds of redundancy is sufficiently justified (fair). Salaried employees may alternatively have the option of being awarded compensation if the courts find that the dismissal is not sufficiently justified (fair). There is a general deadline of 5 years. Trade unions represent their members in such cases. A conciliation meeting should be held within 1 month.

In **Germany**, actions for unfair dismissal must be given priority.

In **Spain**:

- non-collective dismissal for economic reasons ("*despido objetivo*"): see 3.3.3;
- collective dismissal and dismissal for reasons of *force majeure* require approval from the Employment Administration. The Employment Administration's decision can be contested through Administrative Court proceedings. In the event of a dispute between the employer and employee concerning the payment or the amount of the severance payment, the employee may proceed in the Employment Court.

In **Finland**, an infringement of the *Employment Contracts Act* may be contested in the District Court. Infringement of collective agreements may be contested in the Labour Court following a mediation procedure if the agreement provides for it. The time limit is 2 years in both cases. Before the Labour Court the employee is represented by his or her trade union. If the union refuses to bring an action, the right to do so rests with the employee himself or herself. If an action is brought within 2 months of termination it must be treated as urgent in all instances. The economic sanction that can follow if the employer terminates the employment contract contrary to the grounds laid down in the *Employment Contracts Act* is economic compensation up to a maximum equivalent to 24 months pay. Contrary to what is the case in individual dismissals there is no minimum compensation prescribed in these cases. The similar deductions for paid unemployment benefits to the employee from the amount compensating daily earnings shall be made. These deductions are then paid to the social insurance institutions.

In addition to the sanctions regulated in the *Employment Contracts Act* there are additional sanctions regulated in the *Act on Co-operation within Undertakings*. Where a matter deliberately or by gross negligence has been resolved without observing the co-operation procedure prescribed in the Act and the employee's contract has been reduced into a part-time one, or terminated, or he or she has been laid off, for reasons related to that matter, he or she shall be entitled to receive the pay for maximum of 20 months as indemnification from the employer.

The right to an employee to indemnification shall expire if no action is brought within 1 year of the right's coming into existence.

These sanction systems can both be applied in the same case. If there is no reason for the termination of the employment contract and the employer does not follow the co-operation procedure the employee is entitled to two kinds of economic compensation. A breach of the co-operation procedure in general does not bring

about this kind of sanction. It is only when the position of the employee has been seriously changed as a consequence of a decision taken without proper co-operation procedure that this sanction can be used. The ordinary sanction for a violation of the *Act on Co-operation within undertakings* is a criminal fine.

In **France** an individual action before the Labour Court may be brought without any specific time limit. The trade unions can act in an action concerning dismissal on economic grounds more freely than in other dismissal actions (a mandate from the person concerned is not required). But the unions have to notify their plans to the person concerned, who may forbid them to take action or decide to take action himself or herself. Trade unions can also ask the civil courts (the Labour Court is only competent for individual actions) to check whether the employer is complying with the social plan.

In **Ireland** a dismissed employee may appeal to a Rights Commissioner or the Employment Appeals Tribunal within 6 months of the date of dismissal. The limit may, however, be extended to up to 12 months in cases where exceptional circumstances have prevented the lodgement of the claim within 6 months. It is common that trade unions initiate and maintain unfair dismissal cases on behalf of the employee.

In **Italy** the employee must contest the dismissal in writing within 60 days of its notification. Once the contestation is made, the time limit for the action itself is 5 years. A previous conciliation procedure is obligatory in the case of "*stabilità obbligatoria*") (fewer than 15 employees, in agriculture fewer than 5 in the establishment or within the city or local authority area). Trade Unions may not act on behalf of their members. The employer has to prove that he was not able to employ the employee at another workplace.

In **Luxembourg** dismissals affected in the context of a collective redundancy are void if they take place before the date of signing the

social plan or the involvement of the National Conciliation Board.

In **Portugal** with respect to collective dismissal ("*definitive closure of the firm, closure of one or more sections or a reduction in personnel for structural, technical or other reasons*") the time limit for requesting judicial declaration of unlawful dismissal is 6 months from the dismissal. In the case of *dismissal by reason of redundancy* the time limit for requesting judicial declaration of unlawful dismissal is 1 year. Trade unions can intervene on behalf of their members in a representative capacity or directly if the case concerns the generic violation of the individual rights of an identical nature of their members (as would be the case with a collective dismissal).

**Sweden:** where a dismissal is challenged solely on the grounds that it is in breach of the seniority rules, the dismissal cannot be declared invalid solely on the ground that it is in breach of the regulations on the choice of employees to be laid off. However, the employee can be awarded compensation for non-compliance with the seniority rules.

In **the United Kingdom** the employee may make a complaint to an employment tribunal within 6 months of the date of dismissal but the tribunal may extend the limit to 12 months if it is just and equitable to do so. A redundant employee may also bring an action claiming that this dismissal was "*unfair*" because the employer acted unreasonably in the way in which the redundancy was handled, e.g. no prior consultation (but failure to follow a procedure beyond the statutory minimum will not of itself make the dismissal unfair if the employer can show that it would have decided to dismiss even if it had followed the procedure). An employee may appoint a representative, including someone from a trade union. In considering claims for redundancy payment there is a statutory presumption that the dismissal was by reason of redundancy. If the employer contests payment it will therefore be for it to show that the reason was not redundancy.

**Other** Member States: see 3.3.2.

## (6) Suspension of the effects of the dismissal

A suspension procedure exists only in **Portugal** (see 3.3.2) and **Belgium**.

In **Belgium** an individual employee can legally challenge the employer's failure to inform and consult (Law of 13 February 1998). If the challenge is upheld the information procedure must be begun or repeated and the notice period is suspended.

Collective dismissal in **Portugal** will be suspended if:

- the employer does not justify its absence from the conciliation procedure;
- the employer has not notified the employees' representatives;
- the employer has not instigated the information and negotiation procedure with the employees' representatives;
- the employer has determined collective dismissal without the agreement of the employees' representatives before 30 days have elapsed since the initial communications;
- the employer does not make the corresponding compensation available to the employees before the end of the period of notice (this obligation does not apply in the case of collective dismissal due to the employer's bankruptcy and in cases covered by special legislation regarding recovery of firms and reorganisation of economic sectors).

Dismissal by reason of redundancy will be suspended if:

- the employer does not justify its absence from the conciliation procedure;

- the courts conclude that there are probably no grounds.

## (7) Restoration of employment

In **Belgium** an individual employee can legally challenge the employers' failure to inform and consult (Law of 13 February 1998). If the challenge is upheld the information procedure must be begun or repeated and the notice period is suspended.

In **Denmark** the Main Agreement between LO and DA provides for reinstatement. A condition is that the Dismissal Board ("*Afskedigelsesnævnet*") does not find that co-operation between employer and employee has been rendered impossible. There is no compensation in addition to the compensation for unlawful dismissal mentioned above. In the case of salaried employees, the law provides for the option of financial compensation of up to 6 months' pay. Where the employment relationship is regulated by a collective agreement, there will often be the option of financial compensation of up to 39 weeks' pay.

In **Spain**:

- non-collective dismissal for economic reasons ("*despido objetivo*"), see 3.3.3;
- collective dismissal and dismissal for reasons of *force majeure*: if the Employment Administration's authorisation of the termination of the employment contracts is declared void by the competent Employment Administration or by the Administrative Court, the employer must reinstate the worker.

In **Sweden** and **Finland** the dismissed employee has priority for re-employment within 9 months of the dismissal.

**Other** Member States : see 3.3.2.

## (8) Administrative or criminal penalties

In **Belgium** any infringement of legislation enacted to implement the EC Directive on collective redundancies may give rise to a fine.

In **Denmark** the employer can be sentenced to pay a fine if it violates the following laws (the list only contains laws which are related to dismissal):

- the Act on notice of redundancies on a large scale;
- the Act on prohibition against discrimination on the labour market;
- the Act on the legal status of employees in connection with transfers of undertakings;
- the Act on employees in agriculture and in private household;
- the Act on equal treatment of men and women.

Furthermore the employer can be sentenced to pay a compensation to the employee.

In **Spain** the non-observance of the procedure for collective dismissals may give rise to a fine. In addition, according to Articles 311 and 312 of the Penal Code certain acts by the employer violating the rights of workers, enshrined by law, collective agreement or individual employment contract, are criminalised.

In **France** there is a fine for:

- not consulting the employees' representatives;
- not notifying a project to the State authority;
- not respecting the periods for sending the letters of dismissal,

In **Ireland** there are fines for non-compliance with requirements regarding notice, redundancy certificates and others. The Minister is also empowered to reduce the rebate due to an employer from 60% to 40% of the statutory redundancy lump sum paid to the employee if the notice requirements are not met (an employer is entitled to receive from the Social Insurance Fund a rebate of 60% of the statutory lump sum paid to a qualified employee). Moreover, the rebate is not paid if the employee was wrongly dismissed by reason of redundancy.

In **Italy** there is a fine pursuant to Article 18 of the *Workers' Rights Statute* in cases where a trade union representative is unjustifiably dismissed. If it is ruled that the worker must be re-instated, the employer must pay to the pension fund a sum equal to the amount of earnings owed to the worker.

In **Portugal** the employer can be fined if in the collective dismissal procedure:

- the employer does not inform, or informs incorrectly the employees' representative; or, if there are no representatives, the employees in writing of the proposal to carry out the dismissal, including the requisite information;
- in the following 15 days the employer does not instigate an information and negotiation procedure with the employees' representatives.

In **Finland** there is a fine for not complying with the procedure for collective redundancy.

In **Sweden** failure to provide the information required with the notification to the public authority may be punishable by a fine in certain cases. The employer may also be liable to pay special administrative costs to the State (notification costs). An employer who, either intentionally or as a result of gross negligence, provides substantially inaccurate information in the notification will be liable to fine or imprisonment.

In the **United Kingdom** where the duty to notify the Secretary of State is not complied with, the employer may be subject to a fine.

In the **other** Member States there are no administrative or criminal sanctions.

## (9) Collective agreements

In **Ireland** and **Italy** there are no collective agreements on redundancy. Only very few collective agreements exist in **Belgium, Spain** and **Portugal**. In **Luxembourg** there are some sectoral level agreements containing provisions on dismissals because of reorganisations or restructuring.

In **Austria** in undertakings with more than 20 employees the employer and the works council may conclude an agreement in order to mitigate the effects of the dismissal (“*Sozialplan*”). If there is no consensus, the works council can seek the decision of the arbitration board (“*Schlichtungsstelle*”).

In **Germany** the employer and the works council may conclude an agreement in order to mitigate the effects of the dismissal (“*Sozialplan*”). If there is no consensus, the works council and the employer can seek the decision of an arbitration board (“*Einigungsstelle*”). Most collective agreements exclude the possibility of ordinary dismissal for economic reasons for older employees.

**Denmark, Greece, France:** see 3.3.2

In the **Netherlands** in some industrial sectors collective agreements provide guidelines in the case of mergers, take-overs and re-organisations on the following subjects:

- consultation with trade organisations/works council/staff representatives;
- apprising them of motives, procedures, measures to be taken, proposed decisions and public information;

- compliance with the Act on Notification of Collective Dismissal and the Works Council Act.

- social plan.

In **Finland** collective agreements usually have the same substance as legal provisions. There are joint, generally binding agreements on protection against dismissal between the central labour market organisations.

In **Sweden** redundancies are usually covered by special collective agreements on seniority. This is due to the fact that the Swedish seniority rules on redundancies must be looked upon in the light that they, as well as those relating to the re-employment right, are semi-mandatory, i.e. they may be derogated from by collective agreements. For the state sector, such a seniority agreement is of general application. A similar provision is found in the local government sector collective agreement. In other collective agreements, there may be general criteria for selecting the employees to be made redundant other than the criteria found in the Employment Protection Act. Mostly, however, derogations from the statutory seniority rules come about by means of special provisions in the respective national collective agreements in the private sector, empowering the local parties to derogate from the statutory scheme. Such derogations are common. Seniority agreements may not, however be discriminatory. In one such case, the seniority agreement was set aside by the Labour Court for discriminating against Finnish-speaking seamen.

