The regulation of working conditions in the Member States of the European Union

Volume 1

Industrial relations & industrial change

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Industrial relations and industrial change

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TABLES

LIST OF ACRONYMS

ACAS	Advisory, Conciliation and Arbitration Service
CGT	Confédération Générale des Travailleurs
EC	European Communities
EEC	European Economic Community
EIRR	European Industrial Relations Review and Report
INEM	Institut National de l'Emploi
SMIC	Salaire Minimum Interprofessionnel de Croissance
TUPE	Transfer of Undertakings (Protection of Employment)
UGT	Union General de Trabajadores
UN	United Nations

PART I
THE REGULATION OF INDIVIDUAL EMPLOYMENT RELATIONSHIPS

TITLE I
THE EMPLOYMENT RELATIONSHIP AND THE PARTIES

CHAPTER 1
THE CONTRACT OF EMPLOYMENT

a) General Definitions

The contract of employment forms the basis of the employment relationship in each of the fifteen Member States.

In eight Member States – **Belgium, Germany, Greece, the Netherlands, Austria, Portugal, Finland** and the **United Kingdom** – a definition of the contract of employment is contained in the *Civil Code* or in employment legislation.

In **Denmark, Spain, France, Ireland, Italy, Luxembourg,** and **Sweden** there is no precise definition of the contract of employment, although in Ireland statutory definitions exist for specific purposes.

A feature common to all Member States is that the label given to the employment relationship is not conclusive. The parties to the contract cannot define the legal nature of their relationship. The courts, case law and jurisprudence play a key role in defining and interpreting the contract of employment.

The conventional elements in the definition of contract of employment common to all Member States are: agreement; work performance, length of time, remuneration and, most importantly, dependency, subordination and control. The latter issues are the subject of increasingly flexible interpretation by the courts.

In general it appears that the legal concept of contract of employment in continental Member States is broader and more comprehensive than that in **Ireland** and the **United Kingdom**, where the contract of employment is equivalent to the common law *"contract of service or of apprenticeship"*.

In the **United Kingdom,** for instance, about one third of those in employment – such as *"casual"* workers and temporary workers supplied through an intermediary – are excluded from statutory employment rights.

According to the *Civil Code* in **Belgium** the contract of employment is a contract to perform a service in which the employee is obliged to work under the command, authority and control of the employer. Legislation, however, lacks precise definitions of these concepts. Many court cases have arisen as a consequence. The *Labour Act*, as amended, has restricted the definition to that of authority only.

In **Germany** it is held in the *Civil Code* that under the service contract the party undertaking to perform a service shall perform that service and the other party to the service contract shall pay the agreed remuneration.

For a considerable time the notion of personal subordination was a valid criterion in helping to define the contract of employment. Nowadays, however, as greater numbers of skilled individuals enjoy increased autonomy in deciding how and when to carry out their work, so the *Federal Labour Court* has turned the notion of personal subordination into a very complex issue consisting of a wide range of elements. Some factors which now help to define the status of an *"employee"* include:

- whether the enterprise expects the individual to be available at all times to accept new tasks;
- whether the individual is unable to refuse tasks offered by the enterprise;
- whether the individual is to a certain extent integrated into the organisational structure of the enterprise;
- and what length of time is required by the individual to perform tasks for an enterprise, etc.

The notion of the contract of employment in **Greece** is found in the *Civil Code*. According to *Article 648*, the contract of employment obliges the employee to provide the work required by his employer for a definite or indefinite period; the latter is obliged to pay the agreed wages. The issue of personal dependence is of importance in helping to define a contract of employment. Although jurisprudence is not always precise, personal dependence exists when an employee is obliged to follow the employer's instructions and to accept his control as regard the working time and the workplace.

In the *Civil Code* of the **Netherlands** it is held (in *Article 1637a*) that: *"the contract of employment is an agreement under which one party, the employee, undertakes to perform work in the service of the other party, the employer, at specified times in return for remuneration"*.

The words *"in service of"* reflect the idea that the work must be done in subordination or under the authority of the employer which has the power to unilaterally issue binding rules concerning the way in which work is to be performed.

In **Portugal** a legal definition is found in *Article 1* of the *Decree-Law of 1969*, and also in *Article 1152* of the *Civil Code of 1966*, which stipulates that a contract of employment is a contract by virtue of which a person is obliged, in exchange for a remuneration, to supply his intellectual or manual labour to another person, under the latter's authority and direction. Although essential to the contract of employment, the notion of subordination can be mitigated in the case of an employee whose profession requires a high degree of technical autonomy.

In **Finland** the concept of employment contract is defined in the Employment Contracts Act (No 320/1970, §1). This states that an employment contract is an agreement whereby one party, the employee, gives an undertaking to the other party, the employer, to perform work for remuneration or other consideration under the latter's direction and supervision. Even if such consideration has not been explicitly

laid down, but it is not made clear that the work is to be done without consideration, compensation will be paid for the work and the Employment Contracts Act will apply. The concepts of employee and employer, on the other hand, are not defined in the Employment Contracts Act.

In **Sweden** there is no definition of the contract of employment other than a general one. The only fundamental requirements are that the term shall relate to a voluntary agreement on the exchange of work for pay. These agreements on the performance of work may be a contract of employment or a contract of assignment. In the latter case the person undertaking the assignment is employed on a more freelance basis but it is difficult to know where to draw the line. The labour law provisions cover the contract of employment and the parties to such a contract, namely the employer and the employee. Refer to *Chapter 2a) i)* below for further information on the concept of employee and the definition thereof.

In the **United Kingdom** the contract of employment is defined in legislation as being equivalent to the *Common Law*: *"contract of service or of apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing"*.

This involves two elements: a *"contract"* and *"service"*. In order to establish the first requirement, the courts insist on *"mutuality of obligation"*. The second requirement of *"service"* was originally based on the notion of *"control"* or subordination of the worker to the demands of the employer as to how the work is to be done. This criterion has, however, proved to be inadequate in many modern cases and so the courts have moved towards more complex mixed or multiple tests, in which a variety of factors are balanced.

The starting point of this approach is to ask whether there is sufficient control to make the worker an *"employee"* and then to ask whether the provisions of the contract are consistent with it being a contract of service. The most significant inconsistency with a *"contract of service"* is an entrepreneurial element, i.e. whether the worker is *"in business on his or her own account"*.

In **Denmark** there is no statutory definition, but it is usual to regard a contract as a contract of employment when a person (the worker or the employee) who is subject to the instructions of another (the employer) undertakes to do work in return for some kind of remuneration.

No legal definition of the contract of employment is to be found in the **Spanish** legal code. The *Workers' Statute Act of 1980* identifies the subjects to whom the said Act applies, i.e. those workers who voluntarily offer their services in exchange for payment, within the organisation and under the management of another person, whether natural or legal and whether called employer or proprietor.

The work must be performed under conditions of dependence or subordination. Case law repeatedly refers to this clause and considers it an *"external sign"* that a working relationship exists (which in turn is identified by various signs such as that of keeping fixed working hours, disciplinary control, *"technical"* dependence in the performance of the work, etc), although the concept of dependence is becoming increasingly flexible.

According to the definition in the *Workers' Statute*, the determining factor is incorporation into an outside organisation. The employee is incorporated into an organisation planned by someone else and performs work under the direction of the leader of the said organisation, integrating into the organisation's *"directive and disciplinary"* circle.

In **France** neither the *Civil Code* nor the labour legislation provides a definition of the contract of employment. There is, however, a large consensus on its definition, i.e. an agreement under which a person undertakes to perform work personally in the service of another party under the authority of the latter and in return for remuneration. The *Court of Cassation* has encouraged a broad interpretation of the concept of subordination. However, a recent law (1994) has endeavoured to limit this broad interpretation by establishing that a person officially declared as a self-employed worker is presumed not to be a subordinate worker.

In **Ireland** there is no overall legal definition of a contract of employment. There are, however, some statutory definitions, e.g. in the *Unfair Dismissals Act 1977*, the definition is as follows: *"Contract of employment means a contract of service or apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing"*.

The contract of employment implies a generally more long-term, exclusive relationship in which the employee is subject to reasonable instructions. Under the common law the test of what constitutes a contract of employment was seen to be the degree of control held by the employer over the employee.

Nowadays it is generally felt that a contract of employment is determined by a package of criteria including, e.g. the payment by the employer of pay and social insurance contributions, the degree of control, and what can be ascertained about the true intention of the parties as to their relationship.

In **Italian** labour law there is no general definition of the contract of employment. There exists an outdated Royal Decree (1924) which relates exclusively to those workers classified as white-collar workers and which states that: *"the contract of private employment is that whereby a company or private individual, as persons or bodies in charge of an enterprise, recruit for the service of the enterprise itself, normally for an unspecified duration, the professional activity of the other party to the contract, whose duty is to collaborate through the performance of non-manual tasks within a given hierarchical structure; this does not apply to the performance of purely manual tasks"*.

The *Civil Code* of 1942 did not reiterate that definition nor did it replace it with another. The basic definition laid down in the *Civil Code* does not refer to a labour contract but to a "subordinate employee", considered as being a worker *"who has engaged himself to cooperate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur"*.

Absolute criteria to define subordination and thus qualify the *"labour relationship"* do not exist. In practice the courts use a combination of criteria. On the whole it can be said that the courts have given a rather broad interpretation to the concept of subordination in order to assure protective labour legislation to a wide range of workers.

More recently the qualifying criterion of subordination has shown growing signs of weakness and has proved to be inadequate, in particular for the purpose of clearly defining the legal nature of the work carried out by new categories of workers. There is a trend towards ensuring a certain stock of minimum legal guarantees for these new groups of workers, irrespective of whether their services may be qualified as forms of self-employment or subordinate employment.

In **Luxembourg**, legislation, case law and collective agreements have progressively substituted the notion of service contract – which appears in the *Civil Code* and the first labour law acts – by the notion of contract of employment.

In the absence of a legal definition of the contract of employment in the *Civil Code*, the courts resort to the criterion of legal subordination, i.e. the employee should be under the authority of the employer.

In **Austria** the contract of employment is defined in the Civil Code as arising when *"a person commits for a certain time to the performance of services for another person"*. Legal authors interpret this legal formula as meaning that the commitment to perform the service essentially involves a situation of personal subordination; according to case law, this situation particularly obtains when the employee is subject to the employer's orders as regards place of work, hours of work and work-related behaviour and is subject to the employer's control and disciplinary authority.

b) Capacity to Contract

The rules governing the capacity to contract are drawn in a number of Member States from the *Civil Code*. Other Member States have introduced more specific regulations, particularly for minors and, in certain cases, married women, spouses and elderly persons.

i) Minors

The full capacity to contract is reached in all Member States at the age of 18. Young people above the minimum age to work but under 18 years of age have a limited capacity to contract in all Member States. In general, minors can conclude a contract of employment providing that they have the explicit or tacit consent of their parents or guardians.

In **Belgium**, minors (under 18 years of age) may conclude a contract of employment provided that they have the explicit or tacit consent of their father, mother or guardian. If this consent is refused, the youth tribunal can grant authorisation. The employer can pay a salary direct to the minor, unless the father, mother or guardian opposes such payment.

In **Denmark** a minor who has reached the age of 15 years has some capacity to enter into a contract of employment.

According to the *Civil Code*, in **Germany** persons below the age of 18 need the consent of their legal representatives to conclude a contract of employment. Once this consent is given, a minor is empowered to enter into all legal commitments related to the employment relationship but it is up to the legal representatives to revoke or limit this authorisation.

In **Greece** all persons above the age of 18 are able to conclude an individual contract of employment. Minors above the age of 15 can conclude a contract of employment with the consent of the father or guardian.

In **Spain**, minors of under 18 years of age who have been emancipated (either by marriage with parental permission for those over the age of 16, or by judicial concession also for those above the age of 16) have full capacity to work, as do minors under 18 but over 16 years of age who, although not emancipated, live independently with the consent of their parents or guardians, or with the authorisation of the person or institution into whose charge they have been placed.

Minors with only a limited capacity to act may also conclude a contract of employment with the express or tacit authorisation of their legal representative. A minor who is authorised to sign a contract of employment is equally deemed to be authorised to *"exercise the rights and comply with the obligations deriving from the contract and to terminate it"*.

In **France**, minors (under 18 years of age) may enter a contract of employment only with the consent of their parents or legal representative; this consent may be tacit and result from the fact that the contract is executed with the knowledge of the parents or legal representative. An emancipated minor may enter a contract of employment alone.

In **Ireland** persons under the age of 18 have only limited capacity to contract.

In **Italy** the age of majority is 18. An *Act of March 1975* has provided that where the minimum age of employment is lower than 18, the minor can also exercise the rights and actions deriving from a labour relationship.

In **Luxembourg** the *Civil Code* fixes the age of majority at 18 years.

In the **Netherlands** a minor (under the age of 18) is competent to conclude a contract of employment as an employee if authorised (either orally or in writing) to do so by his or her legal representative. Unless explicitly precluded by conditions in the authorisation, a minor shall be deemed equivalent to an adult in everything that has a bearing on the contract of employment concluded as a result of the authorisation. In the absence of any such requirement in the authorisation, however, the pecuniary remuneration due to a minor shall be paid to the legal representative if the latter opposes the payment of the remuneration to the minor in writing.

A minor shall not act in legal matters without the assistance of his or her legal representative unless it is clear to the court that the legal representative is incapable of expressing his opinion.

A minor who has concluded a contract of employment without authorisation and performed work for an employer for four weeks without the legal representative objecting shall be deemed to have been authorised orally by the legal representative to conclude a contract of employment.

In **Austria**, minors of 14 years of age and over may in theory conclude a valid contract of employment, except in the case an apprenticeship or vocational training relationship, which cannot be concluded without the approval of the legal representative. The contract of employment may be terminated prematurely by the legal representative if there are pressing reasons for doing so. In reality, however, the

Children and Young Persons Employment Act imposes prohibitions or restrictions on the employment of young persons below 18 years of age in various sectors of activity.

In **Portugal**, a law of 1991 (*Decree-Law No 396/91 of 16.10.91*) allows minors aged 16 and 17 who have completed their compulsory schooling (9 years) to conclude a contract of employment, provided that their legal representatives (parents or guardians) do not object in writing. The same law allows minors aged 14 and 15 (16 with effect from 1 January 1997) to conclude a contract of employment provided the following three conditions are fulfilled: the work must be light work which poses no threat to their health and their physical and mental development; they must have completed their compulsory schooling; and they must have the written authorisation of their legal representatives. If they have not completed their compulsory schooling, minors may not take up work until they reach the age of eligibility; they must also attend school, have the written authorisation of their legal representatives, and not be required to work hours that would jeopardise their regular attendance at school.

In **Finland** minors over the age of 15 may, in accordance with an explicit provision of the Employment Contracts Act, enter into, terminate and cancel an employment contract themselves. For minors under the age of 15, the legal guardian can in certain cases enter into an employment contract on their behalf or give them permission to enter into a contract themselves.

In **Sweden** minors, in other words persons under the age of 18, may only conclude a contract of employment if they have the permission of their guardian. A minor may, however, hand in his notice and, if aged 16 or over, enter new similar employment without the renewed agreement of the guardian. Both the child and the guardian are entitled to give notice on a contract with immediate effect when it is a matter of the child's health, development or schooling. Legislation on the working environment restricts further the scope for employing workers under the age of 18. The principal rule is that a minor may not be employed if under 16 years of age and under no circumstances before the minor has completed his compulsory schooling. Exceptions apply in the case of light work of no risk to health or schooling, for example predominantly holiday work. The age limit is set at 13 but with a margin for exemptions. Special local authority regulations apply to such work. A failure to comply with the working environment regulations does not, however, imply that the contract of employment is voided.

TABLE 1: CAPACITY TO CONTRACT – GENERAL MINIMUM AGE

Member State	General Minimum Age
Sweden	18
Spain, France, Portugal, UK	16
Belgium, Denmark, Germany Greece, Ireland, Italy, Luxembourg, Netherlands, Finland	15
Austria	14

In the **United Kingdom** persons under the age of 18 (minors) have limited capacity to contract. The general rule is that he or she is bound only if the obligations are on the whole beneficial to him or her. In practice, this is easily proved by the existence of financial advantages to the minor.

ii) Spouses

Married women have the full legal capacity to conclude a contract of employment but in **Belgium** and in **Luxembourg** both husband and wife can enter an action before the civil tribunal if either thinks that the chosen profession of the other is seriously prejudicing them or their children morally or materially.

In the **Netherlands** a contract of employment concluded between spouses shall be null and void but this prohibition can be easily avoided if one of the spouses is acting under the disguise of a legal person.

iii) Elderly persons

In **Spain** the *Workers' Statute* does not specify a maximum working age, as the *Constitutional Court* has declared that it is not possible to specify a maximum age applicable across the board unconditionally. The *Constitutional Court* does however permit the *Workers' Statute* to use compulsory retirement as an instrument in its policy of sharing work between the older and younger generations. The law thus authorises the government to fix the maximum age for working and for terminating the employment contract. This fixing of the maximum age is also conditional upon the availability of social security on the one hand and the labour market on the other. In every case, care must be taken to ensure that the worker ousted from the labour market has paid sufficient social security contributions for entitlement to the corresponding retirement pension. The Government has not yet used this right to fix the maximum working age. The *Workers' Statute* also authorises the compulsory retirement age to be fixed by collective bargaining, with the same provisions as above regarding social security contributions; in this respect, it is fairly common for collective agreements to feature the type of clauses that are ordinarily found in company restructuring plans, in the context of a commitment to maintain either the general volume of employment or the posts remaining.

c) Consent, Object and Cause

Consent must be reached in accordance with civil or common law rules. Violence, deceit and error can be grounds for annulment.

The object of the contract of employment (the performance of work) and its cause (the obligations of both parties) must be possible and legally permissible, i.e. in accordance with rules of law, public order and morality.

The contract is rendered void from the moment of declaration of nullity. Thus, in most Member States, for the duration of the factual employment, the relationship is treated as if there were a valid contract. Only future employment is affected by nullity.

d) Form and Proof of Contract

In principle the contract of employment has no set form and can be concluded in writing, orally or even tacitly. This situation is common to all Member States.

However, under *EC Directive 91/533* workers are entitled to written documentation of the main working conditions which are applicable to them.

In the **Netherlands** this directive has been implemented by the insertion of *Art. 1637f* in the *Civil Code*.

In addition national legislation or collective agreements may require specific types of contracts of employment to be in writing.

Part-time, fixed-term, temporary, apprenticeship contracts and those for seamen, commercial travellers or civil aircraft employees are often required in writing. Examples can be found in **Belgium, Greece, Spain, France, Greece, Italy, Luxembourg, Austria, Portugal**, and the **United Kingdom**.

As regards proof of contract of employment, the general rules of proof apply.

In **Belgium** a written form is necessary as regards e.g. part-time contracts, fixed term contracts, contracts for a precisely indicated job, contracts for replacement, apprenticeship-contracts and contracts for professional sportsmen.

In **Denmark** the implementation of *Council Directive 91/533/EEC* on an employer's obligation to inform employees of the conditions applicable to the contract of employment or employment relationship in 1993 through the adoption of an act requiring the employer to provide information on the issues mentioned in the directive resulted in the introduction of some requirements of written form which had not existed previously.

In **Germany** although there is no set form for contracts of employment, a written statement of the contents of the contract is required by statute if no written contract exists. This statement has to be made available to the employee at least one month after the beginning of the employment or one month after the terms of employment have changed. The particulars that have to be laid down are:
name and address of the contractors;

- the date of the commencement of employment;
- in case of fixed term contracts, the duration of the employment;
- the location of employment, or in case the employee will not be working at more than one location, the notice that this can be requested;
- a description of the job content;
- the rate or method of calculation of the remuneration;
- the working time;
- the duration of the annual holidays;
- the period of notice to terminate the contract:
- a general remark on the collective agreements and work agreements applicable.

This written statement merely testifies to the main terms of employment between the parties. It does not actually constitute the contract of employment as such.

In **Greece** contracts of employment concluded between the State or legal persons under public law and their employees are put into writing in the same way as contracts for seamen, fixed-term contracts and part-time contracts.

Recently, *Presidential Decree 156/1994*, which harmonised Greek law with *Directive 91/533/EEC*, has imposed on employers the obligation to communicate in writing to their employees the main conditions of their contract and their employment relationship within the two months following the conclusion of the employment contract. The details to be communicated are the following: identities of the parties, location of employment, post or qualification of the employee, job category, job content, date of commencement of employment and duration of employment, annual holidays, rate and frequency of remuneration, the collective agreement applicable and, finally, the conditions governing termination of the employment contract and the rate of severance pay.

An employer who fails to comply with the obligations imposed by *Presidential Decree 156/1994* can be fined by the Labour Inspector. However, the contract of employment is not rendered null and void or irregular in any other respect.

In **Spain**, the contract must be in writing in almost all cases. It is obligatory in the following cases: fixed-term contracts not exceeding four weeks, contracts relating to a specific task or service, apprenticeship contracts, part-time contracts, homeworking contracts, and contracts for workers recruited in Spain to work for Spanish companies abroad. In the absence of a written contract in the cases enumerated, the employment relationship is deemed to relate to a full-time activity of indefinite duration, except where there is proof to the contrary confirming the temporary nature or part-time nature of the services. In addition to these specific cases, each party to a contract of employment may demand of the other party that the contract be in writing. Proof of contract, generally, is the written contractual documentation. Where the written form is not compulsory, the law stipulates that any relationship in which there is an exchange of activity and of payment is assumed to be an employment relationship. The employer must provide the employees' legal representation with a *"basic copy" (copia básica)* of all contracts which must be in written form, with the exception of contracts relating to special employment relationships of senior management which must be notified to the legal representation.

In **France**, numerous texts relating to particular categories of employment contract (fixed-term contracts, part-time contracts, linked work/training contracts, etc.) require that the contract be concluded in writing.

However, virtually the only contract that is rendered null and void if not concluded in writing is the apprenticeship contract. In the other cases, the penalty is often submission of the contract to the general rules applicable to contracts of employment.

In addition, many collective agreements require the employer to confirm the hiring of an employee in writing.

In **Ireland** although contracts of employment do not need to be in writing, there is a statutory device to make available to employees a written statement of the contract's contents. This was originally contained in the *Minimum Notice and Terms of Employment Act 1977*, and is now governed by the *Terms of Employment (Information) Act 1994* (which implements *Directive 91/533/EEC*), which provides that an

employer must *"not later than two months after the commencement of an employee's employment with that employer"* furnish to that employee a written statement containing a number of particulars relating to the employee's contract. These particulars are:

- full names of employer and employee;
- the employer's address;
- details of the place or places of work;
- the job title;
- the date of commencement of employment, and in the case of a temporary or fixed term contract, its duration;
- the rate or method of calculation of remuneration;
- the intervals between payment of remuneration;
- any terms or conditions relating to hours of work or overtime;
- any terms or conditions relating to paid leave;
- incapacity for work due to sickness or injury and sick pay;
- pensions and pension schemes;
- the period of notice which the employee is obliged to give and is entitled to receive, or (if the contract of employment is for a fixed term) the date on which the contract expires;
- details of any collective agreements which directly affect the employee's terms and conditions of employment.

These *"particulars"* must also be made available to every employee within two months of the employee asking for them; an employee may ask for such particulars as often as required. The Act further states that the employer may, in lieu of specifying the particulars listed above, refer the employee to *"provisions of statutes or instruments made under statute or of any other laws or of any administrative provisions or collective agreements governing those particulars which the employee has reasonable opportunities of reading during the course of the employee's employment, or which is reasonably accessible to the employee in some other way"*.

This written statement only evidences the main terms of employment between the parties. The particulars set out in this statement do not actually constitute the contract of employment as such but rather merely what the employer claims are the terms of the contract.

In **Italy** the written form of the contract is normally requested for what are known as atypical employment relationships (part-time, fixed term, work/training employment).

National collective agreements generally require that an employer provides the employee with a written statement specifying the date when the employment is to begin, the exact place of work, the job position according to the classification scale agreed collectively, the remuneration, etc.

Recently *Article 2, subsection 3* of the *Decree Law of 4th August 1995, No 326*, provided that, where no collective agreement had been applied, the employer, when hiring, has to deliver a signed declaration with the indication of the length of the holidays, pay timing, the terms of notice for dismissal and the normal, daily or weekly length of working hours. This *Law Decree* can be considered a partial but delayed form of incorporating the *Directive of 14th October 1991, No 91/533*, concerning the obligation of the employer to inform the workers of the conditions applicable to the contract or the employment relationship.

In **Luxembourg** written contracts are required for both fixed-term and indefinite duration employment.

In the **Netherlands** in exceptional cases legislation or a collective agreement may provide that the contract of employment or specific clauses must be in writing.

In **Austria,** the written form is compulsory only as an exception, e.g. for apprenticeship contracts and manpower supply contracts. In addition, certain clauses in contracts of employment must be drafted in writing, for example agreements on the surrender to the employer of any future job-related inventions, or sureties to safeguard the employer's entitlement to claim damages against the employee.

In **Portugal**, a written contract is required for fixed-term employment, temporary (agency) employment and apprenticeship employment, and also for seamen, occupational physicians, professional sportspersons, professional actors and foreigners.

In **Finland** entering into a contract is not subject to observance of any particular form, but as a rule the employer must, within two months of the start of the employment relationship, give the employee a written description of the main conditions of employment.

In **Sweden** there is no general requirement under law with regard to the form that a contract of employment must take. It can be drawn up virtually in any format. With regard to the employment of seamen, however, there is a requirement that the contract must be in writing but a failure to comply with this requirement does not mean that the contract of employment is voided. It is not unusual in collective agreements for there to be a requirement that provisions must be in writing but a failure to comply with this requirement does not mean in any way that the contract of employment is voided.

In the **United Kingdom** there are only two types of employment relationship in which writing is essential to the effectiveness of the contract: for the engagement of a seaman on a ship registered in the UK; and for a deed of apprenticeship.

The employer is obliged to provide every employee (within two months of the commencement of employment) with a written statement reflecting the main terms of employment.

It must:

- identify the parties;
- specify the day on which the employment begins;
- state the date on which the employee's period of continuous employment begins.

It must also provide particulars of certain terms of employment:

- the scale or rate of remuneration, or the method of calculating remuneration;
- the intervals at which remuneration is paid;
- any terms or conditions relating to hours of work (including any terms or conditions relating to normal working hours);
- any terms and conditions relating to:
  - entitlement to holidays, including public holidays,

and holiday pay (sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);
  - incapacity for work due to sickness or injury, including provisions for sick pay;
  - pensions and pension schemes;
- the length of notice of termination which the employee is obliged to give and is entitled to receive, stating the date when the contract expires if the contract is for a fixed term;
- the title of the job which the employee is to do or a brief description of the work for which he or she is employed;
- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;
- any collective agreements which directly affect the terms and conditions of employment including, where the employer is not a party, the persons by whom they were made;
- where the employee is required to work outside the United Kingdom for more than one month:
  - the period for which he or she is to work outside the United Kingdom;
  - the currency in which remuneration is to be paid while he or she is working outside the United Kingdom;
  - any additional remuneration and benefits by reason of being required to work outside the United Kingdom;
  - any terms and conditions relating to his or her return to the United Kingdom.

Written particulars need not be given to certain mariners, or to employees engaged to work wholly or mainly outside Great Britain, unless the employee ordinarily works wholly or mainly outside Great Britain and the work outside Great Britain is for the same employer, or the law which governs his or her contract of employment is the law of England and Wales or Scotland. This written statement provides *prima facie* proof of the terms of the contract; case law confirms, however, that it is not conclusive evidence of a contract of employment.

CHAPTER 2
THE PARTIES

a) The Worker or Employee

i) General definition

The general definition applying in all Member States is that an employee is *prima facie* a person employed under a contract of employment. In some Member States, in the absence of precise statutory definitions, case law has been decisive in shaping legal definitions of employee and worker.

In **Belgium**, **Denmark** and **Finland** there is no legislative definition of worker or employee.

In **Belgium** the law defines the worker as *"any person occupied in work under a contract of employment or an apprenticeship contract"*. Such is the case with the law concerning the organisation of the economy.

In **Germany** there is no statutory definition of an *"employee"*. There is, however, a statutory definition of the *"self-employed"*, which reads: *"He who essentially is free in organising his work and in determining his working time is assumed to be self-employed"*. An employee is held to be a person who is obliged to work for somebody else on the basis of a private contract in a relationship of personal subordination.

In **Spain**, a worker is any natural person who undertakes, by contract, to perform work or to render service to another person in exchange for remuneration and in a dependent or subordinate status. The use of the term *"worker"* in Spanish laws is not always consistent. Recent laws (e.g. the *Trade Union Freedom Act, the Prevention of Occupational Hazards Act, etc.*) begin by defining *"workers"* with regard to the Constitution, in a broad sense that also includes civil servants. In other cases, while maintaining distinct regulations, parallel legislative reforms have been adopted concerning civil servants and personnel employed under contract, but with contents that are literally identical for the two categories (e.g. with regard to maternity leave, election of workers' representatives, etc.).

In **France** the definition of a salaried worker is not given in labour law. The *Labour Code (Code du Travail)* uses the expression *"salarié"*. The labour movement, however, prefers the term *"travailleur"*, a more comprehensive term which includes both private sector salaried workers and public sector civil servants (*"fonctionnaires"*). The latter are not salaried workers as they do not have contracts of employment. Relationships involving a certain element of subordination but not involving contracts of employment can, on occasion, be put on a par with *"salariés"*. There are certain other employment relationships which, under the law, are subject to the rules of labour law without there being any requirement to demonstrate an element of subordination.

In **Ireland** there are no common statutory definitions of what constitutes an employee, a worker or workman. To set out an overall position is therefore not possible. Most statutes which cover *"employees"* usually provide for a definition of the term, e.g. s.1 of the *Terms of Employment (Information) Act 1994*: *"[...] a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment [...]"*.

The *Industrial Relations Act 1990* provides for a definition of *"worker"* similar to that given above for *"employee"*: *"[...] any person [...] who has entered into or works under a contract with an employer whether the contract be for manual labour, clerical work, or otherwise, whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour [...]"*.

The same Act, however, also uses a different definition of *"worker"* for the purposes of trade disputes (strike) law; it provides in s. 8 that *"'worker' means any person who is or was employed whether or not in employment of the employer with whom a trade dispute arises [...]"*.

In **Italy** there is a basic definition of a subordinate employee, laid down in the *Civil Code*, as being a worker *"who engaged himself to co-operate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur"*.

In the **Netherlands** most statutory labour law only applies to those workers or employees whose contracts can be considered as genuine contracts of employment. A few statutes however have a wider scope *"ratione personae"*, including those who personally perform labour for another party and whose position is more or less comparable with that of an employee.

In **Austrian** labour law there is no standardised definition of employee: in employment contract legislation an employee, according to case law, is someone who is obliged to perform a service for someone else on the basis of a relationship of personal subordination. In employee representation legislation, however, the focus is placed on the contract and on employment. Finally, the broad definition of employee in the context of employee protection legislation extends to all persons who are active within the framework of an employment or training relationship.

Under **Swedish** labour law there is no general or defined rule which stipulates what a worker or employee is. The term is used differently from one law or set of laws to the next, all of which pursue different objectives. The definition has been more finely hone in the work of the law courts and the trend has been towards a broader but also more standardised term. From the work of the courts it would seem that the following criteria indicate employment relations: a person who carries out work and is personally responsible for that work; the person is subject to supervision; the work is ongoing or permanent in nature; remuneration reflects time spent and special reimbursement is payable, for example, for expenses. The economic and social position of the parties is also of importance. All the various circumstances must be judged together on a case-by-case basis but for the person carrying out the work to be considered as a normal worker the work must be permanent and be carried out under supervision. Casually employed persons and those who carry out work on a purely part-time basis can be considered as workers or employees, the deciding factor being whether the work is carried out under circumstances which typify the activities of a worker or an employee.

In the **United Kingdom** a person employed under a contract of employment is called an employee. Nearly all statutory employment rights are limited to employees under a contract of employment. However, some statutory regulation extends beyond employees to all those who work under contracts personally to execute work or labour. In the *Trade Union and Labour Relations (Consolidation) Act 1992*, s.296(1), a worker is defined as including those who work, or normally work or seek work, under a contract of employment or under any other contract whereby the worker undertakes to do or to perform personally any work or services for any party to the contract who is not a professional client. This definition is wide enough to cover all employees, those who are working temporarily, unemployed and work-seekers, as well as those under contracts for services to perform work in person. However, it excludes those who perform the services through others and it also excludes those who work for professional clients and those who sell completed work.

ii) Blue-collar and white-collar workers

In six Member States – **Belgium, Denmark, Germany, France, Greece** and **Italy** and **Austria** – statute law distinguishes between blue collar and white collar workers.

In **Belgium** and **Germany** this distinction is the subject of much debate and its legal relevance is diminishing. The distinction is of little or no importance in other Member States.

In **Belgium** a clear legislative distinction between blue collar and white collar workers is made on the basis of intellectual versus manual work. This distinction has been under heavy attack in recent years.

In **Denmark** a distinction is usually made between the two groups of workers. Traditionally white collar workers have been entitled to more benefits than blue collar workers. The *Salaried Employees' Act* applies to workers doing commercial and office work, technical or clinical assistance of a non industrial or craftsman nature, and supervising functions, provided that the worker is subject to the instructions of the employer and works for at least 15 hours a week.

In **Germany** blue collar workers and white collar workers are still treated as separate groups but the difference is becoming less clear. In *Section 3* of the *Act on Social Insurance of White Collar Workers*, a number of occupations are listed which define *"white collar"*. The Act empowers the *Federal Department of Labour and Social Security* to extend the list after consultation with representatives of both groups. The result is an up to date but very detailed list. Uncertainty still surrounds the distinction and for some time a heated debate has been going on as to whether it should be abolished. The statutory terms of notice in case of dismissal and the rules on sick-pay have been brought to an equal level for the two groups. There is however still a difference in the system of workers' representation where both groups are treated as different entities.

In **Greece** the most significant distinction between workers is the distinction between blue collar workers and employees. The legal definition and the criterion on which the distinction is based is the following: *"the employee [...] is considered to be any person employed for his main occupation for remuneration, independently of the method of payment, in the service of a private establishment, office, or in general of an enterprise or of any work and providing service, exclusively or in prevailing character, non-manual. The servants of any category, as well as any person in general who is directly employed in production as an industrial, handicraft, mine or agricultural worker, or as an assistant or as an apprentice of the above, or as a servant who provides services in general are not considered private employees"*.

Collective agreements sometimes give blue collar workers more favourable employees' rights.

Although anachronistic, the distinction is of practical relevance as regards the rules governing dismissals. Employees are entitled to an obligatory period of notice and receive higher rates of compensation than do blue-collar workers.

In **Spain** there is no legal difference between the different types of workers, and in particular, between *"labourers"* and *"employees"*. The contract of employment covers both the contractual relationships of manual and non-manual workers and (under a special regime) management personnel. The term *"worker"* refers to any person whose name appears on a contract of employment, whatever the type of work contracted and its characteristics.

In **France** the distinction between blue-collar and white-collar workers is made in the collective agreements but has no significance other than allowing employees to be classified in the jobs hierarchy.

Although in **Ireland** there is no distinction between manual workers and non manual workers, some legislation (for example that dealing with the payment of wages) deals with certain categories of employees only, in some cases manual (blue-collar) workers; it is not generally an important categorisation in law.

In **Italy** a significant distinction between blue and white collar workers is made in the *Civil Code*.

In **Luxembourg**, the law of 24 May 1994 on employment contracts confers one and the same status on blue-collar and white-collar workers.

In the **Netherlands** no distinction between blue-collar and white-collar workers is made in statute law.

In **Portugal**, the distinction between manual and non-manual workers whereby staff could be classified as blue-collar or white-collar has almost disappeared with the introduction of blanket legal provisions. The only vestige of distinction remaining is that concerning the maximum working week, which is 44 hours for manual workers and 42 hours for non-manual workers.

In **Finland** the Employment Contracts Act applies in its entirety to both blue-collar and white-collar workers. In special legislation distinctions can be made between these groups; *inter alia*, the Act on cooperation in enterprises (No 725/1978) provides for separate representation of these groups in the cooperation procedure between the company's management and staff. Public-law terms of employment are not covered by the Employment Contracts Act either, but by special arrangements in the public sector.

The **United Kingdom** does not generally draw any distinction in modern legislation between blue collar and white collar workers. The *Truck Act 1831* required that the wages of manual workers be paid in current coin of the realm. The *Wages Act 1986* repealed the *1831 Act*; cashless pay is now lawful for all workers.

iii) Supervisory or leading personnel

In some Member States such as **Germany**, **Greece**, **Spain**, **Ireland**, **Italy**, the **Netherlands** and **Austria**, supervisory personnel have special legal status and are excluded by law from provisions applying to other workers, e.g. on working-time, overtime, fixed-term contracts and dismissal.

In **Belgium**, management and executive staff are categorised as *"employés"* (white-collar workers). They do not constitute a separate category. Special provisions are applicable to them in exceptional cases.

In **Greece**, this category of employees includes employees with management responsibilities, senior executives, chief representatives of the employer, personnel occupying positions of trust in relation to the management of the enterprise, directors, etc. Legislative provisions concerning working hours, weekly rest day, overtime, night work and remuneration for work on Sundays and public holidays do not apply to them, although the legislation concerning paid leave does.

In **Spain** the category of top management personnel includes *"workers who exercise powers inherent to the legal holding of the company, relative to the company's overall aims, with autonomy and total liability limited only by the criteria and direct instructions given out by the superior person or bodies of the management or administration of the entity which respectively constitutes said holding"*.

In **Ireland** the office holder is subject to somewhat different rules from an ordinary employee. An office holder is somebody whose employment is governed or influenced by something other than just a contract of employment. Case law uses very broad terms, so the kind of workers covered would thus be, for example, teachers, company directors, senior public service executives, and so forth. Some statutory exclusions, for example those from the *Unfair Dismissals Act 1977* and the *Employment Equality Act 1977*, relate to office-holders.

In **Italy** as in other countries, the criteria for distinguishing managers, *"cadres"*, from white collar workers are set by collective agreements and by the courts. The most common definition is that a manager is the alter ego of the employer, in charge of directing the whole enterprise or of an important and autonomous branch thereof, operating with full autonomy within the general directives of the employer.

Recently an Act has been passed which clarifies *Art. 2095* of the *Civil Code* including *"cadres"* as a fourth category of employee. The definition remains, however, extremely vague and substantially left to collective bargaining.

In the **Netherlands** company directors usually perform their work under a contract of employment. The *Civil Code* provides some specific rules concerning the directors' relationship with the company.

In **Portugal**, management and executive personnel still occupy a relatively vague legal category. The general rules of labour law apply to them, but with certain special features concerning working hours (exemption scheme), probationary period (longer) and termination of contract (more flexible for contracts concluded in respect of positions of trust in the public service (*"trabalho em regime de comissão de serviço"* – a formula deriving from administrative law on the public employment relationship).

In **Finland** the *Employment Contracts Act* has a relatively wide field of application, covering supervisory and leading personnel too. Various special Acts of labour legislation may, however, have a somewhat narrower field of application, as is the case with the Working Time Act, for example.

iv) Excluded persons

Most Member States exclude a wide range of individuals from the application of labour legislation.

In **Denmark** managing directors of joint stock companies are usually not regarded as workers or employees because they are not subordinated to the supervision of the employer.

In **Greece** agricultural, home and family workers are excluded and domestic workers partially excluded from labour legislation.

In **Spain** the following categories are generally excluded: civil servants, counsellors or members of companies' administrative organs, commercial representatives who are responsible for the risks of the commercial operation, independent hauliers who own their vehicle, work carried out for friendship, charity or on the *"good neighbour"* principle, family work and performance of obligatory social services.

In **France** home helps, trainees and clergymen are excluded from the application of much labour legislation.

In **Ireland** the *Unfair Dismissals Act* excludes 13 different categories of worker, while the definition of worker under *Part III* of the *Industrial Relations Act 1990* excludes six categories.

In **Austria,** board members of an *"AG"* (public limited company) are not classified as employees. Homeworkers, commercial representatives and persons treated in law as comparable to an employee are only partially covered by labour law. Persons treated in law as comparable to an employee work without a contract of employment by order of and for the account of certain persons (there is no dominant relationship of personal subordination); however, because they are economically dependent from the point of view of requiring protection they are treated in law as comparable to employees.

In **Portugal** certain types of work (e.g. prison work and the work of ministers of religion) are systematically excluded, while certain occupational groups (agricultural workers, domestic servants, seamen and dockers) are excluded from the scope of certain general laws.

In **Finland** managing directors of limited companies and similar economic units have, in accordance with a firmly established practice of the Supreme Court, been regarded as not coming under the Employment Contracts Act's concept of employee.

In the **United Kingdom** the coverage ratione personae of labour legislation is not very consistent. Besides the general limitation to the narrow category of employees, specific statutes each have their own excluded categories. Among common excluded categories are: casual or short-term workers, temporary workers supplied by an intermediary, employees under fixed-term contracts, part-time workers, even if *"employees"*, under fixed-term contracts for one year or more who agree to waive their rights to claim for unfair dismissal or redundancy payments, employees who under their contracts of employment ordinarily work outside Great Britain and certain mariners.

v) Special categories

Certain categories workers are subject to particular rules and regulations.

In **Belgium** special rules apply to, e.g. commercial travellers, domestic servants and student workers who are covered by an Act governing individual contracts of employment. Special Acts also apply to seamen, bargemen, apprentices and professional sportsmen.

In **Germany** special regulations exist for commercial agents and home workers.

In **Greece** seamen come under special legislation.

In **Spain** special regulations exist for senior executive staff, home helpers, professional athletes, artists in public entertainment, commercial representatives who are not responsible for the risks of the commercial operation, disabled workers in special workshops, port stevedores and prison inmates.

In **France** special regulations exist for, e.g. commercial travellers, home workers and domestic servants.

In **Ireland** shop and office workers, bakers and confectioners, agricultural workers, railway and some transport workers are covered by special enactments.

In **Italy** special regulations exist for domestic work, home work, seamen and professional sportsmen.

In the **Netherlands** there are special regulations for, e.g. seamen, commercial travellers, company directors and disabled workers in special government work centres.

In **Austria** there are special regulations for construction workers, home helps and domestic staff, caretakers, media workers, actors, contract civil servants, pharmacists, craftsmen and ships' crews, and those who drive private vehicles for a living.

In **Portugal** there are special regulations for domestic servants, agricultural workers, seamen and dockers, professional athletes and disabled persons working in sheltered employment.

In **Finland** there is special legislation on household employees' working conditions, seamen and persons who provide certain local authority home-help services.

In the **United Kingdom** there is a vast amount of legislation applying to the specific employment of groups such as agricultural workers, construction workers, hotel and catering workers, civil aviation employees, dock workers, drivers and certain other transport workers, teachers, electricity and gas workers, firemen, hairdressers, laundry workers, court officials, local government officials, merchant seamen, national health service employees, offshore workers, shop and office workers, postal workers, railway workers, shore fishermen.

vi) Foreign workers

In general foreign workers have only restricted access to the Community labour market; unless they possess a residence permit and a work permit they cannot be employed.

European Community law provides for the free circulation of EC national workers throughout the Community without discrimination on the basis of nationality.

As regards non-EC nationals work permits are required in all Member States. When awarding or renewing these permits, the competent administrative authorities take into account criteria such as the development of national labour markets, i.e. is there a native or EC national available for the job in question?

In **Spain** account is taken of whether any Spanish workers are unemployed in the activity the applicant proposes to carry out, the geographical zone and the rules existing in the applicant's country of origin. Certain foreign workers have preference, e.g. non Spanish passport holders born in Spain, those married to Spanish citizens, and citizens of Portugal and South American countries.

In the **Netherlands** non EC-nationals who have worked at least three years legally in the Netherlands are entitled to a notification on their residence permit. In that case they no longer need a work permit.

In **Austria** the Federal Minister for Labour and Social Affairs each year sets a ceiling on the number of employment permits to be issued for workers from non-EC countries. The total number may not exceed 9 % of all native and non-native employees in Austria.

In **Portugal**, in an enterprise with more than five employees, at least 90% of the employees must be Portuguese, or, according to a better interpretation (the present interpretation) of the *Law of 1977*, nationals of EU Member States.

In **Finland** foreign workers are as a rule required to have a work permit before taking up gainful employment in the country. Both employers and employees who contravene this rule may be subject to penalties. Citizens of countries belonging to the *European Economic Area*, their spouses and their children under the age of 21, however, do not need to have a work permit.

Under the terms of a convention signed in 1954 nationals of the other Nordic countries enjoy equal status with Swedish nationals when seeking employment in **Sweden**. Since the entry into force on 1 January 1994 of the *EEA Agreement* work permits are required only by nationals of countries which are not members of the EU or the EEA. Work permits in accordance with the provisions of legislation on aliens are not issued if the conditions of employment are different from those found on the Swedish labour market. When important parts of a work permit are being dealt with the employers and trade union organisations involved are given an opportunity to state their opinion and applications are regularly rejected which relate to work for which pay and other conditions are considered worse than for work under corresponding Swedish collective agreements. A work permit is issued for a particular period and relates to a particular job or type of work.

In the **United Kingdom**, in so far as non-EC nationals are concerned, there are special provisions applying to Commonwealth citizens between the ages of 17 and 27 years on holiday. They may work provided that this is incidental to their holiday.