On the Swedish labour market, there are also “*employment security agreements*”, applicable to redundancies. These agreements are administered by joint bodies of the social partners. Such agreements cover almost the whole of the labour market and are usually of great impact in order to mitigate the hardship experienced by employees who are made redundant. The agreements may entitle the employee to financial assistance to various kinds, paid training, severance payments, premature pension supplements, extended

period of notice, right to be transferred to another job within a group of companies, etc.

Some 85% of all employees are members of some employee organisation and many employees are also members of employer organisations.

In the **United Kingdom** collectively bargained agreements may establish criteria for redundancy selection. It should be stressed, however, that the employer must always act reasonably in making a redundancy dismissal. According to case law the involvement of recognised representatives of the employees' may assist in establishing that the employer has acted reasonably. Since October 1, 2004, failure to follow a procedure beyond the statutory minimum will not of itself make a dismissal unfair if the employer can show that it would have decided to dismiss even if it had followed the procedure.

## **(10) Special Arrangements:**

### **(a) Insolvency**

If, in **Austria**, the employee has not yet started work, the liquidator may choose whether he or she wants to have the relationship started or not. A white collar worker has the same right, a manual worker has not. If the employee has already started work, the liquidator may dismiss him or her within 1 month of the opening of the insolvency procedure. This includes people with fixed-term contracts. The employee may resign prematurely and put forward of his or her claims against the employer within 1 month of the date of adjudication in bankruptcy.

In **Belgium** insolvency does not of itself amount to *force majeure*. The contract of employment is suspended on the employer ceasing business. The receiver dismisses the employees. If there are insufficient funds the guarantee fund ("*Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprise*") intervenes.

In **Denmark** both the receiver and the employee are entitled to give notice that the contract is to be terminated in accordance with the rules on the period of notice. If the receiver dismisses the employee after the bankruptcy has been declared, any wage demands or claims already due during the period of notice will usually be regarded as bankruptcy claims. Such wage and pension demands are given priority. If the claims are not covered by the estate the employees get their amounts due from the Employees' Guarantee Fund.

In **Germany** the period of notice is 3 months with effect as of the end of a month, unless a different period is agreed under the employment contract or stipulated under statutory provisions. If the employees to be dismissed are specifically named in the redundancy plan agreed between the receiver and the works council, the presumption in law is that the dismissals are essential for reasons relating to the running of the undertaking. The courts may only carry out a subsequent review with regard to whether grave errors were committed. If no works council exists or no redundancy plan is agreed on, the receiver may apply to the labour court for a ruling that certain employees have to be dismissed.

In **Greece** the payment of compensation is not a condition for the validity of the dismissal. If an undertaking is in an economic crisis, special liquidation can be ordered by court. One effect of such a decision is that all employment relationships are terminated (this is not considered to be a dismissal).

In **Spain** the employment relationship can be terminated by the bankruptcy trustee.

In **Finland** bankruptcy and the death of the employer in themselves provides grounds for dismissal and the notice period is 2 weeks. Also in cases of restructuring the notice period is shorter than in normal cases.

In **France** dismissal is possible, if it is urgent, inevitable and indispensable after consultation of the works council, once the competent

authority has been informed and authorisation has been given by the “*juge-commissaire*”.

In **Ireland** the rules on redundancies apply without specific requirements.

In **the Netherlands** the receiver may terminate the contracts of employment and dismiss employees if he or she has obtained permission from the supervising judge. The terms of notice will not exceed 6 weeks.

In **Portugal** the judicial proclamation of insolvency does not automatically terminate the contracts of employment. The judicial administrator must comply with all the employer’s contractual obligations to the employees but he or she can terminate the contracts or some of them following the rules on collective dismissals.

In **Sweden** both the receiver and the employee are entitled to give notice that the contract is to be terminated in accordance with the rules on the period of notice.

In the **United Kingdom** a statutory redundancy payment and certain other debts payable to the employee will be paid, without limits, from the National Insurance Fund. The requirement to inform and consult appropriate representatives continues to apply to an insolvent employer.

In the **other** Member States there are no specific requirements.

### **(b) Transfer of the firm**

If, in **Austria**, the working conditions deteriorate considerably according to the collective agreement applicable after the transfer, employees may resign within the legal period of notice. They then have the same rights as if they were dismissed by the employer.

In **Belgium** the transfer does not in itself provide a reason for dismissal.

In **Spain**, the transfer of an undertaking does not affect the continuation of the new

employment relationship of the employees. The new owner takes the place of the previous owner with regard to the rights and obligations related to the employment relationship. If the new owner intends to reduce the number of employees for economic reasons, it has to follow the procedures concerning economic dismissal or objective dismissal for economic reasons.

In **Germany** dismissals in connection with a transfer are void.

In **Finland**, if an undertaking is transferred, the transferee may not dismiss the employee merely because of the transfer. If an employment contract is terminated because an employee’s working conditions are weakened substantially as a result of assignment of the enterprise, the employer is deemed to be responsible for the termination of the employment relationship.

In **Ireland** dismissals in connection with a transfer which are not justified as being for an economic, technical or organisational ground are considered to be automatically unfair.

In **the Netherlands** an employer is expressly prohibited from terminating employment because of a transfer.

If, in **Italy**, an undertaking in economic crisis or in bankruptcy is transferred, it is possible to depart by collective agreement from the rule that the transfer does not terminate existing employment relationships. The transferee can be empowered by collective agreement to re-employ some of the employees previously employed by the transferred undertaking (Law No 80 of 27 January 1992).

In **Luxembourg** the transfer cannot constitute a ground for dismissal but, according to the law of 19 December 2003 (implementing Directive 2001/23/EC), where the transferor is bankrupt a collective agreement can be negotiated modifying the employment conditions of the workers to preserve their employment and to assure the survival of the enterprise.

In **Portugal** the transfer has no effect on the continuity of employment contracts. The transferor takes the place of the transferee as employer.

In **Sweden** the *Employment Protection Act* provides for a general re-employment right if the employee has been dismissed for lack of work by the transferor. The re-employment right may also apply to the transferee. The re-employment right also applies to bankruptcies. Furthermore, the core principle of the EC Directive – the transfer of the rights and obligations of the employment contract (relationship) to the transferee –also applies to the public sector and to crews of sea-going vessels. Past periods of employment with the transferor are specifically safeguarded under the Employment Protection Act. This also applies to bankruptcies if continued employment comes about with the person who is taking over the business from the bankruptcy estate. Similarly, the past period of employment is accounted for by separate provisions regarding parental leave (*Parental Leave Act*) and when the employee is on sabbatical leave (*Education Leave Act*). In accordance with the *Vacation Act*, statutory accrued vacation rights are safeguarded. This provision makes it possible for the employee-debtor to make a claim either to the transferor or the transferee. This provision also applies to bankruptcies if continued employment comes about when the undertaking is taken over by another person from the bankruptcy estate.

In **the United Kingdom** dismissals for, reason connected with a transfer are automatically unfair unless they are for an economic, technical, or organisational, in which case the fairness of that dismissal will be judged

according to whether the employer acted reasonably under the 1996 Act.

### (c) Closure of the Business

With regard to the closure of the business there are specific compensation payments in **Belgium**.

In **Germany**, if the employer decides to close the business it is considered to have dismissed the employees for economic reasons.

In **Greece**, if the closure is caused by *force majeure*, there is in general no longer any obligation to pay compensation to the employees. However, if the employer was insured against this risk, it is obliged to pay 2/3rds of the compensation in so far as the risk is covered by the insurance. This applies only to white collar and manual workers.

In **Spain**, in the case of the death, incapacity and retirement of the employer without a successor, the contract comes to an end without any proceedings. The employees concerned are entitled to severance payments of 1 month's salary. In the case of the closure of the business for reasons of *force majeure*, insolvency or the dissolution of the legal personality of the employer, the labour authorities intervene and the employees are entitled to severance payments (20 days for each year worked with a maximum of 12 months' salary).

In **Portugal** closure of the business may be a ground either for termination by operation of law or for redundancy. The employees are entitled to compensation.

### 3.4 RESIGNATION BY THE EMPLOYEE

This part deals with the termination of an employment relationship on the initiative of the employee. With regard to the different rules for fixed-term contracts and fixed-task contracts, see above 2.

#### (1) Substantive conditions

In the majority of the Member States no ground is required for resignation by the employee.

In **Austria** the period of notice is 14 days for manual workers and 1 month to the end of the month for white collar workers. Resignation without notice is possible if there is an important ground, e.g. non-payment of wages, violence by the employer. If the employee resigns without ground or giving notice this has no effect on the termination of the employment relationship, but the employer is entitled to damages.

In **Belgium** the employee may either give notice or pay compensation. For manual workers the period of notice is 14 days if the length of service is up to 20 years and 28 days if the length of service is 20 years or more. For white-collar employees the period of notice depends on the salary and the length of service. Where the annual salary is less than €26,418 it is ½ months where service is less than 5 years and 3 months where service is more than 5 years. Where the annual salary is between €26,418 and €53,836, the notice period can be no more than 4 ½ months. Where annual salary exceeds €53,836 the notice period can be no more than 6 months.

In **Germany** the period of notice is 4 weeks as of the middle or end of the month, or 2 weeks during a probationary period. If this period is not respected, the employer is entitled to damages. Extraordinary resignation (without notice) is possible if there is an important ground. In either case the resignation must be in writing.

In **Denmark**, see 3.3.2.

In **Greece**, the period of notice is:

- for manual workers: 7 to 91 days according to the length of service (corresponding to the period on which the compensation is calculated if the employee is dismissed);
- for white collar workers: 2 weeks to 3 months (corresponding to half of the notice the employer has to give if it dismissed the employee, maximum 3 months).

In **Spain** there is no legal period of notice. If collective agreements establish periods of notice and, if such a period is not respected, the employer is entitled to compensation of 1 day's pay for each day of notice not given. In case of resignation for proper cause (such as grave misconduct of the employer, geographical move of the employer, substantial change in working conditions) the court may fix an amount of compensation.

In **Finland** notice must be given for resignation. The employee can terminate the contract without notice and immediate effect on certain conditions. This would be the case where the employer commits a breach against, or neglects its duties based on, the employment contract or the law and thus is having an impact on the employment relationship in such a serious manner as to render it unreasonable to expect that the employee should continue the relationship even for the period of notice.

In **France** a period of notice may be established by collective agreement. If such a period is not respected the court may fix an amount of compensation. The court may also fix compensation in the case of resignation for proper cause (see below).

In **Ireland** the period of notice that an employee is required to give will be determined by the contract of employment. There is a

statutory minimum notice period of 1 week where the employee has been continuously employed for 13 weeks or more. If the employee does not respect the required contractual notice period, this will be a breach of contract.

In **Italy** there is a period of notice except in cases where an employee resigns with justified grounds without notice. If the period of notice is not respected, the employer is entitled to compensation equal to the salary during the period of notice. A period of notice is established by collective agreements.

In **Luxembourg** the notice periods are 1 month (up to 5 years' service for the same employer), 2 months (5 to 10 years), 3 months (more than 10 years). The period of notice starts:

- on the 15<sup>th</sup> day of the month if the resignation has been notified to the employer before this day,
- on the first day of the following month if the resignation has been notified after the 14<sup>th</sup> day.

A resignation which does not comply with these periods is not void. The employee has to pay compensation (the pay he or she would have received until the end of the notice period).

In the **Netherlands** the employee does not need the permission of the CWI to resign. The period of notice to be respected is 1 month. A longer period can be agreed upon in writing (e.g. by way of a collective bargaining agreement), but is not to exceed 6 months. The employee is to provide a written statement of the reason for resignation if so requested by the employer.

Instead of resigning by giving notice, the employee can turn to the court to request rescission of the employment contract. If the request for rescission is based on a change of circumstances, the judge may allow the employee severance pay.

The employee can resign immediately (without giving notice) if he or she has an urgent reason or the employer gives him/her an urgent reason to resign. In the latter case, the employee is entitled to damages. In the case of a judicial dispute, the employee has to prove the urgent reason. If he or she fails to do so, the employee has to pay damages.

In **Portugal** there is the following minimum period of notice:

- in contracts for an unspecified period: 30 or 60 days, according to whether the employee has worked for up to or more than 2 years. Collective agreements or individual contracts of employment can extend this period to 6 months for employees with representative, supervisory or technically complex functions, or those holding positions or responsibility;
- in contracts for a specified (fixed) period: 15 or 30 days, according to whether the contract has a duration less than, equal to or more than 6 months respectively.

If the employee cites proper cause ("*justa causa*"), there is no period of notice. The law lists the following justifiable causes which may be claimed by the employee:

- culpable failure to pay the employee in the correct form when due;
- culpable infringement of the employee's legal guarantees or those arising out of agreements;
- application of an improper penalty;
- culpable failure to respect health and safety regulations in the workplace;
- culpable damage to the employee's legitimate interests;
- offences against the physical integrity, freedom, honour or dignity of the employee, punishable by law, practised by the employer or its legal representatives;

- the need to comply with legal obligations compatible with continuation of service;
- substantial and lasting alternations in working conditions during the legitimate exercise of the employer's powers;
- non-culpable failure to pay the employee promptly.

Jurisprudence maintains that it is not sufficient merely for any of these situations to occur. Such serious disturbances must be caused to the employment relationship that the employee cannot be expected to continue it any longer and therefore cannot be expected to serve a period of notice.

In **Sweden** the employee must respect a minimum period of notice of 1 month. Some collective agreements, especially for white collar workers, prescribe longer periods, but seldom longer than 3 months. If the employee has not respected the period of notice as laid down, the employer is entitled to damages and compensation for financial loss. The resignation cannot be declared invalid. If the employer has substantially neglected his obligations, the employee can resign with immediate effect.

In **the United Kingdom** the period of notice that an employee is required to give will be determined by the contract of employment. There is a statutory minimum notice period of 1 week where the employee has been continuously employed for 1 month or more. If the employee does not respect the required notice period, this will be a breach of contract.

## (2) Desertion of the post

If an employee does not appear at his or her workplace or if he or she leaves it, this may be regarded as tacit resignation. In this respect there are the following rules in the Member States:

In **Austria** there are no rules on the matter. According the case law desertion of the post may be considered a tacit resignation.

In **Belgium** and **Germany** because the resignation must be in writing, desertion of the post cannot be considered tacit resignation.

In **Denmark** desertion of the post is deemed a breach of contract.

In **Greece** desertion of the post is considered tacit resignation. This depends on the length of absence and of the justification for it. Illness too is often considered as tacit resignation.

In **Spain** desertion of the post is considered tacit resignation.

In **Finland** desertion of the post is considered tacit resignation if the employee has been away from work for at least 1 week and has not provided valid cause. The employer is then entitled to consider the contract terminated.

In **France**, desertion of the post is considered tacit resignation if the employee is absent for a lengthy time and the circumstances give the impression that the employee has a serious and unequivocal will to resign.

In **Ireland** there is no legislation on the matter. Case law has established that where an employee so conducts himself or herself as to lead a reasonable employer to believe that the employee has terminated the contract, the contract will be regarded as having been terminated by the employee.

In **Italy** desertion of the post is a just cause for dismissal.

In **Luxembourg** desertion of the post could be considered tacit resignation if it is accompanied by facts showing a formal and unequivocal desire to rupture contractual relations.

In **the Netherlands** desertion of the post is a ground for immediate dismissal.

In **Portugal** desertion of the post is considered tacit resignation if the employee is absent for more than 10 days without communicating the reason for the absence. The employee may rebut this presumption if he or she proves that a

case of *force majeure* occurred which prevented him or her from communicating the reason for the absence. The employer may only invoke termination through desertion of post after sending written notification to the employee's last address informing the employee that because of his or her conduct he or she is presumed to have deserted the post.

In **Sweden** there are no legal rules on this subject, but in case law, it has been established that the employment relationship is dissolved after a few weeks, after a result of the conduct of the employee. In the State sector, however, the employment relationship is not dissolved unless the employee terminates it in writing. This means that the employment relationship cannot come to an end tacitly; accordingly, the State employer has to terminate it in writing.

In **the United Kingdom** case law has established that where an employee so conducts himself or herself as to lead a reasonable employer to believe that the employee has terminated the contract, the contract is then terminated.

### **(3) Procedural requirements**

There are only the following procedural requirements in the Member States:

In **Belgium** notice must be given in writing, otherwise it is void.

In **Germany** written resignation is legally required. Otherwise the resignation is void.

In **Denmark** notice has to be given in writing.

In **Greece** there is a formal requirement only for employees of the State and or public institutions: the resignation must be in writing. Otherwise it is void.

In **Spain** the Labour Court must be involved if a contract is to be terminated because of the employer is at fault.

In **Finland** the employer or its representative must be personally informed about the

resignation. The employee must provide the employer with an opportunity to be heard upon the grounds for the resignation.

In **France** there are no legal procedural requirements, but collective agreements may provide for written resignations. In this case there is no consequence if the form is not complied with.

In **Italy**, as a rule, there are no specific procedures. However, resignation of an employee during a period where dismissal is prohibited (pregnancy and marriage) has to be notified to the Provincial Office of Labour for approval. Some collective agreements provide for written resignation. If in this case the form is not respected, the dismissal is void.

In **Luxembourg** resignation must be notified by registered letter or by letter handed personally to employer and countersigned.

In **the Netherlands** there are no legal requirements that the resignation be in writing but collective bargaining arrangements may so provide. At the employer's request the employee must provide a written statement of the reason for resignation. Notification has to be given at least 1 month in advance.

In **Portugal** the law requires the employee to inform the employer in writing of the intention to terminate the contract, whether in the case of termination with proper cause or termination with notice. If notification is not in writing the resignation is valid, but it is considered to be a resignation without notice. In this case the employee is obliged to pay compensation.

If the reason for termination is the employer's culpable failure to pay the employee and the respective arrears represent at least 60 days' pay, there is a special procedure whereby the employee can terminate the contract without notice.

In **Sweden**, in the State Sector, resignation is only valid if it is in writing.

#### (4) Effects of the resignation

The employment relationship is terminated as a consequence of resignation although in **Ireland** it has been recognised that there may be exceptions to this general rule such as in the case of an immature employee or decisions taken “in the heat of the moment”.

##### Payments by the employer to the employee:

In **Austria** there are severance payments (“*Abfertigung*”) from 2 months’ salary (after 3 years’ work) to 12 month’s salary (after 25 years); no severance payments if the period of activity is less than 3 years or if the employee resigns without important ground before the end of the notice period.

In **Germany** the employer has to pay compensation if the employee resigns for proper cause arising from the employer’s conduct.

In **Greece** the employer has to pay compensation if the employee resigns with proper cause. If the employee resigns after being entitled to retirement benefits, the employer has to pay half of the compensation for dismissal. The same applies in the case of a fixed-term contract with an age limit.

In **Spain**, the employee is entitled to compensation if he or she terminates the contract of employment with proper cause arising from the employer’s conduct:

- substantially modified working conditions affecting the employee’s vocational training or his or her dignity;
- non-payment of salaries;
- other serious breaches of contract apart from *force majeure*.

These grounds have to be approved by the Social Affairs Court Judge and are accompanied by a compensation fixed by the judge as if it were a case of unjustified

dismissal (“*despido improcedente*”): 45 days’ pay for each year of work, maximum 42 months’ pay. The employment relationship is terminated as a consequence of the judicial verdict.

The employment relationship can be also terminated as a consequence of resignation:

- where a decision is taken by the employer to transfer workers (geographical mobility), the worker will be entitled to choose between the transfer or termination of his or her contract, receiving compensation of 20 days’ pay for each year of service, up to a maximum of 12 months’ pay;
- where a decision is taken by the employer to substantially modify certain working conditions (working times, working hours and shift work arrangements), the worker, if placed at a disadvantage, is entitled to terminate his or her contract and receive compensation of 20 days’ pay for each year of service, up to a maximum of 9 months’ pay.

In these cases, workers can terminate their employment contracts themselves with the right to compensation, without the need to request a response before the Employment Court Judge.

In **France** the court may decide that the resignation is attributable to the employer because of:

- the employer’s incorrect behaviour (“*comportement fautif*”), e.g. non-payment of salaries, violence, assault;
- substantial modification of the contract by the employer. In these cases the court may decide on compensation.

In **Ireland** the employee is entitled to statutory redundancy payment if he or she resigns in response to the employer’s conduct in a redundancy situation.

In **Italy** the employee is entitled to a payment in each case of termination of contract (“*trattamento di fine rapporto*”). If there is good reason for the employee to resign without notice, the employer has to pay compensation equal to the salary during the period of notice.

In **the Netherlands** the employee may ask the court to fix financial compensation if the employer’s misconduct leads to a wish to terminate the contract, e.g. sexual harassment.

In **Portugal** the employee is entitled to compensation if he or she terminates the contract of employment with proper cause arising out of the employer’s conduct:

- in the case of a contract of indefinite duration between 15 and 45 days basic pay for each year of service, with a minimum of 3 months;
- in the case of a fixed-term contract, the same formula applies but the compensation cannot be less than the salary he or she would have received up to the end of the contract.

In **the United Kingdom** an employee may claim to have been “constructively dismissed” if he or she resigned as a result of the employer’s repudiatory breach of contract.

3 requirements must be met:

- the employer’s conduct must be a repudiatory breach of contract – actual or anticipatory;
- the employee must terminate the contract and must not do anything which could be construed as agreeing to (or “*waiving*”) the employer’s breach of contract;
- the employer’s conduct must be the employee’s reason for terminating the contract.

Constructive dismissal may give rise to a complaint of unfair dismissal as well as to a claim for damages at common law.

### **Unemployment Benefits:**

Unemployment benefits are not payable in **Austria** and **Belgium**.

In **Greece** there are in general no unemployment benefits. However, a sick employee who is considered to have resigned tacitly is entitled to unemployment benefits.

There is a waiting period in **Germany** (12 weeks, except if the employee has an important ground for his or her behaviour), **Denmark** (5 weeks), **Italy** (30 days) and **Sweden** (up to 45 days).

In **Finland** there is a waiting period that can vary from 30-90 days. If the employer has caused the resignation of the employee, the employer is deemed to be responsible for termination of the employment relationship in the same way as if notice would have been given by the employer.

In **Spain, France, Luxembourg, the Netherlands** and **Portugal** the employee is entitled to unemployment benefits only if he or she resigns with proper cause and also in **Spain** where a female employee leaves her job as a result of “gender violence”.

In **the United Kingdom**, if the employee leaves his or her job voluntarily without just cause, there will be no entitlement to jobseeker’s allowance (as unemployment benefit is now known) for a period between 1 and 26 weeks.

### **Retirement Pensions:**

In **Austria** there is no effect on public pension schemes. Company pension schemes: entitlements to direct payments (by the employer to the employee) lapse if the employee resigns, if he or she leaves without good cause or when he or she is justifiably dismissed. There is no lapse if the employee pays contributions to a private insurance company. Then the company will pay the benefits later.

In **Germany** company pension rights are maintained, if:

- the employee has completed the 30<sup>th</sup> year of his or her life; and
- the pension commitment has existed for at least 5 years.

In **Denmark** dismissal does not affect state pension. Pension rights based on a collective agreement are maintained. Company pension rights are often lost but there are many cases where they are maintained.

In **the United Kingdom** the dismissal does not affect public pension schemes. With regard to occupational pension schemes the rights already acquire are preserved or transferred to another scheme.

In the **other** Member States there are no effects.

#### **Sickness Insurance:**

In **Greece** the employee is only entitled to sickness insurance benefits if he or she is entitled to unemployment benefits. In **Luxembourg** the entitlement is terminated with the termination of the contract. In the **other** Member States there are no effects.

### **(5) Remedies**

Unless otherwise indicated otherwise below:

- there is no priority for remedy proceedings;
- the burden of proof is on the plaintiff.

In **Austria** an action before the court for labour and social affairs may be brought by the employer without any specific time limit.

In **Belgium** there are no specific remedies.

In **Germany** the employer may claim damages without any specific time limit,

In **Denmark** the employer has access to the general courts within 5 years.

In **Greece** an action may be brought before the general courts without a specific time limit. Labour cases have to be processed rapidly.