The conditions for the granting of work permits are often laid down in detailed administrative rules. In some countries there is a tendency to issue only a rather limited version of the work permit, restricted to a specific occupation in a specific establishment, e.g. in **Germany**, **France**, the **Netherlands** and the **United Kingdom**.

In **France** a similar restrictive policy has been applied since 1974. Work permits are rarely issued. Those for whom they are issued include certain seasonal workers in agriculture, highly qualified workers and, more and more restrictedly, third-country nationals able to invoke humanitarian grounds.

In **Italy** the issue of illegal immigrants, particularly from Third World countries, gave rise to a *1986 Act*, later amended by the *Law of 28th February 1990, No 39*, aimed at regulating the situation by controlling the future influx of non-EC workers into the Italian labour market. *Act No 81 of 16 March 1988* explicitly allows the possibility of setting up employment contracts for part-time work or homework with workers from outside the EC.

Recruitment of non-EC nationals without prior authorisation (work permit) is normally a criminal offence, e.g. in **Belgium**, **Greece**, **France**, the **Netherlands**, **Austria**, **Portugal** and **Sweden**.

The sanction as regards the validity of the contract of employment is in most Member States nullity. This does not automatically mean the exclusion of the application of the general rules on the working conditions and remuneration. For reasons of fairness normal rules are applied in **Belgium**, **France**, the **Netherlands** and **Austria**. In **Greece**, however, an employer can terminate the contract without being obliged to pay damages due to loss of income.

Once authorised to work, foreign workers should have, in general, the same rights and duties as native workers. Exceptions do occur.

vii) Disabled persons

Specific legislation on the employment of disabled persons exists in all Member States with the exception of **Ireland** where there is a code of practice on the subject.

Statutory quota systems on the recruitment of disabled persons exist in seven Member States as follows:

TABLE 2: QUOTA SYSTEMS FOR THE EMPLOYMENT OF DISABLED PERSONS

Italy	15%
France	6% (1991)
Germany	6%
the Netherlands	3-7%
Austria	4%
Spain	2%
Greece (public sector)	2%
Luxembourg	2-4%

In **Belgium** the obligatory quotas for the recruitment of disabled persons are laid down for each branch of activity by Royal Decree. There is no such thing as a single quota for the whole private sector.

In **Germany** there is an obligation on employers to employ disabled persons in at least 6 % of posts once they have 16 or more employees. To encourage employers to employ severe-

ly disabled persons, the employment service may allow such persons to be counted as 2 or even 3 towards an employer's quota.

In **Greece,** *Law 1648/1986, as amended by Law 2224/1994,* gives recruitment priority to several categories of persons: war invalids, war victims and former resistance fighters (plus their spouses and children), disadvantaged persons aged between 15 and 65 years who are only partially capable of holding down a job due to a mental or physical disorder leaving them up to 40% disabled. In companies employing more than 50 employees, at least 8% (depending on the category in question) of the total workforce must be recruited from among these categories, regardless of the existence of vacant posts.

In **Spain** legislation applies in both the private and the public sector to companies with more than 50 employees.

In **France**, companies with more than 20 employees must in principle employ disabled workers in at least 6% of posts. However, they can escape this obligation by concluding subcontracting contracts with special establishments which employ disabled workers or by applying a collective agreement establishing a programme in favour of such workers.

In **Ireland** there is a voluntary 3% quota for employment in the public sector.

In **Italy** the law stipulates that 15% of the total workforce in companies with at least 35 workers must be recruited from amongst broadly defined categories of disabled persons.

In the **Netherlands** there is an Act on the statute book, applicable to both the private and public sector, authorising the government to prescribe per sector of industry a minimum-percentage between 3 and 7 which companies should recruit from defined categories of disabled persons. However, this Act is a dead letter as no percentage has been prescribed for any sector of the industry.

In **Austria** the obligation to employ disabled persons is governed by the Employment of Disabled Persons Act of 1970. All employers in Austria with a workforce of 25 or more are obliged to employ at least one assisted disabled person per 25 employees.

In **Sweden** employers are required to adopt measures to rehabilitate an employee who falls ill or suffers injury. Special sickness benefit for rehabilitation is payable to the employee as an incentive to rehabilitation. The general insurance scheme supervises rehabilitation activities. In addition to the above there is a special statutory provision to promote access to the labour market for the elderly and the disabled, primarily as voluntary measures with assistance from the labour market authorities. Workers with a reduced ability to work for whatever reason – physical, psychological, or intellectual deficiencies plus social obstacles – are included. The various types of economic support provided under labour market policy and which are available to employers taking on disabled people have been shown to be the most important way of securing work for this group of people.

In the **United Kingdom** the quota system, which had existed since 1944, has been replaced by the *Disability Discrimination Act 1995* in force since the end of 1996) which makes it unlawful for employers of 20 or more employees to discriminate against disabled persons. There is discrimination if the employer treats a person less favourably than other persons for a reason related to that person's disability. The employer may justify the discrimination for a reason which is both material and substantial. However, the employer is under a duty to make reasonable adjustments to working arrangements or to physical features of the premises where this will assist the disabled person to compete for employment opportunities.

One Member States reserves certain occupations for disabled persons: **Italy** where telephonists' jobs are reserved for blind persons.

Most Member States give aid to employers employing disabled persons either in the form of grants to adapt workplaces to the needs of disabled workers or wage and labour cost subsidies, e.g. in **Belgium, Greece, Spain, France, the Netherlands**, and **Portugal.**

Special legislation protecting disabled persons against dismissal exists in e.g. **Germany, France,** the **Netherlands** and **Austria.** In the **United Kingdom,** the *Disability Discrimination Act 1995* covers dismissal as well as recruitment, terms of employment, promotion, and other job opportunities.

In all Member States with quotas (with the exception of **Spain**) compliance monitoring systems are in operation.

In **Germany** an employer failing to meet the quota is required to pay a flat-rate penalty of DEM 200 per month per job unfilled.

In **France**, employers who do not fulfil their obligations in another way must pay a levy to the *National Development Fund* (ranging from 300 to 500 times the current hourly minimum wage).

In **Ireland** a non-statutory code of practice covers a wide range of aspects of employment of disabled persons.

In the **Netherlands** no penalties are levied as the Act is a dead letter.

In **Austria**, employers failing to meeting the quota must pay a monthly compensatory levy of ATS 1920 for each post unfilled. Employers who employ more disabled persons than the obligatory quota receive a monthly premium of ATS 960 per person.

In the **United Kingdom** the *Disability Discrimination Act 1995* (above) is enforced by way of individual complaint to an industrial tribunal, which may award compensation.

b) The Employer

In most Member States' legislation there is no general definition of the concept of *"employer"*.

Occasionally a definition is provided with a specific application, e.g. in **Ireland** the *Unfair Dismissals Act 1977* defines the employer as *"the person by whom the employee is or was employed under a contract of employment"*.

In general, the employer is a party to a contract of employment who provides work for the employee. Unlike workers, employers can be legal persons as well as natural persons.

In some countries, e.g. in **Greece** and **Italy**, the notion of *"entrepreneur" is distinct from that of "employer"*.

In the **Italian** *Civil Code* the *"entrepreneur"* is defined as someone who *"professionally carries out an economic activity with the aim of producing or exchanging goods or services"*. This notion may refer equally to individual enterprises, where the employer is a single person, as it may to enterprises set up by two or more partners. From the point of view of labour law it is important to distinguish between the employer who is also an entrepreneur and the employer who is not an entrepreneur. For those relationships of subordinate employment that are not an inherent part of the activity of an enterprise, the same rules apply as for the employment relationship within the enterprise, as long as they are *"compatible with the special nature of the relationship"*.

According to the *Constitutional Court*, incompatible rules are those contained in *Title III* of the *Workers' Statute* relating to trade union rights and activities at the place of work. The rules concerning the reinstatement of an employee at the place of work following unlawful dismissal are equally incompatible.

However when the employer is a legal person it is up to this legal entity to decide who is entitled to enter into contracts of employment on behalf of the legal entity. This can raise legal uncertainties concerning liability etc.

In **Austria** there is no legal definition of the concept of *"employer"*. The party to the employment contract who can determine the labour of the contracting partner is to be regarded as the employer. The difference between entrepreneur and employer is that an entrepreneur does not necessarily need to employ any employees.

In the **United Kingdom** most employers in the private sector are companies incorporated under the *Companies Act*. The courts have been reluctant to *"lift the veil"* of corporate personality so as to prevent the legal fiction being used to deprive workers of their employment rights. Moreover, in the context of industrial action, the concept of the separate legal personality of each *"employer"* has enabled a company in dispute with a trade union to create a series of separate buffer companies between itself and its suppliers and customers, so as to make unlawful any secondary industrial action involving those suppliers and customers (*see also next section on Groups of Enterprises*).

c) Groups of Enterprises

The group of enterprises is, generally speaking, not recognised as such in the labour law of most countries. Case law tends to uphold that groups may not constitute a single enterprise when it comes to the legal regulation of employment relationships.

In **Greece** the group of enterprises is not treated as a single employer. *Law 1876/1990* on free collective bargaining does not provide for collective bargaining at group level.

According to Greek case law, the transfer of an employee from one enterprise to another within the same group does not entail maintenance of that employee's acquired rights. However, Article 16 of *Law 1767/1988* entitles works councils to designate joint representatives to handle matters of concern to all employees within the group.

In **Spain**, although the legislation does not contain the concept of *"group of enterprises"*, case law, even though it only very rarely bestows on the group the status of employer for workers performing services for the whole of the group, does in certain circumstances assign joint responsibility to all of the enterprises within the group in order to guarantee the debts of a subsidiary; such joint responsibility can be applied in very particular situations where there is unity in the management of the enterprise and confusion regarding asset ownership and workforce. At the same time, Spanish case law does not consider that there exist any greater objections to the internal mobility of workers between the various enterprises within a group.

In **France**, case law accepts that two companies can jointly be employers when the characteristic prerogatives of the employer are shared between them.

The group is the framework for worker representation when a group of companies have a common management and similar or complementary activities and when there exists a community of workers. Such a group is treated as a single enterprise.

In **Austria**, the *Arbeitsverfassungsgesetz* (Employees' Representation Act) in particular refers to the concept of *"group"* as defined in §15 of the *Aktiengesetz* (Limited Companies Act). Within the context of such groups, group-level representation bodies can be set up for the entire group workforce.

In **Ireland** and the **United Kingdom** certain employment rights may, however, be transferred to an *"associated employer"*. These rights concern protection of continuity of employment on transfer to another company in the same group or return to work after pregnancy or confinement after unfair dismissal. Where rights depend on the number of employees employed by an associated employer they may also be counted.

This is, e.g. the case in **Italy** where the phenomenon of splitting production activities is becoming increasingly important. By using the device of legal personality as a kind of *"shield"* it is possible for companies to split their production activities into distinct enterprises each being small enough to avoid the minimum threshold in terms of size as regards, e.g. statutory trade union rights and protection against unlawful dismissal. This phenomenon is also important within the individual firm. It seems unlikely, however, that any legislative measures will be taken in the immediate future to rectify this situation.

In **Finland** the concept of group of enterprises is defined in the *Act on cooperation in enterprises (No 725/1978)*, primarily by means of a reference to the definitions used in company law. The Act also lays down, however, that associations in which by ownership or agreement the group leader has the right of decision and accounts for a significant proportion of its results shall be regarded as subsidiaries of the group and that the Act can also be applied to other associations of companies that can be assimilated to groups.

In legal practice in the field of labour law, situations in which the same owners exercise the right of decision in several companies have given rise to employers' obligations above the formal company limit. In Supreme Court case law *(HD 1995:93)* it was stated that in such a situation the employer is obliged, before an employee's contract is terminated, to ascertain whether instead the employee can be transferred to any of the other companies.

In **Sweden** there is no general definition of this concept. For limited-liability companies legislation lays down that the parent company and the subsidiary together form a group. In accordance with the *Security of Employment Act (1982)* a worker changing jobs within the same group or in conjunction with the transfer of a firm or operation from one employer to another shall be credited with the time worked for the previous employer when the period of service with the new employer is calculated. This can be important, for example, in connection with the period of notice or a worker's position in the order of priority in the event of the need for redundancies.

d) Enterprise, Undertaking or Establishment

In most Member States the concepts of the *"enterprise"*, the *"undertaking"* and the *"establishment"* are not well developed in law.

In **Belgium**, the term *"enterprise"* is defined in the *1948 Organisation of the Economy Act*. This Act considers the enterprise to be a technical production unit. A legal entity may contain several such units, i.e. several *"enterprises"*. The same Act also defines *"group"*: a group means enterprises with multiple head offices, international enterprises, the economic group.

Before the entry of **Denmark** into the EC and the adoption of legislation implementing several EC Directives, there was no discussion of the concepts of undertaking, enterprise etc. Nowadays some problems exist, particularly in cases involving equal pay and transfer of undertakings.

In **Germany** the enterprise refers to the legal structure whereby the economic unit is identified as an entity (natural person of corporate body). It is the point of reference for the law on workers' representation on the supervisory board. The point of reference for many rules, however, is not the enterprise but the establishment, which means the organisational unit (plant) where work is performed and whereby the employer intends to accomplish the goal of the enterprise. In other words, the establishment refers to a more or less factual phenomenon. It is the point of reference for the rules covering the works constitution, transfer or protection against unfair dismissals.

In **Greece** enterprise and establishment are distinguished by reference to objectives; an enterprise as a unit aims at an economic goal whereas the objective of an establishment is a technical, productive result. The use of both concepts, however, in Greek legislation is not always consistent (e.g. *Article 2* of *Royal Decree 2417/1920* or *Art. 1* of *Legislative Decree 3789/1957*).

In **Spain**, while the *Workers' Statute* does not define *"enterprise"* it does offer an explicit definition of the workplace *("centro de trabajo")* or establishment: *"the workplace is considered to be the production unit of a specific organisation which is registered as such with the Labour Authorities. As regards work at sea, the vessel is considered to be the place of work, situated in the Province of its port of registry"*.

In **France**, the legislation refers both to the enterprise and the establishment, without defining either. In general, the enterprise is synonymous with the legal person carrying out the activity. The establishment, referred to particularly in the rules on safety and health and on worker representation, is a production unit, the contours of which may, according to case law, vary as a function of the rules applicable.

Labour legislation in **Italy** gives great importance to the concept of production unit, alongside that of entrepreneur (or of not-entrepreneur employer). Production unit is defined by *Article 35* of the *Statuto dei lavoratori* (*Workers Statute, Law No 300*) as *"every head office, plant, branch office, office or autonomous department that employs more than fifteen employees"* which effectively acts as an essential point of reference in the application of important regulations such as union rights in the workplace or protection from unjustified dismissal.

In **Luxembourg** the term enterprise refers to an economic and legal unit consisting of one or more different establishments.

In the **Netherlands** the first definition of an undertaking was laid down in the *Works Councils Act 1970*, where it was held that undertaking shall mean *"any organisational unit which acts as an independent entity in society and in which work is performed under contracts of employment"*. This definition has been used in recent legislation as have the more factual terms of establishment and *"(part of the) business"*.

In **Austria**, as in Germany, the enterprise represents the legal-economic structure, while the establishment represents the concrete technical and organisational unit. The concept of *"the establishment"* is particularly important in the Employees' Representation Act and in the transfer of establishments. The concept of *"the enterprise"* is much less important for labour law. It is primarily of significance in connection with the central works council, which must be set up in enterprises with several establishments, and in connection with worker participation on the supervisory board.

In **Portugal**, the legislation does not provide precise definitions of enterprise and establishment. The term *"enterprise"* appears both in the subjective sense (entity comprising one or more establishments) and in the objective sense (organisation of material and human resources), and the term *"establishment"* is used in the objective sense (transfer of establishment).

In **Finland** there are no statutory definitions of these concepts. Neither was there any discussion of these concepts in Finnish labour law before this became a topical issue with the implementation of EC labour law Directives in Finland.

There is no general definition of this concept in **Swedish** law. When applied to a limited-liability company an undertaking is defined as follows: when a limited-liability company owns more than 50 % of the voting rights for all shares

or units in another legal person, the former is the parent company and the legal person is the subsidiary.

In the **United Kingdom** the concept of the enterprise or undertaking is not well-developed in law. The employee is regarded as being employed by a specific person, i.e. a particular company or individual or partnership and there is no provision for making the *"head of the undertaking"* responsible as employer. Certain employment rights may, however, be transferred to an *"associated employer"*. The establishment is a geographical place. Its scope is defined solely by case law. It has been said to be a *"body of persons carrying on activities by way of business associated with a locality"*. In determining the scope of an *"establishment"* the courts and tribunals take account of a variety of factors.

TITLE II
RECRUITMENT

CHAPTER 1
FREEDOM TO RECRUIT

a) General Freedom to Recruit

The freedom of contract is the basis of the employment relationship in all Member States. This principle stems from the general principles of the law of contract and implies that each individual is free to choose the occupation and employment desired. On the employer's side it means that the employer is free to choose with whom he or she wants to conclude a contract.

The freedom of contract, guaranteed by the Constitution of three Member States – **Germany**, **Spain** and **Portugal** – implies in all Member States the prohibition of forced labour.

This general principle is, like other principles, rights and freedoms, subject to the limitations and restrictions imposed on it by other rights, principles and values statutorily or constitutionally guaranteed in the legal system concerned.

b) Limitations on the Freedom to Recruit

i) Constitutional rights of equal treatment

The freedom to recruit and select workers may not impinge upon the principle of equality of treatment and the prohibition of discrimination on any grounds such as race, colour, language, religion, political or other opinions, social origins, birth or other status. These fundamental principles laid down in various international instruments (*European Convention on Human Rights*, UN Covenants, ILO Conventions etc) are enshrined explicitly or tacitly in the Constitutions of **Belgium**, **Germany**, **Greece**, **Spain**, **France**, **Ireland**, **Italy**, **Luxembourg**, the **Netherlands**, **Austria**, **Portugal** and **Finland**. Most of these countries have specific legal provisions dealing with particular cases of discrimination.

In **Denmark** discrimination in matters of recruitment is not forbidden by the *Constitution* nor is there at the present time (September 1995) a general legislative instrument. This is, however, to change in the very near future. An Act prohibiting discrimination on grounds of race, colour, religion, political opinion, national extraction or social origin is expected to be proposed by the Minister of Labour in the autumn of 1995. The main protection against an employer's abuse of discretionary power resides in the collective bargaining system; but the employer may discriminate against non-union members (e.g. in the case of a closed shop agreement, for which there are no statutory provisions).

In **Germany** the *Constitution* does not only guarantee equal treatment for women, but encourages measures to promote their actual equality. In some states legislation has been passed to raise the chances of women in the public sector by introducing quotas and additional instruments. In the private sector works councils have to ensure that no unequal treatment of men and women takes place and the employer is obliged not to discriminate against any employee on account of his or her sex.

In the **Netherlands** there is a *General Act on Equal Treatment* prescribing equal treatment of persons irrespective of creed, personal convictions, political attitude, race, sex, nationality or sexual orientation. This Act ensures the direct applicability of the equal treatment principle in all relationships on the labour market.

The **Finnish** *Employment Contracts Act* includes a provision to the effect that the employer shall treat his employees impartially so that no-one is without reason assigned to a different post than other workers on grounds of birth, religion, age, political or trade union activity or other comparable circumstance. This also applies explicitly when a person is recruited.

Despite the fact that **Sweden** is a signatory to a number of international conventions relating to discrimination at the workplace there are no rules generally prohibiting discrimination of this type. It is assumed that no such discrimination occurs on the Swedish labour market and that it is primarily the duty of the trade unions to ensure that discrimination does not arise. In the Swedish Constitution there is however a requirement to the effect that when appointments are made to the civil service exclusively factual grounds shall be considered. Further related provisions are laid down in special legislation. At local level there is a general constitutional objectivity principle which stipulates that employers may not give consideration to non-factual or irrelevant aspects when choosing staff. Special laws, which cover the whole of the labour market, prohibit discrimination on the basis of sex or ethnic origin.

In the **United Kingdom** there is no general right of equality of treatment; specific statutes, however, prohibit discrimination for reasons of sex, race, disability, and relating to trade union membership or activities. In Northern Ireland discrimination on grounds of religious belief and political opinion are also prohibited. In a leading case it was considered that: *"an employer may refuse to employ (a worker) for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived but the workman has no right of action against him"*.

It is a general principle of English law that the exercise of a right (in this case, not to enter into contractual relations) will not be rendered unlawful only because of the bad motives of the person exercising the right, i.e. there is no doctrine of *"abus du droit"*.

ii) EEC Directive 76/207 on Equal Treatment

Sex discrimination within the meaning of *EEC Directive 76/207* on equality of treatment for men and women, in respect of access to employment, promotion, vocational training and working conditions is forbidden in all Member States.

Rulings of the *European Court of Justice* have influenced national law in, e.g. **Germany**, **France** and the **United Kingdom**.

The *European Court* has held that domestic labour courts in **Germany** should settle damages in cases of sex discrimination according to the structure of domestic law and according to the spirit of the *1976 EEC Directive*. The courts decided to fix damages at a level equivalent to six months of the salary the applicant would have earned if he or she had been employed. Now such persons are entitled to up to three monthly salaries by statute.

In **Greece**, *Law 1414/1984* transposed *Directive 76/206* into Greek legislation; however, its provisions remained ineffective for a long time, and collective agreements continued to contain instances of sex discrimination. Violation of the legislation, both at recruitment and during the course of the labour relationship, was obvious. The change was brought about by case law, when an important *Court of Cassation* judgment (*No 1360/1992*) recognised for the first time the application of the principle of equal treatment with regard to recruitment. This judgment was complemented by a subsequent judgment (*No 85/1995*) which applied the same principle to the termination of employment contracts, declaring null and void a legislative provision that was discriminatory regarding the age of retirement for women.

In **France** recruitment discrimination on grounds of sex is prohibited and punishable. A few activities remain closed to women, based on concerns for women's welfare; these restrictions may not be compatible with *Directive 76/207*.

In **Italy** the legislation on equal treatment for male and female workers (*Law No 903/1977*) was completed with the approval of the *Law of 10th April 1991, No 125*. The new law is manifestly inspired by case law from the *Court of Justice* both regarding the notion of indirect discrimination which it has adopted and the principle of the partial reversal of the burden of proof in sex discrimination disputes.

In 1991 **Sweden** acquired a new law on equality between women and men. This replaced an existing law on a similar subject dating from 1979 and the aim with the new legislation was partly to bring Swedish regulations up to the level of EC law. There was then a discussion on whether Swedish equal treatment legislation achieved this aim and further amendments on discrimination relating to remuneration followed in 1994. Swedish case law in this field is still very sparse.

In **Austria** the Directive has already had an impact on the legislation; in particular, the statutory requirements on equality of treatment have been extended to recruitment, termination of contract and working conditions in general.

In the **United Kingdom**, following enforcement proceedings by the European Commission, the *Equal Pay (Amendment) Regulations 1983* were introduced. They amend the *Equal Pay Act 1970* by introducing claims for equal pay for work of equal value where previously it was only possible to claim equal pay on the basis of like or broadly similar work. The decision of the ECJ in the Marshall (No.1) case (*Case 152/84*) led to a further change. The case concerned a female state employee with a retirement age of 60 who claimed the right to work until age 65, the retirement age for men. The *Sex Discrimination Act 1986* amended the law to provide that unless there is a *"normal retiring age"* which is the same for male and female employees, a woman who has been required to retire at an earlier age than a male colleague will be presumed to have a retirement age of 65. As a result of the Marshall (No.2) case (*Case C-271/91*) the upper limit on awards of compensation for sex discrimination was removed.

iii) Free movement of workers

The principle of equal treatment of EC nationals in respect of access to employment is in force in all Member States, via *Article 48* of the *EEC Treaty* and EEC Regulations (e.g. *Regulation 1612/68*). *Article 48* states that *"freedom of movement for workers shall be secured within the Community"* and that this shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

iv) Trade union membership

Discrimination on the grounds of belonging or not belonging to a trade union is illegal in most Member States. In the **United Kingdom**, partly under the influence of the judgement of the *European Court of Human Rights* in *Young, James and Webster (1981)*, on closed shops, legislation in effect bans both pre-entry and post-entry closed shops. In the **Netherlands** a closed shop only exists in the printing industry. It is legally allowed under narrow conditions.

In **Sweden** it is only the right to belong to an employers' or trade union organisation which is protected. Discrimination based on affiliation to a trade union infringes the law but the right to remain outside an organisation, the right to refuse membership, is not protected. However, it is against existing laws on the security of employment if a worker is given notice because he does not wish to be a member of a trade union. Since the incorporation into Swedish law of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in 1995 there have been indications that the right not to be a member of a trade union will enjoy greater protection.

v) Non-EC nationals

The employer's freedom to recruit is also restricted in respect of non-EEC nationals who are, in turn, subject to various restrictions throughout Member States as outlined above in *Title I, Chapter 2,a),vi)*.

vi) Priority groups

In some Member States legislation and/or collective agreements specify priorities or preferences as regards recruitment of specific groups.

As outlined above in *Title I Chapter 2, a), vii)*, **Germany**, **Greece**, **Spain**, **France**, **Italy**, **Luxembourg** and **Austria** have a quota system for the employment of disabled persons.

France and **Portugal** give absolute preference to redundant workers if their jobs are recreated within a certain period. In **Spain** workers over 45 years of age are given indirect preference; in **Spain** and **France** priority is given to those taking extended parental leave; in **Portugal** seasonal casual workers have preference for permanent jobs; in **France** part-time workers have priority when full-time posts become available in the enterprise and vice-versa.

In the **Netherlands** many employers in the public and semi-public sector give preference to the employment of female employees. Under Dutch legislation this is allowed but it is doubtful whether this practice is in conformity with the recent *Kalanke-Judgement* of the *EC-Court of Justice*. Furthermore, a statute of 1994 urges employers to recruit *"allochtone"* workers according to the proportion of the allochtones on the regional labour market. But there are no sanctions.

In **Finland** the *Employment Contracts Act* lays down that an employee who has been made redundant has a priority right to return to work for his previous employer for a period of nine months after the end of the period of notice. This entitlement applies if the employer needs workers for the same or similar tasks as those carried out by the dismissed employee.

If an employer has part-time employees who want to work full-time and he is looking for new employees for similar part- or full-time work, the work must first of all be offered to the part-time employees, provided that this is possible with regard to the nature of the work and that there are no dismissed employees who have priority.

In **Sweden** any worker made redundant is given priority for reinstatement in the same type of work if the employer intends to take on new staff within one year of the date of the redundancy. The right of reinstatement applies only to workers employed by the employer for more than 12 months over the preceding 24 months and who are adequately qualified for the new job. Seasonal workers have priority for reinstatement for seasonal work if they have worked for the employer for more than six months during the preceding 24.

vii) State intervention

In **Belgium**, State intervention in matters of recruitment takes the form of *"subsidised freedom"*. The authorities do not intervene in a binding way but they offer enterprises which recruit certain categories of job-seekers significant financial benefits.

In **Spain** the recruitment system is based on public intervention in the employment market through a national public service organised on a tripartite basis. Private employment agencies are prohibited. The compulsory character of state intervention means that enterprises are under an obligation to ask for workers through the employment offices but can choose freely among the registered employees. For their part, employees should be registered with the employment offices. In certain cases, however, employers are allowed to recruit directly.

In **Italy** the freedom to contract *was* subject to an important legal limitation stemming from state intervention in the labour market. The old principle of public monopoly regarding public service employment formally continues to exist but has been divest of content.

Up until 1991 employers could hire only through the public employment office indicating the number and skill level of the workers they intended to hire, and specifying only 50% of the names. *Article 25* of *Law 223/1991* has substituted the rule of numerical recruitment, dating to the Law of 1949 on hiring and partly amended in the mid 1980s, with the opposite principle of recruitment by name: employers, in other words, may apply to the public employment office stating explicitly in each case the name of the worker they intend to hire. More recently, with the *Law-decree of 4th August 1995, No 326*, things have progressed further. Now employers can hire directly so long as they give notice to the employment office of the name of the workers within five days from hiring.

Private employment agencies are still formally prohibited, but the approval of a legislative reform is awaited which should recognise this service. The legitimacy, from the point of view of *European Community Law*, of the public monopoly over hiring which is in force in **Italy** is presently being examined by the *Court of Justice*.

In **Sweden** an employer's freedom to contract is limited by a law which prohibits discrimination, *cf. b) i)* above. There are other statutory provisions stipulating special qualification requirements for various public-sector occupations, for example doctors, nurses, ministers of the church and judges. As far as the state sector is concerned the requirement is that account shall be taken exclusively of factual aspects such as merit (experience in the occupation and skill (suitability)). Other factual aspects could also be parental leave or labour market policy reasons. In the state sector the employer has little room for manoeuvre as the principles for recruitment are laid down by law. There is a special law covering the employer's obligation to inform the public employment service of any vacancies. The law has provision for exceptions with regard to employment where the notification is not needed and it does not really restrict the employer's scope for recruitment since an employer is not obliged to choose workers sent by the public employment service.

viii) Works councils

In **Belgium** the works council cannot intervene in individual cases, but it is competent to examine the general criteria to be applied to dismissals and recruitments. More specifically, it is competent to determine the general criteria to be applied to dismissals or re-recruitments resulting from economic or technical circumstances.

In **Germany**, in establishments with more than 20 employees where there is a works council, the employer must go through certain procedures before the person selected can be employed. The employer is obliged to inform the works

council on the details of a job vacancy. Once an employer decides to advertise a vacancy, the works council can demand that it is also advertised within the establishment to ensure that the in-house workforce is aware of the vacancy. The employer is obliged to show all completed application forms to the works council and to gain the works council agreement to the content of written selection tests used and to the selection criteria for the evaluation of the results of these tests.

The works council can reject in writing prospective recruits under certain conditions; if so the employer may appeal to the labour court. The labour court may declare the works council's decision void if it finds the refusal unjustified. In a case of urgency the employer may employ the selected person on a provisional basis even after the works council has refused agreement. Such provisional employment tends to cause practical difficulties.

In **Austria** the works council, under the terms of the *Arbeitsverfassungsgesetz* (Employees' Representation Act), has consultation rights with regard to the recruitment of employees. It is entitled to information, can propose job advertisements and must be informed of every recruitment effected. It has no say, however, in actual placement.

There are at present no works councils in **Sweden** but employers are required to initiate negotiations with the local trade union with which a collective agreement exists before large numbers of workers are taken on with ensuing major changes, or with the trade union concerned when managerial or senior posts are to be filled. This is known as the primary bargaining duty. The trade union then has an opportunity to express its opinion but it is the employer who decides whether to employ or not and the trade union cannot prevent the employer opting for a particular applicant.

ix) Collective agreements

Collective agreements in some Member States – **Belgium**, **Germany**, **France** and the **Netherlands** – may contain general guidelines or recommendations concerning the recruitment and selection of workers.

Collective agreements in **Sweden** may contain special rules which extend an employer's obligation to negotiate before taking on new staff, establish guidelines for the recruitment of staff or in some other way restrict the employer's freedom to choose, for example by requiring him to recruit from within the firm in the first instance.

x) Rights to privacy

The right to privacy must be taken into account when determining the scope of questions to be included on the application form workers must fill in before recruitment. That is the case, *inter alia*, in **Germany**, **Spain**, **France**, the **Netherlands** and **Austria**.

In **Belgium** the right to respect of private life and family life is guaranteed by the Constitution.

In **Germany** the employer may not ask a female applicant whether she is pregnant.

In **France** a law of 1992 consolidating the case law prohibits, at the time of recruitment, any request for information that does not have a direct link to the job in question. The methods and procedures for collecting information must be notified to the candidate. The works council must be informed of these methods and of the techniques for aiding recruitment.

In **Austria** the employer may not ask a female applicant whether she is pregnant. If the question is asked and the applicant answers falsely, there is no legal comeback (no grounds for dismissal or for declaring the contract null and void). Nor may questions be asked about previous convictions, financial circumstances or detailed state of health, unless these are of relevance for the specific job in question and do not clash with the overriding interests of the applicant.

There is in **Sweden** no legislation prohibiting employers from obtaining certain information from job applicants. In the public sector job applicants are protected by provisions in the constitution requiring decisions to be taken on objective grounds. Consequently, information on family circumstances, sexual orientation etc. are normally ruled out as irrelevant to the appointment.

xi) Rehabilitation of offenders

In **Germany** the employer was formerly permitted to ask whether an applicant had been convicted. This is only allowed now within reason.

In the **United Kingdom** the *Rehabilitation of Offenders Act 1974* makes it unlawful to exclude a rehabilitated offender from any employment by reason that he or she has a conviction, if that conviction is spent. A number of professions, however, are excluded from the scope of this provision.

CHAPTER 2
PROBATION PERIOD

a) Form

The trial clause or probation period is aimed at verifying the viability of an employment relationship before it becomes definite.

In principle the probation period does not prevent the worker from enjoying the protective rights guaranteed by labour law with the exception of those relating to termination of employment. The main legal consequence of the trial clause is that the contract can be terminated by either party without justification and in some Member States without notice.

In some Member States the trial clause has to be drawn up in writing and agreed, at the latest, before the beginning of the employment. This is the case in **Belgium**, **Spain**, **Italy**, and **Luxembourg**. Unless it is in writing the trial clause is null and void and the employment contract will be of a definitive nature.

In **Spain** the provision establishing a probation period does not apply if the worker has already previously performed the same functions within the enterprise, regardless of the method of recruitment.

In the **Netherlands** legislation does not require a written form but collective agreements often do so in order for the clause to be valid.

In **Austria** the agreement to a probation period does not need to be in writing.

In **Portugal** the trial clause need not be in writing but unless the parties agree otherwise in writing the clause is incorporated into the contract of employment.

b) Duration and Conclusion of Probation Period

In **Belgium** for blue collar workers the minimum duration is seven days and the maximum 14 days. For white collar workers these periods are respectively one month and six months except those earning more than 780,000 BEF where the maximum is 12 months. The duration can also be fixed in the individual employment contract, company regulations and collective agreements. The trial period can be suspended and prolonged but an employer can only give one probation period per employee.

In **Denmark** there is provision for the employer to dismiss with 14 days notice (instead of the normal one month) if it happens within the probation period provided that the employment relationship does not last more than three months.

In **Germany**, according to the terms of the *Act on Protection against Unfair Dismissals*, workers were not covered during the first six months of an employment relationship. The *Act on the Improvement of Employment Opportunities of 1985*, however, has enabled an extension of the probation period.

In **Greece** the courts consider two months to be the maximum for a probation period (interpretation *a contrario*, *Art. 1* of *Law 2112/1920* and *Art. 2* of *Royal Decree of 16/18 July 1920*). The law does not specify a maximum duration, which can be up to one year. The continuation of the employment contract after the probation period depends on the implementation of the clause which can adjourn or dissolve the employment relationship. Where disputes arise, the court can decide whether the contract should be renewed or converted into a contract of indefinite duration.

In **Spain** the limits concerning the duration of the probation period are those laid down in the collective agreements. In the absence of any such provision in the collective agreement, the probation period may not exceed six months for qualified technical personnel and two months for other workers. In enterprises employing fewer than 25 workers the probation period may not exceed three months for workers who are not qualified technical personnel. According to the *Constitutional Court*, the ability to terminate the working relationship during the probation period *"is limited in the sense that it cannot be used on grounds that are not directly related to the employment relationship and that conflict with a fundamental right"*, such as the right to equality. The cases that most frequently come before the *Constitutional Court* concern cancellation of the contract by the employer during the probation period of pregnant employees.

In **France** the duration of the probation period in contracts of indefinite duration is not fixed by law, except in the case of commercial travellers (three months). In all other cases the duration depends on the collective agreement, custom or the individual agreement. The courts ensure that the contract complies with custom or the collective agreement and can reduce contractual probation periods that are deemed excessive.

As far as probation periods in fixed-term contracts are concerned, the law gives a specific rule for cases where no shorter period is customary or specified by provisions in agreements; in these cases the probation will not exceed that calculated at the rate of one day per week up to a maximum of two weeks where the period of the contract initially agreed is six months or less, and one month in other cases. Should the exact duration of the contact not be stated therein, the probation period will be based on the minimum duration of the contract (*L. 122-3-2*). Some collective agreements have specified a *"period of notice"* when the probation period exceeds a certain duration.

In **Ireland** there are no general rules regarding the legal concept of probation. There are, however, two important points to note. Firstly, the *Minimum Notice and Terms of Employment Act 1973* provides that an employee who has been employed for a minimum period of 13 weeks shall be entitled to a minimum notice of at least one week. Workers on probation are not excluded and are entitled to a normal period of notice. Secondly, the *Unfair Dismissals Act 1977* on the other hand excludes from its protection employees who are on probation, where the employment contract is in writing and where the period of probation is *"one year or less"*.

In **Italy** the parties can fix a minimum and a maximum duration. A maximum duration of six months is indirectly set by *Act No 604 of 1966 on unfair dismissals*. The law fixes a shorter maximum duration for apprentices (two months) and domestic servants. Collective agreements often set shorter maximum periods (e.g. the metalworkers' national agreement) and often provide for a prolongation of the trial period, e.g. in case of illness or work accident. Either party to the probation period may terminate without a term of notice and without justification.

In **Luxembourg** the probation period agreed between the parties may not generally be less than two weeks or more than six months. There is an exception in the case of workers who have not attained a certain level of education: in these cases the maximum duration is reduced to three months. The maximum of six months can be extended to 12 months in the case of workers whose monthly salary does not exceed LUF 115 740. The courts have held that an agreement between the parties with regard to the duration which exceeds the duration fixed by the law is null and void. A probation period cannot be renewed.

This is the same in the **Netherlands** where the law fixes a maximum duration of two months.

Also in **Italy** and the **Netherlands** recent court decisions have questioned the absolute validity of the employer's freedom to escape judicial control over the reasons for dismissal of an employee on probation (particularly in cases of suspected discrimination).

In **Austria** the probation period is legally limited to one month. During this time the employment relationship can be terminated by either party at any time, without notice and without giving a reason. If a longer probation period is agreed, the employment relationship exceeding the statutory probation period is to be converted, at the wish of the

contracting parties, into either a fixed-term or an indefinite-duration employment relationship.

In **Portugal** the statutory probation period for fixed-term contracts is 30 days if the contract is for at least six months, and 15 days if the contract is for less than 6 months. The statutory probation period for contracts of indefinite duration is 60 days for most workers (90 days if the enterprise has fewer than 21 employees), 180 days for workers in highly technical posts or in posts with a high degree of responsibility or positions of trust, and 240 days for managers and senior executives. Collective agreements and individual contracts may specify shorter probation periods.

Probation periods up to a maximum of six months are permitted in **Sweden**. If the probationer is not to be employed beyond the agreed probationary period the employer must duly notify him, failing which the probationary period is automatically converted to employment of indefinite duration. Any employer agreeing to employment on a probationary basis is obliged to inform the local trade union with which he has a collective agreement so that the trade union has an opportunity to raise any objections it may have. If the probationary period is to be terminated prematurely or terminated without employment on an indefinite term following on, the employer must inform the worker two months in advance. If the latter is a member of a trade union the local branch must be given notice at the same time. Both the employer and the trade union are entitled to discuss the notification with the employer. Collective agreements may contain rules regarding shorter probationary periods, requirements covering the reasons for stipulating a probationary period or a total ban on probationary periods.

In the **United Kingdom** there is no statutory regulation of the probation period. Employees who have been employed for less than two years have no right to complain of unfair dismissal. The effect of this is that an employer is free to treat the first two years of any employment as a *"probationary period"* without the risk that premature termination will result in tribunal proceedings to test the fairness of the dismissal. However, as a result of a judicial decision in 1995, the two-year rule may be regarded as unjustifiable indirect discrimination against women provided that it can be shown, in a particular case, that the proportion of women who can comply with the two-year requirement is considerably smaller than the proportion of men who can do so (this decision is under appeal).

CHAPTER 3 NON-STANDARD EMPLOYMENT CONTRACTS

The term *"non-standard employment contract"* is understood to comprise the majority of employment contracts or similar relationships of subordination of the employee which are not full-time and for an indefinite period. The chapter will, therefore, focus on fixed-term contracts, temporary work contracts, part-time employment, homeworking apprenticeship contracts.

TABLE 3: DURATION OF PROBATION PERIOD

COUNTRY	TIME	CATEGORY	NOTICE REQUIRED
Belgium	14 days 6 months 12 months	Blue collars White collars White collars earning more than 780,000 BEF	None None None
Denmark	3 months	White collars	14 days
Germany	6 months (max.)	All workers	
Greece	2 months (min.)	All workers	None
Spain	9 months (max. except collective agreement) 6 months (max. except collective agreement) 3 months (max. except collective agreement) 2 weeks	Leading personnel Technical workers Other qualified personnel Unqualified personnel	None None None None
France	3 months maximum 2 weeks or 1 month depending on duration of contract, the term fixed in individual or collective agreement or custom	Commercial travellers Other workers	None None
Ireland	No statutory regulation		
Italy	6 months	All workers	None
Luxembourg	2 weeks (min) 6 months (max) 12 months	All workers All workers Workers earning more than 115 000 LUF	2 days 24 days 1 month
Netherlands	2 months	All workers	None
Austria	1 month 2 months	All workers Apprentices	None
Portugal	30 days (fixed-term contracts, but 15 days if the contract is for less than 6 months) 60 days (90 if the enterprise has fewer than 21 employees) 180 days 240 days	Most workers Middle managers and technical personnel Posts involving technical complexity, high responsibility or positions of trust Management and senior executives	None None None None
Finland	4 months	All workers	None
Sweden	6 months	All workers	Yes, at the termination of the probation period at the latest
United Kingdom	No statutory regulation		

a) Fixed-Term Contracts

A fixed-term employment contract generally expires on a certain predetermined date without notice having to be given by one of the parties involved.

Fixed-term employment contracts are regulated by general employment legislation in **Germany, Greece, Luxembourg, the Netherlands, Austria** and **Sweden**. Specific regulations can be found in **Belgium, Spain, France, Italy** and **Portugal.**

In **Denmark, Ireland** and the **United Kingdom** there are no specific legal regulations on the formation or duration of fixed term contracts. However, in **Ireland** s. 2(2) of the *Unfair Dismissals Act 1977*, as amended in 1993, sets out the rules which apply where a fixed-term contract is to be determined, and these rules may in turn influence the manner in which such contracts are entered into.

In some Member States fixed-term contracts are not subject to certain conditions. This is the case in **Belgium, Denmark, Ireland, the Netherlands, Austria** and the **United Kingdom.**

On the other hand in **Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Spain, Finland** and **Sweden** particular circumstances are required to justify their use.

i) Specific requirements

In **Germany** the Federal Labour Court ruled in 1978 that there must be objective grounds, such as cover for absence or a temporary increase in workload, to justify the use of a fixed-term contract.

In **Greece** fixed-term contracts may be used to ensure that emergency work is done, to deal with temporary increases in workloads and to carry out clearly defined work not normally in the employer's area.

In **France** an employer may have recourse to a fixed-term contract for any non-permanent and precisely defined job. A list of specific circumstances in which these contracts could be used was abolished in 1986. It remains, however, that fixed-term contracts may not be used for permanent jobs linked to the company's normal activity. Employment creation programmes and training schemes may also include fixed-term contracts.

In **Italy** *Act. No 230* lays down a number of conditions under which fixed-term contracts may be used: cover for absence, emergency tasks, temporary increase in workloads and completion of clearly defined work related to the employer's activity but not normally carried out by the company. A *1987 Act (No 56)* enables new types of fixed-term contracts to be agreed by collective bargaining. Collective agreements must also establish the percentage of workers employed with fixed-term contracts as a proportion of the total workforce.

In **Luxembourg** the law restricts the use of fixed-term contracts to precisely defined temporary tasks outside the normal activity of the company.

In the **Netherlands** there are no limitations on the conclusion of fixed-term contracts in statute law and in case law; sometimes those limitations are laid down in collective agreements.

In **Portugal** the law (*Article 41* of *Decree-law No 64-A/89*, of 27-2-89) sets out the conditions and circumstances in which use of a fixed-term contract is justified. In addition to situations of temporary need, the law specifies two different types of situations which can be considered as measures to promote employment: the first linked to the employer (company start-up or start-up of a new activity within a company), the second linked to the employee (worker seeking a first job, or long-term unemployed worker).

In **Finland** employment contracts can be concluded for a fixed period if the nature of the work, the post and working practices or other comparable circumstances so require or if, on account of the firm's activity or the work to be carried out, the employer has another reason for concluding a fixed-term contract. Notwithstanding the Act, an employment contract can, however, be concluded with a long-term unemployed person for a fixed term, provided that this is at least six months, on the basis of a special employment Act in force until the end of 1996.

The **Swedish** *Security Act* lists the following types of permissible fixed-term employment contracts:

- Contracts for a specific period, a specific season or for specific work if required by virtue of the special nature of the work. Examples are harvest work, a fixed-term investigation assignment or the construction of a special building.
- Contracts for a specific term to fill temporary posts, to undergo training or for holiday work.
- Contracts for specific terms to cope with temporary excessive workloads.
- Contracts for terms immediately preceding military service lasting more than three months or following retirement.

ii) Duration

There is no statutory regulation of the maximum duration of the fixed-term contracts in **Denmark, Greece, Ireland, Luxembourg, the Netherlands, Finland** and the **United Kingdom.**

In **Denmark** however, in cases where an employer is repeatedly using fixed-term contracts for the same employee, the courts may hold the view that the employer is trying to circumvent the *Salaried Employee's Act*; in such cases the fixed-term contract will thus be considered as a normal contract for an indefinite period.