In **Spain** there are no specific remedies.

In **Finland** the employee can demand compensation in the court without 2 years of termination of the contract.

In **France** the employer may ask the court to state the wrongful character of the dismissal (no specific time limit).

In **Ireland** the employer is free to pursue a civil action in a court of law for breach of contract. The time limit is 6 years.

In **Italy** annulation (within 5 years) or nullity (without specific time limit) of the resignation may be demanded by the court.

In **Luxembourg** the employer may ask for compensation for damages.

In **Portugal** the employer may demand compensation from the courts. The time limit is 1 year.

In **Sweden** there is no legally sanctioned way in which the employer can physically oblige the employee to work. If the employee does not respect the period of notice, the employer is entitled to damages and compensation for financial loss.

In **the United Kingdom** the employer may seek redress through the civil courts within 6 years if the employee fails to give the required notice.

### **(6) Compensation to the employer**

The employer is not entitled to compensation in **Belgium, Greece, Spain, Ireland and the Netherlands.**

In **Austria** and **Germany** the employer is entitled to damages if the employee resigns before the end of the notice period without having important grounds for doing so.

In **Denmark** in the case of salaried employees, the employer has the right to recover any losses incurred as a result of the employee failing to work out his or her notice. Without documentation, the employer can demand compensation corresponding to half of 1 month's salary.

In **Finland** the employee has to pay damages if he or she cancels the employment contract without grounds or does not respect the notice period. No ground is required when the employee gives notice.

In **France**, if the employee does not respect the period of notice, he or she may be sentenced to pay compensation and damages.

In **Italy**, if the employee resigns without notice having no justifying ground, he or she has to pay compensation to the employer.

In **Luxembourg** the employer has to pay compensation for the period of notice not given.

In **Portugal** termination may oblige the employee to compensate the employer if:

- proper cause is claimed, but found to be groundless;
- the period of notice is not fulfilled, totally or in part.

The employer is entitled to compensation in these circumstances of an amount equivalent to the salary for the period of notice not fulfilled.

In **Sweden** the employer is entitled to damages if the employee resigns before the end of the notice period without important grounds for doing so.

In the **United Kingdom** the employee will be liable to pay damages if he or she resigns in breach of contract.

## (7) “Contrived” resignations

In all member states contrived resignations are resignations which conceal a dismissal. In this respect only the following special rules apply:

In **Italy**, if the employee resigns in a period in which dismissal is prohibited (e.g. pregnancy), the resignation is notified to the Provincial Office of Labour, which has to approve it.

In **Sweden**, for a resignation to be a concealed dismissal, the employee's action must have been instigated by the employer, whose behaviour was thus at odds with good labour market practice. The same should apply to an agreement to terminate the appointment at the employer's instigation. If the employer fails to respect good labour market practice and refuses to allow the employee to withdraw his resignation this measure may be held to represent a concealed dismissal.

## (8) Resignation for proper cause

The employee does not need a reason to resign. However, in some Member States it is of advantage for the employee if he or she has such grounds (non-payment of salary, for example). The situation is as follows:

In **Austria, Germany, Italy, Sweden** and **Finland** the period of notice does not need to be respected if there is proper cause for termination before the end of the notice period (for details see above 1);

In **Greece, Spain, France, Portugal** and the **United Kingdom** an employee who resigns with proper cause is entitled to compensation. Moreover, if in **France** journalists resign because the paper's leanings change, they are treated as if they had been dismissed.

In **Ireland** termination by the employee of his or her contract of employment because of the employer's conduct counts as dismissal. It is a matter for the competent body to determine whether or not the employer's conduct was such that the employee was entitled to

terminate, or it was reasonable for the employee so to terminate the contract, and thereby become compensated for unfair dismissal.

In **Luxembourg** an employee who resigns for proper cause (including victims of sexual harassment) may seek financial compensation from the employer.

In **Belgium** the employer's behaviour may entail the termination of the contract if this behaviour shows implicitly the will to terminate the contract.

In **the Netherlands** an employee who resigns with proper cause may ask the court for financial compensation.

In **Denmark** the existence of proper cause has no effects.

## **(9) Collective agreements**

In **Belgium, Greece, Spain, Ireland, Portugal** and **the United Kingdom** there are virtually no collective agreements on resignation.

In **Austria** collective agreements have a wide scope because they apply to all workers with an employer who is a member of the industry union, even if not all workers are members of the trade union. Collective agreements often feature rules on periods of notice which differ from the letter of the law.

In **Denmark** most employees (non-salaried workers) are covered by collective agreements. Danish legislation covers only civil servants

and salaried employees. Salaried employees are:

- employed for trade or office work, technical or clinical assistance, management;
- in the service of the employer for at least 8 hours a week;
- subject to the management and instruction of the employer;
- awarded salaried status in full or in part by agreement.

In **the Netherlands** some collective agreements stipulate that notice of resignation must be given in writing.

In **France** and **Italy** collective agreements may provide for written notification of resignation.

In **Luxembourg** some collective agreements provide for shorter periods of notice.

In **Finland** collective agreements follow the legislation.

In **Sweden** collective agreements are found prescribing longer periods of notice for, in particular, salaried employees but the periods are seldom longer than 3 months. Other collective agreements feature a "*set-off rule*", meaning that the employer is entitled to withhold a certain sum of the wages due, as fixed damages, if the employee is violating the period of notice set forth by statute or collective agreement.

## 4. GENERAL QUESTIONS RELATING TO ALL FORMS OF TERMINATION OF EMPLOYMENT RELATIONSHIPS

### (1) Non-competition agreements

In **Austria** a non-competition agreement is only valid if:

- it is limited to the employer's particular branch;
- it does not cover a period of more than 1 year;
- it does not unreasonably restrain the employee's professional prospects.

The parties may agree on a penalty for breach of the agreement. The employer cannot assert its rights under the agreement if it is responsible for the termination of the contract.

In **Belgium** a non-competition agreement is only valid if it:

- is in writing;
- refers only to a restricted area, where the employee can really be in competition with the employer (it cannot extend beyond Belgium);
- provides for lump-sum compensation (half the employee's salary for the period the agreement is entered into);
- is limited to 12 months maximum.

An agreement is void if the employee's annual salary does not exceed €26,418 on the termination of the employment relationship. If the salary is between €26,418 and €52,836 the agreement is only valid if there is a collective agreement defining the functions to which a non-competition clause may apply. If the salary exceeds €52,836 the agreement is valid except for functions excluded by a collective

agreement. A non-competition agreement does not take effect if:

- the employment relationship is terminated during a probationary period;
- the employer gives notice or pays compensation;
- the employee terminates the contract because of misconduct by the employer.

In **Germany** a non-competition agreement is only valid if:

- it is in writing;
- it is justified by the employer's commercial interests;
- it does not unreasonably restrain the employee's professional prospects;
- the employee receives appropriate compensation (at least half the pay he or she received on termination of the employment relationship).

The maximum period of non-competition is 2 years. Non-competition agreements with persons employed on job-training schemes ("*Auszubildende*") and minor commercial and industrial employees are prohibited by law.

In **Denmark**, in the case of salaried employees, employers have the option under the *Salaried Employees Act* of entering into a non-competition agreement/clause. Such an agreement/clause may apply for 1 year. If the employer wishes it to apply for a period in excess of 1 year, it must pay the employee a reasonable sum for his or her trouble. Unreasonable circumstances in this connection may be declared invalid by the courts.

In **Greece** there is only case law on the matter. Non-competition agreements must be limited as regards their duration (in general 1 year) and their territorial scope (in general the same city). There is no compensation.

In **Spain** non-competition agreements may not cover more than 2 years for technicians and 6 months for other employees. An agreement of this nature may only be valid when the employer has a genuine industrial or commercial interest in it, and the employee is paid appropriate financial compensation. With regard to managers and directors and to persons taking part in trading operations on behalf of 1 or more employers without assuming the risk and chance associated with such operations, the law defines and complements the requirements more precisely, by making it a condition, in addition to the requirements already mentioned, that the “*no subsequent competition*” agreement may only be effective if termination was not due to the employer’s failure to fulfil the obligations incumbent upon it. Sufficient financial compensation is deemed to have been paid when the employee has received “*goodwill compensation*”, already quantified in the appropriate section.

In **Finland** competition agreements are explicitly regulated in the *Employment Contracts Act*. It states that, for a particularly weighty reason related to the operations of the employer in the employment relationship, an agreement made at the beginning of or during the employment relationship (*agreement of non competition*) may limit the employee’s right to conclude an employment contract on work to begin after the employment relationship has ceased with an employer which engages in operations competing with the first-mentioned employer, and also the employee’s right to engage in such operations on his or her own account.

In **France** there is no specific legislation in this regard. Case law requires that non-competition agreements must be limited with regard to duration, area and professional qualification of the employee. The employer must have a legitimate interest in non-competition.

Financial compensation by the employer is not required for the agreement to be valid.

In **Ireland** at common law all restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint, however, may be justified if it is reasonable in the interests of the contracting parties and in the interest of the public. There are no specific rules concerning the duration of scope but it is unlikely that a non-competition clause of more than 1 year will be upheld.

In **Italy** an agreement of non-competition (“*patto di non concorrenza*”) must be in writing and must include a compensation on behalf of the employee. Its duration may not exceed 5 years for managers and 3 years for other employees. Agreements made for a longer period are reduced to the legal periods. Directors are subject to Article 2125, paragraph 2, of the *Civil Code Act*. Management staff is not regarded as being equivalent to directors.

In **Luxembourg** any non-competition agreement must be in writing. It cannot be concluded with a minor employee and with employees earning less than a sum specified by regulation. It is valid if

- it is limited to a specified sector with activities similar to those carried out before;
- it does not cover a period of more than 12 months after the termination of the employment relationship;
- it is geographically limited to a region where the employee can be in real competition with the employer. It may not cover more than the national territory.

The agreement has no effect if the employer has terminated the contract without important ground or without respecting the period of notice.

In **the Netherlands** the non-competition clause must have been entered into in writing or by

law, on pain of nullity. The court may either wholly or partially set aside the clause, with retroactive effect at the employee's request, if his or her interests are judged to be unfairly harmed. The employee may claim compensation from his or her employer throughout the period in which the non-competition clause is operative, if this clause forms a significant barrier to the employee's prospect of employment. Should the employee violate a legally valid non-competition clause, the court may mitigate the agreed penalty. The employer cannot invoke the non-competition clause if it has terminated the contract of employment without respecting the rules relating to dismissal.

In **Portugal** non-competition agreements are in theory void because they violate the right to work after termination of the contract. Such agreements are, however, valid in the following cases:

- if it is a professional activity the performance of which may cause actual loss to the employer;
- if compensation is stipulated for the employee, to be paid during the period of restriction of activity;
- if the restriction on freedom to work does not exceed 2 years (3 years in the case of certain activities where there is a high degree of confidentiality);
- if the agreement is concluded in writing.

In **Sweden** there are no specified statutory rules on non-competition agreements. Such agreements could be adjusted or set aside if they go beyond what is regarded as reasonable. A collective agreement between the largest private employers' confederation (Confederation of Swedish Enterprise) and 3 trade unions (SIF, Ledarna and CF) plays a large role in assessing what can be regarded as reasonable. According to the collective agreement, non-competition clauses may be used only to protect know-how specific to the particular company concerned and shall

normally not cover a longer period than 2 years. Such a clause does not apply where the employer has dismissed the employee unless the dismissal is due to a breach of contract of the employee.

## **(2) Agreements to the effect that the employee will not terminate the contract during a certain period**

In **Austria** it is probably *contra bonos mores* if one party to a contract is not allowed to terminate it. A fixed-term employment relationship for more than 5 years can be terminated by the employee by giving 6 months' notice.

In **Belgium** an employee whose training had been paid for by the employer often agrees to pay compensation if he or she resigns or is dismissed because of misconduct before a specified date ("*clause d'écolage*"). There is no legislation on the matter. Case law is divisive as to the validity of such clauses.

In **Germany** an employment relationship entered into for the employee's lifetime or for period of more than 5 years can be terminated by the employee after 5 years by giving 6 month's notice.

Where, in **Denmark**, an employee has entered into such an agreement and in the light of circumstances arising at a later stage (e.g. employee offered new and better work, spouse or employee moves, co-operation between employee and employer deteriorates, etc) it would be unreasonable to enforce the agreement, the courts tend to allow the employee to resign from his or her position subject to a reasonable period of notice.

In **Greece** this question has not come up so far. It may be that the rules on fixed-term contracts apply: termination is always possible if the other party gives an important ground.

In **Spain** the employer and the employee can agree that the employee will not terminate the contract (maximum 2 years) if the employee

has received special training for carrying out a certain project or a certain specific task. This agreement has to be concluded in a written form. If the employee terminates the contract before the end of the agreed period, the employer is entitled to compensation for damages.

In **Finland** notice can be given with respect to employment contracts made for over 5 years as for open-ended contracts.

In **France** there is no specific legislation on the matter. The courts acknowledge the validity of clauses according to which an employee whose training had been paid for by the employer promises to stay in the undertaking for a specified period. The courts may award the employer compensation if the employee breaks this clause.

In **Ireland** the employer would be able to sue the employee for damages in breach of contract in the ordinary courts if the employee terminated the contract during the period when the contract did not permit him or her to do so.

In **Italy** such agreements are very rare. According to case law, the rules on fixed-term contracts apply during the specified period. This means that the employee can only resign for cause.

In **Luxembourg** such agreements are void.

In the **Netherlands** the general rules on contract law apply. The court may fix compensation if an employment contract for a fixed period of time is terminated prematurely.

In **Portugal** as compensation for the employer's expenditure on training the employee, the parties may agree that the employee shall work for the employer for a certain period not exceeding 3 years. The employee may discharge himself of this undertaking by repaying the sums expended by the employer on his professional training.

In **Sweden** there is no specific legislation or case law on the matter.

In **the United Kingdom** an employer could sue an employee for damages for breach of contract in the ordinary courts if the employee resigned during the contractually agreed period when this is not permitted.

### **(3) The issuing of a reference**

In **Austria** the employer is obliged on request to issue a reference in respect of the type of work done by the employee and the duration of the contract. Remarks which make it more difficult for the employee to find a new job are unlawful.

In **Belgium** the employer is obliged to issue a reference at the end of the contract regarding the dates of the beginning and end of the employment relationship and the type of work. Other information can be added at the employee's request.

In **Germany** employees are entitled to receive a reference regarding the length and type of their employment. On request, remarks on the employee's performance and behaviour can be added. A reference must be true. However the employer may not impede the employee's future job prospects.

In **Denmark** a salaried employee is entitled at any time to demand from the employer confirmation in writing of the duration of the employment relationship, his or her main duties, his or her salary and, where appropriate, information on the grounds for the termination of the relationship.

In **Greece** the employer is obliged to issue a reference regarding the type of work done by the employee and the duration of the contract. An employee who does not agree with the reference may ask the courts for a decision modifying the reference.

In **Spain** the content of the reference is limited to the length of service in the firm and the type of work carried out or service provided.

In **Finland** the certificate of employment is regulated in the *Employment Contracts Act*. On termination of the employment relationship, the employee is entitled to receive, on request, a written certificate of the duration of the employment relationship and the nature of the work duties. At the specific request of the employee, the certificate shall include the reason for the termination of the employment relationship and an assessment of the employee's working skills and behaviour. The certificate shall not provide any information other than that obtainable from normal perusal.

The employer is required to provide the employee with a certificate of employment on request within 10 years of termination of the employment relationship. A certificate on the employee's working skills and behaviour shall, however, be requested within 5 years of termination of employment relationship.

If more than 10 years have elapsed from termination of the employment relationship, a certificate of the duration of the employment relationship and the nature of the work shall be given only if it does not cause the employer undue inconvenience. Subject to the same conditions, the employer shall issue a new certificate on request if the original has been lost or destroyed.

In **France** the employer is obliged to issue a reference at the end of the contract regarding the dates of the beginning and end of the employment relationship and the type of work. The name of the employee and of the undertaking and the date of issue must also feature. Other remarks can be added. There may be not discriminating remarks.

In **Ireland and the United Kingdom** references are a contractual matter to be agreed between the parties concerned. If former employees consider references inaccurate or unfair, they may be able to obtain redress at common law through the civil courts.

In **Italy** there are no particular rules apart from the principle of good faith.

In **Luxembourg** the employer has on request to issue a reference on termination of the employment relationship. It contains only the dates of entry and departure and the kind of work or works carried out. It must not contain remarks which are disadvantageous to the employee. In the case of a fixed-term contract the reference has to be issued on request at least 8 days before termination.

In **the Netherlands** the employer is obliged to give an employee at his or her request, on the termination of the employment relationship, a testimonial stating the nature of work performed, the working hours per day or per week, and the duration of the employment. If the employee should so request, the employer must state in this testimonial the manner in which the employee fulfilled his or her tasks and why the employment terminated. The employer is liable for damages if it fails to furnish such a testimonial or if it gives inaccurate information therein. Any clause excluding or restricting these obligations on the part of the employer is null and void.

In **Portugal** when the contract of employment ceases in any form the employer is obliged to provide the employee with a "*certificate of work*" showing the starting and finishing dates, the post or posts held and any other information requested by the employee in writing. In addition to this the employer must provide the employee with a declaration proving that he is unemployed.

In **Sweden**, according to case law, the employer is obliged to supply a reference. The employee can take the matter to court and damages may be imposed for failure to produce this reference. There are no general rules on references but there is a specific rule on domestic employees and rules can be found in a number of collective agreements.

#### **(4) Full and final settlement**

In **Austria** there are no specific rules.

In **Belgium** a settlement does not mean that the employee has relinquished his or her rights.

In **Germany** the employee often signs a declaration that he or she has no further claims arising out of the employment contract ("*Ausgleichsquittung*"). In this way he or she also may renounce any protection against dismissal. The declaration will only cover rights which the employee can effectively renounce. The employee cannot renounce, for instance, his or her rights arising from a collective agreement if both parties are bound to that agreement.

In **Denmark** a settlement (i.e. an agreement) which contains such a formulation has the same legal force as any other agreement or court ruling. However, this does not mean that the employee thereby relinquishes his or her rights.

In **Greece** there is no such thing as a full and final settlement.

In **Spain** the legal force of the phrase "*received in full and final settlement*" effects full mutual discharge, since it documents the cancellation of any reciprocal obligation stemming from the contract of employment between the employer and the employee which is being terminate. The employee may request the presence of a legal representative of the employees at the moment when the final settlement is signed. Nonetheless the evidential force of this document is not absolutely conclusive and there is scope for evidence to the contrary.

In **Finland** a settlement does not affect peremptory provisions concerning the payment of a wage.

In **France** a full and final settlement has the effect of discharging the employer if it is regularly entered into and is not contested by the employee within 2 months of signature. The effect of discharge is limited to the rights embraced by the parties when concluding the settlement.

In **Ireland** any provision in an agreement is void insofar as it purports to exclude or limit

the application of the *Unfair Dismissals Act* or is inconsistent with any provision of that legislation. When an employee receives a sum of money "in full and final settlement" of all claims (statutory or at common law) he or she will only be precluded from claiming unfair dismissal where there has been "full and informed consent". Consequently employers are required to advise the employee of his or her statutory entitlements and to give the employee an opportunity to take independent advice. A settlement providing for a redundancy payment less than the statutory entitlement is void.

In **the Netherlands** the employee is entitled to the payment of remaining holidays.

In **Luxembourg** the settlement must be made in two copies in writing. The words "*pour solde de tout compte*" must be on the document in the employee's own hand and followed by his or her signature. The period for denouncing the agreement (3 months after signature) must be clearly indicated. A settlement which meets these conditions has the effect of discharging the employer from paying salaries, compensation, etc. If the employee denounces the settlement it merely has the value of a normal receipt of the sums mentioned.

In **Portugal** the phrase "*received in full and final settlement*", sometimes recorded on the pay slip, does not constitute renouncement by the employee of all possible claims on the employer. Remission of debts in fact involves an agreement between creditor and debtor. "*Final settlement*" by the employee merely evidences receipt of the sum to which the receipt relates. Case law recognises that an employee may formally declare at the end of employment that he or she has received everything to which he or she is entitled ("*remissão abdicativa*").

In **Sweden** such a settlement does not have any specific, immediate or direct legal force.

In **the United Kingdom** any provision in an agreement (whether a contract of employment or not) is void insofar as it purports to exclude

or limit the operation of any statutory right as to preclude a person bringing proceedings before an employment tribunal. This is subject to specified exceptions relating to agreements reached under the auspices of “a conciliation

officer” or where there is a compromise agreement which satisfies specified conditions, including receipt by the employee of advice from an independent adviser.

## ***APPENDIX I:***

### ***Legislation on 'probationary periods' in some Member States***

#### **GERMANY**

##### **Waiting period**

General protection against dismissal in accordance with the Protection against Dismissal Act applies once an employment relationship has existed without interruption for a period of six months (waiting period). During this time the employer may dismiss an employee without an objective reason (conduct of the employee or urgent company needs). During the waiting period an employee does, however, enjoy protection against dismissal for discriminatory reasons, and specific bans on dismissal (e.g. during pregnancy) also apply. The employer and employee may agree to reduce or forego the statutory waiting period of six months. An extension is not permitted.

##### **Trial period**

A trial period requires an agreement between the employer and employee. On the one hand it gives the employer a chance to judge the efficiency and suitability of the employee, whilst at the same time giving the employee an opportunity to make sure that he or she likes the job. There is no statutory duration of a trial period. According to case law, the limit for the agreed length of a trial period depends on the type of activity involved, taking account of usual practice in the occupation and branch. The higher the quality of the activity, the longer the employer must be given to assess a new employee. However the trial period may not exceed six months, the only exception being where the job involves special demands.

There are two options for trial employment:

- (1) The duration of the employment relationship may be fixed for the scheduled duration of the trial period. In this case the employment relationship automatically ends after that period,

unless the parties agree that it should continue as an open-ended employment relationship.

- (2) A trial period may be agreed at the beginning of an open-ended employment relationship. Such an agreement allows either side to terminate the employment relationship during the trial period, observing a statutory minimum period of notice of two weeks (the general statutory minimum period of notice is four weeks).

If an agreed trial period is longer than six months, and regardless of whether the employment relationship is a fixed-term or open-ended one, general protection against dismissal, in accordance with the Protection against Dismissal Act comes into effect, i.e. the employer may dismiss the employee only for an objective reason, and the general statutory minimum period of notice of four weeks applies.

#### **SPAIN**

##### **The probationary period within the contract of employment**

The probationary period may be defined as the initial phase of the employment contract during which the services on which the contract is based are put to the test, the aim being to continue or terminate the contract depending on the positive or negative outcome of the probationary period.

Its legal basis is contained in Article 14 of the amended text of the Workers' Statute, as approved by Royal Legislative Decree 1/1995 of 24 March. The current wording of Article 14 of the Workers' Statute arises from the amendments introduced by Law 11/1994 of 19 May. Article 14 of the Workers' Statute is worded as follows:

“1. A probationary period may be agreed in writing, subject to the time-limits laid down in collective agreements, where appropriate. Where there is no collective agreements, the probationary period may not exceed six months in the case of professionally qualified workers or two months for other workers. In enterprises with fewer than 25 employees, the probationary period may not exceed three months for workers who are not professionally qualified technical personnel.

*The employer and the worker are both obliged to undergo the period of testing which is the purpose of the probationary period.*

*An agreement establishing a probationary period shall be declared null and void if the worker has already previously performed the same duties in the enterprise, regardless of the type of contract.*

2. During the probationary period, the worker shall have the same rights and obligations relating to the job he is performing as members of the workforce, except those deriving from the dissolution of the employment relationship, which may take place at the request of the parties while it is in force.

3. Once the probationary period has elapsed and neither party has withdrawn from the contract, the latter shall come into full effect and the services performed shall be included in the calculation of the worker's length of service in the enterprise.