In the **Netherlands**, no maximum duration is fixed in the *Civil Code.*

In other Member States limits on the duration of fixed-term contracts can vary from three months to three years.

In **Belgium** there is no statutory maximum duration, except for the transition period up to the end of 1997, for which a maximum of two years or three years is provided.

In **Germany** the *Employment Promotion Act (1985)* allows fixed-term contracts of 18 months (or 24 months for recently established companies up to 6 months in business and which employ 20 or less employees if this is a new recruitment).

The lowering of the restrictions on fixed-term contracts is limited until 31 December 2000. Besides legislation the law does not foresee limits on the duration of fixed-term contracts, but there must be a justified reason for the duration.

In **Spain** the maximum duration depends on the type of contract: three years in the case of contracts promoting job-creation, start-up of an activity and apprenticeship; two years in the case of work-experience contracts. The minimum duration of fixed-term contracts is six months.

In **France** *Act No 90-613* of 12 July 1990 incorporates the terms of a multi-sectoral agreement on the duration and renewal of fixed-term or temporary contracts. Such assignments must not exceed 18 months, renewals included, except in the case of workers on public employment support schemes.

In **Italy** the duration of fixed-term employment relationships in the civil service cannot exceed three months (*Article 36 of the legislative decree of 3rd February 1993, No. 29*). In the private work sector the law does not fix precise limits for the maximum duration of fixed term contracts except for administrative and technical managers who can be hired for a fixed term with contracts that do not exceed five years (*Article 4 of Law 230/1962*). Work/training contracts, the maximum duration of which has been established by law at twenty-four months, fall within the category of fixed term contracts.

A new Bill in **Luxembourg** also provides for a total of 24 months.

In **Austria** there is no maximum duration for fixed-term contracts of employment. In practice they are used for relatively short durations.

In **Portugal** the maximum duration is three years (two years in the case of a contract for a company start-up or the start-up of a new activity within a company). The normal minimum duration is six months but can sometimes be less if the situation necessitating the contract has a shorter duration.

In **Sweden** there is only one constraint and that relates to temporary excessive workload. The time may not exceed six months in any period of 24. In other permitted cases of fixed-term employment the law has no provision for a maximum period. When judging whether a fixed-term contract is permissible and not an attempt to circumvent the principal requirement of the Security of Employment Act which stipulates that the employment must be for an indefinite period, the duration may be taken into account for the assessment.

iii) Renewal

The most liberal systems can be found in **Denmark, Ireland, Sweden** and the **United Kingdom.** In these countries there are no conditions set on the number of times these contracts may be renewed nor do they become open-ended if they overrun their limit.

Conversion of the fixed-term contract into an open-ended one is the rule in **Belgium.** Renewal is only permitted in exceptional circumstances with the consent of the employee and the union.

In **Germany** a renewal is only legal if objective circumstances continue to justify them. In case of renewal there is a presumption against substantive justification for the fixed-term contract.

In **Greece** a fixed-term contract may be renewed twice.

In **Spain,** a contract which has been signed for a duration shorter than the maximum statutory duration may be renewed a number of times, although the total cumulative duration must never exceed the statutory maximum. In some types of contracts a minimum duration is set for these extensions, which are usually for six or twelve months.

In **Greece** a fixed-term contract may be renewed twice.

In **France** a fixed-term contract may be renewed once.

In **Italy** a fixed-term contract may be renewed, but only once in exceptional circumstances, and for the same duration as the first contract.

In **Luxembourg** a fixed-term contract may be renewed twice.

In the **Netherlands** a renewal does change the form of the fixed-term contract. However once renewed, it no longer expires automatically but can only be terminated with the authorisation of the *Labour Office.* This last fact detracts from much of the attractiveness of fixed-term contracts for employers.

In **Austria,** according to case law, if an employer wishes to conclude a series of consecutive fixed-term contracts with the same employee, there must be valid economic or social reasons for doing so, and these must be verified meticulously in each individual case. If no valid objective reason exists the fixed-term arrangement is null and void and an open-ended employment relationship must be assumed.

In **Portugal** the contract may be renewed for up to a further three years, e.g. six times for six months each.

If in **Finland** a fixed-term employment contract has been concluded in cases other than those specially authorised, it must be regarded as an open-ended contract. There is no absolute limit on the number of times a fixed-term contract can be renewed, but subsequent extensions may state that there are no legal grounds for a fixed-term contract.

In **Sweden** there are no restrictions regarding how many times a permitted fixed-term contract can be renewed. The rules governing probation periods are different from those relating to other types of fixed-term contracts since the standard procedure is that the contract shall be continued indefinitely and that no renewal of the probationary period can occur except under exceptional circumstances when entirely different work is involved with entirely different demands on the worker than applied in the case of the work for which the probationary period was completed. One and the same person may, for example, be employed in various temporary positions by an employer over a lengthy period. The only requirement is that it is genuine stand-in work and that the employer is not exploiting the fixed-term employment model in an attempt to circumvent legislation on employment security. In such instances the court can make it clear that the contract shall apply for an indefinite period. This presupposes that the trade unions ensure that there is no improper

exploitation of the scope offered by fixed-term contracts. Employers who are bound by collective agreements are therefore obliged to inform the worker's local trade union branch of any fixed-term contract of more than one month's duration.

iv) Conversion

Ex lege conversion of a fixed-term contract into an open-ended contract if it overruns its predetermined date is the normal situation in **Belgium, Greece, Spain, France, Italy, Luxembourg, Portugal** and **Finland.**

In **Spain,** in the case of fixed-term contracts with a statutory maximum duration as described above, if the contract has been concluded for a period shorter than the statutory maximum the extension is too, up to this statutory maximum. In the case of contracts with no statutory maximum duration clause, or where a maximum duration is specified and the renewal of the contract is for a duration exceeding the statutory maximum, the contract is converted into a contract of indefinite duration. But here too the conversion is *iuris tantum*, i.e. without prejudice to the employer's entitlement to demonstrate the fixed-term nature of the contract.

If in **Luxembourg** a fixed-term contract overruns its limit, the law assumes that it has been renewed for the same period as the first contract.

In the **Netherlands** a fixed-term contract which is not explicitly renewed runs for a further period of the prior duration up to a maximum of one year. It counts as a renewal when less than 31 days are between the contracts.

In general fixed-term contract workers enjoy the same terms and conditions as their colleagues with an employment contract of an indefinite period. Exceptions can be noted in, e.g. **Germany** and **France** (probationary periods).

v) Administrative involvement

Administrative authorities are involved in fixed-term contracts in **Luxembourg** (where the Minister of Labour has the power to grant exemptions to the rules), in the **Netherlands** (as regards the permission to terminate a renewed fixed-term contract) and in **Spain** (where the written employment contract must be registered with the *INEM*).

vi) Representation

In most countries fixed-term contract employees are included for the purpose of calculating company size thresholds, e.g. relating to works councils. This is the case in **Belgium, Denmark, Greece, Spain, France, Italy, Luxembourg,** the **Netherlands, Austria** and **Finland.**

In **Germany** a company must have five permanent employees for it to be eligible to set up a works council. Employees on fixed-term contracts are not included in this calculation unless they remain employed for a longer, unspecified period.

In **Spain** a worker on a fixed-term contract of more than one year is counted as a full worker for the calculation of the company's workforce; persons recruited for a duration of less than one year are counted according to the number of days of work performed during the 20-day period preceding the election, with each tranche of 200 days worked corresponding to one full worker.

In **France** they are included *pro rata* to their presence at work for the previous 12 months.

In some countries a minimum service requirement is imposed on employees before they can vote in, e.g. works council elections, in **Belgium,** the **Netherlands** (three months) and in **Spain** (one month), while in **Portugal** only employees with open-ended contracts may vote. In **Spain** workers must also have at least six months' length of service before they are eligible to be elected.

b) Temporary Work Contracts

i) General approaches

In a temporary work relationship three parties are involved: the employee, the employing agency and the client company.

In general, two approaches to temporary work exist. In some countries temporary work agencies are forbidden. This is the case in **Greece** and **Italy.**

In **Greece,** however, even though temporary-employment contracts are null and void because they conflict with a prohibitory and public order law, *"job-placement agencies"* exist illegally. These are proliferating and extending their activities into the "undeclared employment" market, which is fed by a growing number of foreign workers.

In **Italy,** the possibility of allowing the activity of temporary work agencies has been discussed for a long time. The present government has presented a draft bill on this subject matter.

ii) Restrictions

In **Denmark, Ireland, Luxembourg,** the **Netherlands, Sweden** and the **United Kingdom** the use of temporary employment contracts is in general not restricted but in **Denmark** and the **Netherlands** collective agreements may prohibit such contracts.

In the **Netherlands** (where formally the limit is six months but in practice no limitation is enforced) and in **Germany** (three months extendable to six months) they are forbidden in the building sector. In **Germany** the contract between employee and employing agency, however, has to be an indefinite one.

In **Belgium** temporary employment contracts may be concluded in the following circumstances:

- replacement of a worker who has been suspended or whose contract has been terminated;
- temporary increase in existing workload;
- exceptional tasks.

In the first instance the labour authorities must always be informed and agreement must be obtained from the works councils.

In **Spain** it is prohibited to conclude temporary employment contracts for replacement of striking workers within an undertaking, and for assignment to jobs and activities which are subject to regulation on account of the significant

dangers involved. Such contracts are permitted in the following cases: to perform a specified task or provide a specified service; to meet the temporary requirements of the market or an accumulation of tasks or a rush of orders; to temporarily replace workers entitled to have their jobs reserved for them; to cover temporarily a permanent post for the duration of the selection or promotion procedure.

In the **Netherlands** the user company must consult the works council.

In **Austria**, under the terms of the *Gewerbeordnung* (Trade, Commerce and Industry Regulations), the hiring out of temporary workers on a business basis requires official approval, in the first instance from the regional head of government (*Landeshauptmann*). The temporary worker is entitled to appropriate remuneration at the local rate, based on the collective agreement in force in the firm in question for comparable activities. The contract of employment between the employee and the lessee (the employer borrowing the employee) must be in writing and have a statutory minimum content. A time limit may not be stipulated unless objectively justified.

On the duration of temporary contracts, limits vary from one or three months in **Belgium**, to three months in **Denmark** (salaried employees), six months in **Germany**, one year in **Luxembourg** and eighteen months in **France** where the contract for temporary workers practically follows the same scheme as that for fixed-duration contracts. In **Spain** the maximum duration is variable and depends on the reason for the temporary recruitment. In **Ireland**, the **Netherlands**, **Austria** and the **United Kingdom** there are no limits.

Under certain conditions, a renewal of the contract with the user company is permitted in **Belgium**, **Denmark**, **Germany**, and **France** and **Luxembourg**.

Breaks between contracts are required in **Denmark** and **Germany**. In **France** a temporary employment contract may be renewed only for the same period as the initial contract.

Written contracts between the agency and the employee are required in **Belgium**, **Denmark**, **Germany**, **Spain**, **France**, **Luxembourg**, the **Netherlands** and **Austria**.

Written contracts between the agency and the user company must be drawn up and signed in **Belgium**, **Germany**, **France**, and the **Netherlands**.

Pay and other aspects of working conditions must be guaranteed in **Belgium**, **Denmark**, **Spain**, **France**, **Luxembourg** and the **Netherlands**.

As regards union rights, some temporary workers are excluded from calculations of the size of a user company's workforce when determining the application of certain employment laws, e.g. in **Denmark**, **Germany** and **Spain** and the **Netherlands**. In **Belgium** and **France**, however, temporary workers are included within the calculation of user company size, in **Austria** only when they are stably integrated.

Conversion of a temporary contract into a definitive one is, under certain conditions, provided for in **France** and **Spain**.

In **France** a new Law adopted in July 1990 seeks to *"reduce the proportion of precarious jobs (such as temporary work) while facilitating their conversion into stable jobs"* (*see Part I, Title II, ch. 3, a), i)* above. The original bill was amended to incorporate virtually all the provisions of the national collective agreement signed on 24 March 1990, notably, introduction of a *"supervisory mechanism"* in the form of a government report submitted to parliament by 31/12/91 on the level and use made of temporary and fixed term contracts by employers.

In **Luxembourg** the temporary contract is automatically converted into a contract of indefinite duration if, once a mission has been completed, the host enterprise continues to employ the temporary worker.

In **Portugal** *Decree-Law No 358/89 of 17 October 1989* regulates the activities of temporary employment agencies, temporary employment, the placing of workers abroad and the extremely exceptional circumstances in which the temporary supply of workers by enterprises that are not temporary employment agencies is lawful.

Under the terms of the law, temporary employment agencies cannot operate without the prior approval of the competent administrative services, such approval being granted only after fulfilment of a number of conditions, notably the lodging of a deposit corresponding to 150 months of the minimum national wage to guarantee the payment of wages and employment-related costs.

Recourse to temporary work is strictly regulated, with only the following situations being recognised:

- temporary replacement of an absent worker,
- temporary or exceptional increase in business,
- specific tasks of limited duration,
- seasonal work,
- intermittent need for labour caused by fluctuations in activity, or for carrying out projects of a limited and temporary nature, and, in addition, an intermittent need for workers to provide direct social support to families.

As regards social protection, the new decree emphasises that temporary workers shall be treated in exactly the same way as other workers of the employing enterprise as regards pay and other conditions of employment. It is thus forbidden to employ temporary workers successively in the same post for periods to time longer than those specified in the contract of employment.

The placement of workers abroad is also regulated. Their repatriation and social protection is guaranteed through their contracts being made subject to special formalities and through the establishment of a system of joint responsibility, comprising national liaison bodies and the employers of temporary workers.

The Decree-Law allows workers to be hired out temporarily by companies that are not temporary employment agencies, under the terms fixed by the agreement or, in the absence of this, only under the following conditions: permanent worker; loan of manpower in the context of collaboration between enterprises that are legally or financially linked or economically interdependent; written agreement on the part of the worker.

The *Institute of Employment and Vocational Training (IEFP)* advises enterprises on the authorisation for employing temporary workers. In addition to its advisory functions, the

IEFP runs the national register of enterprises employing temporary workers and advises on and administers the deposits to be provided by petitioners. The IEFP acts jointly with the General Labour Inspectorate, the organisation entrusted with monitoring the application of the law.

In **Finland** there is a legal obligation for temporary work agencies to report to the occupational safety and health authorities. Under the Acts on monitoring of safety and health and on applications for changes in matters of occupational safety and health, the health and safety authorities may in addition forbid the hiring-out of labour to other countries and the advertising of such hiring-out if the employer omits to submit the notification or otherwise infringes the conditions of employment for work carried out abroad.

iii) Legal sanctions

In **Belgium**, **Germany**, **Spain**, **Ireland**, **Luxembourg**, the **Netherlands** and **Austria** abuse of the law may lead to the withdrawal of an agency's licence and in some countries, e.g. **Germany** and **France**, may lead to prosecution.

If the agency's licence is withdrawn, or in case of unlawful temporary contracts in **Germany**, the employee is regarded as having an employment contract with the client company.

In **Greece** persons running a private employment agency or intervening to find a placement, in return for remuneration, for a Greek or a foreigner, risk imprisonment of at least three months and a fine of at least 100 000 drachmas.

In **Austria** infringements of the *Arbeitskräfteüberlassungsgesetz* (Manpower Supply Act) are punishable by severe administrative penalties.

In **Finland** an employer who fails to fulfil his obligation to notify his labour-hire activity is punishable by a fine.

Any person in **Sweden** hiring out workers who infringes the law is liable to be fined or imprisoned.

In the **United Kingdom**, as result of deregulatory legislation, employment agencies and employment businesses no longer have to be licensed, but an industrial tribunal may, on the application of the Secretary of State, prohibit a person from carrying on such an agency or business on grounds of unsuitability or misconduct or other sufficient reason.

c) Part-Time Employment Contracts

i) General definitions

A specific legal definition of part-time work is to be found in only five Member States:

- In **Germany** the *Employment promotion Act* defines part-time workers as those workers whose regular working week is shorter than the regular working week of comparable full-time workers in the undertaking. Where no regular working week has been agreed upon, the decisive factor is the regular time worked in one week on average throughout the year.
- In **Spain** the *Workers' Statute* defines part-time work as work in which the number of hours worked per day, per week, per month or per year is lower than the norm for the activity concerned over the period in question. In addition to the standard part-time work formula there are several variants. Firstly, there is the handover contract, whereby a post is shared 50-50 between a worker approaching retirement age and an unemployed person recently recruited into the undertaking (see section f, "Solidarity contracts"). Secondly, there is marginal part-time work, of less than 12 hours per week or 48 hours per month; this gives reduced social protection, with the exception of unemployment benefit, disability pensions (when the disability is not due to an industrial accident or occupational disease), and retirement pensions, and the social security contributions payable under this formula are, accordingly, substantially lower. Thirdly, there is permanent, intermittent work for seasonal workers, which is normally full-time but is performed only during certain months of the year; in this case, the part-time contract is deemed to be a contract of indefinite duration (*cf. section e, Casual/Intermittent Employment*).
- In **France** the *Labour Code* defines part-time work as a number of hours at least one fifth below the statutory or collectively agreed working hours, whether calculated on a weekly, monthly, quarterly or annual basis.
- In **Luxembourg** the law defines the part-time worker as one who, with his employer, agrees on a working week shorter than the statutory or collectively agreed working week in the establishment concerned.
- In **Ireland** the *Worker Protection (Regular Part-Time Employees) Act 1991* defines a *"regular part-time employee"* as *"an employee who works for an employer and who (a) has been in the continuous service of the employer for not less than 13 weeks, and (b) is normally expected to work not less than 8 hours a week for that employer [...]"*; such employees receive greater protection than part-time employees who have not reached the numerical thresholds mentioned in the above provisions;

In **Germany** the *Employment Promotion Act 1985* assumes that a worker on call works at least 10 hours per week, if nothing is stipulated in the employment contract. Furthermore, the Act assumes that these workers are only obliged to work when the employer notifies them at least four days in advance and when daily working time is at least three hours, unless the employment contract states otherwise.

In other Member States no specific definitions exist.

Basic terms and conditions as well as legislation on minimum notice periods, redundancy pay, etc apply equally to full-time and part-time workers in **Belgium**, **Denmark**, **Greece**, **Spain**, **France**, **Italy**, **Luxembourg**, **Portugal** and **Finland**.

In **Ireland**, employees, including *"regular part-time employees"* are entitled to paid annual leave at the rate of six hours leave for every 100 hours worked under the *Holiday (Employees) Act 1973*, as amended by the *Worker Protection (Regular Part-Time Employees) Act 1991*. Specific legislation on minimum notice, redundancy and unfair dismissal applies only to regular part-time employees working not less than eight hours per week and who have been in employment for at least 13 weeks.

In the **Netherlands** the government has (end 1995) tabled a bill which forbids all unequal treatment for part-time

workers in working conditions, save if they are objectively reasonable.

In **Finland** there is no statutory definition of part-time employees, but part-time work can cover anything from employment for just a few hours a week or month, for example, to a job carried out regularly for more than 30 hours a week (but not full-time). The basic idea is that the general rules of labour law are also applied to part-time employees, but there are certain exceptions (see, for example, the right to "sandwich" leave, which is granted to full-time employees only).

Part-time employees have a special statutory right to extra work and training when their employer is looking for new workers for similar part- or full-time work. If the new work requires training that, with due regard to the employee's capability, can reasonably be organised by the employer, then the latter must provide such training.

In **Sweden** the general provisions of labour law also apply to part-time employees. The proportion of part-time employees – approximately 25 % of the labour force – is extremely high in international terms. The primary explanation for this is probably the high proportion of female workers. There are no statutory provisions governing normal working hours for part-time employees. Such matters are agreed by the parties concerned. Part-time employment contracts have not as a rule been considered a problem in Sweden since protection for employment is determined by the nature of the contract and not the working hours. Persons holding short-term part-time employment contracts can nevertheless be treated unfairly and the problem of part-time employment contracts has come increasingly under scrutiny. Certain social benefits are only available if a specified number of hours are worked. There are also rules in collective agreements which entail less advantageous conditions for workers who only work a small number of hours per week. In a number of large-scale collective agreements there are therefore special recommendations on a specified minimum number of hours to be worked.

In the **United Kingdom**, since 1995, employment rights are no longer dependent on the number of hours worked. The relevant legislation was amended as the result of a judicial decision that such thresholds were unjustifiable indirect discrimination against women, because they constitute the overwhelming majority of part-time employees.

In **Belgium, France, Spain** and **Italy** the part-time contract must be in written form. Failure to comply with this requirement in the latter two Member States leads to the assumption of a full-time contract.

In **Spain,** unless there is proof to the contrary, this contract is moreover presumed to have been concluded for an indefinite duration; this presumption of indefinite duration also applies when the part-time contract is added to the performance of fixed and periodic work within the enterprise's normal volume of activity.

There is a somewhat paradoxical tendency in a certain part of the **Italian** jurisprudence to invalidate part time contracts that are not put into a written form.

In **Belgium** the *Programme Law of 22.12.89 (Title II, chapter IV-M.B. 30.12.89)* introduces important modifications to the rules on part-time work. The modifications concern the priority that is given to part-time workers who apply to fill a vacancy within their enterprise, and to monitoring the performance and flexibility of part-time workers.

The collective agreement of 27.2.81 (*CCT No 35*) already laid down that the part-time worker should be given priority, if so requested, to fill a vacancy for a full-time job within the enterprise. The above-mentioned programme law increases this priority and modifies some elements in the procedure. From now on the part-time job or another part-time job which, on a weekly basis, is longer than the current number of hours of work.

There is, however, an important limitation. The right of priority for vacant jobs (full-time or part-time) is only applicable in the same type of job which the worker already holds and has the necessary qualifications.

A part-time worker who wants to apply the priority rule must send the application to the employer in writing. The employer must confirm receipt of this application in writing. This acknowledgement of receipt must mention clearly that the employer is committed to communicate in writing all vacancies for full-time or part-time jobs which meet the above conditions.

When a part-time worker, who is in receipt of unemployment benefit for unemployed hours, does not accept the job (full-time or part-time) proposed by the employer after having submitted such an application, the employer must inform the unemployment office of the *National Employment Office*. The programme-law contains penal and administrative sanctions in cases where the above-mentioned arrangements are not respected.

To put an end to certain abuses in part-time work, three new measures have been taken, to improve the monitoring of the performances of part-time workers.

1. Announcement of the part-time worker's schedule:
- in conformity with the *Act of 3.7.78*, concerning employment contracts, a written part-time employment contract must be signed by the worker at the latest at the time of actually starting work. The programme-law lays down that a copy of this contract, or that part of it dealing with working hours and the worker's identity, must be kept in the place where working regulations can be examined;
- when the part-time working system is based on a cycle of more than one week, it must be possible to determine exactly when the cycle starts. The programme-law describes a cycle as a succession of daily working hours in a fixed order, laid down in the working regulations;
- when the working hours are flexible, the workers concerned have to be notified of their daily working hours, at least 5 working days in advance.

2. Monitoring dispensations from the normal time schedule for part-time workers:
- any employer who employs part-time workers must be in possession of a document in which all dispensations from the normal working hours are indicated. In each case of dispensation from working hours the document

must show opposite the name of the worker the date and the time when work starts and ends. Employers using suitable instruments (such as time-clocks) are exempt from keeping this new document.

3. Sanctions:

- to ensure that these obligations are respected, the programme-law lays down civil sanctions, in addition to penal and administrative fines. When there is no record in a monitoring document or registration instrument, the part-time workers will be presumed to have performed the work in conformity with the working time laid down in their employment contract (or the working schedule which the contract refers to), and, in cases of flexible working hours, that were published according to the procedure laid down by the programme-law. If the time is not published (in contract copy, on posters, or otherwise) the workers will be presumed to have worked as on a full-time employment contract.

The working time of part-time workers can be flexible (*Act of 3.7.78, Art. 11 bis, concerning employment contracts*). The programme-law stipulates that, on average, the length of a working week must be respected for a maximum period of 3 months. This also applies to full-time workers. This period can be extended to a maximum of one year by CCT or by Royal Decree. The duration of the working week of part-time workers can never, however, be shorter than one-third of the working week of full-time workers in the same function in the enterprise or the same sector. Dispensations from this limit can be laid down by a Royal Decree of the Council of Ministers, or by the Ministry of Employment and Labour. When the employment contract allows services shorter than the limits fixed by the programme-law, payment is still based on these lower limits.

When flexible hours are applied, the length of each period can from now on never be shorter than 3 hours (*Law of 16.3.71, modified by the programme-law*). This limit applies to both full-time and part-time workers.

As far as salaries are concerned, full-time and part-time workers employed under the same flexi-time regulations are paid according to the principle of deferred payments (*"paiement différé"*).

In **Germany** the *Act on Improvement of Employment Opportunities (1985)* regulates for the first time part-time work in an attempt to make it more attractive, e.g. by stimulating mobility between full-time and part-time. If the employee declares a wish to change the pattern of working time, then the employer is obliged to provide the employee with information on all relevant available jobs.

In **Greece,** legislation governing part-time work was introduced in 1990, with the adoption of *Law No 1892* on modernisation and development. This Law allows the contracting parties to agree in writing, at the time of recruitment or later, that work for a fixed or indefinite duration will involve a shorter working day or week than that fixed by law or collective agreement, in return for proportionally reduced remuneration.

Dismissal of an employee for refusing to accept conversion of his full-time post into a part-time post is null and void. Nor may the employer impose additional work on any part-time employee who has family obligations or who simultaneously has another job elsewhere.

In **Italy** employees willing to work part-time are registered on a special list with the public employment service. A copy of the written contract must be filed with the provincial Labour Inspectorate. For the passage from full-time to part-time, even stricter formalities are provided for, in order to protect the employees. The legislature has taken a favourable view towards part-time work. After the passing of *Act. No 863 (1984)* the regulation of part-time work through collective bargaining has become widespread.

ii) Representation rights

The works council or employee representatives must be informed or consulted on the introduction of part-time work in the company in **Belgium, Germany, France, Luxembourg** and the **Netherlands.**

In **Denmark** the introduction of part-time working is governed by collective agreement at industry or company level.

In **Ireland** obligations arise only where collective redundancies are envisaged.

As regards representation rights, in most Member States all employees, irrespective of hours worked, are eligible to vote for or to stand for election to employee representative bodies. This model applies in **Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Finland, Austria** and the **United Kingdom.**

The situation in **Ireland** and the **Netherlands** is somewhat different.

In **Ireland** the *Worker Participation (State Enterprises) Act 1977* states that only those employed in a *"whole-time capacity"* may vote or stand for election, although the Act does not define *"whole-time"* employment.

In the **Netherlands** all employees working at least one third of standard hours are eligible to vote for or to stand for election to representative bodies.

Part-timers are included with full-timers in calculations of workforce size in **Belgium, Denmark, Germany, Greece, Spain** and the **United Kingdom;** although in **Belgium** part-time employees working less than 75 % of normal hours are counted as only half one full-time employee. In the **Netherlands** only part-timers working at least one third of standard hours count as full-timers.

In **France,** part-time employees are counted pro rata to their working time for the purpose of calculating the size of the workforce.

In **Italy** part-time employees are counted pro rata to the number of full-time employees they represent.

As regards worker representation in undertakings in **Luxembourg,** part-time workers are counted in full for the purpose of calculating the size of the workforce, provided they work 16 hours per week or more. For workers working less than 16 hours per week, the size of the workforce is calculated by dividing the total hours of work specified in their contracts by the statutory or collectively agreed working hours. Employees holding part-time posts simulta-

neously in several undertakings are eligible only in the undertaking in which they work the longest hours; if they work equal hours in different undertakings, they are eligible in the undertaking in which they have the greater length of service.

In **Sweden** part-time employees are placed on an equal footing with full-time employees when the strength of the workforce is calculated. They have the same representation rights as full-time employees.

d) Job-Sharing

Job sharing is not common to all Member States.

In **Belgium** a system of company work redistribution plans was introduced by *Royal Decree of 1993* and by a Law of 1995. The aim is to allow the work available within an undertaking to be redistributed among a greater number of workers. The procedure involves the conclusion of a framework collective agreement at sectoral level and of an employer's agreement at company level, augmented where necessary by individual agreements. The employer benefits from a flat rate reduction in the employers' social security contributions for each additional post created.

The *1985 Act on Improvement of Employment Opportunities* in **Germany** provides some minimum regulations for this kind of work. If one of the job sharers is unable to work, the other job sharer is not obliged to replace him or her by prior agreement. Such a prior agreement would, under exceptional circumstances, be possible for replacement in emergency situations, but even then it must be considered whether the employer can be expected to accept this replacement.

In addition to the limitation of the obligation to replace, a protection against dismissal is also included in the Act; i.e. the termination of one job sharer contract never justifies the dismissal of the other employee in the job sharing relationship.

In **Italy**, in June 1995 the current government presented a draft bill on job sharing.

With the aim of boosting employment, rules have been introduced in **Finland** to the effect that employees who voluntarily switch from full-time to part-time working may be granted, within the limits of a budgetary appropriation, compensation for reduced income, known as the part-time allowance. This allowance can be granted if the employer takes on, in addition to the employee switching to part-time work, an unemployed job-seeker for the same tasks.

An Act on experimental *"sandwich"* leave schemes came into force from the beginning of 1996 for a period of two years until the end of 1997. It involves an arrangement whereby a full-time employee, under a time-off agreement concluded with his employer for a certain period, can be released from the duties inherent in his employment and at the same time the employer undertakes to employ an unemployed job-seeker for a corresponding period. The length of such leave ranges from a minimum of 90 to a maximum of 359 calendar days.

The employee is entitled to pay for the leave period. This comes from funds set aside to provide a guaranteed income for unemployed persons, but the full amount of such pay comes to 60% of the daily unemployment allowance to which the employee would have been entitled if he had been unemployed. A ceiling of FIM 4 500 a month is laid down in the Act.

There are also certain provisions on job-sharing in sectoral collective agreements.

Job sharing is also being developed by major employers in the **United Kingdom** and has been applied successfully in civil service departments.

(see also section f – solidarity contracts)

e) Casual/Intermittent Employment

In **Germany**, **Spain** and **France** employees doing casual or intermittent work are afforded certain legal protection.

In **Germany** the *Act on Improvement of Employment Opportunities (1985)* provides for some minimum regulation in the case where the employee is engaged on a casual basis to suit the employer's needs. When employer and employee agree that the employee is only expected to work when necessary, two conditions have to be fulfilled:

- firstly, the duration of the weekly working time has to be agreed. If such agreement is lacking, it is assumed by law that the weekly working time is ten hours;
- secondly, the employee is only obliged to work when the employer provides notice at least four days in advance. In the absence of agreement, it is assumed that the employee is occupied for at least three days of consecutive work.

In **Spain** there is no clearly recognised *"intermittent employment contract"*, although there is a contract for permanent work of a discontinuous nature, which refers to periodical company activities of a continuous nature.

Whenever this intermittent or *"cyclic"* performance of an activity arises, the corresponding contract of employment must be of this type and not a separate temporary contract used for each *"cycle"* of activity, nor a part-time contract with a pre-determined annual duration.

It is understood that permanent contracts of a discontinuous nature are entered into on an indefinite basis, with periods in which the contract is suspended during phases of inactivity. The workers contracted must be called each time the activity commences in strict order of seniority within each speciality. In the event of failure to call a worker (the conditions for which may be regulated by the collective agreement), the worker may resort to labour jurisdiction in the same manner as if dealing with a matter of dismissal. The time limit for appeal is calculated as of the moment the worker becomes aware of the problem.

The contract must be in written form and must illustrate the periodical or cyclic activities which justify its use. Collective agreements may provide possibilities for *"regular casual workers"* to become permanent workers in virtue of continuous services rendered.

In **France** a *Law of 20 December 1993* provides that intermittent work, in which periods of work alternate with periods of inactivity, constitutes a form of part-time contract of employment (e.g. part time defined over a year). It must therefore be the subject of a written contract. However, the

employer is allowed considerable flexibility in organising the work (possibility of modifying the periods of work, on condition that he gives notice thereof; recourse to overtime hours paid as normal hours).

The intermittent worker is therefore simply a variety of part-time worker, enjoying the same status as the latter.

In the absence of legislation, case law may provide some protection, e.g. in the **Netherlands** where in 1994 the *Supreme Court* rejected the unequal treatment in working conditions of workers on so-called labour-on-call contracts.

In **Finland** the provisions of labour law usually apply also to casual employment.

In **Sweden** intermittent employment can be viewed partly as work which recurs at regular intervals but which is considered to be a new employment relationship each time, and partly as seasonal work or other work which in view of its nature is discontinuous but yet arises within an existing employment relationship. An example of the first type would be *stevedoring*. During the intervening periods the worker is not employed by the employer concerned. When the employment contract is being concluded the employer must make it clear to the worker that the work is of the type described. In the case of seasonal work or work which by virtue of its nature is discontinuous, court rulings have required that termination of the work should be caused by circumstances over the which the employer has no control, that the periods of work are reasonably predictable for the worker and that the employer informs the employee at the outset that the indefinite employment contract includes seasonal or other interruptions to the work. In accordance with the *Security of Employment Act* a worker who has been laid off, in other words who in the event of a temporary suspension of the work during the term of the employment contract is exempted from his obligation to remain in the vicinity of the workplace, is entitled to keep his wages and other employment benefits. Seasonal work or other work which by virtue of its nature is discontinuous is not subject to the provisions of the law on pay during lay-offs. Aspects of the special nature of the above types of employment contract are governed by collective agreement. In all other cases the general labour law provisions apply.

Intermittent employment contracts may be concluded in order to fill the permanent posts defined by such arrangement or agreement which, by their nature, consist of an alternating sequence of periods worked and periods not worked.

The intermittent employment contract shall be an indefinite contract, which must be in writing and shall include:

- the qualifications of the employee;
- the components of the employee's remuneration;
- the minimum annual duration of the work of the employee;
- the periods during which the employee is to work;
- the organisation of working hours within these periods.

Working hours over and above the minimum annual duration specified in the contract may not exceed one-quarter of that duration.

In cases where the nature of the activity does not allow the periods of work and the distribution of working hours within those periods to be specified with any exactness, the agreement or the extended collective arrangement shall stipulate the necessary adaptations and in particular the conditions in which the employee shall be entitled to refuse the dates and working hours he or she is asked to work.

Employees with intermittent employment contracts shall enjoy the same rights as full-time employees. This applies to all legal rights and all rights laid down by collective agreement with the exception of those arising out of *Law No 78-49 of 19 January 1978* on monthly payment; the employer and the union should reach agreement on the extension to workers on intermittent contracts of all or some of the rights laid down in the monthly payment law.

For purposes of establishing rights related to length of service, periods not worked shall count in full as hours worked.

Failure to comply with these provisions shall make the employee on an intermittent contract a permanent worker on an open-ended contract in line with the working schedules of the company concerned.

Several sector-level agreements have been concluded on the basis of this legislation, e.g. in the agriculture and food distribution sectors.

In the **United Kingdom** the status of *"employee"* was denied by the courts to so-called *"regular casual"* workers at a hotel, who claimed that they had been unfairly dismissed. The *Court of Appeal* held that the mutual reliance of the employers on the services of the casual workers on receiving priority of hiring each week, could not give rise to an overall (or *"umbrella"*) contract of employment. Nor were the regular casuals employed on a series of contracts each time they were engaged because, according to the Court, they were in *"business on their own account"*, despite the fact that they worked for no one else and contributed no capital.

Casual workers may, thus, be excluded from employment protection legislation either because they are not *"employees"* or, even if they are *"employees"*, because they lack the qualifying period of continuous service (e.g. two years to claim unfair dismissal).

f) Solidarity Contracts

Solidarity contracts are not very common in Member States of the Community.

In **Spain** there is a type of solidarity contract known as the *"contrato de relevo"* (handover contract). This contract enables a worker, in certain circumstances, to convert a full-time contract to a part-time contract, switching to half-time work and thus enabling another worker to be recruited on a handover contract.

The decision of the worker to switch to part-time work, and thus to *"partial retirement"* or *"progressive retirement"* should, in principle, be voluntary, although it is possible for a collective agreement to impose a compulsory clause in this regard, particularly in the light of case law which recognises the validity of clauses imposing compulsory retirement at a certain age. The worker who converts his contract and goes into partial retirement must meet all the requirements

necessary for entitlement to a retirement pension, except for the age requirement. He must be no more than three years under the retirement age (i.e. 62 or over), and will receive 50% of the total pension due. The worker recruited on the handover contract must be unemployed prior to recruitment. The contract of the worker approaching retirement age will terminate on his reaching the statutory retirement age (65), and the handover contract does not necessarily have, at this point, to be consolidated as a full-time contract: it may be terminated or consolidated as either a full-time or part-time contract as the employer so wishes; nevertheless, there are certain benefits available, in the form of reduced social security contributions, if the undertaking opts to extend the contract for an indefinite period and on a full-time basis. Generally speaking this contracting arrangement has so far had little impact, the number of handover contracts totalling scarcely more than 2000 per year (2 182 in 1992, 2 611 in 1991, 2 283 in 1990).

In **France** solidarity contracts have enabled progressive retirement amongst older employees who benefit from state-paid compensation if the employer replaces those leaving with young unemployed.

In **Italy** this type of contract has had some success. The *Act No 863 of 1984* provides for two types of solidarity contracts: firstly, the *"expansive"* type, which has the specific aim of increasing employment levels; and secondly, the *"defensive"* type, which aims to avoid collective dismissals.

On the whole, this law has proved to be of little practical importance; the defensive contract has been applied in only limited cases and attempts to increase employment levels through the expansive contract have proved to be highly ineffective.

Regarding defensive solidarity contracts, *Law 863* has been amended by *Article 5* of *Law 236* of 1993. The new regulation turned out to be very effective and was widely used by enterprises to face crisis situations by reducing work hours instead of effecting collective dismissals.

g) Community Programme Contracts

"Community programme contracts" exist in some Member States.

In **Belgium** the rules relating to so-called *"subsidised contract employees"*, which apply to unemployed persons employed by certain local authorities, such as municipalities, *Centre publics d'aide sociale* (public welfare centres), etc., are laid down in a scheme specified in *Royal Decree No 476 of 1986*.

This scheme is aimed at the unemployed, but not necessarily the long-term unemployed. The employees are hired for an indefinite period and their remuneration is equal to that of corresponding state employees. Wages are paid by the local authorities, who receive a subsidy from the national government.

Another programme (*Royal Decrees 25 of 1982 and 473 of 1986*) seeks to employ in the non-commercial sector the long-term unemployed, i.e. those without work and drawing full unemployment benefit for over two years. These employees can be employed by non-profit organisations for permanent activities which are of public importance or social or cultural value and which meet community needs which would not otherwise be met. For a number of legally defined activities, these workers can be hired out to third parties.

In **Spain** the *Basic Employment Act of 1980*, established that any unemployed worker who receives unemployment benefit may be required to perform social work (subject to the agreements established by the organisation which arranges unemployment benefit) when this work is:

- social service and the result benefits the community;
- arranged with a public or private social services organisation or a non-profit-seeking charitable-aid organisation;
- of a temporary nature;
- to be carried out in the area in which the worker is registered;
- coincides with the physical and professional aptitudes of the unemployed worker.

This law restricts, however, the employment of unemployed workers by the public authorities using these *"community programme"* contracts. The maximum duration of these contracts, which must be of a temporary nature, is five months. Once the request has been made by the public authority (within the framework of the agreements which have been signed by the INEM with the different authorities), the employment office selects the necessary workers and may opt for a rotating system of workers. The workers are under the obligation to carry out the community work for which they have been selected and their unjustified refusal to do so will bring about the suspension of their unemployment benefit for a period of six months. Whilst carrying out the community work, the workers continue to receive, from the *INEM*, their complementary amount from the public authority employing them, equivalent to the difference between the amount of unemployment benefit and the total amount on which the benefit is calculated.

In **France** *Decree 84-919 of 16 October 1984* created Public Works Schemes which are set up only by local government authorities and are offered to young unemployed volunteers between 16 and 21. A youth who performs tasks under this scheme receives compensation of 1,200 FRF per month.

In **Italy** there are long-standing laws providing that laid-off workers or unemployed workers be employed in *"socially-useful jobs"*. The latest provisions regarding this are found in *Law-decree 326/1995*.

In the **Netherlands** a variety of community programmes currently exist:

- a *Guaranteed Job Scheme* for the young unemployed (18-23 years);
- two *Subsidised Contractual Schemes* for elderly long-term unemployed.

Only in one of the last schemes are workers employed at the going rate. In the other schemes workers are employed on specific conditions.

In **Portugal** the law also regulates work performed for public bodies or private non-profit bodies under job-creation programmes for unemployed persons drawing unemployment benefit. These types of work, known as work *"for the benefit of the community"* cannot, under certain conditions, be

refused by these workers without valid justification, since unjustified refusal can result in withdrawal of entitlement to unemployment benefit.

Workers on a community programme in the **United Kingdom**, which in the past provided temporary employment for long-term unemployed on projects of benefit to the community, have been treated as employees, but pupils on school work experience programmes are not employees.

h) Homeworking

In some Member States homeworkers are covered by general legislation or by collective agreements for the enterprise or industry in question. In most cases homeworkers are explicitly or implicitly excluded from such regulations. A decisive point in the law is whether or not the employment relationship of the homework is considered a genuine employment contract.

Employment protection legislation for homeworkers exists only in **Germany, Spain, France Italy** and **Austria**. In the **Netherlands**, as in **Portugal** (*Decree-Law 440/91*), there is a special statute which is a dead letter.

In **Greece,** the status of homeworking is based on a legal provision concerning all workers in this category who reside and work in small and medium-sized towns of fewer than 6 000 inhabitants. The rules relating to remuneration, working hours, Sunday rest and termination of the contract of employment do not apply to them, although they have the status of subordinate employee. Generally speaking, the trend in case law is to focus on those elements conducive to regarding homeworkers as self-employed and to consider that these equate with work performance contracts or self-employment contracts.

In **Sweden** traditional home working occurs in certain branches of industry where the worker at home performs work on a piecework basis for a company. In the wake of technological progress it has recently been shown that in many instances some skilled work can be carried out at home, for example on a number of days per week. In the *Annual Leave Act (1977)* there is a special rule for workers performing work at home to prevent employers controlling working hours. A homeworker is entitled to remuneration in place of paid leave. The *Working Hours Act (1982)* does not apply to work carried out at the worker's home. For the rest any special provisions governing home working are set out in collective agreements or personal agreements between employer and employee. Homeworking has recently been reviewed from, *inter alia,* the working environment angle (*see also Title III, Chapter 6 d)*).

Where special statutes are in existence, they mainly regulate areas where homeworking is permitted or prohibited, recruitment and employment contracts, registration and protection with regard to wages, working time, safety conditions and dismissal.

i) Apprenticeship Contracts

These are contracts under which the employer agrees to instruct and teach the apprentice, in return for which the apprentice agrees to serve the employer and to learn for a fixed period.

In most Member States the structure of the apprenticeship is regulated by special laws, with the exception of **Spain**. The apprenticeship contract is not regarded as an ordinary employment contract although the normal rules for employment contracts often apply.

Limits on the maximum age at which an apprentice can enter into a contract vary from 18 years in **Belgium**, 20 years in **Greece**, 24 years in Portugal, 25 years **France,** to 29 years in **Italy**. In **Spain** the maximum age is 25, although this limit does not apply when the contract concerns a disabled worker.

In general, the apprenticeship contract should be in writing and should have an obligatory content. If it is not in writing and signed by both parties, it will be treated in the **United Kingdom** as an ordinary contract of service and the apprentice will thus be unable to claim the special advantages of apprenticeship.

The apprentice is entitled to a wage or a compensation. This is less than that of regular workers and can vary from one country to another.

In **Belgium** the apprentice will receive compensation, equal to a percentage of the minimum wage for the job the apprentice wishes to learn.

In **Spain** the apprentice's remuneration is fixed by collective agreements, and may not be less than 70%, 80% and 90% respectively of the statutory national minimum wage during the first, second and third years of the contract. The remuneration for apprentices below 18 years of age may not be less than 85% of the statutory minimum wage for their particular age.

In **France** this is a percentage of the SMIC, whilst in **Greece** the remuneration is between 20 and 80% of that of regular workers.

The minimum wage is also linked to that of regular workers in **Italy** (from 80 to 92% in some collective agreements).

In **Austria,** remuneration for apprentices is governed by collective agreements. It consists of a flat-rate amount.

In **Portugal** the apprentice is entitled to a training grant fixed annually by the *Ministry of Employment*. The apprentice receives a percentage of this amount (50%, 60%, 80% and 100% respectively during the first, second, third and fourth years of apprenticeship) paid by the *Employment and Vocational Training Institute* (100% the first year, 75% the second, 55% the third and 35% the fourth), the difference being paid by the employer.

The apprenticeship cannot last more than a specific period, e.g. in **France** three years and five years in **Greece** and **Italy**, although in the latter many national collective agreements have greatly reduced this maximum length.

In **Spain** the duration of the contract may not be below six months nor above three years, unless the sectoral collective agreement specifies different durations based on the particular needs of the sector and the workplaces to be occupied; additionally, once the maximum duration of the apprenticeship contract has expired the worker may not be recruited under the same scheme either by the present undertaking or a different undertaking.

Differences also exist between Member States on the termination of the apprenticeship contract.

In **Germany** the end of the apprenticeship automatically results in termination of the contract. If the apprentice does not pass the examination, the contract is extended until the next examination which may only be repeated once.

In **Spain** the general rules on the termination of fixed-term contracts apply, except that if the employee continues to work beyond the statutory maximum duration the contract is deemed to have been converted into a fixed-term contract, the period of apprenticeship counting towards the employee's length of service in the undertaking, and a new probationary period is inadmissible. When the apprenticeship ends, there no longer exists, generally speaking, a contractual relationship between the parties.

In **France,** however, apprentices are given priority by their former master. If the apprenticeship contract is followed by a contract of employment, then the latter will be a contract of indefinite duration.

Although in **Ireland** and the **United Kingdom** apprenticeship contracts are not treated differently in law from other contracts in general terms, they may in certain circumstances be excluded from legal protection.

In **Austria** the apprenticeship contract is normally for three years; the maximum permitted duration is four years.

In the **United Kingdom** there is no liability to a redundancy payment on expiry of an apprenticeship contract and it seems unlikely that an employee could establish unfair dismissal on expiry of the term specified in the agreement. Furthermore, the employer is not obliged to offer the apprentice a job on the expiry of the apprenticeship.

In **Italy** the Constitutional Court has made an attempt to strengthen the job security of apprentices by declaring unconstitutional *Art. 10 of Act. No 604 of 1966* which excludes apprentices from protection against unfair dismissal.

In **Ireland** an apprenticeship scheme is operated by the State manpower agency (FAS) (the *Training and Employment Authority*) under the *Industrial Training Act 1987*); under this scheme apprentices are trained by the authority while also employed by companies participating in the scheme. A system of training leading to an *National Craft Certificate* has also been introduced and in currently being extended.

Reforms of apprenticeship laws were enacted in 1987 in **France** and **Italy**.

In **Finland** there is a special Act on apprenticeship contracts, which was thoroughly revised in 1992. It defines the apprenticeship contract as a special contract of employment providing for remuneration for work done but the specific aim of which is that the employee acquires skills in a certain occupation or part thereof. The apprenticeship contract does not come into force until it has been approved by the local administrative authority. Only persons over the age of 15 can enter into an apprenticeship contract. The Apprenticeship Contracts Act contains detailed provisions on the obligations entailed in and termination of apprenticeship contracts.

In **Sweden** examples of this type of contract can be found in collective agreements for apprentices which are aimed at providing vocational training with employment for young people primarily in the trades. A combination of company training and theoretical school education is often provided. The apprentice's wages during the traineeship period are also governed by collective agreements. The traineeship is also provided as a community-geared element of labour market policy. Financial assistance is provided for employers taking on trainees or study grants are provided for trainees. Such measures are not covered by the general provisions of labour law.

TITLE III
CONTENT AND EXECUTION OF EMPLOYMENT

CHAPTER 1
JOB CONTENT

a) Job Classification Systems

Job classification or job evaluation systems are established mostly by collective agreement and are commonly used in **Belgium, Germany, Spain, France, Ireland, Italy,** the **Netherlands, Austria, Portugal,** and the **United Kingdom.**

In **Denmark,** however, the Confederation of Trade Unions has traditionally been opposed to job classification and job evaluation.

i) Collective agreements

Provisions in collective agreements on job classification vary considerably between Member States.

In **Belgium** only minimum standards are agreed collectively. Most of the detail of a job classification system is left to the agreement of the individual parties to the employment contract.

In **Greece** collectively agreed job classification schemes are (apart from those in some large companies) strongly influenced by legislation.

In **Spain** job classification is, in principle, a collective bargaining issue; it is normally laid down in the applicable collective agreement or, where appropriate, in the agreement between the undertaking and the workers' representatives. As regards the agreement between the worker and the employer, a comparison has to be established between the subject of the contract and identification with the category, occupational group or level of remuneration provided for in the collective agreement. At the start of the 1980s, when the *Workers' Statute* first came into force, the classification system was traditional and archaic. Gradually, the classification systems have been overhauled through collective bargaining, with a tendency to replace the system of occupational categories by the system of occupational groups, thus expanding the occupational equivalences between different workplaces and facilitating multiskilling models. This tendency has become more marked with the 1994 legislative reform of the labour market.

In **France** job nomenclatures were traditionally a matter for industry-wide collective agreements. The way they are structured can vary considerably – some mention jobs, while others go so far as to define functions and tasks.

There has been an explosion in company-level agreements on this subject; industry-wide agreements tend more to define classification methods and criteria.

In **Ireland** job classifications and descriptions are traditionally a matter for collective bargaining although custom and practice may also play a part. Where neither of these apply, job classifications are generally determined unilaterally by the employer.

In **Italy**, since 1973, the traditional system of classification in most industrial sectors has been changed considerably in order to adapt to changes in work organisation. Classifications are now the same for blue and white collar workers and have resulted in a reduction in wage differentials between the least and most skilled workers. Within each level national agreements distinguish between different *"professional profiles"*, i.e. patterns of jobs having a common professional value to be specified and applied through plant wide bargaining. In general the parties refer to this collective classification in order to measure the performance due from the employee and the corresponding remuneration due from the employer.

In the **Netherlands** most large companies use job classification systems, laid down in a collective agreement.

In **Portugal** the clauses in collective agreements list the occupations and occupational categories concerned and describe the corresponding tasks and functions, which may vary depending on the structure of the undertaking, the sector of activity and even the jobs that exist in these organisations.

In **Finland** most of the major employment areas have different job classification systems in the sectoral collective agreements, with differing degrees of systematic formulation.

There are models of job classification systems under collective agreements in virtually all sectors of the labour market in **Sweden**. There are various degrees of systematic configuration.

During the past 30 years there has been increasing use by management in the **United Kingdom** of work study and job evaluation techniques in both the public and private sectors. The main object has been to formalise the relationship between job content and wage payment. This has involved classifying jobs into component factors, such as effort, skill, and responsibility. The result has been to produce systematic job classifications, regulated through rules often agreed with unions.

ii) Legislation

In **Belgium** legislation requires that works councils be consulted on the fixing of criteria for the different levels of trade skill and such clauses as have an impact on rates of remuneration and job classification rules.

In **Germany** works councils participate, e.g. in questions relating to wage structures in establishments and, in particular, in the drawing up of principles governing remuneration.

In establishments normally employing more than 20 persons with voting rights, the employer must inform the works council before classifying and assigning to a different group any member of the workforce. The employer must submit to the works council the required application documents and provide personal data on those concerned. Where an employer envisages engaging or transferring an employee, information on the job concerned and the classification planned must be provided.

In **Spain** the system of job classification is established by occupational category or group. The criteria used to define the categories and groups must be geared to common rules for the two sexes. The law defines the occupational group as that which *"unites the occupational skills, title and general content of the service provided and may include diverse occupational categories as well as diverse functions or occupational specialities"*. The worker is thus obliged to perform functions corresponding to each equivalent occupational category, which means that there is equivalence when the occupational skill necessary for the performance of the functions of the first category permits the development of the performance of basic work in the second category, with the help, if necessary, of prior training or adaptation measures.

In **France** *Art. L 132.12* requires that organisations that are bound by sectoral agreements or, where there is no sectoral agreement, by occupational agreements, shall meet at least once every five years to examine whether existing classifications need to be revised.

In the **Netherlands** an employer must obtain the works council's approval before adopting, amending or withdrawing a job assessment system. The same requirements apply to policies on recruitment and promotion. This obligation shall not apply if the substance of the matter concerned is already governed by a collective agreement.

In **Austria**, minimum wages (manual workers) and minimum salaries (white-collar workers) are established by collective agreement. For white-collar workers, two-yearly increments are typical. For manual workers, in contrast, job-profile and length of service are not prime considerations. Establishment-level agreements play no significant role in remuneration questions.

In **Portugal** the law requires that job descriptions and classifications in collective agreements should correspond with minimum standards as laid down in law.

In the **United Kingdom** there is no legal obligation to inform or consult workers' representatives on job classifications.

b) Good Faith

In all Member States the principle of good faith or the obligation of loyalty and trust imposed on the employee in the relationship with the employer means, generally speaking, a duty not to disclose secrets and a commitment not to compete when carrying out other work, often extending beyond termination of the employment contract. (These so-called ancillary duties depend on the circumstances of the specific case.)

A general tendency to limit the scope of the *"duty of fidelity"* may be observed in **Germany**, **Greece**, **Spain**, **France** and **Italy**.

In **Germany** a vigorous debate continues on whether the employment relationship should be treated as something more than a contractual relationship and whether the personal element should play a decisive role. The consequences of such a view would be that the duty of fidelity would still be an important source of other ancillary duties. An increasing tendency is to reduce the relevance of the personal element and consequently to reduce the scope of the *"duty of fidelity"*.

In **Greece** the obligation of good faith is often interpreted as an obligation on the employee not to cause prejudice by individual behaviour to the legal interests of the employer.

In **Spain** case law has traditionally confirmed that the worker has an *"obligation to faithfulness"*, although this has been subject to recent criticism and is not now included in the Workers' Statute, which only refers to an inherent obligation to comply in good faith. The constitutional court has stated that: *"it is clear that the existence of an inherent obligation of faithfulness, which entails a comprehensive binding of the worker to the employer's interests, cannot be defended as it is not in accordance with the constitutional system of labour relations and is shown to be contradictory by the existence of conflict, the general legitimacy of which is protected in the text of the constitution"*.

This does not exclude the fact, however, that it is necessary that the mutual behaviour of the parties to the contract should be in line with the requirements of good faith, *"as a general requirement which stems from the development of all laws and specifically of the contractual relationship which defines the compliance to the respective obligations, and the infringement of which makes the exercising of rights illicit or abusive and outside their protection"*.

In **France** jurisprudence has, in the past, accepted a duty of fidelity or a duty of loyalty, especially for management. Nowadays, however, these obligations of good faith are increasingly being ignored.

In **Italy** duties of good faith tend to be restricted to the functional needs of production whilst the *"personal behaviour"* of the worker tends to be excluded from their coverage.

In the **Netherlands** the duty of good faith – an essential characteristic of the general law on contracts – has been specified in the *Civil Code* title on the contracts of employment in *Art. 1639d*. It states that an employee shall generally do and refrain from doing what a good employee should do and refrain from doing in like circumstances.

In **Austria** the duty of loyalty protects the employer's commercial interests; in law, it is primarily regulated by duties of forbearance, such as a duty not to pass on commercial and company secrets and a duty not to engage in competition with the employer. Its coverage correlates with responsibility within the undertaking.

The **Finnish** *Employment Contracts Act* contains a general provision on employees' obligations which clearly sets out the requirement for good faith. Under this rule, the employee must, for example, avoid doing anything that conflicts with what can reasonably be required of an employee in his position and that would be likely to damage the employer.

In **Sweden** it is considered that it is part of the worker's obligation under the terms of the employment contract to be loyal to the employer and this loyalty obligation implies that the worker may not disclose information and shall be discreet about anything within his employer's company which it would be damaging to disseminate and shall not enter into competition with his employer. Workers may not under any circumstances take action which is liable to jeopardise or otherwise obstruct the employer's company. Even various forms of critical remarks about the employer, complaints about shortcomings in the company and such like can constitute a lack of loyalty. Court rulings do, however, indicate that a worker has extensive rights to criticise his employer by virtue of the universal right to self-expression. The underlying notion in this loyalty obligation is that the employment contract should not consist merely in an exchange of work for remuneration but that it should also create a personal relationship between the contracting parties.

In **Ireland** and the **United Kingdom** there are certain terms which, in the absence of any express terms to the contrary, will always be read into a employment contract as *"implied terms"*. One of these implied terms concerns what is usually described as the *"duty to fidelity"*. The significance of this duty is that it may continue in some circumstances to bind the employee even after the employment relationship has been terminated.

c) Obligation to Observe Secrecy

In almost all Member States there are statutory provisions requiring the employee to observe secrecy. These obligations may involve criminal liabilities, especially as regards manufacturing secrets.

In **France** this obligation is interpreted strictly. The duty to respect professional secrets does not usually mean, however, that a worker cannot use the professional skills acquired in a job, nor discuss and criticise publicly the company's policy, as is the case in, e.g. **Italy**.

Furthermore in most Member States civil law imposes an obligation to observe secrecy, often both during the employment relationship and after its termination. In most Member States the substance of this obligation varies from case to case and carries the greatest weight where the employee has an influential position in the company.

In **Ireland** and the **United Kingdom** the following categories of trade information can be distinguished or identified in this respect (*Faccenda Chicken Ltd. v. Fowler, 1986, I.C.R. 297*):

- the nature of the employment (e.g. an employee who regularly handles confidential material may be under a higher duty than others);
- the nature of the information (it must be capable of being regarded as a trade secret or its equivalent);
- whether the employer impressed on the employee the confidentiality of the information (merely telling the employee is not enough but is simply evidence that it may be a trade secret);

- the extent to which the relevant information can be isolated from other information which the employee is free to use and disclose. For example, where information about prices and discounts, which the employer wanted to protect, could not be severed from a package of other sales information which was not confidential, the Court of Appeal held that this was not protected after employment had ended.

Confidential information which falls short of being a trade secret is protected during employment because of the employee's general duty of fidelity but an employee is free to use confidential information which is not a trade secret after his employment ends.

Special rules on the observance of secrecy are laid down for members of works council and workers' representatives, e.g. in **Germany**, **Greece**, **Spain** the **Netherlands** and **Austria**.

In some Member States the obligation to observe secrecy is not contemplated expressly in the Statute, e.g. in **Spain** and the **Netherlands**.

In **Spain**, the *Constitutional Court* considers that the obligation of good faith in the employment contract imposes an extra limitation on the exercise of freedom of expression; it must be specially qualified for reasons of strict necessity, which must be justified by the person invoking them.

In **Finland** the *Employment Contracts Act* contains rules on business and trade secrets during the employment relationship, while the Act on improper conduct in industrial activity contains restrictions regarding the disclosure and exploitation of business and trade secrets after the expiry of the employment contract.

In **Sweden** there are special statutory requirements regarding the obligation to observe secrecy on the part of public-sector employees in public office. In the case of private-sector employees the obligation to observe secrecy is governed primarily by the collective agreement or the individual contract of employment. There is also special legislation to protect trade secrets in order to prevent the abuse of company secrets – not only on the part of employees. The safety ombudsman for the working environment is obliged to observe secrecy with regard to what he learns about, for example, trade secrets, business relationships and various personal circumstances when he considers matters relating to the working environment and rehabilitation. A worker who makes an invention can under certain circumstances also be obliged by law to observe secrecy. As regards employers' legal obligation to provide information and to enter into negotiations there are limits on their obligation to provide information to make allowance for the damage which may occur as a result a person's individual integrity, competitive tendering, research and development work. When negotiating, the employer may also request that the information he provides shall not be divulged. If the trade union does not agree to this the employer has a right to negotiate the matter of secrecy and if no agreement can be reached the employer can request the labour court to decide the matter. A person receiving information subject to secrecy in the course of negotiating on behalf of an employee's organisation may pass on this information to the leader of his organisation.

d) Exclusive Service

As regards exclusive service there are, generally speaking, no restrictions on a worker having a second job, unless there is an express agreement to the contrary. A worker is, however, not permitted to engage or co-operate in any form of disloyal competition during the employment relationship. If doing so would inflict serious harm on the principal employer, then this employer may seek to prevent it.

In **Spain** the exclusive service contract is governed by complex legislation. This type of agreement can never be imposed on a worker and must always be accompanied by financial compensation. In cases where such an agreement with financial compensation exists, the worker may terminate the arrangement and regain his freedom to work in another job by providing the employer with 30 days' notice in writing, in which case he loses the compensation or any other rights deriving from the exclusive nature of the service.

In **Sweden** the right to have second job is restricted by law only for public-sector employees. The latter may not have a second job, any assignment or carry out any activity which might undermine their trustworthiness in terms of their neutrality in their work or which might be detrimental to the image of the authority. Other employees are obliged to be loyal (*see b*) above) and not compete with their employer in a way which causes him harm. There are frequently also provisions in collective agreements prohibiting activities which compete.

e) Restraint of Trade

Concerning restraint of trade an employee is not allowed to compete with the employer during the employment relationship but once this relationship is terminated freedom of employment is restored.

All Member States, however, accept in principle, covenants of non-competition which permit specific agreement between the parties aimed at restricting the worker's post-contractual freedom of employment.

This acceptance is, in general, laid down in legislation, except for **France** and **Sweden** (where it is contained in case law and collective agreements) and **Ireland** and the **United Kingdom** (where it is contained only in case law).

The conditions required for the clause of non-competition to be valid vary considerably from one Member State to another.

In **Belgium** the covenant will only be valid for those purposes agreed upon between the unions and the employer(s) if the employee's annual gross remuneration is between BEF 650,000 and BEF 1,300,000. If the employer earns more than BEF 1,300,000 a year the covenant will be valid for all purposes which are not excluded by agreement between the social partners. A *1978 Act* also provides for the possibility of an atypical covenant for white collar workers and for enterprises with an international character or an own-research service. This covenant may deviate from the normal conditions, e.g. regarding the length of the non-competition period and the territory involved.

In **Luxembourg** the non-competition clause is not required to be in writing if the annual salary does not exceed LUF 1 472 000.

In **Germany, Luxembourg, the Netherlands** and **Austria** the clause is not valid if agreed with a minor.

The provisions, in ss. 74-75f of the **German** *Code of Commerce* only apply to white collar workers with commercial functions. White collar workers with a technical function have a more fragmented protection provided for by s. 133f of the *Trade Act*. For blue collar workers there is no statutory regulation whatsoever. The Federal Labour Court, however, has ruled that the principle laid down in s. 74-75f of the *Commercial Code* should be applied to all workers, regardless of function and status.

Another requirement for the validity of the covenant is that it must be in writing. This is the case in **Belgium, Germany, Greece, Italy,** the **Netherlands** and **Portugal.**

Other conditions of validity can relate to activity, duration and geographical limitation.

As regards the maximum duration this may vary from six months in **Spain** (except for technical personnel), one year in **Belgium, Luxembourg** and **Austria,** two years in **Germany** and **Spain** (technical personnel), three years in **Italy** (except for leading personnel) and **Portugal,** to five years in **Italy** for leading personnel.

As regards the geographical limits, it is, in general, provided for that the covenant must be limited to locations where the employer can really compete with the former employee, taking the nature of the enterprise and its activity radius into account and without going outside the national territory.

Another requirement for the validity of the clause can be a condition that the employer has to pay the employee compensation for the period of non-competition. This is the case in **Belgium, Germany, Spain, Italy, Portugal.**

In other Member States individual or collective agreements may provide for similar compensation or the courts may grant such economic compensation.

A covenant is only valid if the employer has a justified business interest in non-competition and provided it does not cause unreasonable disadvantages to the worker. A covenant will, generally speaking, be unenforceable if it is too wide as regards subject matter, geographical area or duration though other reasons may cause a similar effect.

In **Luxembourg** the clause cannot be applied if the breach of contract was not according to the law, while in the **Netherlands** an employer shall not be entitled to derive benefits from a breach of a covenant of non-competition if still liable for compensation because of the manner in which the employment relationship was terminated.

As regards legal sanctions, courts in e.g. **Belgium, France** and the **Netherlands** are entitled to set lower amounts if the compensation demanded is considered to be excessive.

In **France** all covenants of non-competition must have one common feature in order to be legally valid; they may limit but cannot suppress completely the freedom to work of those who are bound by them. In the absence, however, of any statutory regulation much uncertainty surrounds the lawfulness of these covenants.

In most branches of activity the vigour of these covenants will be eased by the application of branch-level collective agreements regulating the maximum scope in time as well as their geographical scope. These collective agreements also seek to provide for the payment of compensation by the employer.

The courts have considerable powers to remodel covenants to make them conform to relevant jurisprudence or collective agreements.

In **Ireland** it has long been accepted that the contractual duty of fidelity imposes some restrictions on the employee in relation to competition with the employer, both during and after the duration of the employment relationship. This principle goes back to an 1894 case in which it was held that it was permissible to restrict the right of an employee to compete with the employer and to continue such restrictions after employment, provided the restrictions could be described as *"reasonable"* in the circumstances. However, such cases are generally decided in the light of the relevant facts; an obligation not to compete will not be accepted where the employee does not have access to confidential trade information, customer lists, or the like.

In the **Netherlands** statute law (*Art. 1637x Civil Code*) poses hardly any limitation to no-competition clauses. However, the courts have wide powers

- to limit or even to repeal the no-competition clause;
- to mitigate penalties contained in no-competition clauses;
- to impose compensation on the employer who enforces a no-competition clause.

In **Austria** the non-competition clause is explicit in the *Angestelltengesetz* (White-Collar Workers Act); beyond this Act, however, it applies analogously to all service relationships. An employer who culpably causes an employee's resignation or dismissal or who himself breaks the employment relationship cannot assert his rights deriving from the non-competition clause. A contractual penalty for contraventions of the non-competition clause can be established, but this penalty can be reduced by the courts.

In **Finland** the *Employment Contracts Act* contains an explicit prohibition on employees engaging in any competing activity during the employment relationship.

There are also special rules applying to the period after the end of the employment relationship. The Finnish Act establishes a principle whereby the restraint of trade may last for a maximum of six months. If it can be considered that the employee has received reasonable compensation for such restraint, it may, however, be extended to a whole year. The maximum fine that can be laid down in order to reinforce the restraint of trade clause amounts to six months' pay. These special rules do not apply, however, to leading personnel directly subordinate to managing directors or involved in the running of a company, business or establishment.

In **Sweden** it is not unusual for an employer to agree with an employee a specific competition clause to prevent the employee working in competition with the company even after

his contract of employment has terminated. Such restrictions often cover a certain period and a certain geographical district and include an amount of money which the employee is liable to pay should the agreement be broken. Such clauses are currently under review and it has been suggested that the courts will amend or invalidate them since they significantly hamper the former worker in his efforts to continue working at his trade. When the court reaches its judgment account is taken among other things of whether the employee was given any consideration, for example greater remuneration for accepting the restraint on trade.

In the **United Kingdom**, as a general rule, all contractual restraints on an employee's freedom to work where and for whom he or she pleases are void at common law as being in restraint of trade. However, a restrictive covenant (i.e. restraint clause) may be upheld and enforced, by way of injunction (interdict) or damages, if the court is satisfied that it goes no further than is necessary to protect the reasonable and legitimate interests of an employer. These legitimate interests are trade secrets (which are, in any event, protected even without an express covenant) and goodwill which the employer has with customers. A lawful restraint may prevent the ex employee working for a competing business or from soliciting his former employer's customers. The covenant will be unenforceable if it is too wide as regards subject matter, geographical area or duration.

f) Workers' Inventions

The law on workers' inventions is set out in a *Patent Act* in five Member States: **Spain** (1986) **France** (1978), **Ireland** (1964), the **Netherlands** (1910) and the **United Kingdom** (1977).

Denmark (1955), **Germany** (1957), **Finland** (1967) and **Sweden** (1949) have special legislation on inventions by employees.

In **Greece** it is governed by the *Civil Code* and in **Italy** by special Acts and by the *Civil Code* and specific Laws (1939, 1957, 1985).

In **Belgium** and **Luxembourg** the matter is regulated by case law.

i) Types of invention

Three types of invention can be distinguished:

- *"service inventions"* are those inventions made in the course of the normal duties of the employee, according to the employment contract;
- *dependent inventions"* are those which are not made in the course of the normal duties of the employee but relate to the activity of the enterprise; have been done during working hours with the aid of fellow workers or using materials in the enterprise; or in the employee's own time but using the professional knowledge acquired in his job;
- *free inventions"* are those made during the period of the employment relationship but not in connection with the work, experience and knowledge connected with the particular job;

ii) Property rights

The right to the invention belongs in **Denmark**, **Germany** and **Finland** to the employee (the inventor's principle). The employer, however, has the right to have the worker's rights to service and dependent inventions fully or partly transferred to him or her. For free inventions and proposals of improvements within his business the employer has priority rights. For any kind of inventions the employee has a duty to inform his employer.

In **Belgium**, **Greece**, **Spain**, **France**, **Ireland**, **Italy**, the **Netherlands**, and the **United Kingdom** the general rule is that the right to the inventions in the course of employment belong to the employer. If the contract stipulates that the right to these inventions is transferred ex lege to the employer then this clause is valid in **Ireland**, the **Netherlands** and the **United Kingdom** (only for research staff and senior staff) but null and void in **Belgium**.

In **Spain** the employer is entitled to assume ownership of the invention or reserve a right to use his invention in the case of "dependent inventions" (*"when the worker makes an invention that relates to his occupational activity in the undertaking and in the making of which there was a predominant influence of knowledge acquired within that undertaking or use of resources furnished by that undertaking"*).

In **France** the employer may obtain the property of dependent inventions or the right to use them against compensation agreed by both parties or fixed by a conciliation committee.

In **Italy** the employer has a property right to certain dependent inventions and in other cases a right of pre-emption to be exercised within three months.

In **Austria** the right to ownership of the invention basically belongs to the employee. Employee and employer can agree in advance in writing that any inventions by the employee shall belong to the employer. This arrangement is also possible by collective agreement. The employee receives appropriate compensation in return for ceding the invention to the employer, except in cases where the invention forms the subject of the employment contract.

In **Germany**, **Spain**, **Italy**, the **Netherlands** and **Austria** if the employer is entitled to the employee's invention then the employee inventor has the right to be named in the patent as inventor.

In the case of **Finland** the same applies as for Germany, except that the Finnish legislation does not apply to improvements but only to patentable inventions.

In **Sweden** the basic assumption is that a patentable invention is registered under the name of the inventor (worker). For inventions exploited within the employer's field of activity the main rule applied is, however, the opposite. The deciding factor is the degree of relationship between the invention and the worker's employment. Restrictions on the inventor's right to dispose of the invention apply to specially affected inventions which form an integral part of the worker's research and invention activities at the employer's company. The employer can in a number of cases specified in law present himself as the person with a right to the invention or with preferential rights to exploit it. The worker

is obliged to inform the employer regarding inventions falling within the latter's area of activity. There are important collective agreements in the field which supplement the law. In the case of intellectual work other than inventions the legal position is less clear. Collective agreements govern aspects of this field, for example copyright law and legislation to protect designs. A worker presenting a proposal for improvements at the workplace not covered by patent, copyright or legislation to protect designs enjoys no protection. The employer may therefore be liable to pay compensation in accordance with a collective agreement relating to what is termed proposal activity.

iii) Compensation

In **Denmark** and **Germany** and **Austria** compensation is obligatory in all cases where an employer uses an employee's invention. These Member States have statutory schemes for the calculation of the payment and also require compensation for the use of proposals for technical improvements (which are not inventions) according to statutory regulation .

In other Member States compensation for service inventions is rare.

In **Spain, France, Italy**, and the **Netherlands** financial compensation for service inventions is only required if the wages paid do not adequately compensate the employee inventor.

In **Finland**, by law, inventors are at all times entitled to compensation for the rights taken out by the employer on an employee's invention. The Act and Ordinance contain certain guidelines as to how the compensation is to be calculated, but in larger companies it is customary for guidelines and rules to be laid down separately within the company to determine the amount of compensation. In addition, there is a special body for employees' inventions, comprising representatives of employers, employees, patent experts and inventors. This body can issue free of charge advisory opinions on the application of legislation. In many cases these opinions also relate to the amount of compensation.

In **Sweden** workers are always entitled to obtain compensation when the employer uses a worker's patentable invention. A special body, composed of legal experts and representatives of the social partners, issues opinions on reasonable compensation. Rules governing such compensation may also be contained in collective agreements.

In the **United Kingdom**, where there is no relevant collective agreement providing for payment or compensation, then compensation must be paid for patentable inventions of outstanding benefit to the employer and if it is just to do so.

In **Ireland** compensation is at the employer's discretion.

In **Spain, France,** and **Italy** the employee has a right to compensation where dependent inventions are exploited by the employer. In **Spain** the amount of such compensation will be determined by reference to the industrial and commercial importance of the invention, the value of the resources and knowledge provided by the undertaking, and the worker's own contribution.

In **Germany, France, Ireland** and the **Netherlands** special procedures exist for cases of disagreement on the amount of compensation.

CHAPTER 2
THE EMPLOYER'S PREROGATIVES

a) Power of management

The power of management is attributed to the employer. As a matter of law, there is a duty on the part of the employee to obey lawful and reasonable instructions by management. The employer can delegate this power.

Generally speaking, the power of management includes a power to *"organise"* the work or to *"direct"* the work. The worker is under the obligation to carry out the work under the direction of the employer, complying with the general company regulations and observing specific orders given. The employer has the power to control and supervise the compliance by the workers with their jobs.

Although the power of management is to a large extent discretionary, there are limitations. These limitations can be set by individual employment contract, law, collective agreement, business regulations, custom, etc. Employers shall generally carry out their duties in an appropriate and responsible manner without *"abuse of right"*. In other words, the orders of the employer must be in line with the normal exercise of managerial powers.

Power of management includes the freedom to recruit and dismiss personnel. This freedom can be limited by collective agreements or protective legislation. Limits can also be imposed in regulations concerning worker participation and consultation and, in some cases, co-decision.

As is the case, e.g. in **Belgium**, the employer has the ability to adapt working conditions to meet the organisational and technological changes which take place in the enterprise. Although *Art. 25 of the 1978 Act* concerning individual labour contracts provides that a clause in the individual labour contract whereby the employer retains the right unilaterally to change wages and working conditions is null and void, this does not take away the employer's ability to make changes in the enterprise. Essential changes (such as, e.g. the content of the job and the pay), will need the consent of the employee(s) concerned.

In **Denmark** the concept of managerial prerogative is used in an even broader sense, since managerial prerogatives are recognized in collective agreements and case law. They are not laid down by statutory provisions. The scope of the managerial freedom in the employment relationship varies according to the collective agreement by which the individual employer is bound. Part of the managerial power is the right to interpret collective agreements. Conflicts concerning the interpretation of collective agreements are in the last resort settled by arbitration. In the period between going to arbitration and receiving the award, workers are under an obligation to abide by the employer's interpretation of the collective agreement.

The existing case law on the employer's managerial prerogatives deals furthermore with themes like the freedom to select workers for recruitment and promotion, the freedom

to dismiss workers, the power to issue work rules, the power to direct and allocate work, the power to monitor the performance of work and the power to determine working hours subject to collective agreement restrictions.

According to the notion of the power of management in **Germany** the employee is obliged to work under the command, authority and control of the employer, i.e. the employer has the right to specify the contractual obligations of the employee by giving orders. The limitation of the power to give orders is laid down in the labour contract. This implies that the contractual duty to work cannot be changed by unilateral order but only by mutual agreement or by a certain kind of dismissal.

When exercising the power of management the employer has to respect the fundamental rights of the employee, e.g. the right of conscience. In this context the duty of equal treatment has become a decisive factor as far as the regulation of working conditions is concerned. It limits the employer's freedom to divide the work-force into different groups with different conditions. However, the principle of equal treatment does not totally exclude different treatment. It prohibits arbitrary distinctions but allows differences which are specifically justified. There is a tendency to raise the requirements for such a justification.

In **Greece** the power of management also affects a wide range of questions covering the employment relationship and the organisation of production. Traditionally the large extent of the power of management is due to the lack at enterprise level of worker participation and collective agreements. However, there have been recent changes in this respect, especially concerning worker participation.

In its legal formulation the power of management in **Spain** includes the power to *"organise"* the work or to direct the work in the strict sense and the power to supervise compliance on the part of the workers.

Case law presents a long tradition of refusing the worker the ability to judge the appropriateness of the orders received, applying the principle *"solve et repete"*. The *Workers' Statute*, however, highlights the fact that the employer's orders must be in line with the normal exercise of managerial powers. This has enabled case law to take a more nuanced approach, recognising an *"ius resistentiae"* (right of refusal) of the worker when confronted with unreasonable orders from the employer.

There is, moreover, a general principle which prohibits personal searches of workers, allowing them only in exceptional cases to protect the employer's property.

In **France**, according to case law, the power of management refers to the organisation of the enterprise, the choice of legal and technical structures, the definition of production methods and the division of tasks, decisions about recruitment and dismissal, and the power to give orders and instructions. The courts rarely interfere with the exercise of these powers of management.

However, the power of management is subject to certain checks: judicial checks in respect of those aspects that are the subject of regulation, e.g. dismissal for economic reasons (redundancy), and checks by the workers' representatives in respect of the general operation of the enterprise and the principal organisational choices (this control is predominantly consultative).

In management terms it is traditionally understood in **Ireland** that employers claim certain *"prerogatives"*. Usually these prerogatives are thought to consist of the right to hire, fire and discipline employees, as well as the right to determine many of the employee's working conditions.

In legal terms the right of the employer to do all or any of these things depends on the express or implied terms of the contract of employment.

The implied terms which the law presumes to be included in most contracts of employment include the duty of the employee to cooperate with the employer and to follow the employer's reasonable instructions. It might therefore be said that the common law adopts a position which is by and large sympathetic to the idea of management prerogatives.

In **Italy** the employer's power of management is seen as the counterpart to the employee's duty of obedience. The exercise of both powers – originally widely discretionary – has been restricted and controlled by collective bargaining and by the law. Some restrictions derive from the Workers' Statute.

According to *Art. 1639b of the Civil Code* in the **Netherlands** an employee shall comply with instructions concerning the performance of work and instructions designed to encourage good order in the employer's undertaking which are given by or on behalf of the employer within the bounds of the law, collective agreements, works rules, custom and practice.

In **Austria** the legal situation is similar to that in Germany. The employer has the right to specify the contractual obligations of the employee under the contract of employment by giving orders. The orders may not contravene laws or go beyond the terms of the contract of employment.

In **Portugal** the power of management is seen as the ability to determine, manage and supervise the employee's performance, within the limitations permitted by law and with due observance of the terms of the contract.

In **Finland** the employer's right to direct and distribute work is already established in the definition of employment contract. The scope of the power of management is not, however, defined positively, apart from where it is stated in the Act that the employee shall carry out his assigned work carefully in accordance with the instructions given by the employer pursuant to his powers regarding the method of carrying out the work, the nature and scope of the work, and the time and place at which it is to be carried out. The employer's instructions can thus put into practice and supplement what has been agreed in laws and contracts.

In Finnish doctrine it is commonly observed that the employer's power of management consists of both a right to manage the company and a right to direct and distribute the work (power of supervision). The latter means that the employer has a right to organise and distribute the work and to determine how it is to be carried out. The employer's right of interpretation is also usually attributed to the power of supervision. In principle, it is the employer who in the first

instance determines how different laws and collective agreements are to be applied at the workplace, and as long as the authorities or courts have not issued authoritative instructions on interpretation, it is the employer's interpretation that counts.

It was as early as 1906 that in **Sweden** employers' rights to manage and distribute work was established in an agreement between employers' and employees' organisations. The labour court subsequently ruled in a number of decisions that an employer's right to manage and distribute work independently and to independently have the right to manage the business was a general principle of law which an employer could only abandon by agreement. Restrictions on the right to manage the business were imposed by legislation on the working environment and working hours as well as in collective agreements on works councils. By the *Co-determination Act of 1976* further restrictions were imposed. The employer is now obliged to liaise. This implies that the employer should initiate negotiations with the local branch of the trade union with which he has a collective agreement before he decides on major changes within his firm or which affect the employment relationships of members of the trade union. This is known as the primary bargaining duty. If the project is not of such importance that it falls within the scope of the primary bargaining duty the employer may still be required, if requested, to conduct negotiations before any decision is taken. An employer also has a duty to liaise with trade union organisations where no collective agreement exists. This obligation is, however, limited to matters which are of particular relevance to the employment contracts of workers who are members of the union which is not linked to the employer by agreement. The employer is the party which adopts the final decision but beforehand the negotiations must have been completed. In the event of disputes regarding the employee's duty to work or sanctions arising from a breach of contract under the collective agreement the trade union as a general rule will have priority of interpretation, in other words for as long as the dispute continues the trade union's interpretation of the matter under dispute shall take precedence. In questions relating to wages and other remuneration payable to the worker the trade union has limited scope to act in such a way. In situations where the employer is to use the services of a contractor the trade union has scope for vetoing the move and preventing the services of a particular contractor being used. In the *Co-determination Act* the parties are urged to conclude collective agreements on co-determination for employees in matters which relate to the conclusion and determination of contracts of employment, management and distribution of work and the running of the company as a whole. Such agreements have been concluded in large sectors of the Swedish labour market. The trade unions' preferred interpretation also applies in disputes regarding the right to leave and wages for the shop steward. The *Protection of Employment Act*, the *Working Environment Act* and the *Study Leave Act* also contain various provisions which give workers a number of options as regards for the preferred interpretation (*see also Part III, Title III, Chapter 2 d)*).

In the **United Kingdom**, as a general principle, a duty on the part of the employee to obey lawful and reasonable instructions by management is implied into every contract of employment, as a matter of law. Failure to do so by the employee may, at the employer's option, lead to the following sanctions at common law:

- withholding of such part of pay as can be attributed to the duties not performed (*"no work, no pay"*);
- if the disobedience amounts to a repudiation of contract (deliberately flouting an essential condition of the contract), summary dismissal.

b) Disciplinary Power

If an employee violates basic duties the employer may take disciplinary action. In most Member States the exercise of this disciplinary power has been restricted and controlled as regards the concepts of misconduct, sanctions, procedure and judicial review. These restrictions have been laid down by Statutes, collective agreements, workplace rules, codes of practice or case law.

In **Belgium**, **Greece**, **France**, and **Portugal** the principal regulations concerning the employer's disciplinary power can be found in workplace rules, though in **France** disciplinary law is also important.

In **Belgium** the *Act to institute workplace rules (1965)* requires that the work rules shall indicate sanctions, amounts of fines and uses to which they shall be put together with offences in respect of which they are imposed and also the possibilities of redress open to employees having grievances or wishing to make observations or objections with regard to sanctions imposed on them. Through the works council the employee can influence the disciplinary power in the enterprise.

In **Denmark**, where there is no general statute law prohibiting unfair dismissal, there are no statutory provisions restricting the employer's disciplinary power either.

In **Germany** sanctions can only be improved with the consent of the works council. Where there is no agreement, the arbitration committee is the decisive body. In addition the Federal Labour Court has developed a range of limitations of the employer's disciplinary power, although the effectiveness of these limitations is unclear.

In **Greece** the issue of disciplinary power is, in general, regulated by workplace rules, co-determined by the works council, according to *Decree 3789/1957*. As regards the procedure and judicial review, workplace rules may provide for independent disciplinary councils, procedural rules and a possibility of appeal within the enterprise. The ordinary civil courts are also competent to control the exercise of disciplinary power.

In **Spain** the legislation requires that misconduct and sanctions be defined according to a standard scale of importance within the collective agreement. Generally, cases of misconduct are grouped into three levels, with corresponding sanctions for each. The law expressly prohibits the adoption of certain sanctions, e.g. a cut in annual holiday entitlement or any other leave entitlement, or any fine. The law also provides for procedural rules and formal guarantees, while case law has established a series of principles in matters of discipline, e.g. the principle of proportionality between offence and penalty, the principle of culpability in respect of the offence committed, and the principle of *"non bis in idem"*.

The law lays down relatively short limitation periods for the sanctioning of misconduct, commencing from the moment when the fault was committed or the moment when the employer was informed of it.

The works council must be notified of all sanctions imposed by the company for serious misconduct.

The employer's decisions regarding sanctions, including sanctions imposed for slight misconduct, may be appealed against in the labour courts. Where those threatened with sanctions are members of a union, the union delegate must be consulted before any sanction is imposed. In the case of workers' representatives, an adversarial procedure must first be initiated, allowing the worker concerned to be heard.

In **France**, since 1945, workplace rules have been required in enterprises with more than 20 employees. The *Act of 4 August 1982* outlined their content, namely rules relating to health and safety, general discipline and disciplinary procedures to be followed.

Although shop rules are still unilaterally established by the employer, they are submitted to the enterprise committee and to the labour inspector who checks their consistency with the law and registers them. The labour inspector, thus, has a considerable influence.

Workers' representatives play no part in the control of disciplinary sanctions. This is up to the courts (control *"a posteriori"*). Fines and other financial punishments are forbidden. In some sectors regulations and disciplinary procedures are laid down in collective agreements.

In **Ireland** most disciplinary and grievance procedures arise out of collective agreements. In the case of disciplinary procedures, they usually concern procedures to be followed if the employer wishes to discipline the employee because of either misconduct or poor work performance. Agreed procedures vary from case to case.

Where there is such a procedure contained in a collective agreement and where the collective agreement is incorporated into the contract of employment, the employer is bound to apply it. This is particularly due to the effect of the *Unfair Dismissal Act 1977*. An employee may be bound to follow a similar grievance procedure contained in the collective agreement.

In **Italy** the only limitation provided by *Art. 2106 of the Civil Code* was that disciplinary sanctions had to be proportionate to the seriousness of an employee's violation, according to the collective agreement.

Art. 7 of Act No 300 (*Workers' Statute*), while confirming the unilateral nature of the disciplinary power, limits its exercise to a rather detailed series of further restrictions, mostly of a procedural nature.

As regards appeal, it should be noted that, in the absence of similar provisions in collective agreements but in addition to the ordinary court procedure, an employee affected by a disciplinary sanction can appeal within 20 days to a tripartite conciliation and arbitration board.

Similar regulations also appear to be applicable to public employment relationships, after the approval of the legislative *Decree No 29* on 3rd February 1993 which had the objective of making provisions governing public employment consistent with those governing the private sector.

In **Luxembourg** there is no statutory regulation in this respect.

In the **Netherlands** the employer may use an unlimited number of disciplinary sanctions to discipline the worker. The only sanction explicitly mentioned in the *Civil Code* is the fine. The *Civil Code* (*Art. 1637u*) provides that an employer shall be entitled to impose a fine for a breach of rules only if an explicit reference is made to the rules concerned and provision is made in the rules for the fine.

An agreement in which a fine is stipulated shall be entered into in writing and must accurately define the use made of the fines. As regards other sanctions, collective agreements, shop rules or individual employment contracts sometimes provide for additional rules.

Statutory regulations on the procedure do not exist but the other sources of law may contain rules in this respect. The courts may control the procedure as well as the weight of the disciplinary sanction. The same applies to all other sanctions not mentioned in the law.

In **Portugal** the law fixes a list of possible sanctions. Collective agreements may contain additional sanctions provided they are not contrary to the law. The law also provides for a procedure to be followed in disciplinary cases. The employee has the right to appeal within the enterprise, without prejudice to the right to launch a legal action. The law provides expressly for a number of abusive sanctions which are, in practice, presumed to be illegal. Finally, the law provides for an elaboration of shop rules, which contain rules regarding the disciplinary power. These shop rules should be communicated to the workers' committees and are submitted for the approval of the labour inspector.

In **Finland** employers have no general statutory power to take disciplinary action against employees who do not fulfil their duties. In certain cases, however, there is provision in collective agreements for certain sanctions for particular misdemeanours, and in legal practice a disciplinary purpose has in special cases been regarded as legitimate for certain measures taken by employers. In the absence of explicit legal rules, however, employers' disciplinary powers should be given an extremely restrictive interpretation. Another reason is that, as a private-law type of agreement, the employment contract opens up the way for a whole series of possible sanctions (cancellation, termination, etc.) if the employee does not comply with his conditions of contract.

In **Sweden** an employer's scope for taking disciplinary action has been severely cut back over recent years and no longer forms part of an employer's prerogative. The basic rule is now that an employee, where a collective agreement-based contract applies, cannot be subjected to any sanctions other than damages without special grounds for such action which are specified in law or a collective agreement. At workplaces where no collective agreement is in force justification for any disciplinary sanctions to be imposed is more likely to be sought in law or the actual contract of employment. In the case of public-sector workers there are special rules relating to disciplinary measures in law. If a public-sector employee

deliberately or by carelessness fails to meet his obligations at work disciplinary sanctions may be applied as a warning or deductions may be made from his salary. Rules on disciplinary measures do exist in collective agreements but they are rare.

In the **United Kingdom**, the common law prerogatives of management have been restricted by the development of the law against unfair dismissals since 1972.

One of the major effects of this legislation, as interpreted, has been to encourage management to develop disciplinary rules and procedures. This has also been a statutory requirement since 1972: the written statement which must be given to the employee must include a note which specifies any disciplinary rules which apply to the employee or refer to a document, reasonably accessible to the employee, which specify the rules.

The note must include details of a grievance procedure which the employee can follow if dissatisfied with any disciplinary decision relating to him or her, or for the purposes of seeking redress of any grievance relating to the employment. This obligation to provide a note of disciplinary rules and procedures initially applied to all employers, but since 1989 firms with less than 20 employees have been exempted.

When dealing with complaints of unfair dismissal, the industrial tribunals may have regard to the *Code of Practice on Disciplinary Practice and Procedures in Employment* issued by ACAS, with parliamentary approval in 1977. This Code is widely followed by employers in their written procedures. Failure to follow a fair procedure (as indicated in the Code) will, in the majority of cases, render a dismissal unfair.

Since most disciplinary are now regarded as express or implied terms of the individual contract, it has proved possible for employees in cases where mutual trust between the parties has not broken down completely, to enforce the procedures by way of injunction (interdict) restraining the employer from dismissing the employee before the procedures have been exhausted.