*Temporary incapacity for work, maternity and adoption or fostering which affect the worker during the probationary period shall interrupt the calculation of the latter, provided that an agreement is reached between the two parties”.*

The following are the main characteristics of the probationary period which define its legal status:

- (a) It is not mandatory, i.e the employer and the worker are free to decide whether or not to include a probationary period in the contract of employment. The Law does not make it compulsory and, therefore, there is nothing to prevent a contract of employment being agreed without a probationary period, or the probationary period being expressly waived by the employer.
- (b) If there is a probationary period, it must be formalised in writing. It is understood that a probationary period does not exist if there is no written record of it.
- (c) The duration of the probationary period will be determined by collective agreement. Where there is no collective agreement, the duration of the probationary period may not exceed:
  - Six months in the case of professionally qualified technical personnel.
  - Two months in the case of other workers (or three months in enterprises with fewer than 25 employees).

This rule implies total freedom under the scope of the collective agreement to determine the appropriate duration of the probationary period. In the absence of an agreement, the time-limits laid down in Article 14 of the Workers' Statute itself are applicable on a subsidiary basis.

- (d) During the probationary period, it is necessary to undergo the testing which is the purpose of the probationary period. It should be taken into account that the purpose of the probationary period is to demonstrate that the worker actually has the skills he claims to have.

- (e) During the probationary period, the worker shall have all the rights and obligations relating to the job he is performing as members of the workforce, except those deriving from the dissolution of the employment relationship. This means that the pay, working hours, weekly rest days, annual holidays, the fulfilment of specific obligations at his workstation, the observance of safety and health measures which have been adopted, etc. of a worker undergoing a probationary period shall be absolutely identical to those of any worker already providing his services in the enterprise.
- (f) Although the probationary period is in principle a feature of open-ended contracts, there are no legal provisions preventing probationary periods from being incorporated into fixed-term or temporary contracts. Probationary periods may also be incorporated into part-time contracts, regardless of whether they are open-ended or temporary.
- (g) During the probationary period, the contract of employment may be terminated at the request of either of the two parties. This special feature of the probationary period is explained in more detail below.

**The probationary period and termination of the employment contract**

While the probationary period is in force, the employer and the worker may withdraw from the contract without the need to furnish or provide proof of any reasons, and without their decision giving rise to compensation, unless this had been agreed by collective agreement or in an individual contract of employment. This is perhaps the essence of the probationary period: during this initial phase of the contract of employment the parties are free to terminate the contract.

Article 14 of the Workers' Statute does not mention the need for prior notice, this also

having to be agreed by collective agreement or in an individual contract of employment. But it is obvious that withdrawal from the contract must take place during the probationary period and not after it has expired. The Law stipulates that *"if the probationary period expires without any withdrawal from the contract, the contract shall come into full effect"*. Nor is a special procedure required for giving notice of the withdrawal terminating the contract.

However, this option of terminating the employment contract during the probationary period is, in terms of the employer's power, not absolute and unlimited, as case law has undertaken to specify. It is interesting in this connection to highlight the judgments of the Spanish Constitutional Court of 16 October 1984 and 16 September 1988.

The Constitutional Court stated that *"the reasons for terminating the contract of employment during the probationary period"* will be of little importance in so far as *"they are confined to the freedom recognised by the Legal Order, which obviously does not lead to unconstitutional results"*.

According to our High Court, the employer's power *"is limited in the sense that it cannot be asserted, for reasons unrelated to the worker himself, against a basic right"*.

Such case law implies that termination of a contract of employment is to be considered null and void and result in the immediate reinstatement of the worker if it takes place during the probationary period on one of the grounds of discrimination prohibited in the Constitution or by law (age, sex, origin, marital status, race, social status, religious or political beliefs, membership of trade unions) or violates the worker's basic rights and civil liberties (physical and moral well-being, ideological and religious freedom, the right to respect and personal and family privacy, freedom of expression, the right to assemble, the right to associate, the right to strike, freedom to join a trade union, etc.).

Finally, the abuse of rights also limits the possibility of terminating the contract of employment; Article 7.2 of the Civil Code defines this as “*any act or failure to act which, by the perpetrator’s intention, its purpose or the circumstances in which it is carried out, clearly exceeds the normal limits of the exercising of a right and causes injury to a third party*”. In this sense, the Spanish courts consider the probationary period inappropriate where the parties are already sufficiently acquainted because they have previously concluded other contracts of employment for the performance of identical tasks, e.g. various temporary contracts. A new probationary period after the transfer of an enterprise is also considered improper.

As stated above, once the probationary period has expired without either party withdrawing from the contract, the contract comes into full effect. The period of service performed during the probationary period will be included in the calculation of the worker’s length of service in the enterprise.

## ITALY

*The probationary period* – Lying between public selection procedures for employment and the actual commencement of an employment relationship there is an intervening period known as the *probationary agreement*, during which “*each of the parties may rescind the contract without the need to give notice or pay compensation*” (Article 2096(3) of the Civil Code). In some ways the probationary period may be considered as legal scope for contractual freedom: however prescriptive the statutory scheme for job placement may be considered to be, an employer is assured some *scope* for making a choice. This in itself should put into perspective any talk of an excess of “*dirigisme*” in the job placement scheme.

On the other hand the very existence of a regulatory procedure for job placements in conjunction with other factors such as the limits placed on an employer’s scope for rescinding a contract, raises the problem of contextualising this room for “*manoeuvre*” in terms of its

systematic coherence. For our part it appears obvious that if the freedom to draw up the definitive employment contract were to be exempted from any monitoring in connection with the probationary period this would have the effect of de-legitimising the placement scheme: workers sent by the employment exchange could be formally taken on only then to be immediately sacked following a negative and final assessment of performance during the probationary period. Consequently there is a need to impose a limit on the legality of rescission during probation. There is also a need, as a minimum measure to recognise through the medium of constitutional law that the legality of the termination of employment notified during the probationary period “*can effectively be contested by the worker when it becomes known that owing to the shortcomings of the trial period or for other reasons it was not possible to determine his conduct of professional skills, for which purpose the probationary period was established*”, so that, in any event, the worker who “*considers that and can prove that he successfully completed the trial period as well as the fact that the termination of employment was unlawfully can exert and secure its nullification by a decision of the court*” (Constitutional Court, 22 December 1980, No. 189).

## THE NETHERLANDS

The parties to a contract of employment may agree to a probationary period. The duration must be the same for both parties, with a minimum of two months (one month in the case of employment contracts agreed for less than two years). A probationary period of more than two months is void. During the probationary period both parties may terminate the employment relationship immediately without giving prior notice. The employee has no protection against unfair dismissal. However, according to case law, the employer has to pay compensation if it terminates the contract of employment during a probationary period on a discriminatory ground such as pregnancy.

## FINLAND

The ordinary rules do not apply to probationary employees. The employer and the employee may agree on a probationary (trial) period of a maximum of four months starting from the beginning of the work. If the employer provides specific, work-related training for the employee, lasting for a continuous period for over four months, a trial period of no more than six months may be agreed upon.

The probationary period can be used both when the employment contract is for an indefinite period as well as when it is for a fixed-term. If a fixed-term employment relationship is shorter than eight months, the trial period must not exceed 50 per cent of the duration of the employment period.

Termination during a probationary period is possible without ordinary grounds. Both parties can cancel (summary dismissal) the contract during the probationary period. The employment contract may not, however, be terminated on discriminatory or on grounds which are otherwise inappropriate with regard to the purpose of the probationary period.

If a collective agreement applicable to the employer contains a provision on a probationary period, the employer must inform the employee of the application of this provision at the time the contract is concluded. When the employer has neglected the obligation to inform the employee about the existence of this provision the probationary period cannot justify a termination of the contract

## SWEDEN

Probationary employment is governed by § 6 of the Security of Employment Act (1982:80), which states that:

*“A contract concerning probationary employment of limited duration may also be entered into, provided that the*

*probationary period does not exceed six months.*

*If the employer or the employee does not wish the employment to continue after the expiration of the probationary period, notification to this effect must be given to the other party not later than at the expiration of the probationary period. Upon failure to give such notification, the probationary employment shall become an employment for an indefinite period.*

*Unless otherwise agreed, probationary employment may be terminated before the expiration of the probationary period”.*

Probationary employment differs from other forms of employment of limited duration insofar as the latter, in principle, terminate when the agreed duration of the employment expires, while probationary employment generally converts into employment for an indefinite period when the probationary period expires, if neither the employer nor the employee takes steps to terminate the appointment.

Probationary employees are regarded as being “properly” employed, i.e. all the rules that apply to established employees apply equally to them. The only difference from other forms of employment is that happens after the probationary period expires.

There are no rules requiring that the employee must be tested in order for the form of employment to be allowed. But if in a particular case the form of employment appears to circumvent the Act’s main rule that employment shall be for an indefinite period (see § 4), it is possible to mount a legal challenge and obtain from the court a declaration that the appointment is valid for an indefinite period.

The employer (or the employee) can oppose continuation of the employment without any reason needing to be stated and without the real reasons needing to be examined (this concerns examination of the reasons under the Security

of Employment Act; if it is actually a question, for example, of an infringement of the employee's right of association, or of discrimination, this can be examined in accordance with the rules apply to those matters).

Probationary employment can be terminated at any time during the probationary period, and in any way. There is no special form of notification required for terminating the employment. There is, however, a rule that the employee and the appropriate workers' organisation shall be informed at least two weeks in advance of the notification. In practice therefore, this means that notification concerning termination of the probationary employment must be given at least two weeks in advance, even if this is not a question of a period of notice in the true sense.

The legislative provisions concerning probationary employment can be replaced by collective agreements. There are collective agreements which, for example, limit the probationary period, or lay down detailed conditions specifying when probationary employment is allowed, or prescribe a particular period of notice.

## **UNITED KINGDOM**

UK legislation makes no reference to trial periods other than in specified circumstances in relation to the offer of suitable alternative work in a redundancy situation (see below for a brief description). While an employer and employee are free to argue that special contractual terms will apply to the employment during a probationary or trial period and agree how long that period will be, the fact that an employee is working through that period is not relevant to the application of statutory rights to the employee.

This means that those statutory rights which apply from the beginning of the employment apply regardless of whether the employee is working on probation or trial. Employers and employees are free to agree contractual terms relating to a trial period, provided that they are

at least as favourable as the statutory rights, although they may be less favourable than the contractual rights which apply to the employment after the trial period. For example, an employer may agree to provide longer maternity leave to employees who have completed their probationary period, but the employer cannot provide less than the statutory 26 weeks' leave during that period. Terms in a contract which seek to reduce or remove statutory rights are ineffective because the employee can still rely on them. For example, the employer might obtain the employee's agreement that there would be a probationary period of 6 months (or whatever length they wished) during which a shorter notice period than that required by statute would apply. Nevertheless the employee could still seek to enforce the statutory notice period if dismissed during the probationary period.

Certain statutory employment rights have qualifying periods. These have the effect that the employee, whether on probation or not, does not qualify for the rights in question until he or she has been employed continuously for the length of the period that applies to the right. For example, there is a one year qualifying period for the general right to complain of unfair dismissal to an employment tribunal. Employees with less than one year's service will only have the right to a remedy for being unfairly dismissed if they can show to the employment tribunal that the reason for the dismissal was one of the prohibited reasons for which there is no qualifying period (see para 3.3.1 above for these). Entitlement to a statutory redundancy payment requires two year's continuous employment.

Special arrangements for trial period in relation to the offer of suitable work in a redundancy situation

An employee whose employment is terminated and who would normally be regarded as having been dismissed on grounds of redundancy is not so regarded if he or she accepts a new job with the same employer (or an associated employer or a successor employer who takes over the business), provided that the new job is offered

before the old one ends and starts within four weeks. In such cases the employee can put off the decision whether or not to accept the new job for a four-week trial period – or longer, if agreed in writing between the parties, where retraining is necessary. If at the end of the trial period the employee is still in the job, he or she is regarded as having accepted it. If however

the new job is not a suitable alternative to the old one and the employee (for whatever reason) rejects it before the end of the trial period, he or she is considered to have been redundant from the old date on which the original employment ended. The same applies if the employer terminates the job during the trial period.

## ***APPENDIX II: Tables***

### **Explanatory Memorandum**

Tables 1(a) to 1(c) present the different situations under which a dismissal is considered to be *prohibited or being against certain specified rights* in different Member States. These three tables should be looked at together.