In the right to impose disciplinary measures in establishments with more than five employees must be stipulated in a works agreement or a collective agreement. Additionally, the works council must agree to each individual disciplinary measure, unless a separate disciplinary committee has been set up with the works council's approval. The Labour Court is competent for disputes between employers and employees concerning the admissibility of disciplinary measures.

c) Duty to Provide Protection

(see also Part IV – Occupational Health and Safety)

The duty to provide protection, be it physical, moral or, in a broader sense, personal, exists in all Member States.

In **Denmark**, **France**, and **Luxembourg** the material scope of this duty is interpreted narrowly and generally linked to safety and hygiene matters.

On the contrary, in **Germany**, **Greece**, **Spain**, **Austria**, **Portugal**, and **Italy** the duty to provide protection has a broader meaning concerning risk and the physical and moral integrity of workers.

In the **Netherlands**, **Ireland** and the **United Kingdom**, according to the law, the employer is under a general obligation to behave in good faith, which includes all aspects of the employment relationship, including, but not exclusively the duty to provide protection.

In **Ireland** and the **United Kingdom**, according to case law, the employer should not behave in a manner which undermines mutual trust and confidence and should be a *"good and considerate"* employer. This extends not only to the physical working conditions but also to the psychological conditions of work.

In **Belgium** the *Law of 1996* on the welfare of workers during the performance of their work will serve as the basis for a new code on welfare at work. The Law extends the sphere of decent working conditions and safety and health to the more general sphere of the physical and moral conditions of work. The employer is obliged to respect moral standards and a certain level of decency in the place of work. The same applies in **Denmark**.

In **Germany** the duty to provide protection is generally stated – in a broad way – in *s. 618 of the Civil Code*, where it is held that: *"the person entitled to the service shall furnish and maintain premises, equipment or instruments which he is required to provide for the performance of the service and organise services performed on his instructions or under his guidance in such a way that the person engaged to perform the service is as fully protected against danger to his life and health as the nature of the service permits"*.

In addition labour duty to provide protection is laid down in various statutes.

In **France** a distinction is made between the obligation to provide security and the obligation to provide protection. The former applies to professional risks (physical integrity), whilst the latter is not well developed in French labour law.

The concept of protection is also very broad in **Greece**, **Spain** and **Portugal**.

In **Greece** the employer should protect the personal values and take care of the personal needs of the employees during the work performance as required by law. As regards health and safety, *Art. 662* of the *Civil Code* obliges the employer to properly arrange the machines at the places of work so that the life and hygiene of the employees may be protected; special laws exist for the security of employees in factories, quarries, etc.

The employer also has to follow up special public law provisions on the protection of employees which require the allowance of necessary time off, the respect of moral standards during work performance, the safeguarding of personal property of employees, the provision of paid leave, regular remuneration, etc.

Similar provisions can be found in the legislation of **Portugal** and **Spain**.

In **Italy** *Art. 2087 of the Civil Code* provides that an employer must adopt in the organisation of the enterprise all measures which, according to the nature of the work, the

experience and the technical possibilities, are required to protect the physical integrity and moral personality of the employees.

In **Ireland** there are very few specific rules setting out the duties of the employer towards the employee, although some such duties do exist. In general terms the main duty of the employer is to provide the employee with a safe place of work and with safe working methods and tools. It has also been made clear in a number of dismissal cases that the employer, as well as the employee, owes a duty of *"fidelity"* or loyalty, and must therefore treat the employee accordingly. This has also sometimes been described as an obligation of *"mutual respect"* which both parties must observe.

The **Netherlands** *Article 1638z* of the *Civil Code* states that an employer shall generally do and refrain from doing what a good employer should do and refrain from doing in like circumstances. In the case law of recent years this article has become a rich source of detailed obligations on the employer. For example, the *Supreme Court* has ruled on the basis of this article that an employer has to provide his partially disabled worker with suitable alternative work if this can be reasonably expected from him. Another article of the *Civil Code, Article 1638x,* requires the employer to equip premises and provide and maintain the tools and implements required for work to be performed and make such arrangements and issue such instructions in respect of the performance of the work that employees are as protected against dangers to life, virtue and property as can be reasonably expected in view of the nature of the work.

In **Austria** the duty to provide protection against dangers to the worker's life and health is provided for in both the White-Collar Workers Act and the Civil Code. However, the duty to provide protection has always been interpreted very broadly; according to case law, it encompasses the whole personality of the worker. Also deriving from the duty to provide protection is the principle that individual employees may not be arbitrarily treated worse than other employees.

In **Finland** the *Employment Contracts Act* contains a special general provision to the effect that the employer shall take steps to provide protection at work and take all necessary measures, having regard to the nature of the work, working conditions and the employee's age, sex, skills and other factors, to protect the employee against accidents at work and any other detriment to health caused by the work. It is also stipulated that the employer and employee must cooperate at the workplace in order to ensure and promote occupational safety and health.

Employers' obligations in this respect in **Sweden** are governed by legislation on the working environment which has provisions for both the physical and the psychological environment. (*See also Part IV, Title I, Table 17: General duties of employers to protect employees*). The employer also has an obligation to exercise his right to manage work on the basis of *"law and best practice"* and, for example, refrain from instructing an employee to do something illegal or unethical.

In the **United Kingdom** the employer is under a duty at common law to provide a safe system of work and a safe working environment. This is regarded as a *"personal and non-delegable"* duty. The employer is also responsible for the acts of those who are in common employment with the injured worker. The common law duty has been amplified and extended by the *Health and Safety at Work etc. Act 1974* and a great number of other Acts and regulations.

The employer is under an implied duty to indemnify an employee against costs and expenses necessarily incurred in the course of his or her duties. An employer is not under any implied duty to take care of the employee's possessions while the employee is at work.

d) Liability

As regards employer and employee liability the following observations can be made.

In **Belgium** a blue-collar worker is obliged to return any tools and unused raw materials to the employer in good condition but is not liable for damage or wear caused by regular use, nor for accidental loss. In the case of damage done during the execution of the labour contract, the worker is liable to the employer or to a third party only for his or her own wilful acts of gross negligence. This liability may be waived only by collective labour agreement made binding by the Crown (and then only as regards liability towards the employer). An employer shall be liable for any bad workmanship caused by the supply of any defective raw materials, information, tools or equipment.

In **Denmark** the employer is liable towards the employee under the normal law of torts for injuries suffered by the employer. In cases, therefore, where the employer is guilty of wilful negligence, he or she may be liable to pay damages for loss suffered, i.e. injury sustained by the individual worker. If the employee causes injuries to third parties then the employer is liable in damages towards that third party.

In **Germany** the employee is in principle liable for any damage his employer is suffering as a result of grossly negligently failing to fulfil his or her obligations under the contract of employment. Where the employer is jointly liable this is naturally taken into account. In the event of ordinary negligence the employee is liable for only part of the damage and in the event of slight negligence he is not liable at all. Third parties can hold liable both the employer and the employee. Under certain circumstances the employee has a remedy against the employer.

In **Greece** the employee's duty of liability to the employer is seen in terms of good conduct towards colleagues at the place of work, carefully supplied work, good relations with the employer, the obligation to return tools and unused raw materials to the employer in good condition, etc. The employer may also refuse to fulfil the duty to pay remuneration before matching it to losses, if an employee has been guilty of fraudulent misconduct. If the employer has failed to take adequate precautions and is guilty of proven gross negligence, then liability for damages may arise. These damages are fixed in relation to the degree of incapacity.

In **Spain** the *Workers' Statute* proclaims the right of workers *"to physical integrity and an adequate safety and health policy"*. Failure by the employer to comply with the safety and health standards may be punished by the courts and may be considered a criminal action. In the event of an accident

caused by the absence of safety measures, the social security benefit payments to which the worker is entitled may be increased by 30 to 50% and must be paid by the employer. This increased amount must be paid directly by the employer, who is prohibited from taking out any form of insurance cover for this liability, which automatically renders null and void any contract taken out to cover, offset or transmit this insurance. In order to obtain exemption from liability for his employees' actions towards third parties, it is not enough for the employer to prove absence of misconduct or negligence on his part. The employer must prove that he *"has taken all the precautionary measures that would be expected of a responsible head of family in order to avoid the damage"*. This proof is not valid if the worker has caused the damage in the performance of the services owed to the employer. This is therefore a liability which is demanded irrespective of all notions of guilt, although doctrinal and jurisprudential attempts are made to base liability on *in eligendo* or *in vigilando* guilt.

In **France** the civil responsibility of the employer for damages caused by work accidents only exists in case of an intentional or inexcusable fault. Failure, however, to observe the many detailed rules render the employer liable to penal sanctions. A third party may bring a claim towards the employer and the employee. Case law interprets this liability of the employer with some restrictions.

In **Italy** the very broad provision of *Art. 2087 of the Civil Code* is specified by a detailed set of rules sanctioned by criminal and administrative penalties seeking to guarantee health and safety within the firms. The effectiveness of these provisions is somewhat restricted. *Act No 300 of 1970* sought to strengthen the control on the work environment.

In **Luxembourg** general *Civil Code* provisions apply. Employees are liable for damage caused through negligence. Employers are liable for damage caused by their employees in the functions for which they have been employed.

In the **Netherlands** the employer shall compensate an employee for any harm to his life and goods incurred in the performance of work unless it is proved that he has not failed to fulfil the obligations or that the failure to fulfil the obligations was due to *"force majeure"* or that the damages were largely due to the employee's gross negligence. If the employer's failure to fulfil obligations results in an employee's death during work, then the employer shall compensate the surviving and dependent spouse, children or parents of the deceased unless the employer proves that failure to fulfil obligations was due to *"force majeure"* or that the death of the employee was largely due to his or her own gross negligence. In the past there was little case law in this area as most employees seemed to be satisfied with the social security benefits provided. In recent years claim under this article have steadily increased, especially as regards damages caused by occupational diseases, linked to asbestos and the like.

In **Austria** the employee's liability is regulated by the *Dienstnehmerhaftpflichtgesetz* (Employee Liability Act). In the case of an excusable mistake the employee is not liable for any damage caused by him. In the case of negligence the courts may reduce the liability, and even waive it altogether in the case of slight negligence. In cases of intent there is no alleviation of liability for employees.

If the employee in the performance of his duties causes damages to his employer or to third parties, he is only liable for such damages if they are caused intentionally or by premeditated negligence. In all other cases the employer must bear his own damages and must compensate third parties for the damages caused by his employee. The law provides, that according to the circumstances of the case the employee may have to bear a somewhat larger liability. Also a larger liability of the employee may be agreed upon in writing, provided the employee is insured for it.

In **Portugal** the law holds the employer liable for work accidents. The same law (*Law 2127 of 1965*) obliges the employer to transfer his civil liability to other bodies legally authorised to take out insurance and provide for payment of damages in special cases that are due to malice or to the responsibility of the management or of management's representative. The employer's liability towards third parties must be resolved within the context of the *Civil Code*, which provides that both the employer and the employee can be held liable.

In **Finland** the *Employment Contracts Act* contains a special provision on damages (§ 51) to the effect that an employer who deliberately or negligently fails to fulfil his obligations as laid down by law or employment contract is liable to pay compensation for any damage arising. It is thus a question of normal principles for contractual damages.

Where the employee causes damage to a third party at work, the employer is liable for compensation. This is laid down in the *Damages Act (No 412/1974)*. The employee is in turn liable to the employer if he has caused the damage wilfully or through gross negligence. If there are attenuating circumstances, the employee is not liable.

It is only under exceptional circumstances that a worker in **Sweden** who, in the course of his work, injures another person (including work colleagues) is held personally liable for damages (as is the case for example if the injury is caused deliberately or by gross negligence or when the worker has a particularly responsible position). Liability generally rests with the employer who is considered to have responsibility for the personal and material risks resulting from the business activities even if he personally has not been negligent. If a worker suffers injury at work through an accident or some other harmful effect the employer is liable to pay compensation. There is also a special law on industrial injury insurance which is applicable to injuries resulting from an accident or other harmful effect at work and which entitles a person to compensation in the event of illness or partial or total loss of capacity for work, such compensation also being payable to survivors. Supplementary compensation may also be payable under the terms of an agreed safety insurance. The conclusion of special insurance for workers injured at work is often included in collective agreements as a supplementary condition.

In the **United Kingdom** under the principle of vicarious liability, an employer is liable to any third party who suffers damage or loss as the result of the negligence or other tort (delict) of the employee in the course of his or her employment. The employee may also be personally liable. There is no duty on the part of the employer to insure the employee against any such liability (other than in respect of

road accidents), unless there is a specific contractual obligation to do so.

CHAPTER 3
WORKING TIME

a) Limits on the Duration of Working Time

In most Member States legislation has set a normal weekly working time, e.g. in **Greece**, **Italy** and **Portugal**, of 48 hours.

In **Belgium** the Law of 1996 provides that before 1 January 1999, for the implementation of a collective agreement, the working week must be reduced to a maximum of 39 hours.

In **Germany** the *Act on Working Time* fixes the normal daily working time at eight hours. Since the weekly working time (which is not specified by the Act) is based on the possibility of a six day week of eight hours a day, this means a regular weekly working-time of 48 hours.

In **Spain** (1983), **Luxembourg** and **Finland** (1996) legislation has set a maximum legal working time of 40 hours per week.

In **Denmark** working time is traditionally a matter for collective bargaining. The normal weekly working hours are 38 hours (possibly reduced to 37 hours in 1990).

In **Spain**, generally speaking and without prejudice to the following observations, the duration of the working week is 40 hours. There must be an interval of 12 hours between the end of one working day and the beginning of the next. Under-18s are not allowed to perform more than eight hours' actual work per day, including, where relevant, time spent on training and, if they work for more than one employer, the hours worked for each of the employers.

In **France** the law sets a maximum working time (in principle 48 hours per week) and a *"normal"* working time (in principle 39 hours per week). But the *"normal"* working time can be adjusted by collective agreement; in particular, it can be based on a timescale other than the week.

In **Ireland** working time is regulated in law under the *Conditions of Employment Act 1936*, as amended, for those engaged in *"industrial work"*; other sectors are either not regulated by law or are regulated under specific legislation. Under the Act working time must not exceed 9 hours per day or 48 hours per week. In practice, however, working time is determined by collective bargaining, and since 1988 a series of agreements have tended to reduce working hours for most categories. Legislation to implement *Directive 93/104/EC* has not yet been introduced.

In the **Netherlands** the new *1996 Act on Working Time* sets the maximum legal working time at 45 hours a week but with an average of 40 hours a week in each period of 13 consecutive weeks.

In **Austria** the normal working week according to the *Working Hours Act* is 40 hours. However, most collective agreements provide for a shorter working week than this.

In **Portugal** the statutory maximum working hours (excluding overtime) are 44 hours per week (42 hours per week for office workers) and eight hours per day (seven hours for office workers), but the daily working time can be increased to nine hours (eight hours for office workers) provided that, in compensation, the employee is given an extra day or half-day of time off per week. As permitted by the law, collective agreements set lower limits.

In **Sweden** the *Working Hours Act* has been in force since 1982 (and is currently under review from the point of view of *EC Directive 93/104/EEC* concerning certain aspects of the organisation of working time). The Act lays down that working hours shall be a maximum of 40 per week. (The standard 45-hour week was shortened to 40 hours in 1973.) Employers may not unilaterally change standard working hours. Employers are obliged to inform workers regarding changes in ordinary working hours. This information as a general rule must be given two weeks in advance. Employers are also required to liase with the trade union before changing aspects of working hours. In most cases working hours are governed by special collective agreements.

In **Finland** a new *Working Time Act* (1996) came into force on 1 November 1996. It is a thorough overhaul of earlier legislation, but it too is aimed at implementing the EC's *Working Time Directive (93/104/EC)*. Under the Finnish *Working Time Act*, normal working time is a maximum of 8 hours a day and 40 hours a week. Normal weekly working time can, however, also be spread out so that it averages 40 hours over a maximum period of 52 weeks.

In the **United Kingdom** it is a distinctive feature of labour law that there is no general legislation prescribing the duration of working time. Both the duration and the distribution of working time are matters for negotiation, where trade unions are recognised. However, the United Kingdom will have to implement the *EC Directive 93/104* concerning the organisation of working time as a result of the decision of the *European Court of Justice* (*Case C-84/94, United Kingdom v Council of European Union*) which has upheld the validity of this Directive.

b) Flexibility of Working Time

Recently, in some Member States, measures have been introduced to allow for the possibility of regulating working hours over a longer period than a week.

In **Belgium** the *Social Recovery Act (1985)* introduced various forms of flexibility. Leaving aside the daily and weekly ceilings of 9 and 45 hours respectively, an average per week can be fixed by binding collective agreement setting a maximum variation of 2 hours per day or 5 hours per week. Another law of 1987 on new working time regulations permits in most of the private sector (except distributive trades, where a special scheme is applied) working time of up to 12 hours per day provided that, within a period of between 3 months and one year fixed by collective agreement, the normal average working time applicable in the sector/enterprise is respected.

In **Germany** a new bill on working time provides the possibility of extending daily working time to 10 hours while maintaining 8 hours on average over 6 months. Collective and, under certain conditions, plant agreements may lengthen the average period to one year.

In **Greece** the statutory working time can be increased (to up to nine hours per day and 48 hours per week) for a period not exceeding three months, either by collective agreement or by agreement between the employer and the workers' council. This must be followed by a proportional reduction in working hours, so that the average working time over the half year does not exceed 40 hours per week and the salary equals that paid for work at the rate of eight hours per day and 40 hours per week (*Law 1892/1990*).

In **Spain** a longer working day can be prescribed, provided that the average number of hours of work is respected over a specific period. The days on which the employee is not in work are often fixed in advance for the whole year. Through collective agreements or, where these do not exist, through an agreement between the company and the workers' representatives, an irregular pattern of daily working time can be applied, provided that the annual average does not exceed 40 hours per week and that there is at least a 12 hour rest interval between any two shifts.

In **France** the average working week of 39 hours can be extended to 44 hours if a collective agreement is concluded at the appropriate level to this effect. If an industry-wide extended agreement exists, up to 48 hours per week may be worked if in general the legal working week is respected.

In **Italy** collective agreements provide for a reduction in annual working time combined with more flexible working time patterns over a one year period.

In the **Netherlands** the new *1996 Act on Working Time* creates the possibility of derogations *in peius* of the standard rules on working time. The Act offers specific limits for longer working hours which may be used on the basis of collective agreements with the trade unions or by agreement with the works council or another kind of staff representation.

In **Austria** a longer working day can be agreed, provided that the stipulated average working hours over a specific period are not exceeded.

In **Austria** the Working Hours Act also offers the possibility of flexitime, whereby workers can themselves decide on the time they will start and finish work each day within an agreed time frame. Flexitime must be regulated by works agreement, and by written contract in establishments which do not have a works council. The working day may not exceed 9 hours, unless the collective agreement permits an extension to 10 hours. The normal weekly working hours may be exceeded provided that any extra hours worked can be carried forward.

The Finnish *Working Time Act* gives the social partners wide scope for concluding collective agreements that diverge from its absolute rules. This right is enjoyed, however, only by employers and by employees' or employers' associations whose sphere of activity covers the whole country. In addition, working time may not exceed an average of 40 hours a week over a maximum period of 52 weeks. It is customary in **Finland** for the national collective agreements to include specific sectoral rules that increase the flexibility of working time.

In **Finland** there is only limited scope for diverging from the provisions of the *Working Time Act* through an individual agreement. If nothing is laid down in collective agreements, the social partners can agree to extend normal working time by a maximum of one hour a day, but it must still average 40 hours a week over a period of four weeks. Under such an agreement, weekly working time may amount to a maximum of 45 hours. In addition, employers and employees may conclude an individual agreement on flexible working hours or "flexitime". This means that within an agreed framework the individual employee can determine the times at which his daily work is to begin and end. The normal daily working time can thereby be shortened or extended by a maximum of three hours' flexitime.

In accordance with the **Swedish** *Working Hours Act* working hours may total 40 hours per week on average over a four week period if such is required by the nature of the work – for example, shift work or work in a service industry. By collective agreement at federation level (in other words not local agreements) these restrictions may be lifted. The *National Board of Occupational Safety and Health*, which is the body with overall responsibility for monitoring compliance with the law, can also grant exemptions when special grounds apply.

c) Night Work

Generally speaking, two legal models can be found with regard to night work.

In the first model night work is generally forbidden but derogations for a number of activities are permitted. This model is applied in **Belgium** and **Finland.**

In the second model, which is applied in all other Member States, night work is permitted unless explicitly prohibited.

It should be noted, however, that despite the above distinction, the difference between the two models tends in practice to be small.

In **Belgium** there is an extensive list of exceptions allowing night work for male workers. As a general rule, women are still not allowed to work at night, except in sectors or in functions where exceptions are provided in a *Royal Decree.*

In the **Netherlands** there are also a great number of exceptions for male night workers. At present the rules governing night work for men and women are equal, apart from the protection of pregnant women (*Act of April 12, 1989*).

Moving to the Member States in the second model, in **Denmark** there are practically no regulations which prohibit night work. The only exception where night work is not permitted is a stipulation in the *Act on the Working Environment* according to which the daily rest period for young persons under 18 years of age must *"normally"* fall between 20.00 and 06.00.

The *Act on Working Time* in **Germany** restricts the night work on eight hours per night. It can be extended to ten hours while maintaining eight hours on average over four weeks. Apart from that night work is not allowed for pregnant women and nursing mothers between 20.00 and 06.00.

In **Greece** there is no general prohibition on night work, except for minors (aged under 18 years) and pregnant women and nursing mothers (Article 10 of the National Collective Agreement of 9.6.1993). However, an employee who works during the night is entitled to the normal hourly rate of pay plus 25%.

In **Greece** night work is, with some exceptions, forbidden for all female employees in industrial enterprises.

In **Spain** there are no limitations on night work for adults, apart from the prohibition on working overtime and provided that the nightworker's shift does not exceed eight hours per day on average over a reference period of 15 days. Employers who regularly require staff to perform night work must inform the labour authority. Night work will attract special remuneration, the level of which is determined by collective bargaining, unless the salary has been fixed on the basis that the work is by nature nocturnal or that extra leave is granted as compensation for the night work.

The law prohibits night work by young people (under the age of 18).

In **France** night work is normally forbidden for women in industry. The *1987 Act on working time arrangements* provides, however, that this prohibition for women in industry can be waived by an extended industry-wide collective agreement but only in industries where economic and social circumstances justify it and only in companies where work takes place in successive shifts. The legal prohibition has been declared to be contrary to *Directive 76/207 (CJ 1991, Stockel)*.

In **Ireland** night work is permitted for all adult workers. Existing limitations for women have been repealed.

In **Italy** night work for women is prohibited in manufacturing enterprises, even as artisans. A *1977 Act* reduced the restrictions on night work for women and abolished them altogether for women managers and those working in the first-aid department of firms. Furthermore, the Act allows the prohibition to be lifted or further reduced by collective agreement. The derogation is not valid for pregnant employees and continues for seven months following the birth of a child. After the *Stoeckel ruling* from the *Court of Justice*, **Italy** rejected *ILO Convention No 89/1948* regarding night work for women working in industry but maintained the law of 1977. This explains why the *Commission of the European Union* started an infringement procedure before the *Court of Justice*. Prohibition of night work for those under 18 years old is provided by *Law No 977* of the 17th October 1967, regarding work protection for children and teenagers.

TABLE 4: STATUTORY REGULATION OF WORKING TIME IN THE MEMBER STATES

COUNTRY	WORKING WEEK	OVERTIME
Belgium	40 hours	65 hours per 3 months
Denmark	No legislation	Governed by collective agreement
Germany	48 hours	2 hours a day on the basis of an 8 hour day if in average remains 8 hours a day within 6 months
Greece	5-day week	Annual ceiling fixed by Decree of the Ministry of Labour (industry)
Spain	40 hours	80 hours a year
France	39 hours (normal duration)	9 hours a week, 130 a year plus more when authorised
Ireland	48 hours	2 hours a day, 12 hours a week, 240 hours a year
Italy	48 hours	No legislation
Luxembourg	40 hours	2 hours a day
Netherlands	48 hours	2 hours a day, 9 hours a week, an average of 5 hours every week in a period of 13 weeks
Austria	40 hours	5 hours a week, 60 additional hours a year
Portugal	44 hours	2 hours a day, 200 a year
Sweden	40 hours	48 hours per four-week period, or alternatively, 50 hours during a calendar month. A maximum of 200 hours overtime per year. Special emergency overtime in the event of natural or other disasters which disrupt activities, or risk disrupting activities or constitute a risk to life, health or properties may be worked as required.
Finland	40 hours	138 hours per 4 months and up to 250 hours per year.
United Kingdom	No general legislation	No legislation

In **Luxembourg** there is no general legislation on night work. Pregnant women and nursing mothers must not be employed between 22.00 and 06.00.

In the **Netherlands** under the new *1996 Act on Working Time* night work is forbidden only for young people under 18 years. For all adult workers, men and women alike, all night work is in principle permitted. The Act only gives a set of conditions for the performance of night work, such as:

- at most 8 hours a night;
- at most 25 times in a period of 13 consecutive weeks;
- after each night shift at least 14 hours uninterrupted rest, etc.

A limited derogation *in peius* from these conditions is possible by way of an agreement with workers representatives. The employer can only require nightwork from pregnant women and from any other worker who has health difficulties in performing nightwork if there is no reasonable alternative.

In **Austria** there are no restrictions on night work for male employees. The *Frauennachtarbeitsgesetz* (Night Work for Women Act) essentially prohibits night work for women, although it lists numerous exceptions, e.g. female employees in the transport and communications sector, in broadcasting, in news agencies, in the hotel and restaurant industry, etc. Additionally, the Act does not apply to certain professions (doctors, pharmacists, etc.). Female employees may work up to 23.00 in shift work, with shift changes at least every five weeks. As part of the adaptation of Austria's legislation to EU law, a gender-neutral set of regulations with extended protective provisions for all employees is planned.

In **Portugal** the law prohibits night work by minors (under the age of 16). Young persons between 16 and 18 years of age may work at night only in exceptional circumstances

(*force majeure*). Women are exempted from night work during the 122 days preceding and following childbirth (at least half of this period must be taken before the expected date of birth). A *Law of 1971*, which has not yet been expressly repealed, prohibits women from working at night in industry, or makes such night work subject to an authorisation from the labour authorities. This restriction does not apply to women with technical and management responsibilities and those working in hygiene and social welfare services.

However, there is a substantial body of legal writing and case law that considers these rules to be in contravention of the constitutional principle of equality and non-discrimination, and of the EU directives on this subject.

In **Finland** night work is defined as work carried out between 23.00 and 6.00. Employers who have work done at night must notify the occupational safety and health authorities. The Finnish Act lays down a 14-point list for cases where night work is permitted. Otherwise, work is to be carried out between 6.00 and 23.00.

Sweden's *Working Hours Act* is based on the premise that all workers shall have time off for night rest between midnight and 05.00. Exceptions to this rule may be made for work of a particular nature, public necessity or other special circumstances where work must continue at night. There are a number of special, tighter statutory requirements with regard to minors.

There is no general legislation in the **United Kingdom** prohibiting night work. Restrictions relating to women and also those relating to men in bakeries were repealed in 1986. The *Employment Act 1989* repealed restrictions on the hours and conditions of young people.

Statutory regulation of night working hours in the Member States may be summarised as follows:

TABLE 5: NIGHT WORKING HOURS

	HOURS DURING WHICH NIGHT WORK IS NOT PERMITTED	
Belgium[1]	20.00	06.00
Denmark[2]	No legislation	
France[3]	22.00	05.00
Germany[4]	20.00	06.00
Spain[5]	22.00	06.00
Greece[6]	22.00	07.00
Ireland[7]	22.00	06.00
Italy[8]	22.00	08.00
Luxembourg[9]	No general legislation (nursing mothers and pregnant women 22.00 to 06.00)	
The Netherlands[10]	00.00	06.00
Austria[11]	20.00	06.00
Portugal[12]	20.00	07.00
Finland[13]	23.00	06.00
Sweden[14]	00.00	05.00
United Kingdom	No general legislation	
Finland[13]	23.00	06.00
Sweden[14]	00.00	05.00
United Kingdom	No general legislation	

1 **Belgium**: these limits are 22.00 – 05.00 or 23.00 – 06.00 for male employees of 16 years of age, and female workers who (a) work in continuous operations or (b) work in shifts. Where shifts are organised in the framework of the 5-day week, the limits are either 23.00-05.00 or 24.00-06.00.

2 **Denmark**: although there is no general regulation, the 11-hours rule of the Act of Working Environment puts certain practical limits on night work: an employee who has worked the normal daily working time must have a period of rest of at least 11 hours before (s)he begins his/her normal working day. The large majority of collective agreements do, however, state that the normal daily working time should be spread over the day. This means that night work must not performed unless the employer can prove there is an acute need for night work for the proper functioning of the enterprise. This does not apply if night work is due to the normal work schedule, e.g. shift work.

3 **France**: professionals and women employed in industry etc., but not in commerce, may not work between 22.00 – 05.00. However, some collective agreements may provide for a 2-hour period of night work after 22.00 but not later than 24.00. Young persons (under the age of 18 years) are not allowed to work between 22.00 and 06.00. Employees occupied in baking bread and pastries must not work between 22.00 and 04.00.

4 **Germany**: Nursing mothers an pregnant women may not be employed between 20.00 and 06.00. Employees do not have to work between 22.00 and 06.00 if they have to take care of a child under the age of 14 if the child lives in the same household and other help is not available.
Female employees, both blue- and white-collar, do not have to work between 22.00 and 0600 am if they have to take care of a child under the age of 14 if the child lives in the same household and other help is not available.
Young persons (under the age of 18 years) may only be employed between 06.00 and 08.00. There are exceptions in restaurants and amusement parks (up to 22.00), in establishments with at least two shifts (up to 23.00), in agriculture (between 05.00 and 21.00) and in bakeries and confectioners (from 05.00). For those who are 17 years of age, even more exceptions exist.

5 **Spain**: The ban on night work applies only to the under-18s.

6 **Greece**: youngsters under the age of 16 may be employed at night (22.00 – 06.00) for reasons of apprenticeship or for other important reasons, or in the public interest. For young people between 16 and 18 years of age the night is an uninterrupted period of 7 hours between 22.00 and 0700. For female employees the night is defined as the period between 22.00 and 07.00.

7 **Ireland**: the Night Work (Bakeries) Act 1936 absolutely forbade baking bread or cakes at night (i.e. for a period of 7 hours including the time between 23.00 and 05.00, or 22.00 and 04.00). This Act was amended in 1981 by making it unlawful to manufacture in a bakery during the period of night save under licence. Children are not allowed to work between 20.00 and 08.00. Young persons may not work at any time between 22.00 and 06.00.

8 **Italy**: for children still of compulsory school age (14), the term *"night"* covers a period of 14 consecutive hours including the time between 22.00 and 08.00. For children under the age of 16, the rest period must be 12 consecutive hours, including the period between 22.00 and 06.00. For young persons older than 16, the rest period should be 12 consecutive hours, including the period between 22.00 and 05.00.

9 **Luxembourg**: young workers must not work between 20.00 and 05.00.

10 **The Netherlands**: for young people this is either between 22.00 and 06.00 or between 23.00 and 07.00.

11 **Austria**: "Night" is defined as 11 successive hours, which must include the time between 20.00 and 06.00. Female employees may not work between 20.00 and 06.00. In exceptional cases the Labour Inspectorate may reduce the obligatory rest period to 10 hours, which must include the period between 22.00 and 06.00. Young persons may not work between 20.00 and 06.00 (exceptions: hotel and restaurant trade, shiftwork).

12 **Portugal**: according to the law, night work is that done between 20.00 and 07.00. Collective agreements may, however, regard as night work periods of work starting after 23.00 and lasting 11 consecutive hours, of which at least seven hours fall between 22.00 and 07.00.

13 **Finland**: Exceptions may be made in specific cases mentioned in the Act, such as seasonal work, shift work in three or more shifts, maintenance and cleaning of roads, streets and airfields, pharmacies, mass media, services, etc.

14 **Sweden**: exceptions may be made with regard to special circumstances, for example continuous operation within industry, health care, hotels and restaurants, the rescue services. In the case of minors (under the age of 18) the *National Board of Occupational Safety and Health* specifies the statutory provisions regarding length of working hours and location.

d) Overtime

i) Limits on the number of hours worked

There is no common concept of the notion of overtime. In recent years, particularly with the increased use of flexible working time arrangements, the notion of overtime has become blurred.

In most Member States, however, maximum limits for overtime are set by the law, apart from **Denmark** and the **United Kingdom**, where overtime is regulated by collective bargaining.

In general, legislation is regarded as a maximum; these ceilings are very often replaced by other arrangements agreed upon in collective bargaining.

In a number of countries overtime has to be authorised. This is the case in **Greece, France** (above the ceiling), **Italy** (largely regulated by collective agreement), and **Luxembourg**.

In most countries there are legal or collective increases in pay for overtime work and rules for time-off in lieu. Overtime pay varies greatly, from in most cases an increase of 25 % on the basic rate for the first hour of overtime and progressively increasing for additional hours and overtime for night work, on public holidays or on Saturdays or Sundays.

Other questions related to overtime are whether or not there is an obligation to inform and/or consult employee representatives or works councils and to what extent overtime is obligatory or voluntary. Rules on these issues differ among Member States.

In **Belgium** any work carried out above the limit of 8 hours a day or 40 hours a week, or the limits set by a legally binding collective agreement, is in general overtime. However, when deviations of the normal limits take place, only hours exceeding the limits concerned constitute overtime. Some agreements express the intent to limit overtime (*e.g. inter-industry wide agreement 1976, collective agreement 1979 in the steel industry and in the insurance establishment 1984*).

In **Denmark** many collective agreements contain regulations on overtime. According to some collective agreements only that time which exceeds the weekly working hours is considered to be overtime, whereas other agreements state that time which exceeds the daily working hours must be considered (and paid) as overtime.

Part-time workers are not usually considered as doing overtime unless they work longer than the *"normal"* working hours of a full-time worker. For shift work only the time which exceeds the normal duration of shift work is considered to be overtime. Many agreements only state that employees are entitled to an allowance when working overtime.

If a collective agreement contains regulations on overtime, then according to case law, the employee is obliged to work overtime if the employer so wishes. Some agreements state that overtime should if possible be avoided, e.g. in the engineering industry. In this case the employer may only request overtime if it is necessary for the proper functioning of the enterprise. If there are limits on overtime, the employer may exceed these limitations with the consent of the employees' organisation or of the shop steward. Where there are no specific terms in a collective agreement referring to overtime, then the employer is entitled to demand overtime and the employees are obliged to carry it out. Although there are then no fixed limits, it is stated in case law that the employer will be in breach of the collective agreement if he uses overtime *"systematically"*.

In **Germany** the notion of overtime, as used in legislation, refers to working time which exceeds the legal maximum of working-time. According to the *Working Time Act* it is possible to exceed the daily working hours by two hours with a maximum of 10 hours if the average working time within a six month period is not more than 8 hours a day. Therefore overtime work does not play a role anymore. The notion of overtime, as often used in collective agreements, refers to the working time which exceeds the regular daily or weekly working-time as fixed by these agreements.

In **France** the employer may request overtime work from his employees up to an annual ceiling (130 hours in principle). Beyond that figure he must obtain the authorisation of the labour administration. Overtime is defined as all hours of work performed beyond the statutory duration of work (39 hours) or beyond the equivalent hours. Overtime may be calculated per *"work cycle"* of several weeks when permitted by a Decree or by an extended industry-level collective agreement, or in industries where work takes place in successive shifts.

The *Labour Code* sets a double ceiling with regard to the maximum duration of overtime. Firstly, it limits the maximum working time, including overtime, to an average of 46 hours a week (calculated over any period of 12 consecutive weeks). Secondly, it limits the maximum hours of work in any given week to 48 hours; so in normal cases the maximum hours of overtime a week is 9. In certain restricted cases, derogations are allowed.

The *Labour Code* provides that an annual number of overtime hours may be decided by the employer. This number has been fixed at 130 hours per year per employee (with exceptions for certain occupations). An extended collective agreement can fix more or less than this figure, e.g. 84 hours in the metal industry.

In **Greece**, a distinction is made between *"overtime exceeding maximum working hours"* (Greek: Yperoria) and *"overtime"* (Greek: *Yperergasia*). The first refers to work performed in excess of the statutory maximum daily working time. The second refers to work performed in excess of the contractually agreed working time (40 hours per week) but still within the limits of the statutory maximum weekly working time (48 hours per week, or 45 hours per week for those sectors which apply the five-day week).

In industry, *"overtime exceeding maximum working hours"* is authorised for emergency work, in order to prevent accidents, for urgent work to meet pressing social needs (e.g. transport), for exceptional accumulations of work, for work on the day immediately preceding a holiday, etc. The employer must seek authorisation from the Labour Inspectorate and keep a special register for this purpose. Additionally, the law requires that the quotas established for each sector of activity be respected, i.e. three hours per day for industrial employees (the annual ceiling is fixed by Ministerial Decree), two hours per day (120 hours per year) for shop em-

ployees, and two hours per day (60 hours per year) for employees of public limited companies, bank workers and office workers.

In **Spain** the definition which the Bill gives of overtime hours is each hour of work performed over and above the maximum duration of the normal working day (and 40 hours per week). The limit is established at 80 hours annually.

It is agreed in several (inter-)sectoral agreements that it is desirable to cut overtime working to the essential minimum. This commitment is repeated in different national agreements (e.g. in the banking, textile and insurance sectors).

In **Ireland** the *Conditions of Employment Act (CEA) 1936* sets the limit for the normal hours in any week at 48 hours. All hours worked in excess of the normal hours shall be overtime. Overtime may not exceed, in respect of any adult workers, 2 hours on any day or 12 hours in any week or 240 hours in any year or 36 hours in any period of 4 consecutive weeks. It is not yet known what the position is likely to be under the new legislation to implement *Directive 93/104/EC*.

In **Italy**, according to the law, overtime is the work carried out above the limit of 8 hours a day or 48 hours a week, but different limits can be fixed by collective agreements. The total overtime cannot, in principle, exceed 2 hours a day and 12 hours a week. The 12-hour weekly average can be calculated over a longer period.

Many collective agreements grant a more flexible use of overtime, with certain limits.

The national metal-workers' agreement provides a maximum of 2 hours a day, 8 hours a week with an annual total of 150 hours per worker. In the insurance agreement these limits are 2 hours a day, 12 hours a week and 140 hours per year per worker. In the textile and clothing industry the individual annual maximum is 180 hours, but the enterprise average maximum must not exceed 130 hours per employee.

In **Luxembourg** legislation fixes the overtime limit at 2 hours per day; thus the maximum working day is 10 hours. As regards part-time workers, the law regards overtime as any time worked in excess of that laid down in the contract of employment.

In the **Netherlands** the new *1996 Act on Working Time* allows, without authorisation, a certain amount of overtime in excess of the standard maximum working hours pro day or pro week. Overtime is limited to 2 hours a day, 9 hours a week in a period of 13 weeks. From these conditions a limited derogation *"in peius"* is possible by way of an agreement with workers' representatives.

In **Austria** overtime is time worked in excess of the normal daily working time (8-9 hours) or weekly working time (40 hours). The Working Hours Act permits five hours overtime per week. In addition to this, it permits a further 60 hours overtime per year (although not more than 10 per week, and with a maximum working day of 10 hours). Further overtime limits can be agreed by collective agreement.

In **Portugal** the law defines overtime as hours worked over and above the normal working hours (determination of the daily starting times and finishing times and rest periods). Overtime is limited to two hours per working day and 200 hours per year. There is no restriction on overtime performed in cases of *force majeure* or which is essential in order to prevent or repair serious damage to the company. In some collective agreements the overtime limit is set lower.

In **Finland** overtime working is subject to the consent of the individual worker, which as a rule must be given separately each time. Overtime may amount to a maximum of 138 hours over a four-month period, but there is a ceiling of 250 hours in a calendar year. Additional overtime of a maximum of 80 hours can be worked if there is a local agreement, provided that this does not mean that the overtime worked in any four-month period exceeds 138 hours. The four-month period can be extended by means of a national collective agreement.

In **Sweden** overtime is understood as working hours which exceed the limits for ordinary working hours and duty hours. The latter refers to time where the worker must be available at the workplace, without performing work, in order to join in if necessary. When there is a special need to increase working hours what is known as general overtime may be made available up to a maximum of 48 hours per four week period or 50 hours per month to a maximum of 200 hours in the course of an entire year. In the case of part-time employment the extra time is constituted by the working hours which exceed the ordinary working hours or time on duty. Extra time may under special circumstances be made available up to a maximum of 200 hours per calendar year. Derogations from the provisions of the law may be included in collective agreements. Emergency overtime in the event of natural or other disasters which disrupt activities or threaten to do so or constitute a risk to life, health or property may be made available during a period of two days. For longer periods authorisation may be requested from the *National Board of Occupational Safety and Health*. This board may permit further overtime or extra time up to 150 hours per year if special grounds apply. The *Working Hours Act* makes no mention of a worker's obligation to work overtime or of remuneration due. Collective agreements often contain rules which indicate special conditions governing when a worker shall be required to work overtime and concerning payment for such overtime. If no special rules are contained in collective agreements on the worker's obligation to be available for overtime such may be decided from case to case on the basis of a labour court ruling.

In the **United Kingdom** overtime is regarded as being within the scope of the individual contract. The protection which has been achieved has been largely as a result of collective bargaining. The collective agreement terms as to hours of work etc. are nearly always incorporated as terms of individual contracts of employment of the workers covered by them and may be enforced by individuals. There are no legal limits on the maximum overtime hours.

ii) Pay rates and time off in lieu

In most Member States attempts are made to limit overtime not only by placing statutory limits on the number of hours worked but also by regulating overtime pay rates and time off in lieu.

In **Belgium** overtime, according to the Labour Act, is paid at a rate of not less than 150%, and 200% for work

performed on Sundays and/or on statutory public holidays. In the textile industry, 100% additional pay is stipulated for *"extraordinary nightwork"*, i.e. overtime worked between the hours of 23.00 and 05.00. In the steel industry, 25% additional pay is traditionally awarded after eight hours and 50% after 10 hours of work (a 100% supplement is also paid for work performed on Sundays and public holidays, even if no overtime is involved). In some cases the law provides that, through collective agreement, payment for overtime may be substituted by time off in lieu.

According to many collective agreements in **Denmark** overtime is usually paid at the normal wage rate per hour plus an allowance of 50-100%. Some agreements, however, give employees the option of having a corresponding number of hours off paid by the employer.

In **Germany** the *Working Time Act* does not contain any rule on supplementary payment as overtime work as a category plays no specific role. An additional payment is often subject to individual or collective agreement.

According to the draft for a new *Act on Working Time* prepared by the Social Democratic Party, it is up to the social partners to choose between additional payment or additional free time. According to the draft of the Green Party, the employee may choose between additional payment or additional free time for the first hour of overtime per week; any further hours must be compensated by additional free time.

In **Greece** the pay-rates for overtime are defined by law. Overtime is payable at a minimum rate of 125% (industry) or 130% (public limited companies, banks, offices and shops) for the first 60 hours; at 150% for the hours from 61 to 120, regardless of category of employee; and at 175% for all hours above 120. Additionally, employees may claim compensation equivalent to twice the hourly rate of pay for any additional hour worked, without prejudice to engagement of the employer's liability concerning the grounds for this unjustified enrichment.

In **Spain** until 1994 the *Workers' Statute* fixed the minimum remuneration for overtime at 75% above the normal pay rate. With the legislative reform of 1994, this statutory provision was abandoned and overtime rates are now fixed by contract or collective agreement. It is now possible to opt, by collective agreement, or where appropriate, by contract, between being paid for overtime according to the fixed rate, which may not in any circumstances be below the ordinary hourly rate, and being given equivalent time off in lieu. In the absence of any agreement on this subject, it is understood that overtime worked must be compensated through time off in lieu within the four months following the overtime.

In **France** the *Labour Code* provides as a general rule that the first eight hours (40-47) of overtime are paid with a 25% bonus. Additional hours are paid with a 50% bonus. Collective, extended and enterprise agreements can, however, replace the payment of overtime by compensatory time off of 125% for the first eight hours and 150% for all hours thereafter. In addition to the increased remuneration, entitlement to time off in lieu has been provided for by law since 1976. Overtime worked beyond 42 hours per week, but within the annual quota of 130 hours, gives entitlement to time off in lieu equivalent to 50% of the number of overtime hours worked. All overtime beyond the annual quota gives entitlement to time off in lieu equivalent to 50% of these hours in companies with 10 employees or fewer, and equivalent to 100% in all other companies.

In **Ireland** the remuneration of overtime is governed by *Section 43* of the *1936 Conditions of Employment Act* which requires that overtime must be paid at a minimum of time and a quarter. In practice, collective bargaining almost always secures higher rates, e.g. the minimum hourly rates for all hours of overtime of law clerks are one and a half times the hourly rate as defined in the Employment Regulations Orders.

In **Italy** in the industrial sector overtime is made more costly by the employer's obligation to pay a percentage of the total amount of wages paid for overtime to a special public fund for unemployment benefits and to pay a higher rate for it; by law a minimum of 10% of the gross wage, generally increased to 25-30% by collective agreements. Collective agreements often set different amounts; usually higher for overtime over 48 hours per week but lower for the hours between 40 and 48 hours. Pay rates differ enormously for the various types and combinations of overtime. According to the national textile agreement, any overtime between 130 and 180 hours a year must be compensated, when requested by the employee, in the form of daily rest periods to be chosen 50% by the individual, 50% by agreement.