Table 2 present a comparison on the *form of notice* in different Member States.

Table 3 present the *period of notice* in different Member States. In many Member States the notice of disciplinary dismissal may be equivalent to summary dismissal which, by definition, is a dismissal without a period of notice. However, in many, if not all, of the Member States a dismissal on a disciplinary basis may provide for a period of notice if the conduct of the worker is not grave enough to justify a summary dismissal.

Table 4 deals with *the obligation to inform the employee of the ground of the dismissal*. With regard to *the form of justification* this

table should be read together with table 2, since in some Member States there may not be a specific form for the actual notice, but there is a prescribed form for justifying the dismissal at least if the employee so requests.

Tables 5(a) to 5(c) look at the *consequences of a dismissal* with regard to some *financial benefits*. Conceptual differences may create some unjustified impression of diversity since particularly the notice of severance payments may in different Member States be understood in a different way. Thus, in some Member States a wider notion of ‘compensation’ is used instead of severance payments. The situation is more similar than the tables on severance payments imply if a wider notion of ‘financial compensation’ is used. Also the overlaps with social security schemes create difficulties of comparison.

Finally, table 6 presents the situation in different Member States with regard to the *restoration of employment*.

**TABLE 1(a) DISMISSAL CONTRARY TO CERTAIN SPECIFIED RIGHTS**

	<b>MEMBERSHIP OF A TRADE UNION/PARTICIPATION IN TRADE UNION ACTIVITIES</b>	<b>SEEKING, HOLDING OR HAVING HELD OFFICE AS AN EMPLOYEES' REPRESENTATIVE</b>	<b>HAVING ORGANISED OR TAKEN PART IN LAWFUL INDUSTRIAL ACTION</b>	<b>HAVING LODGED A COMPLAINT OR TAKEN PART IN LEGAL PROCEEDINGS AGAINST AN EMPLOYER</b>	<b>RACE, COLOUR, SEX, MARITAL STATUS, SEXUAL ORIENTATION, RELIGION, POLITICAL OPINION, IDEOLOGICAL CONVICTION OR NATIONAL OR SOCIAL ORIGIN</b>	<b>AGE</b>
<b>B</b>	X	X	X	X	X Except political opinion and ideological conviction	
<b>DK</b>		X regulated in the main agreement in between LO and DA and in collective agreements	X		X Except marital status and ideological conviction	X
<b>D</b>	X	X	X	X	X	X
<b>EL</b>	X	X dismissal allowed on specific grounds	X	X	X	X
<b>E</b>	X	X	X	X	X	X
<b>F</b>	X	X	X	X		X case law
<b>IRL</b>	X		X allowed under certain conditions	X	X except ideological conviction	X
<b>I</b>	X	X	X	X	X	X
<b>LUX</b>	X	X		X in sexual harassment cases	X	
<b>NL</b>	X	X			X	
<b>A</b>	X	X	X		X	
<b>P</b>	X	X	X	X	X	X
<b>FIN</b>	X	X a shop steward can only be dismissed if the majority of the employees he or she represents agree	X	X	X	X
<b>S</b>	X	X	X		X	
<b>UK</b>	X	X	X protected under certain conditions	X it is automatically unfair to dismiss an employee for asserting certain statutory rights	X race, colour, sex, marital status, sexual orientation, religion or belief (& political opinion in Northern Ireland)	

**TABLE 1(b) DISMISSAL CONTRARY TO CERTAIN SPECIFIED RIGHTS**

	<b>PREGNANCY</b>	<b>ABSENCE FROM WORK DURING MATERNITY LEAVE</b>	<b>ABSENCE FROM WORK, ACTUAL OR FORESEEABLE, IN ORDER TO CARE FOR DEPENDENTS</b>	<b>ABSENCE FROM WORK AS A CONSEQUENCE OF COMPULSORY MILITARY SERVICE OR OTHER CIVIL OR POLITICAL SERVICE</b>	<b>TEMPORARY ABSENCE FROM WORK BY REASON OF ILLNESS OR ACCIDENT</b>	<b>CONTRACTING BY A PARTICULARLY SERIOUS OR TRANSMISSIBLE DISEASE, APART ALTOGETHER FROM ANY TEMPORARY ABSENCE FROM WORK WHICH IT MAY OCCASION</b>
<b>B</b>	X	X	X	X	X difference between blue and white collar workers	
<b>DK</b>	X	X		X		
<b>D</b>	X consent of the competent authority	X consent of the competent authority		X		
<b>EL</b>	X	X		X		
<b>E</b>	X	X	X	X	X	X
<b>F</b>	X	X		X priority for re-engagement	X in general	X in general
<b>IRL</b>	X					
<b>I</b>	X	X	X	X	X	X
<b>LUX</b>	X	X	X maximum 2 days per year per child		X 26 weeks maximum	
<b>NL</b>	X	X		X	X	
<b>A</b>	X consent of the court	X consent of the court		X consent of the court		
<b>P</b>	X	X	(absence allowed)	X	X	X
<b>FIN</b>	X	X		X	X if not followed by a substantial and permanent deterioration in the employees' working capacities	X
<b>S</b>	X	X	X to a certain extent	X	X	
<b>UK</b>	X	X	X in certain circumstances	X employees are entitled to reinstatement following return from service in military reserve forces, with a right to complaint to a reinstatement committee		

**TABLE 1(c) DISMISSAL CONTRARY TO CERTAIN SPECIFIED RIGHTS**

	<b>ANY OTHER GROUND WHICH IS DISCRIMINATORY OR CONSIDERED AN INFRINGEMENT OF HUMAN RIGHTS OR OF CIVIL LIBERTIES</b>
<b>B</b>	activity as a company physician; absence for educational leave; activity in association with responsibility for the elimination of toxic wastes; introduction of new technologies without having complied with the information obligations; parental leave; paternity leave; disability; election candidates and the elected; breastfeeding mothers
<b>DK</b>	parental and educational leave
<b>D</b>	handicapped and persons on parental leave with the consent of the competent authority
<b>EL</b>	handicapped with the consent of competent authority; parental leave
<b>E</b>	parental leave; female employees who are victims of gender violence exercising their employment rights
<b>F</b>	Handicapped; pregnancy; parental leave
<b>IRL</b>	parental leave; the exercise or contemplated exercise of the right to adoptive or carer's leave; exercising national minimum wage rights
<b>I</b>	marriage; parental leave
<b>LUX</b>	Marriage; refusal by a part-time worker to work over time; parental leave; internal regrading
<b>NL</b>	parental leave
<b>A</b>	activity as a member of a mediation board; leaving the workplace in case of a serious and immediate danger for the employee's life of health; parental leave
<b>P</b>	parental leave
<b>FIN</b>	parental leave; paternity leave; special maternity leave
<b>S</b>	leave for educational purposes; parental leave; disability
<b>UK</b>	in addition to the reasons listed in Tables 1(a) and 1(b), the following are regarded as automatically unfair reasons for dismissal; non membership of a trade union; failure to accept an employer's offer that is designed to move workers away from collectively-agreed terms of employment; parental leave; paternity leave; adoption leave; reasons relating to the right to request flexible working; rights relating to the protection of part-time workers and employees on fixed-term contracts; reasons relating to statutory working-time standards, enforcement of the national minimum wage, and claims for employment-related tax credits; certain reasons concerned with health and safety at work; in the case of certain retail employees, the employee's refusal to work on Sundays; the making by an employee of a 'protected disclosure' under the 'whistleblowing' provisions; jury service; performing the functions of a trustee of an occupational pension scheme; specified acts relating to the statutory recognition and derecognition procedures; exercising the right to be accompanied, or to accompany, at a grievance or disciplinary hearing or hearing relating to flexible working; or in connection with the transfer of an undertaking, unless it is for an 'economic, technical or organisational reason entailing changes in the workforce of either the transferor or transferee'. In addition a 'spent conviction' under the Rehabilitation of Offenders Act 1974 is not a proper ground for dismissal.

**TABLE 2: FORM OF NOTICE**

	<b>NO SPECIFIC FORM REQUIRED</b>	<b>WRITTEN</b>	<b>OTHER</b>	<b>COMMENTS</b>
<b>B</b>		<b>X</b>		
<b>DK</b>				Varies according to the applicable collective agreement and laws
<b>D</b>		<b>X</b>	<b>X</b> active participation of the works council; in case of a disciplinary dismissal prior warning	
<b>EL</b>		<b>X</b>		
<b>E</b>		<b>X</b>	<b>X</b> active participation of the works council in most cases	
<b>F</b>		<b>X</b>		
<b>IRL</b>	<b>X</b> “disciplinary” “capacities/.personal attributes”	<b>X</b> “redundancy”		
<b>I</b>		<b>X</b>	<b>X</b> conciliation procedure	
<b>LUX</b>		<b>X</b>		
<b>NL</b>	<b>X</b>			A permit required
<b>A</b>			<b>X</b> active participation of the works council	
<b>P</b>		<b>X</b>	<b>X</b> active participation of the works council	
<b>FIN</b>	<b>X</b>		<b>X</b> employee must be provided with an opportunity to be heard (personally or through a representative) before employer gives notice	
<b>S</b>		<b>X</b>		
<b>UK</b>	<b>X</b>	<b>X</b> written response on request after one years continuous employment		reason dismissal contemplated by employer required as part of the statutory dismissal and disciplinary procedure

**TABLE 3: PERIOD OF NOTICE**

	NO	YES	LENGTH AND COMMENTS
<b>B</b>	X	X	“disciplinary”: no period of notice; blue collar: 28 or 56 days (in some sectors the period has been increased); white collar; depends on the earnings and the length of employment
<b>DK</b>		X	blue collar: varies according to the applicable collective agreement; white collar; from 14 days up to 6 months
<b>D</b>		X	minimum: 4 weeks or two weeks during an agreed trial period; extension of the period of notice to be given by the employer is dependent on the employee’s length of service and age: up to 7 months; without notice: dismissal for an important reason
<b>EL</b>	X blue collar	X white collar	blue collar: compensation 7-91 days’ pay; white collar; notice or compensation, 1-24 months.
<b>E</b>	X	X	disciplinary: no period of notice. Objective: minimum 30 days. Collective: a consultation period
<b>F</b>		X	1-2 months depending on the length of service; collective agreements or individual contracts may provide for a longer period of notice
<b>IRL</b>		X	“disciplinary”, capacities/personal attributes”: 1-8 weeks, redundancy: 2-8 weeks
<b>I</b>		X	depends on the classification and the length of service
<b>LUX</b>	X	X	“disciplinary”: no period of notice; “capacities/personal attributes”, economic”: 2/4/6months or longer
<b>NL</b>		X	1-26 weeks
<b>A</b>		X	blue collar: 14 days; white collar: 6 weeks-5 months
<b>P</b>	X	X	“disciplinary”: no period of notice (but with a formal procedure which cannot last less than 15 days); “capacities/personal attributes”, “economic”: notice of 60 days (after special procedures which could last two or three weeks)
<b>FIN</b>		X	14 days – 6 months
<b>S</b>		X	1-6 months
<b>UK</b>		X	1-12 weeks depending on the length of service; individual contracts may provide for a longer period

**TABLE 4: OBLIGATION TO INFORM THE EMPLOYEE OF THE GROUND OF THE DISMISSAL**

	NO	YES	FORM OF JUSTIFICATION & COMMENTS
<b>B</b>	X	X	“disciplinary”: yes; “capacities/personal attributes”, “economic”: no
<b>DK</b>	X	X	the situation varies according to the applicable collective agreement and laws
<b>D</b>		X	in the case of dismissal with notice: at the request of the employee; in the case of dismissal without notice: immediate notification at the request of the employee; the works council must be informed of the reason for dismissal
<b>EL</b>	-	-	-
<b>E</b>		X	written, active participation of works council in most cases
<b>F</b>		X	obligation to invite the employee to a meeting where the ground must be informed
<b>IRL</b>		X	if requested by the employee, no form required
<b>I</b>		X	written
<b>LUX</b>		X	“disciplinary”: written; “capacities/personal attributes”, “economic”: if requested by the employee
<b>NL</b>	X		
<b>A</b>	X		active participation by the works council
<b>P</b>		X	written
<b>FIN</b>		X	if requested by the employee; form: written
<b>S</b>		X	if requested by the employee; form: written
<b>UK</b>		X	on request after one year’s continuous employment. Also since 1 October 2004 required as part of the statutory dismissal and disciplinary procedure