In **Luxembourg** the law fixes the rate of pay for overtime at 125% of normal pay for manual workers, 150% for white-collar workers and 200% for young workers.

In the **Netherlands** overtime payment is not regulated by law but by either collective agreements or the individual employment contract. Generally speaking, rates vary from 150-300% of the usual hourly rate depending on the hours of overtime worked.

In **Portugal** the law provides that time and a half must be paid for the first hour of overtime and time and three quarters for every subsequent hour. If the overtime is worked on a weekly rest day or a public holiday, double time must be paid.

In enterprises employing more than 10 workers, employees are entitled to 15 minutes time off in lieu for each hour of overtime worked. This time off must be granted once the number of hours accumulated is equivalent to the length of the normal working day. Overtime worked on an obligatory weekly rest day also gives entitlement to one day of leave to be taken during the three working days immediately following the rest day. Several collective agreements offer a more favourable scheme than those offered in the metalworking, banking and insurance sectors.

In **Finland**, overtime worked on top of normal working hours is paid at higher rates. The first two hours in excess of normal daily working hours are paid at time and a half and any others at double time. Hours in excess of normal weekly working hours are paid at time and a half. There are certain special rules for seasonal work.

Overtime pay can take the form of time off in lieu if the employer and worker so agree. The amount of time off is

reckoned in accordance with the principles for calculating overtime pay. As a general rule, time off must be taken within six months of working overtime.

In **Sweden** it is customary for collective agreements to indicate a number of working hours per day and any work over and above such hours is defined as overtime. Collective agreements almost always contain provisions regarding extra payment for overtime. The extra pay normally increases in line with the duration of the work beyond normal working hours. Many collective agreements also contain rules which provide for compensatory leave instead of extra payment. Standard practice is for one hour's overtime to be compensated by more than one hour's leave. If there are no specific provisions in the accord establishing whether a right to pay or a right to leave exists, the procedure as evident from court rulings is that the employer cannot force the employee to opt for compensatory leave. On the other hand the employee is always entitled to opt for paid overtime.

In **Austria** overtime is paid at time a half. Some collective agreements provide for higher rates than this. Compensation on the basis of a flat-rate overtime remuneration is also admissible, as is time off in lieu at the ratio of 1:1½.

In the **United Kingdom** collective agreements may provide for both extra premia and time off in lieu.

e) Weekly Rest Periods

In all Member States, apart from the **United Kingdom**, periods of weekly rest are provided for in legislation. Sunday is usually the principal rest day. In some countries, e.g. **Spain**, **Austria** and **Portugal**, one and a half days are guaranteed by law. In many Member States the working week is organised over five days, thus giving two rest days. The principle of Sunday as rest day has been questioned in a number of countries, e.g. **Belgium**, **France** and **Italy**.

In most cases, when work is carried out on Sundays, legislation gives the right to a compensatory day of rest, usually in the following week. In a number of countries, either by law or by collective agreement, special monetary compensation is paid for work on Sundays.

Although it is generally unlawful to make employees work on a Sunday in **Belgium**, there are many exceptions, e.g.:

- the duties of a watchman on the premises of the undertaking;
- cleaning, repair and maintenance work necessary for the smooth running of the undertaking and work, other than productive work, necessary for the normal recommencement of work in the undertaking on the following day;
- temporary work undertaken to avert an imminent accident or to cope with an accident which has occurred;
- urgent work to be done on machinery or materials and work required on account of unforeseeable circumstances; or
- temporary work necessary to prevent the deterioration of raw materials or products.

Employees who work in the following undertakings and establishments or who carry out the following work may also be employed on Sundays:

- undertakings supplying food/drink whose products are intended to be delivered immediately for consumption;
- undertakings for the retail sale of food and drink;
- hotels, motels, campsites, restaurants, catering establishments, tearooms or bars and premises licensed for the sale of alcoholic liquor;
- tobacconists and florists (selling other than artificial flowers);
- pharmaceutical chemist shops, drug stores and stores selling medical or surgical appliances;
- public baths;
- newspaper firms, public entertainments, public games and sport events;
- lending libraries and undertakings bringing out chairs, vehicles, boats, etc.;
- undertakings for the production, transformation, processing or transport of gas, electricity, steam or nuclear energy, and water works and water-distribution services;
- overland- and air-transport undertakings, fisheries;
- ship repair and maintenance undertakings;
- placement offices, information bureaux and travel agencies;
- industries where the nature of work does not permit any interruption or delay;
- establishments and services providing health care or prophylactic or clinical treatment;
- undertakings for retailing fuel and oil for motor vehicles (this only applies to vendors and sales personnel);
- undertakings operating parking facilities for motor vehicles;
- photographic undertakings (only as regards street photographers photographing passers-by);
- cinematographic industry undertakings producing newsreels (with respect to employees filming or engaged in the various stages of production of newsreels);
- undertakings for the production of films for cinemas and television (this applies to manual workers engaged in work connected with lighting, machinery, set-building and set-striking);
- broadcasting and television undertakings;
- undertakings providing for exchange of currency on railway stations, airports and seaports;
- emergency repairs and breakdown services for motor vehicles and automatic distributing or vending machines;
- work connected with various displays, shows and festivals in particular art shows, exhibitions, museums, trade, industrial and agricultural fairs, markets, annual pavement sales of old stock or annual jumble sales, processions and sports events;
- the work of loading and unloading cargo and hauling of ships in ports, on landing stages or wharves and on railway stations;
- the work of gamekeepers and water bailiffs;
- urgent or indispensable agricultural work.

The *1987 Act* on the introduction of new working-time arrangements allows the introduction of work on Sundays provided there is an agreement between the social partners.

In **Denmark**, where flexibility of working hours is not a legislative matter, *par. 53 of the Act on Working Environment* states that every employee must have a full period of rest of 24 hours every seven consecutive days. Such a period of rest should if possible be on a Sunday but may be another day if this is necessary due to the nature of the work. This rule does not apply to the agricultural sector.

Most collective agreements state that the weekly working hours should be spread over the first five days of the week. This, however, does not mean that work on Sundays is prohibited. Usually work on Sundays only takes place in enterprises where there is shift work or where acute needs arise.

In **Germany**, since the amendment to the *Trade Act of 1891*, employment of workers on Sundays (at least in principle) is forbidden. Rules on Sunday rest are contained in the *Act on Closure of Shops*, and in the *Act on Working-Time in Bakeries and Confectioners*. The rest time for each Sunday is at least 24 hours.

Employees in the following sectors are excluded from this general rule on prohibition of Sunday work:

- agriculture, forestry, fishing, maritime, aircraft, domestic workers, press, hospitals, artistic and scholarly professions and certain groups of leading personnel.

The most important activities exempted from the general rule are:

- those serving the needs of recreational purposes, for example transport, restaurants, concert halls, theatres, etc.;
- those which must be carried out without delay in order to fight emergency situations or in order to provide essential services in the public interest;
- those which are necessary to make up an inventory required by law;
- those which are necessary to guard, clean, or to maintain the equipment of the establishment, or which are necessary to prepare the work for the following day;
- those which must be performed in order to maintain certain raw materials;
- those which by their very nature neither allow an interruption nor a delay, as well as those which are only carried out during specific seasons or periods, where exceptions may be allowed by administrative Decree. Important branches where such Decrees apply are the iron and steel industry and the newspaper industry;
- in the commercial trade permission may be obtained from the State administration to work up to a maximum of 10 Sundays or public holidays per year. This permission can only be given if the need to extend business activities on Sundays and public holidays can be shown. Sunday work is in any case restricted to a maximum of 8 hours, finishing at the latest at 18.00;
- where the needs are referring to transport, medical care and information, the *Act on Closure of Shops* provides exceptions for certain shops normally covered by the rules on shop closure.

These derogations, however, are possible but limited by the fact that at least 15 Sundays are free every year and another day off is given within two weeks.

The most important law in **Greece** on Sunday rest is the *1966 Royal Decree No 748*, which provides for a number of exceptions to the general rule on Sunday rest.

The most important exceptions are:

- the duties of those employed in agriculture, cattle-raising, hunting and fishing, except those working in factories or offices of such enterprises;
- the work done by members of the employer's family, sailors and domestic servants;
- the work of loading/unloading cargo, transport, production and distribution of electricity, communication, public shows, florists, hospitals, security guards, etc.

The *Minister of Labour*, the *Prefect for the district* or the *Labour Inspector* can exercise the right to make further exceptions to the general rule, e.g. for reasons of social need, local holidays, etc.

In **Spain** the worker is entitled to a minimum weekly rest period of one and a half consecutive days, which, as a general rule, must include the whole of Sunday plus Saturday afternoon or Monday morning. The minimum weekly rest period for under-18s is two consecutive days. The *Workers' Rights Act* also provides for the establishment of rest periods *"for certain specific activities"*, through a *Royal Decree* adopted by the Government after consulting the most representative employers' and workers' organisations. This applies to the maritime sector, the commercial sector and the security guard sector.

In **France** the weekly rest period is laid down in an *Act of 13 July 1906*, subsequently incorporated into the *Labour Code*. Two basic principles exist:

- firstly that the weekly rest period shall be at least 24 consecutive hours (thus making it unlawful to make any employee work for more than six days a week, although in practice the working week is often limited to five days)
- secondly that the weekly rest day shall be Sunday.

Exceptions to the rule of Sunday rest are allowed, e.g. where it is established that a simultaneous rest period on Sunday for all employees of an establishment would be detrimental to the general public or to the normal operation of the establishment concerned. In such cases the *Prefect* may authorise Sunday work.

The debate on Sunday rest was re-opened by a number of large retail companies which overtly flouted the law. After numerous incidents, an Act was adopted on 20 December 1993 introducing new possibilities for allotting the weekly rest day in rotation in retail establishments, notably those involved in leisure or relaxation activities of a sporting, recreational or cultural nature, in tourist or thermal spa municipalities and in major tourist zones (e.g. the Champs-Elysées in Paris, following a Prefectoral Decision of 1994).

In **Ireland** the *Conditions of Employment Act*, which covers industrial work, prohibits any industrial Sunday work other than that which is:

- continuous process shift work;
- licensed shift work;
- he printing or publishing of newspapers;
- the work of a creamery;

- industrial work excepted from the subsection by regulations made by the Minister;
- the construction, maintenance, alteration or repair of any telegraphic or telephonic installation;
- the maintenance or working of a broadcasting station.

An employer may, however, employ an adult male worker on any Sunday, for a period not exceeding three hours or for two or more periods not exceeding a sum of three hours to do industrial work. The *Shops (Conditions of Employment) Acts* provide for further rules on work on Sunday.

In **Italy** all workers have the right to rest one day a week, generally on Sunday (art. 36 of the *Constitution* and art. 2109 of the *Civil Code*). *Act No 370* (1934) provides for a number of exceptions where work may be performed on Sunday:

- maintenance, cleaning and repairing of plant, in so far as such work cannot be performed on weekdays without harm to the work of the undertaking or danger to the employees;
- guarding undertakings and plant;
- stocktaking and drawing up the annual balance-sheet.

The following work may be performed on Sunday in so far as it is strictly necessary:

- work indispensable to the safety of the employees or plant or the preservation of products or materials;
- work which is ordered for public reasons by the prefect.

The 24 hours weekly rest period can be shifted to another day for a series of undertakings and activities provided for in general by *Act No 370* and in more detail by ministerial decrees, e.g.:

- industrial operations where combustion or electric furnaces are used for processes requiring continuous operations connected therewith;
- industrial operations the processes of which must either wholly or in part be carried on continuously;
- seasonal industries involving work of an urgent nature to deal with the raw materials or the products.

In **Luxembourg** the *August 1988 Act* has reformed the *1913 Act* on the weekly rest period. Its main provisions are as follows:

- there is a general ban on Sunday working in both the private and the public sector except for companies staffed solely with members of the owner's family;
- security work, cleaning and maintenance and repairs are all excluded from the terms of the legislation provided that they cannot be done on any other day of the week;
- also excluded is work arising out of some emergency or accident, work in certain retail outlets for up to four hours on a Sunday (to be extended by *Grand Ducal Decree* up to eight hours on six Sundays or more per year) and catering establishments, pharmacies, agricultural and viticultural undertakings, places of entertainment, public utilities and transport companies, all hospitals and homes and other places *"where work needs to be continuous"*;
- in companies with continuous operations not coming under any of the previous headings but who want to have Sunday working, then the employer will have to conclude a special company agreement with the unions represented in the company which will then have to be approved by the Minister for Labour;
- employees working Saturday night / Sunday morning may work only until 06.00 on Sunday and then must be off at least until 06.00 on Monday;
- employees working on a Sunday in pharmacies, agriculture, places of entertainment or the public utilities have a right to a day off in lieu if they work for more than four hours on a Sunday or a half day otherwise plus a 70% pay supplement for hours worked on a Sunday;
- the Labour Inspectorate is responsible for monitoring implementation of the law and the law provides for fines of between 2,500 LUF and 50,000 LUF and/or up to one month's imprisonment for breaches.

In the **Netherlands** the new *1996 Act on Working Time* is ambiguous as to work on Sunday. It states that the worker shall not work on Sundays, save if the contrary has been agreed upon and results from the nature of the job. In addition Sunday work may be imposed if the situation of the company requires it and if it is agreed with the workers' representatives, or – failing that – with the workers concerned. But even then the worker should be free from work on at least 13 Sundays a year. Employees of a religious belief who do not observe Sunday as a rest day can have their weekly rest on the Saturday or the Friday.

In **Austria** the question of weekly rest periods is governed by the *Arbeitsruhegesetz* (Rest Periods Act) of 1983. This gives employees entitlement to an unbroken period of 36 hours rest from work, which must include Sunday and must generally begin no later than 13.00 on Saturday. There are exemptions, however, both for specific activities and specific categories of workers. The only types of activities admissible during the weekly rest period are:

- cleaning, maintenance and repair work which cannot be carried out during regular working time without interrupting or seriously disturbing productivity;
- fire protection work;
- guarding of plant or premises;
- looking after, supervising and providing food for residents of boarding schools and homes.

Exemptions also exist for employees in particular places of work, when working is necessary:

- in order to ensure availability of the necessities of life;
- in order to control traffic, or for technological reasons;
- in order to cater for recreational needs, tourism, etc.

Additional exemptions exist for markets and trade fairs, railway sales points and airports.

In **Portugal** the obligatory day off is Sunday. Exceptions are permitted, e.g. in the case of round-the-clock or shift work.

Exceptions to the requirement to close or to suspend work on one day a week include:

- pharmacies, hospitals, maternity units and clinics, bathing establishments, creches, hotels, fishmongers, butchers, greengrocers, florists and shops selling dairy produce, delicatessens, tobacconists, undertakers, shipping companies, newspapers and press agencies, travel agencies, ticket agencies for plays, shows, etc., theatres and other places of public entertainment, car hire firms,

garages, petrol stations and fuel and lubricant suppliers, telecommunications and broadcasting services, and all establishments operating at airports, seaports and frontiers.

The weekly rest day may also be a day other than Sunday for:

- workers essential in order to ensure the continuous provision of services which cannot be interrupted
- workers responsible for cleaning services or other preparatory or additional work which must be performed while other staff are not at work
- security officers and caretakers
- domestic staff.

In **Finland** the *Working Time Act* stipulates that working time is to be organised in such a way that the employee has an uninterrupted rest period of at least 35 hours each week. Where possible, the weekly rest period is to include Sunday. It may amount to an average of 35 hours over a 14-day period, but it must be at least 24 hours a week. In certain cases mentioned in the Act, exceptions may be made to the rules on weekly rest periods.

The **Swedish** *Working Hours Act* requires employees to have at least 36 consecutive hours leave per period of seven days. Temporary exceptions are made where occasioned by circumstances which the employer was unable to foresee. This rest period, known as the weekly rest period, shall as far as possible be taken at weekends. Most collective agreements require working hours to be located between Monday and Friday and leave to be taken at weekends but there are special rules in collective agreements relating to those companies which require work over the entire week or in the form of shift work.

In the **United Kingdom**, apart from restrictions on specific categories, there are no statutory requirements for Sunday rest. Under the law enacted in 1994 to liberalise shop trading hours, certain workers are protected from dismissal for refusing to work on Sundays.

f) Public Holidays

In all Member States, except for **Denmark**, legislation provides for a number of public holidays. In the **United Kingdom**, Christmas Day and six *"bank holidays"* (in Scotland, seven) apply as of right to those working in banking and financial institutions, and, in practice most of these (or substitutes) are granted by collective agreement or custom and practice to the vast majority of workers.

The number of public (paid) holidays varies from 6 (plus one every five years) in the **Netherlands**, to 8 in **Ireland**, 10 in **Belgium** and **Luxembourg**, 11 in **France** (of which only one, 1 May, is a compulsory day off work with pay), 12 in **Portugal**, 13 in **Greece** and **Austria**, and 14 in **Spain**.

In **Germany** the number varies from 9 to 14, depending on the region.

In **Spain** the system for fixing the 14 paid public holidays each year is relatively complex, the days being decided between the national government, the Autonomous Communities and the local municipalities, with due account taken of the commitments made to the Catholic Church regarding the public holiday nature of certain days. The government may move to a Monday any national holidays which fall during the week, and those which fall on a Sunday are moved to the Monday immediately following.

In **Italy** the law recognises 4 national holidays and 11 other holidays, plus usually the Patron Saint's day.

In **Finland** work may be carried out on Sundays and religious holidays on condition that by its nature it is regularly carried out on such days or if there is a separate agreement to this effect. Sunday work is paid at double the normal rate.

There is special legislation laying down that *Independence Day* (6 December) and *1 May* are public holidays for which employees are entitled to be paid.

In **Sweden** labour law provisions do not cover public holidays. These are considered as Sundays for the purposes of working hours. Pay for holidays is always calculated as part of wages per week, month or some other unit of time. If wages are on an hourly basis pay for holidays is not included. If a holiday falls on a normal working day special holiday pay is payable in accordance with collective agreements. Other special rules relating to public holidays are found, *inter alia*, in collective agreements.

In most countries, public holidays are treated in the same way as Sundays as far as exceptions for work, pay, compensatory rest etc. are concerned. Sometimes there is a day in lieu when a public holiday falls on another day of rest. This aspect is often dealt with by collective agreement.

g) Paid Annual Leave

In all Member States, except for the **United Kingdom**, legislation exists on paid annual leave.

Minimum length may vary from 15 days in **Ireland**, to 18 days in **Germany**, 20 days in the **Netherlands**, 24 days in **Belgium** and **Greece**, 25 days in **France**, **Luxembourg** and **Sweden**, 5 weeks in **Austria**, 21-30 days in **Portugal**, and 30 days in **Spain**. In the **United Kingdom**, collective agreements and individual contracts usually provide a basic holiday entitlement of 20-25 days, both for manual and white-collar workers. However, about one-third of part-time employees receive no paid holiday.

In most countries workers qualify for the full minimum basic entitlement after twelve months (sometimes six months) of service. In the **Netherlands** no qualifying period exists.

The pay structure is generally settled through collective bargaining, particularly in **Belgium, Denmark, Germany, Ireland, Italy, the Netherlands and the United Kingdom.**

Collective agreements usually provide for longer periods of annual leave. Other conditions, e.g. working during holidays, extra payment, etc. vary considerably.

CHAPTER 4
REMUNERATION

a) Sources of Pay Determination

The main sources of pay determination in all Member States are collective bargaining, State legislation and industrial negotiations.

Collective bargaining is the most important source determining pay not only in those Member States in which no general minimum wage has been established by law, i.e. **Belgium, Denmark, Germany, Greece, Ireland, Italy, Finland, Austria** and the **United Kingdom**, but also those which have guaranteed statutory national minimum wages, i.e. **Spain, France, Luxembourg,** the **Netherlands, Portugal** and **Sweden.**

Inter-sectoral industry-level agreements and agreements at enterprise or, even, shop-floor level are, between them, responsible for fixing the structure and levels of pay.

The State also intervenes in the regulation of wages by the implementation of incomes policies and the enactment of protective legislation governing minimum wages, equality of treatment, structure of wages and the place, time and form of payment as well as the protection of wages. State intervention in pay regulation has traditionally been low, apart from periods of incomes policies in, e.g. **Belgium, Denmark, Germany, Ireland, Italy, Sweden,** and the **United Kingdom.**

The principle of equal treatment between men and women is common to all Member States, via *Article 119 of the EEC Treaty* and *Directive 75/117/EEC*, although its implementation varies considerably. The right to non-discrimination between EEC-nationals as enshrined in *Article 48 of the EEC Treaty*, is also applicable to levels of pay throughout the Community.

Wage structure is usually left to collective bargaining, particularly in **Belgium, Denmark, Germany, Spain, Ireland, Italy,** the **Netherlands, Austria, Finland, Sweden** and the **United Kingdom.**

All Member States permit payment of wages in cash, by cheque, by transfer into a bank account or by other means (but to a limited extent in **Ireland**). In **Spain** the element paid in cash may not exceed 30% of the worker's total remuneration.

TABLE 6: STATUTORY PUBLIC HOLIDAYS AND PAID ANNUAL LEAVE IN THE MEMBER STATES

COUNTRY	PUBLIC HOLIDAYS	PAID ANNUAL LEAVE	
		STATUTORY	COLLECTIVE AGREEMENT
Belgium	10	24 days	
Denmark	No legislation	30 days	
Germany	10-14	18 days	5-7 weeks
Greece	13	24 days	
Spain	14	30 days	
France	11 (one of which is a compulsory day off with pay)	30 days	
Ireland	8	3 weeks	4 weeks
Italy	4 national plus 11 others	No specific number of days	5 to 6 weeks
Luxembourg	10	25 days	26-28 days
Netherlands	6 plus 1 every 5 years	4 weeks	5 to 6 weeks
Austria	13	5-6 weeks	
Portugal	12	22 working days	
Finland	2 national plus 10 others	30 days	
Sweden	No legislation	25 days	Often more, especially for white-collar workers
United Kingdom	7-8	No legislation	20-25 days

As far as place, time and form of pay are concerned similar rules apply in all Member States, generally by means of statutory regulations.

All Member States guarantee, in accordance with *Directive 80/987/EEC*, the payment of certain arrears of pay in cases of insolvency or bankruptcy through statutory Redundancy or Special Guarantee funds.

In **Belgium, Germany, Greece, Spain, France, Italy, Portugal,** the **Netherlands, Austria, Portugal,** and **Sweden** and the **United Kingdom,** wages are considered privileged credits; wages cannot be seized by creditors in full.

b) Minimum Wages

There are three main systems of regulating minimum wages in the Community.

The first system is based upon a statutory national minimum wage and is applied in **Spain, France, Luxembourg,** the **Netherlands** and **Portugal.**

In the second system minimum wages are laid down by collective bargaining, either by national collective agreements establishing a general minimum wage, as in **Belgium, Greece** and **Finland,** or by industry-level collective agreements fixing specific minimum levels of pay, as in **Denmark, Germany, Italy, Austria** and **Sweden.**

In the **Ireland** the third system prevails whereby specific minimum wages for certain sectors of industry are laid down by *Joint Labour Committees* (in **Ireland**). A similar system (*Wages Councils*) existed in the **United Kingdom** until 1993 when it was abolished.

i) Statutory national minimum wages

Under the first system minimum wages are fixed by government statutes after consultation with the two sides of industry. All employees are covered in **Spain, France, Luxembourg,** the **Netherlands, Austria** and **Portugal.**

In **Luxembourg,** lower rates are fixed in agriculture and in domestic work.

Coverage varies from the age of 18 in **Spain, France** and **Luxembourg,** to 20 in **Portugal** and 23 in the **Netherlands.**

Young workers are entitled to a fixed percentage of the adult minimum in **France, Luxembourg,** the **Netherlands** and **Portugal;** in **Spain** the youth minima are fixed in cash amounts.

TABLE 7: STATUTORY MINIMUM WAGES

Age	France (1)	Luxembourg (2)	Netherlands	Portugal (3)	Spain (4)
23			Adult		
22			85.0%		
21			72.5%		
20			61.5%	Adult	
19			52.5%	75%	
18	Adult	Adult	45.5%	75%	Adult
17	90%	80%	39.5%	50%	± 60%
16	80%	70%	34.5%	–	± 40%
15	–	60%	30.0%	–	–
Adult rates monthly	FRF 6374,68	LUF 43,744 LUF 52,493	NLG 2204	PTE 40,100 PTE 33,500	ESP 50,010

1 In France the full adult rate applies from age 18. Workers of 16 and 17 years of age may also receive the adult rate if they have at least six month's service. The figure of FRF 6374.68 is based on the hourly rate as at 1 May 1996.
2 In Luxembourg the statutory minimum wage is LUF 43 744 for unskilled workers and LUF 52 943 for skilled workers. The rates concern respectively skilled workers with and without dependants (LUF 39,119) and unskilled workers with and without dependants (LUF 32,599) (Source: E.C. COMMISSION 1990).
3 In Portugal the statutory minimum wage for domestic workers has always been lower; in 1995 it was PTE 45 700.
4 In Spain the minima for younger workers are put in cash terms rather than percentages. For 1996 the minimum monthly wage for workers of under 18 years of age was ESP 50 220.

All the statutes provide for reviews and adjustments of the minimum wage level.

In **Spain** the minimum wage is fixed annually by the government, subject to prior consultation with the main trade unions and employers' associations. The minimum wage is determined in terms of a series of factors: price index, national average productivity, increases in the participation of workers in the national income and the general economic situation. Half-yearly revisions are also provided for, should the evolution of the price index be different than planned.

The fixing of minimum wages has been fiercely debated, both because of the *"invasion"* into the sphere of collective autonomy by state intervention and because of the unequal treatment implied by the fact that the amount of the minimum wage differs according to the age of the worker.

Following an appeal by the *UGT* the *Constitutional Court* ruled that the minimum wage constitutes a coercive intervention in working relations, justified by the protection of an interest deemed worthy and necessary of state attention; therefore the limitation which contractual freedom encounters in the minimum wage is entirely justified.

With regards to differentiations on the grounds of age the Constitutional Court was of the opinion that in principle, equal work must receive equal pay, and *"based on this equality, age may not act as a differentiating circumstance"*; nor may the presumptions that the younger worker produces less and has fewer personal needs, or that a lower level of wage stimulates the employment of the young, justify a lower wage.

Thus, the legitimacy of the age differentiation in the minimum wage decrees depends upon on there being certain types of work where it can be clearly shown that younger people do not produce work of equal value to that of older workers. To support this view, the *Constitutional Court*, pointed to the general experience of collective negotiations and to the general practice in other Community Member States. Consequently, the *Constitutional Court* upheld the validity of establishing differentiated minimum wages *"in the knowledge that the wage reductions are not applied when the workers and young employees perform a job which entails demands, effort and, in effect, work of the same value as that carried out by older workers"*.

There has been a noticeable trend in recent years towards closer alignment of the age-related minimum wages. This began with a reduction from three scales (over-18s, over-17s and over-16s) to two (under-18s and over-18s). Since then, the annual increases in the statutory minimum wages have been more substantial for the under-18s, bringing the two scales closer together.

In **France** the purchasing power of employees is guaranteed by linking the minimum wage (*SMIC*) to trends in the national consumer price index instituted as a bench-mark by decree in the *Council of Ministers* after consultation with the *Central Collective Agreements Committee*. Where this index reaches a level corresponding to an increase of at least two per cent above the index recorded when the minimum wage was last established, then the minimum wage will be increased by the same proportion from the first day of the month following publication of the index.

The minimum wage is fixed each year, with effect from 1 July, by government decree in the *Council of Ministers*. In no circumstances shall the annual increase in the purchasing power of the minimum growth wage be less than half the increase in the purchasing power of the average hourly wages recorded in the quarterly survey carried out by the *Ministry of Labour*. The base figure for the index may be altered by decree in the *Council of Ministers*, after consultation with the *Central Collective Agreements Committee*. A government decree, made after consultation with the *Central Collective Agreements Committee*, may in the course of any year increase the minimum wage. Collective agreements capable of extension must contain minimum wage tables.

The *Act of 13 November 1982* on collective bargaining and the settlement of collective labour disputes provides for a duty to bargain yearly for employees on minimum wages. At enterprise level, however, only modest results are to be found in this respect.

In **Luxembourg** the minimum wage is fixed by law and must be linked to increases in the consumer price index. The government must report to parliament once every two years on general economic conditions and pay growth and it may at the same time propose an increase in the minimum wage.

In the **Netherlands** a mechanism for automatic adaptation to the average rise of pay exists in law. However, this mechanism – due to restrictive economic policies – has been

interrupted frequently with the result that the minimum wage is not much above the level where it stood 10 years ago. Taking into account the rise in prices this means that the minimum wage has lost ca. 10% of its purchasing power over the last decade.

In **Portugal** the minimum wage is reviewed every year in the light of price and pay growth and the development of economic sectors.

ii) General minimum wages by collective agreement

This second system applies in **Belgium, Denmark, Germany, Greece, Italy** and **Sweden.**

In **Belgium** and **Greece** there is a general minimum wage laid down by national-level collective agreements.

As regards **Belgium** the current minimum wage level is laid down by an inter-industry wide collective agreement concluded in the *National Labour Council* on 2 May 1988. The minimum wage levels can be, and are, improved by collective agreements concluded throughout the industry or region by the different joint committees.

The 1988/1990 central agreement between trade unions and employers provides for an increase of the minimum wage rates of BEF 500, but only for employees with a minimum of six months' service. The minimum wage applies from the age of 21.

Another inter-industry wide collective agreement, concluded in the *National Labour Council*, contains the minimum wages of those minors employed in industry branches for which there is no competent joint committee. Their minimum wage is equal to a percentage of the minimum wage for adults as follows:

TABLE 8: MINIMUM WAGES BY COLLECTIVE AGREEMENT IN BELGIUM

AGE	
20	92.5%
19	85.0%
18	77.5%
17	70.0%
16	62.5%

In **Denmark, Germany** and **Italy** and **Austria** minimum rates of pay are set by industry-level collective agreements.

In **Denmark** minimum wages apply for example to engineering workers and some white-collar staff. At central employer/union level comparatively low minimum wages are set; additional rates are then negotiated at company or plant level.

In **Germany** there is no statute law which determines a minimum wage. Minimum standards of wages (and other parts of remuneration) are only set by collective agreements.

The wage level is determined by contract in accordance with par. 611 of the *Civil Code*. If the employment relationship is fixed by collective agreement, the wage provided for in this collective agreement is the valid minimum wage to be observed by the parties to the individual contract.

In **Greece** the minimum wage level is laid down by national collective agreements under *Law No 3239*. These agreements distinguish between blue-collar and white-collar workers and between single and married workers.

Blue collar workers are covered from the age of 18 and a minimum is set per day. White-collar workers are also covered from the age of 18 but a minimum is set per month. Payment of the full rate depends not on age but on qualifications and years of service.

For examples in 1989 the minimum rates were established as follows:

TABLE 9: MINIMUM WAGES BY COLLECTIVE AGREEMENT IN GREECE

White collar workers aged 18 and above (per month)			Blue collar workers aged 18 and above (per month)		
Years of service	Single	Married	Years of service	Single	Married
0-3	GRD 52,948	GRD 56,757	0-3	GRD 2,336	GRD 2,553
3-6	GRD 56,757	GRD 60,560	3-6	GRD 2,462	GRD 2,642
6-9	GRD 60,560	GRD 64,354	6-9	GRD 2,552	GRD 2,730
9-35	GRD 64,354	GRD 68,124	9-35	GRD 2,633	GRD 2,807
White collar workers under 18 (per day)			**Apprentice technicians aged 15 to 19**		
Years of service	**Single**	**Married**	**Years of service**	**Single**	**Married**
0-5	GRD 44,967	GRD 48,207	0-1	GRD 1783	GRD 1917
			1-2	GRD 2019	GRD 2175
			2-3	GRD 2135	GRD 2302
(Source: EIRR, 182, MARCH 1989)					

Italy does not have minimum wage legislation. However, art. 36 of the *Italian Constitution* entitles an employee to receive a wage *"proportionate to the quality and quantity of his work and in any case sufficient to guarantee a free and decent life to him and to his family"*.

Long established case law has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the courts, normally equal to prevailing collectively agreed rates.

The problem remains of guaranteeing the minimum protection of collective agreements to non-unionised workers. This has been gaining new urgency since estimates indicate that more than 30% of industrial workers, mostly in the marginal area of the economy (e.g. home working), are outside the coverage of collective agreements.

In **Austria** there are no statutory minimum wages. Most employees, however, are covered by collective agreements which lay down minimum wage levels. Alternatives to the collective agreement exist for employees who are not cove-

red by a collective agreement. These include the *Mindestlohntarif* (minimum wage scale set by the Federal Arbitration Board, applied especially to domestic workers), the *Satzung* (statute), and apprentices' pay. These schemes largely cover the relatively few employees who do not enjoy minimum wage protection under a collective agreement.

In **Finland** employers are obliged under the *Employment Contracts Act* to apply at least the wage conditions laid down for the same or similar work in national collective agreements, so that in a particular sector there is generally a statutory minimum wage adapted to the system of collective agreements.

Sweden has no special legislation governing minimum wages but it is not unusual for collective agreements to contain such provisions. Normally a clause is included on the length of time for which wages are to be paid. This presupposes that wages for more qualified staff shall be paid at a higher rate. During wage rounds the standard practice is that national agreements at federation level indicate minimum levels for wage increases then there is a distribution of further wage increases based on negotiations at local level with an embargo on strikes and lock-outs (binding on the company, the authority, etc.).

iii) Specific minimum wages for sectors of industry

In **Ireland** specific minimum wages for certain sectors of industry are laid down by *Joint Committees or Wages Councils*. There is no legal measure setting out minimum wages for the entire workforce. However, in certain industrial and service sectors there are institutions which have the task of setting minimum rates of pay and conditions of employment for all workers in that sector. The legal basis of these institutions, known as *"Joint Labour Committees"* (*JLC*'s) is contained in the *Industrial Relations Act 1946* as amended by the *Industrial Relations Act 1990.*

A *JLC* may be established by the *Labour Court* and, once established, consists of an equal number of representatives of workers and employers, together with some independent persons nominated by the *Minister for Enterprise and Employment*. Its task is to draft regular *"employment regulation orders"*, which contain legally binding minimum terms and conditions which all employers and workers in the relevant sector must observe. After giving interested persons an opportunity to object, these orders are given legal force by the *Labour Court*.

There are currently 15 *JLC*'s in existence, covering a wide variety of manufacturing industries and services. It is not known exactly how many workers are covered by JLC's and estimates vary from 35,000 to about 60,000.

The *Industrial Relations Act 1990* provides, in sections 44-50, for measures strengthening the role of the existing *Joint Labour Committees* and improving the enforcement of statutory minimum rates of pay set by the Committees.

In the **United Kingdom** there is also no general minimum wage legislation. The only exception is the wages of agricultural workers which are regulated by *Agricultural Wage Boards.*

CHAPTER 5
MODIFICATION OF WORKING CONDITIONS

In some Member States specific statutory provisions exist on the modification of working conditions. Case law on the matter is not abundant, although principles can be derived from decisions in dismissal and redundancy cases.

In **Finland** the general rule is that the employer cannot unilaterally modify working conditions. Subject to the conditions under which the contract of employment may be terminated (very important reasons), the employer may, however, alternatively and giving due notice, modify the agreed conditions of employment. Conditions laid down by law or collective agreement cannot be modified, however.

a) Modification by Mutual Consent

According to the principle of freedom of contract it is always possible to amend working conditions by mutual consent. This can be done without precondition in all Member States except **Portugal**, as regards certain matters such as wage cuts or demotion in occupational category.

In **Portugal** some statutory provisions make modification of fundamental working conditions such as wages subject to the assent of public authorities even in cases of mutual agreement.

Obviously the parties to the employment contract cannot modify by mutual consent terms and conditions of employment that are based on mandatory statutory rules. Also the terms and conditions of employment based on rules in collective agreements cannot be changed by mutual consent if they have an imperative force on the employment relationship.

When an employee undertakes new terms and conditions of employment without protest it may be concluded, in cases of doubt, that a modification was agreed by mutual consent. In some Member States, however, e.g. **Spain** and **France**, the courts have shown themselves to be wary of abuses.

b) Modification on the Initiative of the Employee

In no Member State can an employee change the terms and conditions of the employment contract without the consent of the employer. Neither can terms and conditions based on statutes or collective agreements, which have an imperative force on the employment contract, be changed unilaterally at the initiative of the employee.

c) Modification on the Initiative of the Employer

Although neither party can unilaterally change the contract terms, the employer's managerial power enables him or her to modify working conditions to the extent permitted by nature of the working conditions and by the contract of employment and relevant collective agreements.

A majority of Member States distinguish between *"hard core"* working conditions, which cannot be changed unilaterally by the employer and those working conditions subject to managerial prerogative. *"Hard core"* working conditions traditionally include wages and working hours.

Working conditions subject to managerial prerogative include:

- use of technical equipment;
- modification of job content;
- distribution of work between workers;
- establishment of working hours within the limits set by collective agreement and statute;
- change of location of work.

The unilateral power of the employer to transfer employees from one workplace to another has, over a number of years, been reduced in all Member States. The respect for the worker's professional status and remuneration, as well as technical and organisational justification, is required by law to a greater or lesser extent in, e.g. **Spain**, **Italy** and **Portugal**.

i) Legislation

In **Germany** in any instance (be it individual or collective) of a transfer that is considered to be a change of the labour contract, the consent of the works council is required, as far as plants with over 20 workers are concerned. The works council can refuse this consent if the employee concerned suffers disadvantages due to the transfer which are not justified on economic or personal grounds.

In **Greece** any unilateral modification prejudicial to working conditions must be agreed to by the employee. *Article 7* of *Law 2112/1920* equates any prejudicial unilateral modification with a dismissal. An employee is deemed to have accepted the new conditions if he continues to work without expressing any objection or reservation about them within a reasonable period of time.

If the employee does not agree to the prejudicial unilateral modification, the employer may instigate a *conditional dismissal*, otherwise known as a *modification-related dismissal*, i.e. he may link termination of the employment contract to the employee's refusal to accept the proposed modification. The reason given for the modification of the working conditions must be sufficiently compelling to justify the dismissal.

In **Spain** a statutory provision requires that, in the case of essential modifications to the working conditions, these modifications must be justified by technical, organisational or productivity-related reasons and that these reasons must be proved by the employer. Substantial modifications are those that affect the following areas: length of working day, timetable, rota system of work organisation, system of remuneration, system of work and output, duties exceeding their occupational equivalent. The law considers that these justifications coincide when *"the adoption of the proposed measures contributes towards improving the company's situation through a re-organisation of its resources designed to boost its competitiveness in the marketplace or enable it to respond more effectively to demand requirements"*.

The law makes a distinction between *"collective"* modifications and *"individual"* modifications. For collective modifications the employer must first consult the workers' representatives within the company. During the consultation period the parties must negotiate in good faith, with a view to reaching an agreement; however, if no agreement can be reached, the employer is entitled to impose unilaterally the essential modifications to the working conditions. If the modifications apply to working conditions that are laid down in a collective agreement, they may not be introduced until conclusion of an agreement modifying this collective agreement or, in certain cases, conclusion of a company-level agreement. For individual modifications the employer may unilaterally impose substantial modifications simply by first communicating the decision to the workers' representatives. In all cases there is a latent period of 30 days between the date on which the decision is taken by the employer and the date on which it can be enforced. In some cases the worker is given the choice between accepting the employer's modifications or terminating the contract of employment, with entitlement to compensation as stipulated by law based on the worker's length of service.

In **Italy** s.13 of the *Workers' Statute 1970* states that a worker can only be transferred to a job that is the same or equivalent to the one he or she was already doing and only if remuneration is the same. Likewise a worker can also be transferred from one unit of production to another if there are valid technical, organisational and productive reasons for so doing. Case law has interpreted these requirements in a restrictive sense.

The power of the employer to determine daily organisation of working hours is usually exercised after consultation with union representatives.

The employer is also required to ask for the opinion of the worker's representatives on modifications in working conditions in **Luxembourg**.

In the **Netherlands** only collective cases of modification of working conditions require the employer to inform and consult the works councils (if they have not already been settled by collective agreement). If the works council refuses its consent the employer can, after having invoked the mediation of a joint committee on industry level, take the matter to court.

In **Portugal** the *Contract of Employment Act* only allows modification of the place of work if this does not harm the worker severely. For modification of the content of the work numerous conditions are imposed, e.g. hours of work can only be changed after the employer has asked the opinion of the works council.

In **Sweden** employers are required to initiate negotiations under their primary bargaining duty with the trade union before any decision is taken on major changes to the situation of the worker, the work or the employment contract. In the event of a dispute arising about the worker's obligation to work under the terms of the contract the trade union which has a collective agreement with the employer will have priority of interpretation, in other words the organisation's opinion shall apply until the dispute is finally examined. In the *Working Hours Act* there is a provision that as a general rule the employer is required to inform workers regarding changes affecting the ordinary working hours at least two week in advance.

ii) Collective agreements

Collective agreements serve mostly to limit the freedom of the employer to modify working conditions unilaterally. However they often contain provisions enabling the employer to vary work conditions under certain circumstances. In **Ireland** and the **United Kingdom** these effects only apply if the collective agreement has been expressly or implicitly incorporated into the individual contract.

In **Austria** any long-term transfer (i.e. longer than 13 weeks) must be notified to the works council. If the transfer brings with it a deterioration in remuneration or other conditions of employment the works council must be asked to give its approval. If it refuses to do so the approval must be replaced by a court judgment, if the transfer is objectively justified.

iii) Individual contracts

It often occurs that the individual employment contract contains only a loose description of the function of the worker, which may make it easy for the employer to bring about unilateral modifications in working conditions. Where an individual contract contains a very specific description of the job function then it may be difficult for the employer to make unilateral changes.

Individual contracts may expressly provide for modifications, e.g. there may be a mobility clause in the employment contract entitling the employer to transfer an employee from one workplace to another, or a flexibility clause enabling the employer to change job content.

In **Belgium** the *Contract of Employment Act 1978* unequivocally declares void *"any clause which reserves the employer the right to change unilaterally the terms of the employment contract"* (*art. 25*).

In **France** there is much case law on so-called *"mobility clauses"*, showing that the courts do not accept all justifications for modifications to work conditions.

In **Italy** controversy surrounds the lawfulness of the clause relating to the variation in the distribution of working hours at the employer's discretion (the so-called working hours flexibility clause).

iv) Implied clauses

When the employment contract makes no express reference to employee mobility, the question arises whether the acceptance of mobility may be implied in the contract.

In **France** the judges must, if necessary, establish whether a condition has been deemed to be dependent on the agreement of the parties, and, if this is the case, the employer may not alter the condition without the agreement of the employee; such agreement is not to be inferred simply on the grounds of continuation of the employment contract. A case in the *Cour de Cassation* has sharply narrowed the employer's power to modify working conditions unilaterally (*Cass. Soc. 7.7.1988*).

In **Ireland** it is assumed that in most employment contracts there is an implied duty of the employee to *"cooperate"* with the employer, which may mean that the employee must agree to proposals for change which the employer says are necessary to ensure functional efficiency or commercial success. In recent years case law of the *Employment Appeals Tribunal* (in the context of dismissal cases) has tended to give the employer the benefit of the doubt; this is to say, where the employer wishes to change the terms of the employment and can demonstrate that there are important functional or commercial reasons for doing so, then the changes should be permitted.

In the **Netherlands** case law requires that any unilateral modification of working conditions by the employer must be *"reasonable"*. The courts will test the interests the employer has as regards modifications against the interests of the worker on continuation of the existing working conditions. Consideration will also be given to whether a new function is *"convenient"* to the worker, whether the worker has been consulted, etc.

In **Austria** an employee's conclusive agreement to a contract modification can only be accepted after stringent verification. Custom may show, however, that in company relocations the employee has a duty to move to the new place of work, albeit within reasonable limits.

In **Sweden** it has been the accustomed and a long-established ruling of the courts that as a basic premise the employer can exercise his right to organise work in a way which ensures that the work to be done falls within his natural area of activity and within the employees' general field of vocational competence. The obligation to work within this context is considered to be covered by collective agreements or contracts of employment even if not expressly stated. This general principle has since been more clearly defined in court rulings for a number of groups of workers and various sectors of the labour market. The labour court has also ruled that acceptable grounds must exist before an employer may make special significant changes to a worker's employment conditions even if such changes do not in principle overstep the employer's right to manage the company's labour force. In the event of such significant changes the employer may not act in an arbitrary fashion.

In the **United Kingdom** the court or tribunal may imply a mobility term if this is considered reasonable; e.g. in the construction industry a term is normally implied that workers can be required to move to sites within daily travelling distance of home.

d) Legal Sanctions

If the employer modifies the terms of the individual contract of employment in a way that constitutes a breach of contract the worker is entitled to refuse to work under the changed conditions.

If the employee is subsequently dismissed the employer is liable to pay damages (a dismissal allowance) to the aggrieved party. The burden of proof that he or she has acted correctly rests on the employer.

In some countries such as **Spain** and **France** the court might also rule in favour of the original conditions being restored.

In the **United Kingdom** the employee who has two years or more continuous employment is entitled to resign and

complain that there has been a *"constructive dismissal"*, i.e. resignation of the employee provoked by the employer.

Likewise, in **France** and **Spain**, workers adversely affected by modifications in certain working conditions have the right to terminate the contract and receive compensation.

In the **United Kingdom** where the employer ceases to carry on business at the place where the employee was required to work according to the original contract, then the employee may be entitled to a redundancy payment. However if the employer offers a new job which amounts to an offer of suitable employment which the employee unreasonably refuses, then the entitlement to a redundancy payment may be lost. The employee is also unlikely to succeed in a complaint of unfair dismissal if the modification of working conditions is found to be a genuine and reasonable business reorganisation which has been implemented following a fair procedure.

In **Germany** there exists a special statutory provision in the situation where an employee refuses the offer of a new contract following the modification of working conditions.

The *Employment Protection Act*, s. 2, provides that a worker who does not wish to accept amended working conditions can accept the offer and at the same time declare a reservation. The implication of the reservation is that the justification of the change of working conditions can still be contested in court but the dismissal cannot any longer lead to termination of the contract.

During the court proceedings the worker must work under the new conditions until the court's final decision. If the change turns out to be socially unjustified, and therefore illegal, the employee must be re-employed under the original conditions and the employer is obliged to pay the employee the difference lost by the employee temporarily working under the new conditions. As in all other cases of dismissal the works council must be consulted before each dismissal.

In **Greece** an employee who objects to a modification is entitled to demand that the previously existing conditions be upheld and:

- to require the employer (*Articles 349 and 350 of the Civil Code*) to accept responsibility for breaking the contract (the employee can claim the compensation payable for such breaking of contact);
- to render the employer liable for compensation on the basis of the moral prejudice suffered. (*Articles 57, 58 and 932 of the Civil Code*).

In some Member States such as **Denmark** and the **Netherlands** where modifications in certain conditions also constitute a breach of the relevant collective agreement the Courts can order the employer to pay an amount of money to the trade unions which are parties to the collective agreement.

In **Austria,** unilateral modification of the conditions of employment constitutes a breach of contract which entitles the employee to withdraw prematurely from the contract with all the consequences provided for under labour law.

In **Sweden** an employer's unilateral changing of work and employment conditions, where such action is not within his entitlement to organise work and constitutes a change to the contract of employment, is considered as constituting notice of termination of contract delivered by the employer. In this connection the general rules apply which require that notice of termination of contract must be based on factual grounds, in other words be based on acceptable personal reasons or be due to a shortage of orders. If an employer is unable to demonstrate factual grounds the employee is at liberty to require that the employment relationship continue and that damages be paid, both for the financial costs incurred and for the infringement of his personal rights which he suffered. If an employer by his own action has also broken the rules of a collective agreement the trade union as party to the agreement may also obtain damages. The trade union is also entitled to damages if an employer has failed in his obligation to liase before a decision on major changes to a workers conditions of work or employment is taken.

In countries were modification of working conditions requires the employer to inform and consult workers' representatives, e.g. **Luxembourg**, non-observance of these requirements may lead:

- either to the annulment of the employer's decision;
- or to annulment of its effect on the individual employment contract.

CHAPTER 6
DECENTRALISATION OF WORK

(see also Part I, Title II, Ch. 3 on Non-Standard Employment Contracts)

a) Borrowed workers

The hiring-out of manpower may be done by employment agencies supplying workers for placement with employers or by employment businesses supplying the services of workers it employs itself.

In various Member States non-profit organisations acting as temporary employment agencies or employment business in certain trades have been established by the State or by the parties to collective agreements, e.g. in **Spain** and the **Netherlands.**

In many Member States the hiring-out of manpower is regulated by statutes. In **Greece, Spain** and **Italy** business in this field is totally prohibited.

In **Greece** prohibitions on the hiring-out of manpower, sanctioned under criminal law, still restrict the emergence of private employment businesses.

In **Spain** the *Workers' Statute* prohibits any hiring out of manpower. This prohibition is sanctioned under criminal law, but also has civil law consequences such as: joint liability between the two employers for the debts they may incur with the social security of these workers; and the entitlement given to these workers to opt to become a member of the permanent staff of any of the companies involved.

Despite the rigid prohibition a few hiring-out firms have emerged, indicating the possible beginning of a certain tolerance of this phenomenon.

Temporary work firms are forbidden in **Italy** by *Act No 264 of 1949*, which entrusts the public employment agency with an exclusive role in the placement of workers if the firm limits itself to a placement activity without engaging the

worker directly and/or by *Act No 1369* of 23 October 1960, which forbids labour only sub-contracting. As already mentioned (*see above*) legislative reforms are under discussion to allow both private employment agencies and temporary employment agencies to operate.

A less rigid system in some other Member States makes it a criminal offence to hire out manpower without a licence. In these statutes detailed regulations lay down standards for the conduct of these private firms and provide, as a sanction, for the withdrawal of the licence.

Such a system operates:

- in **Denmark**, though not in the retail and office sectors;
- in **Spain**, where temporary employment agencies have been legal since 1994, although they need to apply for authorisation from the administration before commencing operations in the labour market. Temporary employment agencies may not hire out employees for especially dangerous jobs and activities, although the list of this type of activities has not yet been legally approved. All hiring out of manpower conducted outside these temporary employment agencies is prohibited.
- in **France**, with the addition that all other forms of hiring-out manpower are a criminal offence (*Art. 125 Cdt*);
- in **Germany** and the **Netherlands**, with the exception that hiring-out is forbidden in the construction industry. Additionally in the latter only employment business (and not employment agencies) can be licensed;
- in the **United Kingdom**, there is no longer a licensing system, but an employment agency or employment business may be prohibited by an order of an industrial tribunal for carrying on business on grounds of misconduct or unsuitability.

Belgium established a *Temporary Workers Statute* in 1976 and two *National Multi-Industry Agreements* also in 1976. The current relevant law dates from 1987.

In **Luxembourg** a draft bill on this issue is at the moment under consideration.

Portugal has *Decree-Law No 358/89 of 17 October 1989*, which regulates temporary work, notably the pursuit of activities by temporary employment agencies (*Chapter II, Section I*), the *"contract for the use of temporary labour"* concluded between the temporary employment agency and the physical or moral person to whom the worker is hired out, and the contract (*Section III*) concluded between the worker and the temporary employment agency.

In all Member States there are fears that the statutory instruments to regulate the system cannot prevent numerous illegal practices of temporary work. In response many trade unions are striving for further restrictions in this area.

Various governments have, however, in recent years relaxed existing rules in order to increase employment, e.g. **Germany** and the **Netherlands** and the **United Kingdom**.

In **Austria**, under the 1988 Arbeitskräfteüberlassungsgesetz (Manpower Supply Act), the hiring out of workers requires prior approval, to be granted in the first instance by the regional head of government. The *Manpower Supply Act* contains a series of employment and social protective provisions for temporary workers. The works council has consultation rights regarding the recruitment of hired-out labour; it must be informed and, if it so demands, a consultation must be carried out. It must also be notified, if it so demands, of the arrangements concerning the employment duration and the remuneration of the hired-out labour.

The hiring-out of manpower has been liberalised in **Finland** in recent years and there are no longer any statutory restrictions on this activity. Operators are merely required to notify the authorities that they are engaged in such activity.

In **Sweden** there has for long been an intense debate on the borrowing of workers. Following a period during which it was prohibited the borrowing of workers was legalised under certain conditions by a *Law on private job placement and the hiring of workers (1991)*. After the Swedish Government withdrew from international conventions restricting freedom in this area a new law introduced what was in principle total deregulation in the field and the borrowing of workers has been allowed since 1993 with very few restrictions.

In **United Kingdom** government has in the past opposed draft EC Directives on temporary workers, except those relating to health and safety, on the grounds that employment agencies and business in the United Kingdom are significantly different from their counterparts elsewhere in the Community and would be severely handicapped if the Directives were adopted.

b) Subcontracting

In most Member States there has been a dramatic increase in recent years in the use of subcontracting or contracting-out. This phenomenon has become particularly common for services such as cleaning, catering and security.

In no Member States are there any special rules for dealing with this phenomenon, except in **Italy**, where the *1960 Act* has regulated some forms of subcontracting by the enterprise, namely works of cleaning maintenance and porterage within the plant, obliging the entrepreneur to grant the workers employed in these activities the same treatment as regular employees. Some company-wide collective agreements have recognised the unions representatives' right to control in general all forms of subcontracting by the employer.

Wide use is made in the construction industry throughout the Community of labour-only subcontractors. This is a practice which takes a variety of forms, often with *"self-employed"* labourers being hired out daily for a lump sum payment by small firms.

These practices often escape the above regulations on the hiring-out of manpower. Special seek to deal with evasion of income tax and social security contributions mostly by the technique of joint liability of the principal company and the contractor for the payment of taxes, social security contributions and eventually wages. This is the case in **Spain**, **France**, the **Netherlands** and the **United Kingdom**.

In **Spain** this liability extends exclusively to the subcontracting of activities or services that form part of the principal company's own activity. This therefore excludes activities

which do not form a more or less stable element of the company's main purpose, i.e. those that are quite simply complementary to the company's activity. Additionally, on the question of joint liability for social security questions, this liability is cancelled if the principal company requests an official certificate attesting to the fact that the auxiliary company has been informed of its obligation to pay the social security contributions.

In **Italy** these practices fall under the prohibition of the *1960 Act*. Workers employed illegally are considered as employees of the real employer-user for all legal effect of the employment relationship. In practice this prohibition has proved to be very difficult to enforce.

In the **Netherlands** the entrepreneur who wants to make use of hired workers or of subcontracting has to inform and to consult the works council on this issue. The works council may initiate legal proceedings when the entrepreneur neglects its opinion.

In **Finland** the *Cooperation Act (No 725/1978)* imposes an obligation to inform and negotiate on employers planning an agreement to engage outside labour. The employer may not as a rule conclude such an agreement before the matter has been dealt with under the statutory cooperation procedure. By demanding negotiation, the employees can defer the decision to engage outside labour for a maximum of one week, unless the parties agree on further negotiations.

In **Sweden** an employer taking a person on to carry out work without that person being an employee of the employer is obliged by law to initiate negotiations with the trade union with which he has a collective agreement (primary bargaining duty). During such negotiations the trade union may declare that the planned action can be considered as tantamount to a failure to comply with the law or collective agreement or as an infringement of a generally accepted practice in the field and it may prohibit the action (in other words veto it). In accordance with a supplementary clause added in 1995 a veto may not be imposed against the *Public Procurement Act*, which is based on EC law. The rules on vetoes do not therefore apply to work which is temporary and occasional in nature, where specialist knowledge is required or when it is a question of taking on hired-out staff in accordance with the 1993 law on private job placement and subcontracting.

c) Movement of Employees within Groups of Companies

This is an area in which little research has so far been carried out. Many of the rules and principles outlined in the previous chapter on the *"Modification of Working Conditions"* apply in this area.

In **Spain**, although there is no legislation on this subject, case law generally accepts it today, even if such movement takes various forms, e.g. simple exercise of the employer's power of management, subjective novation of the employment contract, suspension of the first employment contract and conclusion of a new contract recognising length of service in the previous firm, cancellation of the first employment contract and conclusion of a new contract recognising length of service, etc.

d) Homeworking

In recent years the number of homeworkers has declined. Those remaining homeworkers are commonly female migrant workers. Traditionally homework has been associated with low-wage, labour intensive industries.

The image of homework could change rapidly when new methods of homework offered by new technologies (so-called *"tele-homework"*) become a genuine feature of the labour market. It is clear that existing regulations deal with traditional forms of homework. It is unlikely that they will remain appropriate for homework in the future.

In some Member States homeworkers are covered by employment acts with a general scope or by collective agreements for the industry or the enterprise. Mostly, however, homeworkers are excluded from general employment laws and from collective agreements.

A decisive point, which can vary greatly from case to case, is whether the labour relationship of the homeworker is regarded as a genuine contract of employment.

Coverage by social security schemes is also a problem. In the **Netherlands** homeworkers are only covered by some of those schemes when they as homeworkers earn at least 300 ECU a month.

In **Austria** homeworking is governed by the 1961 *Heimarbeitsgesetz* (Homeworking Act). The Homeworking Act is modelled on general labour law in many respects, containing provisions on:

- employee protection;
- public holidays;
- leave;
- continued payment of remuneration during prevention from working;
- care benefits;
- termination of the homeworking relationship;
- compensation for job loss;
- the homeworking joint agreement (modelled on the collective agreement);
- remuneration protection.

If no joint homeworking agreement exists, the Homeworking Commission can set pay rates for homeworking.

In **Portugal**, homeworking (homework performed at his home by a worker who is economically dependent on the work provider) is governed by a law of 1991 (*Decree-Law No 440/91, of 14.11.1991*). This law, which does not apply to contracts for the provision of intellectual work, covers the following questions among others. Safety at work, remuneration and social security. It also obliges work providers to keep a register of their homeworkers.

Some Member States have special statutory provisions to protect homeworkers, e.g. **Germany**, **Spain**, **France**, and **Italy** as follows:

TABLE 10: STATUTORY PROVISIONS TO PROTECT HOMEWORKERS

prohibition of homework in special areas				I
recruitment of homeworkers				I
written contract with particulars and approval employment office		E		
registration of activities		E		
wage protection	D	E	F	
working time protection	D		F	
safety regulations	D			
dismissal protection	D		F	

In **Germany, France, Italy** and **Portugal** there are many doubts about the efficiency of the regulations concerning homeworkers in view of the isolation and lack of organisation of homeworkers within the labour market. Occasionally, however, homework committees on a bipartite or tripartite basis are sometimes set up.

Protective regulations are absent in **Denmark, Ireland, Luxembourg, Finland** and the **United Kingdom**, whilst the special statute that exists in the **Netherlands** is no longer applied.

In **Finland** all labour legislation usually applies also to persons carrying out work at home; there are special provisions for certain specific cases only.

In the past, in **Sweden**, certain types of industrial manufacturing processes were carried out at home on behalf of companies. Later technical developments have changed this pattern of traditional home working. Increasingly, qualified workers are coming to agreements with their employers allowing them to work from home at least a few days a week. This presupposes that, generally speaking, the same rules apply to a worker's employment irrespective of whether the work is carried out at the workplace or at home. Various special provisions relating to holidays and working hours are laid down by law owing to the fact that the employer cannot monitor workers working at home. Responsibility for the working environment can raise problems since the employer has no control over the conditions under which the work is carried out. Special rules for home working are contained in collective agreements or in the individual contracts of employment (*see also Title I, Chapter 3 h)*).

CHAPTER 7
SUSPENSION OF EMPLOYMENT CONTRACT

The execution of the contract of employment may be suspended in the event of a temporary *"force majeure"* (Act of God), by decision of the employer and because of the employee's circumstances.

a) *Force majeure*

When a temporary *force majeure* prevents the performance of the contract for a certain period of time, the employee's obligation to work and the employer's duty to pay remuneration are temporarily suspended.

This rule applies in all continental Member States, although the legal concept of this notion may vary from one country to another.

In **Finland** the *Employment Contracts Act* contains a provision to the effect that if, as a result of a fire or exceptional natural occurrence affecting the workplace or any similar impediment beyond the control of management and labour, a worker has not been able to carry out his work, he is entitled to pay for a maximum of two weeks from the time of such occurrence.

In **Sweden** the social partners' mutual rights and obligations are suspended in the event of strike and lock-out but employment continues.

In **Ireland** and the **United Kingdom**, however, where there is no general doctrine of *"suspension"* of employment contracts, Acts of God would fall under the common law doctrine of *"frustration"* of contract. If a change of circumstances makes the performance of the contract unlawful, or physically impossible, or its objects incapable of achievement, the contract will be automatically brought to an end and not merely suspended.

b) Suspension by the Employer

(*see also Part III, Title II, Ch. 5, Lock outs*)

Employers can suspend the contract of employment for economic and disciplinary reasons and by means of lock-outs. Most Member States provide for a statutory suspension of the execution of the employment contract for economic reasons.

In **Belgium** most of the joint committees have set detailed rules about the limits and the necessary formalities in their sector. The *1978 Act* concerning individual employment contracts itself stipulates that any regulation on part-time work is limited to a maximum period of three months if the regulation foresees less than three working days per week or less than one working week per two weeks. If the employer follows all the rules, the employee is not entitled to a guaranteed remuneration but he or she will receive unemployment benefit. Suspension is only possible when the employee has taken up all the days of compensatory rest to which he or she is entitled.

In **Denmark** the employer is freed from obligations in some situations where the causes were anticipated, e.g. in seasonal work when there is a lack of raw material. It is a matter of interpretation in each individual case as to whether the contract is suspended or the employee is dismissed.

In **Germany** a mere suspension of the contract of employment due to economic reasons does not, in principle, free the employer from the obligation to pay wages. The Federal Labour Court holds that the employer who normally makes the profit is supposed to bear the risk. There are two exceptions to this rule: suspension by industrial action and when the existence of the establishment would be endangered. In this latter case the obligation to pay wages could be reduced or eliminated.

A scheme covering short-time work has become a very important instrument to overcome temporary economic difficulties. Short time work cannot be introduced without the works council's agreement. The *Labour Exchange* can pay short-time benefits compensating to a certain extent (63 or 68% of the net income) the reduction in wages of the short-

time workers. The maximum duration is in principle six months but this can be extended to 24 months.

In **Greece** the employer may lay off workers for economic reasons only after making a written announcement and for a maximum period of three months in one year. If this is the case the employers pay half of the regular remuneration.

In **Spain**, if a temporary economic downturn impedes production the employer may suspend employment contracts after first consulting the workers' representatives and, if he fails to obtain their approval, seeking authorisation from the labour authorities. Once suspension has been authorised the workers are deemed to be in a situation of partial unemployment and are entitled to receive unemployment benefit equivalent to the proportion of the working day lost.

In **France**, in cases of technical or partial unemployment, the employee is entitled to a partial remuneration. The employer will not be freed from his or her obligations unless an administrative decision on unemployment benefit entitlement has been made.

In **Ireland** common law on whether an employee can claim as of right to continue to receive wages when laid off is uncertain. The employee will in practice look to any statutory protection that may exist. Outside of the circumstances governed by legislation, an employer is obliged to pay wages unless non-payment is permitted by the particular contract of employment. There may be a clause which permits lay-off without pay or short-time at reduced pay in certain circumstances.

In **Italy** a special public fund guarantees partial income during periods of suspension or reduction of work for economic reasons (lay-off and part-time). This has become the major instrument of public protection for workers' income. The *Law 223* of 1991 introduced important changes in the regulation of this Fund. The maximum duration has been fixed at 36 months over a five-year span.

In the **Netherlands** the question whether an employee can claim as of right to receive wages when laid off is uncertain as it is to be decided on a vague provision in the *Civil Code* (*Art. 163&d*). More important is another statutory provision which in principle prohibits the employer from reducing the effective working time with a corresponding reduction in wages (*Art. 8 of the Extraordinary Decree on Labour Relations*). But this provision allows exceptions. The *Labour Inspectorate* may grant a short-term permit in cases of temporary economic downturn. Once a permit is granted, the employer is free not to pay full remuneration and the employee will be entitled to an unemployment benefit. Often – in agreement with the trade unions – a combination is arranged: the workers receive unemployment benefits and the employer tops up to the normal level of the wage.

In **Austria** the law does not explicitly prohibit suspension of contract. Care must be taken to ensure, however, that the risk distribution is evenly balanced between employer and employee. If the employer cannot continue to employ the employee for economic reasons, this essentially falls into his area of risk, and he is not freed from the obligation to continue to pay wages. This risk distribution, which is dealt with in §1155 of the *Civil Code*, is alterable by agreement, which in practice leads in some cases to a collectively agreed time limit on entitlement to remuneration. Short-time working is less common in Austria than, for example, in Germany. In cases of short-time working the public authorities pay a short-time working allowance if the partners to the collective agreement provide for compensation to be paid to employees.

In **Portugal** the employer, subject to certain material conditions (e.g. economic grounds, technological grounds, catastrophes) and subject to observance of certain procedures (informing and negotiating with the workers' representatives), may suspend contracts of employment or reduce working time when such measures are indispensable to assure the company's survival and to maintain jobs. For as long as this measure is in force the employees affected are entitled to financial compensation corresponding to two thirds of their normal pay (this latter being subject to a ceiling of three times the statutory minimum wage). The cost of this compensation is shared equally by the employer and a public institution.

In **Finland** the *Employment Contracts Act* contains detailed provisions regarding the conditions and procedure for laying off workers. The general rule is that unilateral laying-off is subject to the employer also being entitled to dismiss the employees. Employees can be laid off for a maximum of 90 days, however, if there is a temporary shortage of work and the employer cannot reasonably organise any other work or suitable training. Prior notice of the lay-off must be given to the employees' representatives and labour authorities as far as possible three months before the start of the lay-off at the latest. The employee must be notified of the lay-off at least 14 days before work is to cease.

In **Sweden** there are special rules governing the laying off of staff when an employer cannot provide work for his employees on account of a temporary shortage of work, operational disruptions, shortage of raw materials or similar reasons. The employee is no longer required to be available at the workplace but the employment contract continues to exist. For a long time the fact of being laid off meant that even entitlement to wages was lost. There is now a special provision in the *Protection of Employment Act* requiring employers in principle to continue the payment of wages during lay-offs. Lay-offs affect blue collar workers and not white collar workers. The right to lay off workers falls within the employer's right to manage the company's labour force but is restricted in accordance with court rulings which have, among other things, stated that a genuine shortage of work must have arisen and that lay-offs are not an option when notice would have been a better course of action. Before a decision on lay-offs is taken the employer must liase with the trade union.

In the **United Kingdom** there are different legal forms of lay-off and short-time. The common law draws a distinction between lay-offs from work due to a trade recession when remuneration must still be paid and lay-offs due to circumstances such as mechanical failure when a principle of risk-sharing is applied. The legal rules regarding the maintenance of income during lay-off and short-time are extremely complicated. The insecurity of workers' income has led to various forms of guarantee payments by collective agreement and statute.

c) Suspension by the Employee

i) Illness

(see also Part II, Title III, Chapter 2)

Generally speaking, illness merely suspends the execution of the employment contract.

In **Greece** the law defines the margins of a short illness during which the employment contract is suspended, while in **Ireland** and the **United Kingdom** prolonged illness in extreme cases may amount to *"frustration"*, so that the employer may legally declare the contract as having come to an end.

In all Member States legislation exists on sickness benefit to be paid to employees who cannot work because of illness. In **Ireland** the Social Welfare legislation may provide some protection.

In most Member States social security legislation devolves (at least a part of) the responsibility for paying sick employees to the employer. This is especially the case in **Belgium, Denmark, Germany, Italy, Luxembourg,** the **Netherlands, Austria, Finland, Sweden** and the **United Kingdom.** In some cases the state provides for a (partial) reimbursement.

In **Spain** the employee continues to receive a proportion of his remuneration for a given time, after which payment becomes a responsibility of the social security services.

In **Greece, Ireland** and **Portugal** there are, in general, no such obligations on the employer. In these countries, payments can be through voluntary schemes.

In **France** sick pay is paid, in principle, by the social welfare bodies. However, all collective agreements contain clauses stipulating that the employee absent on sick leave will continue to be paid part of his salary by the employer for a certain period, and that the employer is responsible for recovering the sick pay from the social welfare bodies.

Sick pay is paid by the employer from the first day of absence in **Belgium, Denmark, Germany, France, Italy** (white collars only), **Luxembourg** (white collars only) from the first day in case of industrial injury or occupational disease.

In **Spain,** where a contract is suspended as a result of an occupational accident or occupational disease, the employer is responsible for payment of the full salary for the day on which work stopped, while the social security system is responsible for payment of the compensation from the second day onwards. Where the contract is suspended due to an ordinary illness or a non-work-related accident, the employer must pay the compensation for the fourth and fifth day of work stoppage and the social security system pays from the sixth day onwards.

The length of the sick leave period during which employers are required to pay varies from 30 days in **Belgium** to six months in **France** in some collective agreements and in **Italy.** Collective agreements or individual contract can extend this period. In the **Netherlands** a new act will come into effect in 1996, obliging the employer to continue the payment of wages during sickness until one year.

The level of sick pay can vary from 100% of normal pay, as in **Belgium, Germany, Austria, Italy** and **Luxembourg** (white collars only), to 70% in the **Netherlands.** In the latter case at least the minimum wage must be granted and the stated percentage is often topped up by collective agreement. In most Member States collective agreements, once again, often provide for a higher level of pay.

In **Finland** wages are paid for the first seven days of the period of illness, after which the employee receives an income-related daily allowance from the health insurance scheme. In many collective agreements, however, the entitlement to wages during a period of illness has been extended to more than a week, with the employer *de facto* paying the difference between the amount of sickness benefit and the wage. The daily allowance is paid for a maximum of 300 days. There is no maximum length of sick leave, but illness can be grounds for dismissal if it leads to a substantial and permanent reduction of the worker's capacity for work.

TABLE 11: SICKNESS LEAVE IN THE MEMBER STATES

COUNTRY	LENGTH OF LEAVE	PAYMENT
Belgium	52 weeks	60% earnings
Denmark	91 weeks in 3 years	90% average preceding 4 weeks' earnings
Germany	78 weeks in 3 years	80% average preceding 4 weeks' earnings
Greece	26 weeks	50% earnings, 10% increase for each dependant (maximum 4)
Spain	18 months	60% from 4th to 20th day inclusive, 75% after that
France	52 weeks in 3 years	50% earnings; with 3 children 66.66% from 31st day
Ireland	52 weeks (or unlimited, if claimant has paid 156 weeks' contributions)	Flat-rate sickness benefits plus proportional supplement. Total maximum 75% weekly earnings
Italy	6 months	50%, 66.66% after 21st day
Luxembourg	52 weeks	100% earnings
Netherlands	52 weeks	70% daily wage (often topped up by collective agreement)
Austria	26 weeks Statute generally provides for 78 weeks	50% 60% from the 43rd day
Portugal	155 weeks	65% average daily wage of preceding 2 months (100% if hospitalised & have dependants)
Finland	-	Determined according to complicated rules for different levels of income
Sweden	-	After the first unpaid day 65, 75, 80, 90 or 70% of wages up to a maximum ceiling depending on how long the period of illness is and whether sickness wages are payable by the employer for the first 14 days (planned reduction to a standard level with effect from January 1996 corresponding to 75% with effect from the second day)
United Kingdom	28 weeks	Flat-rate (GBP 54.55 in 1996)

In **Sweden** an employer must pay sickness pay for the first 14 days of a period of illness. Thereafter sickness benefit is payable from the national sickness insurance scheme. The level of benefit has successively fallen over the past few years from a level of 100% of income (up to a maximum amount) from the first day of illness, subsequently to a state of affairs where no benefit was payable at all for the first day and thereafter 65% of income (with sickness pay 75%) for the second and third day, thereafter 80% of wages for the first year (with sickness wages 90% from day 4 till day 14) and for the subsequent period at a rate of 70%. A decision in principle on a standard level for benefit with effect from the second day at 75% of income with effect from 1 January 1996 has been taken.

In the **United Kingdom** employers are obliged to pay statutory sick pay for the first 28 weeks of illness, at a relatively low fixed rate, after which the employee transfers to one of a number of social security benefits. The money received as statutory pay must be set off against contractual remuneration and vice versa.

Finally, the level of statutory illness benefit may vary from 50% in **France** and **Italy** to 60% in **Belgium**, 65% in **Portugal**, 70% in **Greece** and the **Netherlands**, 75% in **Spain**, 80% in **Germany**, 90% in **Denmark** and 100% in **Luxembourg**. In **Spain**, the level of benefit is 60% up to the twentieth day and 75% for all days thereafter.

ii) Maternity

(*see also Part II, Title III, Chapter 1*)

In all Member States pregnant women at work are entitled to a leave of absence before and after confinement. The duration of and other conditions concerning maternity leave vary between Member States.

The duration of leave varies from 15 in **Greece** to 18 weeks maternity leave and 10 additional weeks parental leave in **Denmark**, 16 weeks in **Austria**, 90 days in **Portugal** and twenty weeks in **Italy**. In the **United Kingdom**, in order to give effect to the *Pregnant Workers' Directive 92/85/EC*, all employees, irrespective of length of service, have a right to return to employment at any time up to 29 weeks from the week in which childbirth occurs.

In certain countries, such as **France**, the leave entitlement is longer if the women already has children.

During maternity leave entitlements to pay may vary from 100% of salary, e.g. in **Belgium**, **Germany**, **Greece**, **Spain**, **Luxembourg**, the **Netherlands**, **Austria** and **Portugal**, to 90% in **Denmark**, 84% in **France**, 80% in **Italy** and 70% in **Ireland**, while in **Finland** it is approximately 60-80%.

In **Spain** the woman must have been making social security contributions for at least 180 days. Most countries impose other conditions for entitlement to maternity leave.

In **Finland** the legislation recognises a number of different forms of leave that parents are entitled to for reasons of pregnancy and childbirth or looking after children, i.e. maternity leave, paternity leave, parental leave and child care leave. Female employees are entitled to maternity leave in connection with pregnancy and confinement. In addition, the parents are entitled to parental leave, the father to paternity leave and both parents to child care leave.

Wages are not paid during maternity leave or any of the other types of leave mentioned above, but the person on leave is entitled to a daily allowance in accordance with the Health Insurance Act. In actual fact, the entitlement to leave has been linked to the Health Insurance Act to such an extent that the right to time off work continues for as long as health insurance benefits are paid. The entitlement to child care leave, however, lasts only until the child reaches the age of three.

TABLE 12: MATERNITY LEAVE IN THE MEMBER STATES

COUNTRY	LENGTH OF LEAVE	PAYMENT
Belgium	15 weeks total, at least 8 must be taken after the birth	100% for 1-4 weeks, 80% later
Denmark	4 weeks before, 10 after + 10 weeks for either parent, or shared between them (+2 weeks for the father after the birth)	90% average weekly earnings
Germany	6 weeks before, 8 after	100% net wage for insured workers, or fixed sum of DEM 100
Greece	16 weeks, of which 8 after the birth	100% of earnings
Spain	16 weeks, of which 6 after the birth	100% of earnings
France	6 weeks before, 10 after	84% of salary + post natal allowances
Ireland	14 weeks, 4 weeks before	70% of salary & maternity grant + additional 6
Italy	20 weeks; 8 before	80% of earnings + maternity grant
Luxembourg	8 weeks before, 8-12 after the birth	100% earnings + maternity grant
Netherlands	16 weeks, 4 weeks before	100% earnings
Austria	16 weeks, 8 before and 8 after the birth	100% (earnings of the last 13 weeks)
Portugal	90 days total, of which 60 must be after the birth	100% daily wage + maternity grant
Finland	263 days	Health insurance benefits
Sweden	Maternity leave: full leave for a minimum of seven weeks before and seven weeks after confinement; leave with a maternity benefit if a woman, for health reasons, cannot work during pregnancy. Parental leave: 10 days for the father in association with the birth of the child; full leave until the child is 18 months old; working hours reduced to 75% until the child is eight years old; temporary leave for care of child in the event of, for example, sickness.	Parental benefit of 90% of salary up to a given ceiling for 30 days for each parent, thereafter 80% for a further 300 days (the amount is gradually reduced) and then SEK 60 per day for 90 days. Employment conditions: in principle six months' service. There are no employment conditions for maternity leave and leave for occasional care of a child . Maternity benefit: benefit corresponding to sickness benefit from the first day. Temporary leave for care of child: 1-14 days 80%, thereafter 90%. A decision in principle has been taken on a standard benefit level of 75% as from 1 January 1996, with the exception of parental benefit which remains at 85% or 75%.
United Kingdom	18 weeks	If 2 years service 90% of pay for first 6 weeks, then GBP 54.55 per week; if more than 26 weeks but less that 2 years service, GBP 54.55 per week (1996).

Female employees in **Sweden** are entitled to full maternity leave for a period of at least seven consecutive weeks before and after confinement. They are also entitled to leave for breast feeding. Some of the rules are new and were introduced in 1995 as a result of *EU Directive 92/85/EEC* on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast feeding. This leave is standard and is not necessarily associated with a benefit (parental benefit). Parental benefit corresponds, in principle, to the value of the parents' sickness benefit. A pregnant woman who, for health reasons, cannot work is entitled to a maternity benefit in addition to the corresponding sickness benefit (*see further details under vi), Parental Leave*).

In the **United Kingdom** there is entitlement to statutory maternity pay for up to 18 weeks at one of two rates: (1) a lower rate for those employed for more than 26 weeks but less than 2 years, and (2) a higher rate for the first 6 weeks, and thereafter at the lower rate, if employed for at least two years. The lower rate is fixed at the same amount as statutory sick pay (above). The higher rate is 90% of normal weekly earnings. Payment may be set off against certain contractual payment due to the employee.

iii) Military service

(*see also Part II, Title III, Chapter 3*)

The execution of the employment contract is suspended during military service. The law, however, does not provide for a form of guaranteed income during this suspension.

This is the case in most Member States. In **Greece** there is a minimum continuous employment requirement.

In **Spain** the employment contract is suspended during both military service and the alternative civilian service for conscientious objectors.

In **Ireland** and the **United Kingdom** there is no compulsory military service but legislation in the **United Kingdom** provides for the safeguarding of the employment and reinstatement of those on military service.

iv) Trade union activities

(*see also Part II, Title III, Chapter 4*)

Statutory provisions on the exercise of trade union activities exist in **Spain, Italy, Portugal** and the **United Kingdom.** In these countries trade union officials have certain rights to time-off with pay for trade union activities.

Some collective agreements in **Belgium, Denmark** and the **Netherlands** provide for the exercise of trade union activities in paid working time, although these are not very common.

In **Finland** workers in firms with at least ten employees have a statutory right to use the employer's premises free of charge outside working hours for trade union meetings and similar gatherings. The *Employment Contracts Act* also lays down that employers are obliged to make up any earnings lost by the workers' main representative during working hours on account of negotiations and certain trade union duties. On the other hand, there is no statutory entitlement to time off work to attend to trade union duties, but collective agreements often contain rules about this.

In **Sweden** trade union representatives are, under a special law, entitled to leave with employment-related benefits to fulfil any trade union duties associated with the workplace. They are also entitled to leave to fulfil other trade union duties within their mandate but without pay.

v) Public activities

Statutory provisions on time-off for public activities exist in all Member States, except for **Denmark**, where collective agreements on this issue are rare.

vi) Parental leave

(*see also Part II, Title III, Chapter 1*)

Statutory provisions according to which employees are entitled to parental leave can be found in **Denmark** (1984), **Germany** (1985, 1994) **Greece** (1984), **Spain** (1980), **France** (1984), **Italy** (1971), the **Netherlands** (1990), **Austria** (1979), **Portugal** (1984) and **Finland** (1990).

In **Belgium** there are no parental leave provisions as such, but under *Arts. 88-95* of the *Law of Social Recovery* (1985) employees may request sabbatical leave provided that it is covered by a collective agreement. Since 1994 it has been possible in Belgium to convert maternity leave into parental leave for the husband in the event of the death or hospitalisation of the mother.

In **Greece**, *Article 8* of the 1993 *General National Collective Agreement* introduced more favourable parental leave conditions for employees. An employee with at least 1 year's service in a company employing at least 50 workers, and whose spouse is also an employee, is entitled to unpaid parental leave during the period extending from the end of maternity leave until the child reaches the age of three, this to a maximum of three and a half months per parent; the same rules apply in the case of adoption.

There are detailed rules (1990) on entitlement to parental leave in **Finland.** They are linked to the arrangements for maternity leave (see *ii* above).

There is special legislation in **Sweden** on parental leave. This is based on the principle that each parent has the same entitlement to leave for child care. The only exception is leave for health reasons during pregnancy, maternity leave for childbirth and breast feeding and the father's entitlement to leave in connection with the birth of a child (*see II above*). Full leave is provided for a total of 450 days. During the first 360 days parental benefit corresponds to the value of sickness benefit, except for a period of one month for each parent, during which the benefit is somewhat higher. Parents are always entitled to full leave until the child is 18 months old, regardless of whether or not they are entitled to parental benefit. They are also entitled to reduce their normal working hours to 75% until the child is 8 years old. This entitlement is not associated with any benefit. Temporary parental benefit to an amount which, in principle, corresponds to sickness benefit if, for example, a child under 12 years old is sick, is awarded to the parent who remains at

home to care for the child. Temporary parental benefits can be transferred by the parent to another person who, instead of the parent, gives up gainful employment to care for the child. An employee may not be dismissed for taking advantage of his/her right to parental leave. The employment-related benefits and conditions of employment of the employee shall not be adversely affected as a result of the leave.

It should also be pointed out in this connection that there is a special law in **Sweden** on entitlement to leave and benefits for caring for a seriously ill relative or close associate.

In **Ireland, Luxembourg** and the **United Kingdom** there is no statutory right to parental leave. The United Kingdom is not obliged to implement the *Parental Leave Directive 96/34/EC* because it is not covered by the *Maastricht Agreement on Social Policy.*

vii) Sabbatical and educational leave

A general statutory right to sabbatical or educational leave is not provided for in most Member States, although in **Belgium, Germany, Greece, Spain, France, Luxembourg** and **Portugal** there are some statutory rights in this area. Sometimes the parties to collective agreements or even the individual parties may agree upon such arrangements.

In **Austria** there is no general statutory entitlement to sabbatical or educational leave, but this subject is under intense discussion at the present time. However, members of works councils are entitled to sabbatical or educational leave for the purposes of further training in connection with their representation duties.

In **Finland** there is a separate Act on educational leave (1979). It gives an individual the right to educational leave for a total of two years in any five-year period, but it does not make provision for any entitlement to economic compensation for the period of educational leave.

There are two possible types of sabbatical leave. The *Compulsory Holidays Act* makes provision for saving up holidays in order to take the accumulated leave at a later date. The part of annual holidays in excess of 18 days can be saved for later in this way. The other possibility is *"sandwich"* leave (see Section 3 d above on job-sharing).

There is a specific law in **Sweden** on entitlement to study leave. An employee is entitled to take leave in order to study. There is no time limit to entitlement to leave and the training involved does not have to be associated with the job but it must be systematic. Study leave is not associated with any entitlement to benefit. There are, however, rules in collective agreements on a small allowance from the employer under certain conditions. A State grant may also be available for certain courses under the *Study Leave Act.* An employee may not be dismissed for using his entitlement to study leave. He can break off his study leave at any time and return to work and is guaranteed the same work or a post offering equivalent conditions.

Under a specific law, immigrants are entitled to leave to learn Swedish. There is public funding for compensation for loss of earnings.

Mention should also be made here of a specific law on entitlement to leave for certain union duties during study and of the fact that employees who have been dismissed are entitled to leave to seek work during the period of notice. Collective agreements often contain further entitlements to leave, e.g. for personal or family reasons.

TITLE IV
SETTLEMENT OF INDIVIDUAL LABOUR DISPUTES

The settlement of individual labour disputes is achieved in all Member States by two principal mechanisms: firstly, conciliation, mediation and arbitration and secondly, court proceedings.

In most Member States more than one mechanism is used to settle conflicts.

CHAPTER 1
CONCILIATION, MEDIATION AND ARBITRATION

Conciliation involves bringing the protagonists in a dispute before a committee in search of an agreement.

Mediation involves appointing someone to seek and propose the essentials of an agreement.

Arbitration involves appointing someone to settle claims.

Conciliation, mediation and arbitration procedures generally play only a small part in the settlement of individual labour disputes in **Denmark, Greece, Luxembourg,** the **Netherlands, Finland** and **Sweden.**

In the other Member States conciliation and mediation are more important, although practical implementation varies from one country to another.

In **Belgium** grievances arising in the course of the employment relationship will usually be handled by the union delegation or the union business agent. The procedures for handling grievances are laid down in collective agreements. If the dispute remains unsettled, the joint committee will deal with the case. This committee can conciliate and recommend a solution to the parties. In some sectors grievances are rarely brought to the courts and are settled by the joint committee.

Arbitration plays no part in Belgian labour law and labour relations. Arbitration clauses covering grievances are only valid for employees whose remuneration exceeds BEF 1,300,000 and who are responsible for day-to-day management of an enterprise.

There is no system of conciliation, mediation and arbitration concerning individual employment contracts in **Denmark.**

In **Germany** the worker may be able, where there is a works council, to initiate a grievance procedure. According to the law a worker who believes that he or she has been discriminated against, treated unfairly, or otherwise put at a disadvantage by the employer or by other employees of the plant has several options:

- to make a complaint to the competent authorities in the plant either in person or through a member of the works council;
- to make a complaint to the works council which is obliged to listen to the employee's grievance and, if it appears justified, to seek to induce the employer to remedy it. If the employer and the works council do not agree on the justification of the complaint, the works council may appeal to the arbitration committee.

The subsequent procedure to be followed depends on the character of the grievance, i.e. conflict of rights or conflict of interests.

In **Greece** mediation and arbitration are rare. Conciliation is sometimes used by the parties' lawyers or the *Labour Inspectorate.*

In **Spain** the conciliation procedure is obligatory before taking a dispute to court; this obligation does not apply in certain cases specified in the law, where, for reasons of urgency or other reasons, the case may be taken direct to court. In the vast majority of cases the conciliation procedure takes place before an administrative body, although it can also follow procedures established for this purpose by collective bargaining or by multi-industry agreements. Where the parties concerned reach an agreement, this has the same force as a court decision. As regards arbitration in individual disputes, this is something that tends to be neglected in practice, even though the *Workers' Statute* (after its reform of 1994) provides the possibility to resort to individual arbitration by employing the procedures established by collective bargaining for differences of interpretation and application of collective agreements; in this precise case, arbitration decisions have the same force as a court decision.

In **France** conciliation has developed in the shadow of the industrial tribunals procedure. Mediation and arbitration are modes rarely used in individual disputes.

In **Ireland** it is normally expected that the so-called Rights Commissioners will hear disputes involving individual workers, rather than groups. The issues will tend to be concerned with aspects of discipline or non-payment of wages. The office of *Rights Commissioners* was established under the *Industrial Relations Act 1969*. Under the *Industrial Relations Act 1990*, *Rights Commissioners* operate as a service attached to the Labour Relations Commission.

Under the *Unfair Dismissals Act 1977*, the Rights Commissioners exercise a quasi-judicial function. Cases under the Act be taken at first instance to a *Rights Commissioner* for a recommendation (which is legally binding). If either party objects to this, the case goes directly to the *Employment Appeals Tribunal* (EAT). This tends to happen in a large number of unfair dismissal cases.

In **Italy** clauses providing for the voluntary settlement of labour disputes (of rights) are included in nearly all national collective agreements. Normally, these clauses provide that all disputes are resolved in the first instance between company representatives and union representatives. Upon appeal an unresolved issue is examined by representatives of the appropriate regional organisations of the two sides.

Conciliation agreements negotiated with union participation are binding and cannot be invalidated by appeals to general principles of civil rights. This is a vital guarantee for the union's negotiation position.

Conciliation of rights disputes has been stimulated by *Act No 533 (1973)*, which provides for tripartite conciliation commissions. These commissions are able to intervene in each individual rights dispute. Agreements reached by the commission can be enforced by court decree.

The legal option of resorting to (formal) arbitration in order to resolve labour disputes has remained rather limited.

In **Luxembourg** there is a possibility of arbitration. Mediation, however, is not usual in individual labour disputes.

In the **Netherlands** individual disputes can be solved through union intervention or mediation by the works council. Collective agreements may also provide a grievance procedure. Sometimes this procedure is obligatory but only if both the employer and the employee are bound by the collective agreement through membership of the employers' organisation or the trade union. An arbitration clause cannot be extended to all employers and employees. In practice, these clauses play only a modest part in the settlement of individual labour disputes.

In **Austria** too there is an industrial complaints procedure. Employees can lodge complaints with the works council or the proprietor of the firm. However, the procedure is not laid down precisely by law.

In **Sweden** mediation procedures are almost entirely restricted to disputes concerning individual employment contracts. The main purpose of mediation is to solve conflicts of interest between organisations but there is no reason why the procedure should not also be used in other types of dispute. The arbitration procedure is, on the whole, used very little in the Swedish labour market. In disputes concerning individual employment contracts the arbitration procedure comes into play when compensation is being sought from the various labour market insurance schemes and, occasionally, when specialist employees have tailor-made employment contracts with special conditions for the post in question. Arbitration is also used to settle disputes between an individual member and his trade union. The usual way of solving individual employment contract disputes in the Swedish labour market is by negotiation between the employer and the employee's trade union. These negotiations can usually be conducted at two levels. If the negotiations do not lead to agreement between the parties, the case can be passed on to the appropriate tribunal for a decision.

In the **United Kingdom** most individual disputes are not processed through machinery provided by the state. They are settled through informal workplace procedures.

The *Advisory, Conciliation and Arbitration Service* (ACAS), which is governed by a tripartite council, took over the functions of conciliation, arbitration and mediation from the *Department of Employment* in 1974. The service must consider voluntary procedures before intervening in individual or collective disputes.

Conciliation in *Industrial Tribunal* cases is an important part of the ACAS workload. ACAS *Conciliation Officers* are re-

quired to promote a settlement of any complaint presented to an industrial tribunal relating to statutory employment rights. ACAS may also provide assistance by other means (including mediation) and may refer disputes to arbitration by consent of all parties. Relatively little use is made of this, however, in individual disputes.

CHAPTER 2
COURT PROCEDURES

a) Ordinary Courts

In **Denmark, Greece, Italy,** the **Netherlands** and **Finland** individual labour disputes are handled by the ordinary courts.

In **Denmark, Greece, Italy** and the **Netherlands** there are no specialist labour courts or tribunals to handle cases concerning individual labour disputes; these are dealt with by the ordinary civil courts.