**TABLE 5 (a) SEVERANCE PAYMENTS AND UNEMPLOYMENT BENEFITS**

**Termination of the contract of employment at the initiative of the employer on grounds related to the *misconduct* on the part of the employee**

	SEVERANCE PAYMENTS	UNEMPLOYMENT BENEFITS
<b>B</b>	<b>NO</b>	<b>YES</b> (possible disqualification for unemployment benefits)
<b>DK</b>	White collar: <b>YES</b> , 1 month salary (after 12 years' work) to 3 months' salary (after 18 years' work); blue collar: <b>NO</b>	<b>YES</b> waiting period (5 weeks) if the employee has given reason for the dismissal.
<b>D</b>	<b>YES</b> equivalent to up to 18 months' salary depending on the employee's age and length of employment (when contract is dissolved by the Court despite the fact that the dismissal is legally invalid)	<b>YES</b> waiting period 12 weeks if the employee has caused employment wilfully or voluntarily
<b>EL</b>	<b>YES</b> (apart from a few exceptional cases)	<b>YES</b> without a waiting period
<b>E</b>	<b>NO</b> - Justified dismissal on disciplinary grounds (procedente") <b>YES</b> - Void dismissal on disciplinary grounds ("nulo") (reinstatement) - Unjustified dismissal on disciplinary grounds ("improcedente") (reinstatement or compensation of 45 days' salary for each year of service, with a maximum of 42 months' salary)	<b>YES</b>
<b>F</b>	if the employee has been working in the undertaking for at least 2 years, except in case of serious misconduct.	<b>YES</b> without a waiting period
<b>IRL</b>	<b>NO</b>	<b>YES</b> possible disqualification for up to 9 weeks
<b>I</b>	<b>YES</b> in any case of termination of contract: 1 year's salary divided by 13.5 + 1.5% for each year of activity + compensation for inflation	<b>YES</b> without a waiting period
<b>LUX</b>	<b>NO</b> if the misconduct is serious, otherwise <b>YES</b>	<b>NO</b> if the misconduct is serious, otherwise <b>YES</b>
<b>NL</b>	<b>YES</b> the judge fixes compensation where the contract is dissolved by the cantonal court on the ground of change of circumstances	<b>YES</b> without a waiting period
<b>A</b>	2 months' salary (after 3 years' work) to 12 months' salary (after 25 years' work): No severance payments if the period of activity is less than 3 years or if the employee is responsible for the summary dismissals	<b>YES</b> waiting period 4 weeks
<b>P</b>	<b>NO</b>	<b>YES</b> without a waiting period
<b>FIN</b>		<b>YES</b> waiting period ( 90 days in exceptional situations shorter) if the employee has given reasons for the dismissal
<b>S</b>	<b>NO</b>	<b>YES</b> possible disqualification up to 60 days if the employee lost his job because of his own fault
<b>UK</b>	<b>NO</b>	<b>YES</b> possible disqualification for unemployment benefits (up to 26 weeks where misconduct)

**TABLE 5 (b) SEVERANCE PAYMENTS AND UNEMPLOYMENT BENEFITS**

**Dismissal at the initiative of the employer, for reasons related to the *capacities or personal attributes* of the employee, excluding those related to misconduct**

	SEVERANCE PAYMENTS	UNEMPLOYMENT BENEFITS
<b>B</b>	<b>NO</b>	<b>YES</b>
<b>DK</b>	White collar: <b>YES</b> , 1 month salary after 12 years' work to 3 months' salary after 18 years' work); blue collar: <b>NO</b>	<b>YES</b>
<b>D</b>	<b>YES</b> see table 5(a)	<b>YES</b>
<b>EL</b>	<b>YES</b> see table 5(a)	<b>YES</b>
<b>E</b>	<b>YES</b> : justified objective dismissal ("precedente") (compensation of 20 days' salary for each year of service, with a maximum of 12 months' salary). - Void objective dismissal (reinstatement) - Unjustified objective dismissal ("improcedente") (reinstatement or compensation of 45 days' salary for each year of service, with a maximum of 42 months' salary).	<b>YES</b>
<b>F</b>	Compensation if the employee has been working in the undertaking for at least 2 years, except in the case of serious misconduct	<b>YES</b>
<b>IRL</b>	<b>NO</b>	<b>YES</b> possible disqualification from unemployment payments for up to 9 weeks
<b>I</b>	<b>YES</b> see table 5(a)	<b>YES</b>
<b>LUX</b>	<b>YES</b> except in the case of dismissal on important grounds, if the employee has completed at least 5 years' service and if he is not yet entitled to a retirement pension	<b>NO</b>
<b>NL</b>	<b>YES</b> see table 5(a)	<b>YES</b>
<b>A</b>	See table 5(a)	<b>YES</b>
<b>P</b>	<b>YES</b> 1 month's basic remuneration for each complete year of service, with a minimum of 3 months	<b>YES</b>
<b>FIN</b>	<b>NO</b>	<b>YES</b> a waiting period (90 days does not apply in cases of sickness)
<b>S</b>	<b>NO</b>	<b>YES</b>
<b>UK</b>	<b>NO</b>	<b>YES</b>

**TABLE 5 (c) SEVERANCE PAYMENTS AND UNEMPLOYMENT BENEFITS****Dismissal for economic reasons**

	<b>SEVERANCE PAYMENTS</b>	<b>UNEMPLOYMENT BENEFITS</b>
<b>B</b>	<b>NO</b> specific severance payments	<b>YES</b>
<b>DK</b>	See table 5(b)	<b>YES</b>
<b>D</b>	in undertakings with more than 20 employees the works council can ask for a social plan which can provide for severance payments	<b>YES</b>
<b>EL</b>	<b>YES</b> the payment of compensation is a condition for the validity of the dismissal	<b>YES</b>
<b>E</b>	<b>YES</b> 20 days' salary of each year of activity; max, 12 months' salary; the payment of compensation is a condition for the validity of the dismissal	<b>YES</b>
<b>F</b>	See table 5(b)	<b>YES</b>
<b>IRL</b>	in certain conditions an employee is entitled to a statutory lump-sum payment calculated as follows: two weeks pay per year of service plus one week's pay (subject to a ceiling on annual reckonable earnings of €31,200)	<b>YES</b>
<b>I</b>	<b>YES</b> see table 5(b)	<b>YES</b>
<b>LU</b> <b>X</b>	<b>YES</b> see table 5(b)	<b>YES</b>
<b>NL</b>	If the contract is dissolved by cantonal court on the ground of change of circumstances, the judge will fix compensation	<b>YES</b>
<b>A</b>	See table 5(a)	<b>YES</b>
<b>P</b>	<b>YES</b> 1 month's basic salary for each complete year of service with a minimum of 3 months	<b>YES</b>
<b>FIN</b>	<b>NO</b>	<b>YES</b>
<b>S</b>	no statutory severance payment; but collective agreements provide for such schemes which are all administrated by joint bodies of the social partners	<b>YES</b>
<b>UK</b>	<b>YES</b> lump sum based on age, earnings, and length of service provided that the reason falls within the definition of redundancy and employee has two years continuous employment.	<b>YES</b>

**TABLE 6: RESTORATION OF EMPLOYMENT**

	<b>TERMINATION OF THE CONTRACT ON THE INITIATIVE OF EMPLOYER ON GROUNDS RELATED TO <i>MISCONDUCT</i></b>	<b>TERMINATION OF THE CONTRACT ON THE INITIATIVE OF THE EMPLOYER FOR REASONS RELATED TO THE <i>CAPACITIES OR PERSONAL ATTRIBUTES</i> OF THE EMPLOYEE EXCLUDING THOSE RELATED TO <i>MISCONDUCT</i></b>	<b>DISMISSAL FOR ECONOMIC REASONS</b>
<b>B</b>	no reinstatement apart from employees' representative and members of the safety council.	idem	idem
<b>DK</b>	the main agreement between LO and DA provides for reinstatement if dismissal board does not find that cooperation between employer and employee has become impossible.	idem	main agreement between LO and DA provides for reinstatement unless the Dismissal Board has found that co-operation between employer and employee has become impossible; if cooperation has become impossible, there will be the option for a financial compensation of up to 52 weeks; in the case of violation of the Act on protection against dismissal due to organisational matters (membership/non-membership of a union or other organisation) the dismissal shall be set aside if the employee puts forward a claim to this effect; if no such claim is made, the employee may be granted compensation corresponding to at least 1 month's wage or salary; the compensation may not exceed 24 months' wage or salary
<b>D</b>	in the case of a dismissal which is invalid, the employment relationship continues to exist	idem	idem
<b>EL</b>	if the Court declares the dismissal void, the employer is obliged to reinstate.	idem	idem
<b>E</b>	if fundamental rights of the employee are violated. In the case of wrongful dismissal the employer may opt either for reinstatement or compensation. If the dismissed employee is	idem	in case of nullity reinstatement is automatic; in other cases it depends on the decision of the public authority; if the

	a representative it is up to him or her to choose.		employer does not comply with the obligation to reinstate a compensation is to be fixed by the Court: 45 day's salary for each year of work
<b>F</b>	the judge can impose reinstatement in certain cases (violation of public liberties, fundamental rights, etc...); if reinstatement is difficult the judge may fix a compensation sum instead of reinstatement there is no compensation: employer's agreement is not required for reinstatement.	idem	idem
<b>IRL</b>	the adjudicative body may award reinstatement, reengagement or financial compensation; in the case of reinstatement there is no compensation above payment of salary; employer's agreement is not required for reinstatement.	idem	idem
<b>I</b>	depends on the threshold of the undertaking, the judge may declare a dismissal void and order reinstatement and payment of compensation, or the employer can opt for reinstatement or pay compensation.	idem	idem
<b>LUX</b>	in the case of wrongful dismissal the Court can propose reinstatement; reinstatement depends always on the employer's consent; where the dismissal is void the employee is reinstated.	idem	idem except in the case of collective dismissal where the dismissals are void for breach of the legal requirements
<b>NL</b>	in the case of manifestly unreasonable dismissal the employee may demand reinstatement; this claim can always be replaced by a lump sum payment fixed by the judge.	idem	idem
<b>A</b>	no reinstatement as such but the employment relationship continues if dismissal is declared void before the end of the notice period, or starts again if this declaration is made after the end of the notice period.	idem	idem
<b>P</b>	if the court declares the dismissal wrongful, either because of the absence of good cause or because of procedural defects, the employee has the right to be reinstated and paid the salary he or she would have received between the dismissal and the decision. Instead of reinstatement the employee can choose	idem	idem

	compensation assessed at between 15 and 45 days of salary for each year of service. If the employee chooses reinstatement the employer can oppose it citing harmful consequences for the functioning of the enterprise. If the court decides against reinstatement, the employee is entitled to receive compensation at double the normal level.		
<b>FIN</b>	no reinstatement without the employer's consent; no specific compensation – the compensation for unlawful dismissal covers everything; reinstatement or non-reinstatement may be taken into account when considering the amount.	idem	
<b>S</b>	no reinstatement as such; the employee remains in employment until the dispute is finally settled by the Court; the Court may, however, at the request of the employer, issue an interlocutory injunction to the opposite effect; if the Court finds that the dismissal has been unlawful the employer may still opt to end the employment relationship but he remains liable to pay additional damages.	idem	priority for re-employment within nine months of the dismissal
<b>UK</b>	Employment tribunal may order reinstatement, re-engagement or compensation (basic award up to £8,400 and compensatory award, to reflect the employee's loss, of maximum £56,800, although the compensatory award may be increased by up to 50% if the employer fails to complete an applicable statutory dismissal and disciplinary procedure). Note, however that even if the employment tribunal awards reinstatement or re-engagement, if the employer refuses to re-employ the employee the remedy is one of additional compensation; the employer cannot, ultimately, be required to re-employ the dismissed employee.	idem	the remedies apply where dismissal is unfair



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