In **Greece, Italy** and the **Netherlands,** however, legislation provides for simple, informal and often more rapid procedures for the settlement of individual labour disputes (at least in the first instance).

In **Italy** a special section of the *Supreme Court* has been created to deal exclusively with labour disputes.

In the **Netherlands** labour cases are dealt with in the first instance by a single judge, the *Cantonal Judge*; he is competent in all labour cases whatever the amount of the claim involved; access costs are low; the parties do not need the assistance of a professional lawyer; the procedure may take one year, but the judge may give interim injunctions. Appeals can be made to the ordinary law tribunals and cassation to the *Supreme Court*.

In **Austria** labour disputes occupy a special place in the ordinary jurisdiction. The decisions are basically rendered in Senates comprising judges and expert lay judges representing employers and workers. The first appeal procedure is simpler and speedier than in ordinary cases. In labour dispute cases the first appeal is heard by the Regional Courts, functioning as labour and social affairs tribunals, the second appeal by the Higher Regional Courts and the third appeal by the Supreme Court.

In **Sweden** legal disputes about individual employment contracts come under the industrial tribunal either as first (and only) instance or as second (and highest) instance. It may be necessary for the general court of first instance to hear industrial disputes of this kind first in situations where the individual employee himself, rather than his trade union, is pleading the case.

b) Labour Courts

The mechanism of the specialised labour court is more widespread in the EC and can be found in **Belgium, Spain, France, Germany, Luxembourg** and **Finland.** Organisation, jurisdiction, composition and procedures of the courts may vary from country to country.

In **Belgium** the *Labour Courts* are competent to deal with all grievances which arise out of the individual employment contract. The Courts deal mainly with individual disputes. They are, however, not competent to interfere in the settlement of disputes of interest. Each chamber comprises a career judge and two lay judges, one of whom is proposed by the trade unions and the other by the employers' association. Appeal can be made to the *Labour Court of Appeal* (similar composition to the *Labour Court*) and finally to the *Supreme Court* (solely career judges).

In **Germany** the Labour Courts are the dominant mechanism for resolving conflicts in labour disputes. The German system comprises three levels: *Labour Courts of the First Instance*, *Appellate Labour Courts* and the *Federal Labour Court*.

The *Labour Courts* are composed of one or more panels, each with a professional judge as chairman and one lay judge each from the employer and employee side. The procedure in the *Labour Court* is divided in two steps: a conciliation session and the ordinary panel session. Normally there are several months between these two sessions.

In **Spain** the resolution of individual labour disputes is almost exclusively a matter for the special labour courts. Labour judges are individual judges, who are informed of the dispute in a single petition. Conciliation must be attempted as a prerequisite to court proceedings. In the majority of cases this is a simple formality. The judge endeavours to achieve conciliation between the parties. A sentence is pronounced only when this fails.

In **France** the *"conseil de prud'hommes"* is an elected bipartite body which exclusively resolves all individual disputes between employer and employee over the interpretation of the employment contract. Each *"conseil"* is divided into four (sometimes five) sections. Each section includes at least one conciliation unit. All cases must first go through this conciliation unit. If conciliation fails, the procedure will go forward to the *"conseil"*. Appeals can be taken to the ordinary *Appeal Court* and to the *Supreme Court*.

In **Luxembourg** the *Tribunal de travail* (Labour Tribunal) is composed of one professional judge (a justice of the peace) and one lay judge each from the employer and employee side. Appeal to the *Cour supérieure de justice* (Supreme Court) is possible for claims of over LUF 25 000; disputes concerning agreements between employer and employee are handled by the *Cour d'arbitrage* (Arbitration Court).

In **Portugal** the *Juzgados de lo Social* (Social Courts) deliver the judgments at first and unique instance; in most cases, however, appeal against these judgments can be made for specified reasons to the Higher Tribunals (associated bodies whose competence extends to Autonomous Communities): if there is contradiction between these judgments, a further appeal can be made to the Supreme Court (associated body whose competence extends to the whole of the national territory). Above the Supreme Court is the Constitutional Court, which deals with all matters concerning the guarantee of the exercise of fundamental rights and public freedoms, the presumed non-constitutionality of provisions having the force of law, and conflicts of competence between the State and the Autonomous Communities.

In **Portugal** the *Labour Courts* form part of the ordinary courts. There is a special section, - the Social Section - within the *Court of Appeal* and the *Supreme Court* to deal with

labour disputes. The *Constitution*, the *Organic Law on Courts* and the *Labour Code of Procedure* stipulate that *Courts of First Instance* (Labour Courts) must be composed of professional judges and by lay judges elected by workers and employers; despite the Decree-Law on the status of lay judges, these judges have never exercised their functions.

In **Finland** there is a *Labour Court* that deals with disputes about the validity and interpretation of collective agreements and whether a particular procedure is in keeping with a collective agreement. This Court also deals with questions of sanctions in the event of an infringement of a collective agreement or an embargo on strikes and lockouts associated with a collective agreement. Its composition is tripartite, comprising representatives of the two sides of industry and neutral government officials. Cases in the *Labour Court* are brought by the organisation or individual employer who has entered into the agreement. Only if an individual employee has received authorisation from the other party to the agreement or if the latter has refused to bring the case can an individual bring a case before the *Labour Court* himself. In practice this is extremely uncommon, but it has happened from time to time.

In **Sweden** there is a labour court covering the whole country which is responsible for dealing with industrial disputes, i.e. disputes about collective agreements and relations between employers and employees in general. The labour court has no authority in conflicts of interest. It is composed of judges, experts and representatives of employers and employees. When a case is being settled the court consists of a presiding judge (who is a highly-qualified lawyer), his deputy (who is also a judge), an expert, two employers' representatives and two employees' representatives. Before a case is settled the court will have tried, as part of its preparation for the case, to reconcile the parties to the dispute. The labour market organisation and the individual employer with a collective agreement are entitled to plead in the labour court. Individual employees (who are not members of the union or whom the union does not wish to represent) and employers who do not belong to any employers' organisation and have not themselves concluded a collective agreement may instead go to the general court as first instance. Industrial disputes which are not associated with collective agreements or the *Co-Determination Act*, or which concern collective agreements which are not between the parties involved, are also taken to a general court. An appeal can then be lodged against a judgment of this kind in the labour court. An appeal cannot be lodged against the judgment of the labour court.

c) Industrial Tribunals

Ireland and the **United Kingdom** also have specialist labour courts in the form of industrial tribunals. The jurisdiction of the industrial tribunals seems, however, to be more limited and more specialised than that of the labour courts.

In **Ireland** the *Employment Appeals Tribunal*, the *Labour Court* and the civil courts each have a role in resolving individual labour disputes.

The *Employment Appeals Tribunal* (EAT) acts by division (chairman or vice-chairman and two ordinary members, one from each side of industry). The *Tribunal* hears applicants under a number of statutes and issues legally binding decisions under these statutes, subject to appeals to the civil courts. The relevant statutes include the *Redundancy Payments Acts*, *Minimum Notice and Terms of Employment Act 1973*, *Unfair Dismissals Act 1977* (as amended), *Protection of Employees (Employers' Insolvency) Act 1984*, *Payment of Wages Act 1991*, *Terms of Employment (Information) Act 1994*, and *Maternity Protection Act 1994*. The EAT procedures are slightly less formal and more flexible than those of the civil courts (especially as regards legal representation and rules of evidence).

The tripartite *Labour Court* hands down legally binding decisions in cases involving equal opportunity between men and women under the *Anti-Discrimination (Pay) Act 1974* and the *Employment Equality Act 1977*. A decision of the *Labour Court* may only be appealed to the civil courts on a point of law.

The civil courts may be involved in appeals from the EAT or *Labour Court* and in cases involving the interpretation of the employment contract or actions for breach of employment contract.

In the **United Kingdom** a specialised system of labour courts, known as industrial tribunals, has existed since 1964. These tribunals now have jurisdiction over a wide range of disputes arising in respect of statutory rights (e.g. unfair dismissal and redundancy, protection of wages, discrimination, health and safety, trade union rights) and also claims for breach of contract where the contract has been terminated.

The industrial tribunals consist of a legally-qualified chairman and two industrial members, one drawn from a panel appointed after consultation with representative employers' organisations and the other from a panel appointed after consultation with trade unions.

There may be an appeal on a question of law to the *Employment Appeal Tribunal* (EAT), which is similarly constituted. A further appeal may be brought to the *Court of Appeal* (England) or *Court of Session* (Scotland) and, from there, to the *House of Lords*. In Northern Ireland, there is no EAT and appeals are taken directly to the *Northern Ireland Court of Appeal* and then to the *House of Lords*.

The function of conciliation has being given to ACAS (above). The Tribunals are normally quicker, cheaper, more accessible and more informal than the ordinary courts.

The ordinary civil courts have jurisdiction in respect of actions for damages and other remedies arising out of breach of the employment contract.

CHAPTER 3
LABOUR INSPECTORATE

In all Member States there are public labour inspectorates with responsibility for the enforcement of general or specific legislation.

In **Belgium**, **Greece**, **Spain**, **France**, **Italy**, **Luxembourg**, and **Portugal** generalist systems apply, whereby labour inspectors monitor the application of labour law, collective agreements, health and safety regulations and, in some cases, social security law.

More specialist systems apply in **Denmark**, **Germany**, **Ireland**, the **Netherlands**, **Austria**, **Sweden** and the **United Kingdom**. Here, inspectors' duties are limited to the enforcement of health and safety regulations and, in certain countries, minimum wages and working time.

In **Luxembourg** the Labour Inspectorate supervises working conditions (both from the point of view of legislation and collective agreements), safety at work and unemployment.

In **Finland** there is a national supervisory authority that comes under the Ministry of Labour. The country is divided into Health and Safety Districts, within which health and safety agencies are responsible for supervision activities, which cover all matters of occupational health and safety, although the term is interpreted very broadly. This authority thus monitors first and foremost the physical working environment, workers' health and safety and arrangements for working time, holidays and the company health service. Supervision also applies explicitly to the provisions of the *Employment Contracts Act*, including regulation of generally applicable provisions of collective agreements and protection of employees against dismissal. The Finnish system is thus somewhere between a general and a specialised system.

a) Generalist Systems

In **Belgium** the *Labour Inspectorate* is responsible for the surveillance of that part of labour law which has penal sanctions, as well as for collective agreements which are extended by *Royal Decree*.

In **Greece** the main task of the *Labour Inspectorate* is to supervise the reasonable application of labour laws and contracts (collective and individual) as well as to examine complaints and accusations made against employers or workers.

In **Spain** labour inspectors have a considerable influence on industrial relations. Legislation passed in April 1988 standardised inspectors' control in areas such as employment, safety and hygiene, social security, unemployment benefits, emigration, migratory movements and the employment of foreign workers. The inspectors' role is particularly important as regards safety and health conditions, the establishment of contracts of employment and social security contributions.

In **France** the *Labour Code* provides inspectors with many functions. Their main task is to control the application of labour law within the enterprise, including those matters governed by collective agreements and matters relating to health and safety. They also play a part in some dismissal cases.

In **Italy** the *Labour Inspectorate* has general tasks of control over the application of all laws concerning employment and social security, as well as collective agreements.

In **Luxembourg** the *Labour Inspectorate* has to insure the proper application of all working conditions, laid down in legislation, company regulations, administrative rules and agreements.

In **Portugal** the *General Labour Inspectorate* has a control function in the field of working conditions (legislation as well as collective agreements), job security and unemployment.

b) Specialist Systems

In **Germany** the *Health and Safety Inspectorate* is responsible for inspection and enforcement of provisions in the area of health and safety and working-time.

In **Ireland** the *Labour Inspectorate* is responsible for the application of legislation on health and safety, hours of work, youth employment, holidays, etc.

In the **Netherlands** the *Labour Inspectorate* has recently been incorporated into a more comprehensive *Service for Information and Inspection* of the *Department of Social Affairs and Employment*. It gives information and gathers documentation on labour law and social policy in general. However the classic function of public inspection with powers to intervene is still limited to the field of health and safety regulations as well as working-time legislation.

In **Sweden** the *National Board of Occupational Safety and Health* and 11 district *Labour Inspectorates* are responsible for supervising compliance with legislation on health and safety at work and working hours. In other words, the application of labour legislation is supervised by the specialist organisations rather than a variety of public bodies.

In the **United Kingdom** the *Health and Safety Executive* and local offices are responsible for labour standards in the field of health and safety. In addition to this specialist inspectorate there is the *Commission for Racial Equality* and the *Equal Opportunities Commission*, which enforce legislation against racial discrimination and sex discrimination respectively.

Part II
TERMINATION OF THE EMPLOYMENT CONTRACT

TITLE I
INDIVIDUAL DISMISSALS

INTRODUCTION

Highly detailed and extremely varied rules govern the termination of the individual employment contract.

Consideration has to be given firstly to the various kinds of individual employment contracts which may exist, e.g. contracts for a fixed period, part-time work etc as outlined in *Part I, Title II, Chapter 3*.

Secondly we have to consider the different ways in which a contract may come to an end, e.g.:

a) mutual consent;
b) a dissolving condition, contained in the individual employment contract;
c) expiry of the period for which the contract of a fixed period was concluded;
d) the completion of the precisely indicated work for which the contract was concluded;
e) the death of the employee;
f) an Act of God (*force majeure*);
g) the will of one of the parties, with or without the serving by one of the parties of a term of notice;
h) the dissolution by a judge.

This survey will, out of necessity, be limited mainly to the termination of the individual employment contract for an indefinite period by way of the serving of a term of notice. The reason for this limitation is self-evident; most individual employment contracts are concluded for an indefinite period and thus constitute the normal individual labour relationship.

There are many different ways to guarantee an individual employee some form of job-security or income security in the case of dismissal. They consist mainly of the following:

1. Motivation and justification of the dismissal by the employer;
2. Role of the representatives of the employees;
3. Serving a term of notice or compensation for lack of notice;
4. Other forms of compensation;
5. Role of the Government;
6. Remedies: compensation or reinstatement.

CHAPTER 1
MOTIVATION FOR AND JUSTIFICATION OF THE DISMISSAL BY THE EMPLOYER

Motivation and justification of the termination of the employment contract is operative in **Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg,** the **Netherlands, Portugal, Finland, Sweden** and the **United Kingdom.**

There are, however, regarding both motivation and justification, wide variations in procedure and content as the following broad descriptions indicate.

In **Denmark** there are no general rules protecting all employees against unfair dismissal. For those who are covered, the termination of the employment contract shall not take place unless there is a valid reason for termination connected with the capacity or conduct of the employee or based upon the operational requirements of the enterprise. The dismissed employee, provided he or she has a seniority of at least 9 months, is entitled to request a statement of the reasons for dismissal. Economic or technological reasons constitute sufficient cause for dismissal. In cases of redundancy the employer may choose at will which employee(s) to dismiss.

In **Germany** a dismissal must be socially justified. There are three reasons for justifying a dismissal: the personality or the behaviour of the employee or economic reasons. The dismissal will still be illegal, notwithstanding the existence of a reason, if the employee can be transferred to a comparable job with comparable working conditions, either immediately or after retraining or further training.

The legitimacy of the unilateral termination of the labour contract via dismissal has been accepted from the very beginning of labour law in **Germany**. According to liberal philosophy nobody should be forced to remain in a relationship longer than wished. Thus, if in a case of grave misconduct or other urgent reasons, it was no longer tolerable for either of the two parties to continue the employment relationship, the weapon of summary dismissal could be used to terminate the contract without term of notice. In all other cases, where no intolerable situation existed, the ordinary dismissal could be used by either of the parties. The only condition was to observe a term of notice. But it should be pointed out that the length of the period of notice originally was up to the individual parties. In other words, by individual agreement, the parties could reduce the period of notice to a very short time. Since in the 19th century, workers had little bargaining power, they consequently had to agree to very short periods of notice.

The first development of protection against dismissal was the legal guarantee for a minimum term of notice. Formerly, the legal provisions regulating this matter were spread over many laws. Later they were integrated in *section 622 of the Civil Code* and the *Act on Terms of Notice for White-Collar Workers of 1926*. The minimum standards for term of notice have been more favourable for white-collar than for blue-collar workers. In 1990 this distinction was declared invalid by the *Federal Constitutional Court*. The terms of notice are the same for both groups.

In **Greece** dismissals are considered legal if the employer gives notice in writing, pays the severance payment and has not abused rights of dismissal. The employers are not obliged to give reasons for dismissals but the workers' representatives must be informed.

In **Spain** every dismissal has to be justified as to its cause. Three different types of legally accepted cause may be distinguished: disciplinary dismissals, dismissals due to force majeure or to economic causes, and dismissals due to objective causes. In the first type (disciplinary dismissals) the employer must demonstrate that the employee has committed serious misconduct and failed in his contractual obligations. The second type includes collective redundancies, justified by force majeure or by economic, technical, organisational or production reasons. The third type covers four situations: incompetence, inability to adapt to the technological needs of the post, the disappearance of the post itself, or persistent absenteeism.

In **France** the dismissal must be grounded in real and serious reasons. A genuine cause excludes prejudice and arbitrariness and is an objective cause, attached either to the person of the employee or his or her aptitude for work or to the reorganisation of the enterprise. A serious cause is a cause the gravity of which makes the continuation of the employment without damage to the enterprise impossible and thus the dismissal necessary. Prior to the dismissal the employer must summon the worker to a hearing and inform him or her of the grounds of the possible dismissal.

In **Ireland** legislation accepts certain dismissals to be *"fair"*, where they relate to the capability, competence, qualifications or conduct of the employee and in redundancy situations. Dismissals are unfair if the grounds are: trade union membership and/or activities; religious or political opinions; taking legal proceedings against the employer; the race, colour or sexual orientation of the employee; and, under certain circumstances, pregnancy. The burden of proof is on the employee to establish the fact of dismissal (where that is in dispute), and on the employer to establish the reason for dismissal acceptable under the legislation. The main problem for the employee therefore is that he or she must prove that there was a dismissal, rather than a resignation. In this context a distinction has to be made between *"actual"* and *"constructive"* dismissal.

In **Italy** a dismissal is legitimate only if supported by just cause or justifiable reasons such as serious violations of the worker's contractual obligations (the so-called subjective reasons) or reasons concerning the productive activity, the organisation of work and its regular functioning (the objective reasons).

In **Luxembourg** the employee can ask the employer the reasons for the dismissal. If the employer refuses to give these in writing, or if the reasons given are illegal or not economically or socially justifiable, the dismissal is considered to be unfair. The burden of proof is on the employer. In companies regularly employing more than 150 employees, the employer planning to dismiss a worker must hold an interview with the worker prior to the dismissal. This procedure does not apply to terminations of contract during the agreed probationary period.

In the **Netherlands** the existing system requires permission for dismissals to be granted by the Director of the District Labour Exchange. For each dismissal sufficient justification has to be given. Moreover, in ex post control, the judge can label a dismissal as *"clearly unfair"*. In such a case the judge will consider not only the reason but also the method by which the dismissal was carried out. The judge may also hold that a dismissal is *"clearly unfair"* if insufficient compensation is paid.

In **Portugal** any dismissal, in order to be considered valid, must meet three conditions: there must be a valid reason, the dismissal must be preceded by a specified procedure, and the dismissal must be notified in writing to the worker. Under the law there are two categories of causes for dismissal: disciplinary causes (subjective causes, otherwise known as just causes) and objective causes (causes not inherently associated with the employee in person). The law specifies as objective causes the closure of the business or of one or more of its departments, staff reductions for economic reasons (structural, conjunctural or technological), disappearance of the post itself, and inability of the worker to adapt to new technologies introduced at his workplace. The procedure, the obligation (or not) to give prior notice and the legal effects of the dismissal vary, of course, depending on the dismissal reasons given by the employer.

In **Finland** there must, in accordance with the *Employment Contracts Act*, be particularly important reasons for an individual dismissal. It is stated explicitly in the Act that the following at least cannot be regarded as such reasons:

- the employee's illness, provided it has not resulted in a substantial and permanent reduction of the employee's working capacity;
- the employee's participation in a strike or other dispute;
- the employee's political, religious or other views or participation in social or associative activities, or
- the employee's pregnancy.

It is further laid down that the employer shall effect the termination of the employment contract within a reasonable time of being informed of the grounds.

In **Sweden** an employee who seriously neglects his duty to the employer can be fired (summarily dismissed), i.e. employment ceases immediately without any period of notice. This happens relatively rarely. What follows applies, therefore, to the much more common type of dismissal, i.e. when employment ceases after a period of notice.

According to the law there must be a valid reason for dismissal. It can never be justified if the employer is in a position to transfer the employee to another post in his employ without releasing another worker. The employee must have the right qualifications for the job to which he is to be transferred. He can be dismissed only if there is no possible alternative work or the employer cannot reasonably be required to keep him on.

A valid reason may be a personal reason or a shortage of work. The reason is personal if there is something wrong with the employee himself or his work; examples are incompetence, negligence, difficulty in cooperating, abuse (e.g. of alcohol) or criminal behaviour. The procedure developed by the labour court provides considerable support for the individual employee; the employer has far-reaching obligations and considerable attention is paid to social aspects in each individual case. Dismissal must be the last resort. In the case of redundancy (which means, in concrete terms, that there is not enough work for the employee) but also in the case of dismissals for economic, organisational or similar reasons, it is the employer who decides whether there are to be

redundancies. There are many ways in which he may plead business risk or other grounds for dismissal. The courts do not investigate the economic assessment. The rules governing dismissal may not prejudice the employer's industrial management rights. Under *Directive 77/187/EEC* on employees' rights in the event of transfers of undertakings, etc., the employer may no longer plead shortage of work as a reason for dismissal by the transferor on the grounds of a transfer as such.

In the event of dismissal on grounds of shortage of work, the employer must follow a special order of priority on the basis of the principle *"last in, first out"*, i.e. employees with the longest service shall be kept on for the longest period. The employer can, to a certain extent, reach agreement with the union with which he has a collective agreement on a different order of priority. An employee who is made redundant is, for a period of one year from the time of dismissal, entitled to be re-established if there is a vacancy in the undertaking where he was working. He must, however, have the right qualifications for the job.

There are collective agreements which prescribe a longer period during which the employer is obliged to transfer the worker and lay down other rules of priority. There are other laws which prohibit dismissal in specific cases, e.g. trade union affiliation, sex, absence for military service or parental leave. Dismissals of this kind may, of course, not be justified under the employment security legislation but as this does not cover, e.g. employees in management posts and members of the employer's family, these groups are protected from dismissal in certain cases.

In the **United Kingdom** every employee, subject to the exceptions set out below, has the right not to be unfairly dismissed by the employer. The burden of proof is on the employer to show the reason.

The following are potentially fair reasons for dismissal:
a) the capability or qualifications of the employee;
b) the conduct of the employee;
c) the employee was redundant;
d) some other substantial reason including economic, technical or organisational reasons entailing changes in the workforce.

The following reasons are treated as automatically unfair:
a) pregnancy or confinement;
b) union-membership or non-membership, or participation in the activities of a union at an appropriate time, or acting as an employee representative for purposes of consultation relating to collective redundancies or transfers of undertakings;
c) asserting statutory rights;
d) reporting circumstances harmful to health and safety, or refusing to work where there is a serious and imminent danger;
e) refusal by a retail or betting office worker to work on a Sunday;
f) having a spent criminal conviction;
g) connected with the transfer of an undertaking, unless an economic, technical or organisational reason entailing changes in the workforce.

There are many categories of employee excluded from the right not to be unfairly dismissed, e.g. employees who have been continuously employed for less than two years, unless this threshold can be shown in a particular case to be indirectly discriminatory to women.

In **Belgium** there is no general obligation on the employer in this area. However, manual workers can request the employer to justify a dismissal that is based on the worker's aptitude or behaviour or on economic or technological grounds relating to the functioning of the business. The employer is not obliged to provide reasons except in the case of dismissal for serious misconduct.

In **Austria** extraordinary termination of a contractual relationship (dismissal, resignation) must always be accompanied by stated reasons, while ordinary termination need not. The latter, however, can be successfully challenged if it hits the employee hard and if the employer cannot give compelling reasons, relating either to the employee in person or to the operation of the enterprise, for not keeping the employee on. In accordance with prevailing legal doctrine, in the case of an extraordinary termination of an employment contract the reasons do not need to be stated at the time of announcement of the decision but only if a procedure for annulment of the decision is initiated.

CHAPTER 2
ROLE OF THE EMPLOYEE REPRESENTATIVES

In a number of Member States employees' representatives are in one way or another involved in the dismissal procedure. This is especially the case in **Denmark, Germany, Greece, Spain, Italy, Austria, Portugal** and **Sweden.**

In **Belgium** the works council has the competence to consider which general principles should be followed with regard to the dismissal and engagement of employees. The role of the works council is mainly a consultative one relating to general principles governing the criteria for dismissals and recruitment rather than to individual cases. However, the inter-industrial collective agreement No 9, concluded in the *National Labour Council*, gave the works council the power to decide upon the criteria to be followed in cases of dismissal and re-engagement. The works council is thus competent to draw up an procedure to be respected in cases of dismissal or re-engagement, taking into account seniority, age, family responsibilities etc. This competence does not infringe upon the managerial prerogative of the employer to decide in which sections of the enterprise and for what reasons dismissals will take place.

In **Denmark**, where the employee contests the reason for dismissal given by the employer, a local negotiation with representatives of management may be demanded. If no agreement is reached at local level, the union may demand negotiations with the employer's association and eventually the union may bring the case before an unfair dismissal arbitration board set up by the confederation of the trade unions and the employer's organisation.

In **Germany** the employer is obliged to inform and consult the works council before every dismissal. The works council is entitled to receive all the information necessary to check the legality of the dismissal. The works council may provide

certain guidelines on selection of who will be dismissed, though only in a minority of cases do such guidelines exist. In cases of disciplinary dismissals, the union can be called in to defend the employee.

In **Greece**, following the recent *Act on Workers' Councils*, employee representatives must be informed of proposed dismissals before they are carried out.

In **Spain** the biggest role of the employee representatives is in cases of collective dismissals for economic, technical, organisational or production reasons, which we will examine further on. In the case of objective dismissals in order to eliminate jobs, a copy of the job-elimination decision must be given to the employee representatives. In the case of disciplinary dismissals the representatives must also be informed of the decision, as soon as it has been taken; and if the employees concerned are union members, the union delegates must also be consulted; if the dismissed worker is an employee representative, an adversarial procedure must be initiated, allowing the other employee representatives to be heard also. In the case of a disciplinary dismissal the employer must first seek the opinion of the employee representatives, but he will make the ultimate decision according to his own criteria.

In **France** an employee who is to be dismissed may be assisted firstly by another employee and eventually by a representative of the employees. The works council has to be consulted in cases of individual dismissal for economic reasons if, within a period of six months beforehand, 30 employees have been dismissed, without however exceeding the dismissal of 10 employees during a period of 30 days. Following a number of collective agreements, joint committees have been set up at enterprise level which are competent for disciplinary dismissals. Their role is, as a general rule, consultative.

In **Ireland** there is no formal role for employee representatives in dismissal cases. Under its procedural rules, however, the *Employment Appeals Tribunal* permits trade union officials to appear as representatives of dismissed union members in unfair dismissal cases.

In **Luxembourg** an employee who is invited for a preliminary discussion with the employer prior to dismissal has the right to be assisted by an employee representative.

In the **Netherlands** the works council does not concern itself with individual cases of dismissal. Only if the employer wants to fix general principles to be followed with regard to the dismissal of employees should he seek the agreement of the works council. In cases of collective dismissals the employer should inform the works council as well as the trade unions. He must ask the *"advice"* of the works council and negotiate with the trade unions the terms of the collective dismissal. Finally an employee representative serves on a tripartite committee advising the Director of the *District Labour Exchange* on each request for permission to dismiss employees.

In **Austria** the works council must be informed of every dismissal and can give an opinion on the matter within five days. If the works council has expressly approved the dismissal, the dismissal cannot be challenged as socially unjustified. A dismissal announced without prior notification of the works council is legally invalid.

In **Portugal** the employee is entitled to be informed in writing about the just cause which the employer proposes to invoke. The employee is entitled to present a defence. The employer forwards copies of the employees' defence to the works council, which then delivers a reasoned opinion. Only after this may the employer proceed with the dismissal.

In **Finland** the employer must, before terminating an employment contract for individual reasons, give the employee an opportunity to be told about the grounds for dismissal. The employee is entitled to ask for assistance and, if he so wishes, engage a trade union representative for this purpose.

In **Sweden** the employer is obliged to inform the employee in advance if he is to be dismissed for personal reasons or fired: at least two weeks in advance in the case of dismissal and at least one week in advance if the employee is to be fired. The local employees' organisation to which the employee belongs must be given notice at the same time. The employee and the local union are entitled to hold discussions with the employer if this is requested within one week of the notice. Neither form of dismissal may be implemented before the end of the discussions. In the case of redundancy the employer is obliged to institute negotiations with the local union before the decision is taken – the primary negotiation obligation. In accordance with *Directive 75/129/EEC* and *92/56/EEC* on collective redundancy, the law now specifies the information which the employer has to provide during negotiations prior to a redundancy notice.

In the **United Kingdom** employee representatives must be consulted where an employer is proposing to dismiss as redundant 20 or more employees. A similar right exists in respect of the transfer of undertakings. As a result of amendments made in 1995, following infringement proceedings (Cases *C-382/92* and *C-383/92 Commission v United Kingdom*), these must be either representatives elected by the employees who may be dismissed or representatives who may be dismissed or representatives of an independent trade union recognised by the employer. However there is no formal role for trade union or other employee representatives in respect of individual dismissals on other grounds. In assessing the reasonableness of a dismissal for purposes of unfair dismissal, it is relevant for the industrial tribunal to have regard to the procedure followed, and usually a failure to consult the individual or his representative will result in a finding that the dismissal was unfair.

CHAPTER 3
SERVING A TERM OF NOTICE

In all Member States a term of notice usually has to be served in order to terminate an individual labour contract for an indefinite period. There are also a number of procedural rules, which vary widely, to be followed.

The length of the terms differs considerably from one country to another. In certain Member States differences exist between blue collar and white collar workers. Seniority also plays an important role. Details may be found in the following *Table 13*:

TABLE 13: NOTICE PERIODS

BELGIUM	a) Blue collar workers: 7 days up to 6 months service 8 days up to 20 years service 6 days for over 20 years this may be improved upon by collective agreement b) White collar workers: statutory provision of 3 months for every 5 years service, subject to a minimum of 3 months. For those earning in excess of BEF 650,000 additional notice periods may be negotiated
DENMARK	a) Blue collar workers: no statutory provision but usually in collective agreements b) White collar workers: from one month minimum for up to 6 months service, to 6 months for those with more than 9 years service
GERMANY	After 2 years service: 1 month After 5 years service: 2 months After 8 years service: 3 months After 10 years service: 4 months After 12 years service: 5 months After 15 years service: 6 months After 20 years service: 7 months Statutory notice periods may be lengthened by collective agreement
GREECE	a) Blue collar workers: No statutory notice period b) White collar workers: 30 days after 2 months service 60 days between 1 and 4 years 3 months between 4 and 6 years 4 months between 6 and 8 years 5 months between 8 and 10 years plus one month per year above this subject to a maximum of 24 months for 28 years service
SPAIN	Disciplinary dismissal: No statutory notice period Objective dismissal: 1 month, which can be replaced by financial compensations
FRANCE	One month for between 6 months' and two years' service, two months after 2 years' service with improved terms under collective agreements. More advantageous conditions in certain collective agreements, and at least three months' notice for managerial staff.
IRELAND	From 13 weeks to 2 years service: 1 week More than 2 and less than 5 years: 2 weeks More than 5 and less than 10 years: 4 weeks More than 10 and less than 15 years: 6 weeks 15 years and more: 8 weeks
LUXEMBOURG	From 1989 notice periods are the same for white and blue collar workers: Up to 5 years service: 2 months From 5 to 10 years service: 4 months More than 10 years service: 6 months
NETHERLANDS	1) Basically for weekly paid employees, one week and for monthly paid employees, one month's notice must be given. This minimum rises to 3 weeks for employees over 50 with at least 1 year's service 2) Plus additional notice: 1 week/year of service over 21 + 1 week/year of service over 45 The maximum of 1) and 2) above is 26 weeks
ITALY	There are no statutory provisions for notice. This is a matter for collective agreements or custom and practice
PORTUGAL	In dismissals for objective causes the notice period is always 60 days.
FINLAND	The period of notice can be agreed up to a maximum of six months Unless otherwise agreed, the employer must serve the following terms of notice when dismissing the employee: 1) one month, if the employment relationship has been in existence for at most one year; 2) two months, if the employment relationship has been in existence for between one and five years; 3) three months, if the employment relationship has been in existence for between five and nine years; 4) four months, if the employment relationship has been in existence for between nine and twelve years; 5) five months, if the employment relationship has been in existence for between 12 and 15 years; 6) six months, if the employment relationship has been in existence for more than 15 years. Unless otherwise agreed, the employee must serve the following terms of notice when terminating the contract: 1) 14 days, if the employment relationship has been in existence for at most one year; 2) one month, if the employment relationship has been in existence for between one and ten years; 3) two months, if the employment relationship has been in existence for more than ten years
SWEDEN	The minimum period of notice is always one month for both employers and employees If the employee has been employed for the past six months or for a total of at least 12 months in the last two years, he is entitled to the following statutory periods of notice: 2 months at the age of 25 3 months at the age of 30 4 months at the age of 35 5 months at the age of 40 six months at the age of 45. Collective agreements often lay down longer periods of notice
UNITED KINGDOM	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)

CHAPTER 4
OTHER FORMS OF COMPENSATION

In a number of Member States additional forms of compensation are provided for, e.g. in **Denmark, Greece, Spain, France, Ireland, Italy, Luxembourg, and the United Kingdom.**

In **Denmark** a salaried employee is entitled to compensation of one to three months depending on his seniority.

In **Greece** white collar workers are entitled to compensation equivalent to the pay of one half of the term of notice. Blue collar workers receive much less.

In **Spain**, in the case of an objective dismissal, and when the cause is known, the employee is entitled to 20 days' wages for each year of service, up to a ceiling of one year's wages. In companies of fewer than 25 employees the employer pays only 60% of the compensation (12 days), the remaining 40% (eight days) being paid by the *Fonds de garantie salarial* (Wage Guarantee Fund).

In **France** the employee after two years' service is entitled to severance pay: one-tenth of a month's pay per year's service for blue and white collars, plus one-fifteenth for each year exceeding 10 years. This is a statutory minimum, and numerous collective agreements contain more advantageous terms.

In **Ireland**, in cases of redundancy (which involves a dismissal where the employee, or his or her skills, are no longer required), a lump sum must be paid equal to one's week pay plus a half week pay for each year of employment between age 16 to 41 plus one week's pay for each year of employment over age 41.

In **Italy** all workers have a right to an allowance in the case of dismissal, and, more generally, on termination of a subordinate employment relationship. The amount of such allowance, called the end-of-service-allowance, is presently determined on the basis of equal criteria for white collar and blue collar workers, according to the form of calculation fixed by *Law No 297* of 29th May 1982.

In **Luxembourg** specific compensation in cases of dismissal amounts from one month to three months for blue collar workers and from one month to twelve months in case of white collar workers.

In the **Netherlands** there is no standard compensation provided for in law; sometimes compensation is foreseen by the collective agreement. Yet many employees are dismissed without any compensation. If however the worker challenges the dismissal in court he stands a good chance that the judge will use his powers to give him a compensation, but no one can foretell what amount. The judge will base his calculation on the formula: one monthly wage compensation for each year of service for workers under 40, 1.5 for workers between 40 and 50 years, and two monthly wages for each year of service for workers over 50 years old. But then various other weighing factors will be applied such as in what way the employee has by his own behaviour provoked the dismissal, etc.

In **Austria** dismissed employees are entitled to compensation based on their number of years' service with the employer. This is equivalent to the wage for the final month worked, times two after three year's service, times three after five years, times six after 15 years, times nine after 20 years and times twelve after 25 year's service. There is no entitlement to compensation in the case of termination of the contract by the employee, premature resignation without due cause, or dismissal caused by the employee's own fault.

In **Finland** there are no other forms of monetary compensation in cases of individual dismissal.

In **Sweden** there are no other statutory forms of compensation. When notice is given for personal reasons it is, however, not unusual for the parties concerned to reach an agreement to the effect that the employee may leave voluntarily against financial compensation from the employer. This can be a way of getting round the strict rules the labour court applies to the assessment of subjective (personal) reasons and of avoiding legal proceedings. In the case of redundancy, an agreement may already have been concluded between the parties about special financial compensation in the form of redundancy benefit. The various employment insurance schemes governed by collective agreement have rules on severance payments for older employees. It is, furthermore, not uncommon, in the event of redundancy, for the parties to agree that the employer is to provide a redundancy benefit or that older employees will be given a chance to take out their occupational pension early so that younger employees can be given a chance to continue working. Employees who are surplus to requirements are sometimes offered training with pay for a certain length of time. It is also possible for an older employee who has been unemployed for a long time to obtain general pension benefits and take early retirement in the interests of the labour market. The latter possibility has been used so frequently in connection with redundancies that special rules have been introduced to prevent abuse.

In the **United Kingdom** the amount of the redundancy payment is calculated according to age and service. The current maximum for a person with 20 years' service over the age of 41 is GBP 6,300.

CHAPTER 5
ROLE OF THE GOVERNMENT

Member States' governments rarely intervene in cases of individual dismissal.

In **Greece** the *Office of Employment* has to be informed of a dismissal.

In **France** the request for an administrative authorisation in cases of an individual dismissal for economic reasons is no longer necessary. The administrative authorities have to be informed, however, of the dismissal.

In the **Netherlands** the employer can normally only terminate the employment contract with the prior permission of the Director of the *District Labour Exchange*. Any dismissal without the Director's consent is void.

There are a number of exceptions for certain persons (such as company directors, civil servants, teachers etc.) and in certain cases, notably cancellation of the contracts by mutual consent, during the probation period, by summary dismissal or bankruptcy. Statistics show that yearly an average of 90,000 requests for a permission are made by employers; ca. 85% are granted. In at least 15% of the cases, therefore, the intervention of the Labour Exchange has a positive effect on job security. If the permission is refused employers often ask the cantonal judge for a dissolution of the contract. If the permission is granted employees can ask the cantonal judge to consider the dismissal manifestly unfair.

CHAPTER 6
REMEDIES: COMPENSATION OR REINSTATEMENT

The most common remedy for an illegal dismissal is compensation, not reinstatement. Compensation may relate to the lack of the serving of a notice, or of an insufficient notice,

to the fact that the court does not accept the reasons invoked by the employer to justify the dismissal, for reason of abuse of law, etc.

Possibilities for reinstatement exist in **Denmark, Germany, France, Ireland, Italy, the Netherlands, Austria, Portugal, Sweden** and the **United Kingdom**. The practical implementation of these provisions varies widely.

In **Belgium**, when the dismissal of a manual worker is considered to be arbitrary for lack of sufficient reason, compensation of six months' wages is payable. This extraordinary compensation is added to the normal compensation in lieu of notice. This system applies only to manual workers, not white collar workers.

In **Denmark**, following an agreement between the two sides of industry, two types of remedies for unfair dismissal are provided for: reinstatement and monetary compensation. The arbitration board may decide to reinstate the employee. Compensation amounts to maximum 39 weeks of salary.

In **Germany**, if the *Labour Court* finds a dismissal to be illegal (for lack of justification) this implies the continuation of the employment relationship. Compensation covering the period of the dismissal and the court decision is covered. The Court can order reinstatement, although in practice normally less than 2% of dismissed workers initiating a lawsuit are reinstated. The employer or the employee may claim the dissolution of the contract if it would be unreasonable to require the continuation of co-operation with the employee or the employer. In most cases, therefore, compensation for illegal dismissal will have to be paid. The law only fixes the maximum amounts of these indemnities, between 12 and 18 months of wages depending on the age and the seniority of the dismissed employee.

In **Greece**, when a court nullifies a termination and the employee had offered to work, the employer has to pay remuneration for the whole period since termination.

In **Spain** the judge can order reinstatement only if the dismissal is shown to have contravened the fundamental rights and public freedoms guaranteed by the text of the Spanish Constitution. In other cases, the general rule is that a court judgment ruling the dismissal to have been unjustified entitles the employer to choose between reinstating the employee or terminating the contract with payment of due compensation. In the case of the unjustified dismissal of a workers' representative (member of the works council, staff representative or union representative), the choice between reinstatement and termination of contract with compensation is given to the worker himself. In either of these two scenarios, if termination with compensation is the option chosen, the compensation will be for the amount stipulated by law, i.e. 45 days' wages for each year of service (up to a ceiling of 42 months' wages) together with retroactive payment of remuneration.

In **France**, where there is no genuine and serious cause the *Labour Court* may propose to reinstate the employee but either party may reject this. The Courts may award the employee compensation amounting to not less than the last six month's pay. In a number of cases (pregnancy, work accident, occupational disease, strike, etc) the dismissal will be null and void.

In **Ireland** the remedies are reinstatement, re-engagement or compensation, depending on the circumstances. Compensation cannot exceed 104 weeks remuneration. In the majority of cases compensation is awarded, although in recent years the number of cases in which reinstatement is ordered has risen.

In **Italy** the law empowers the judge to order reinstatement in any case of unjustified, discriminatory or formally invalid dismissal. This protection applies to companies employing up to 15 employees. Reinstated employees will receive back-dated pay. A court order of reinstatement is respected in 58% of cases. Given however the extensive fragmentation of the economy the majority of Italian workers, employed in small units, were not covered by the law. With the most recent reform of legislation about dismissals (*Law 108/1990*) it was also established that the worker, in case of discriminatory dismissal, has the right to be reinstated in his/her former position, no matter how many workers are employed by the company. The same law provides that, in all cases where the small size of the enterprise makes it impossible to re-employ the dismissed worker, unjustified dismissal causes the employer to be ordered to pay damages.

In **Luxembourg** the courts may award damages in case of abusive dismissal. Reinstatement can also be recommended and the employer who does not consider reinstatement can be fined to pay damages of up to one month's pay.

In the **Netherlands** the dismissal is regarded as void and the worker is legally still considered as *"engaged"* when:

a) the required permission of the Director of the *District Labour Exchange* is lacking;
b) the dismissal contravenes explicit dismissal prohibitions (such as in case of pregnancy, illness, etc);

If necessary the worker can enforce the continuation of employment activities by way of an injunction. In other cases of *"clearly unfair dismissal"* the judge may either order reinstatement or compensation to be paid. Where the judge orders reinstatement the employer is always entitled to grant, as an alternative, the payment of a higher compensation, thus preventing reinstatement.

In **Portugal** the labour contract is maintained if the court decides that the dismissal for just cause is null. The employee will receive back-dated pay and can choose to be reinstated. If the employee chooses not to be reinstated then he or she must receive a severance payment, which is calculated on the basis of length of service and is equal to one month's pay per year of service or part thereof, with a minimum of three months.

Dismissal procedure reforms are contained in Regulations to the *Labour Procedures Act*, effective from July 1, 1990. Now, five sets of circumstances are established in which procedural faults by the employer in implementing a dismissal render it null and void, and the employee entitled to reinstatement. This concept of *"radically null dismissal"* in fact originated some time ago in case law. The new regulations increase employer's indemnities in certain type of dismissals, widen the rights of unions to initiate unfair dismissal claims, notably.

In **Finland** the normal remedy for unfair dismissal is compensation. This is a form of indemnification which does

not, however, depend on the monetary damage inflicted on the employee and which is imposed instead of a normal indemnification to make up for the wrongful dismissal. The amount of compensation is a minimum of three months' and a maximum of 24 months' salary.

The person dismissed does not have a right to reinstatement. On the other hand, if there are prospects of continuing the employment relationship, the court can order a smaller amount of compensation to be paid if the employer allows the employment relationship to continue. In practice, this form of sanction is used extremely rarely.

According to **Swedish** law, wrongful dismissal has two possible consequences: damages may be payable or the dismissal may be declared invalid. If an employee is wrongfully fired, damages may be payable but the employee can be reinstated only if the court finds that there was no valid reason for dismissal. Damages may be payable to cover both the employee's financial loss and any offence against the employee as a result of wrongful dismissal. If the employer has also infringed the rules governing dismissal in the collective agreement, damages may also be payable to the trade union. If an employer refuses to reinstate an employee despite a Court order, special damages may be payable to the employee amounting to a minimum of 16 months' pay and a maximum of 48 months' pay, depending on the employee's age and length of service. (The amount may not exceed the number of employment months or part months but the minimum, regardless of length of service, is six months' pay).

In the **United Kingdom** the primary remedies available for unfair dismissal are:

a) reinstatement in the job from which the employee was dismissed with all benefits restored;
b) re-engagement in a different suitable job with the same employer or a successor.

In practice, less than 5% of unfairly dismissed employees obtain these re-employment remedies. The only sanction for non-compliance with the order is an additional award of compensation varying between 13 to 52 weeks pay, with higher amounts in case of dismissal for trade union reasons. The most important remedy is compensation. The basic award, intended to compensate for loss of job security, is calculated according to age and length of service and is a maximum in ordinary cases of GBP 6,300. The compensatory award is intended to compensate the employee for actual financial loss, with a maximum of GBP 11,300.

TITLE II
COLLECTIVE DISMISSALS

CHAPTER 1
DEFINITION

National rules concerning collective dismissals have largely been influenced by the *1975 Council Directive* on collective dismissals (*75/129/EEC*). This contains two main elements: first, informing the public authorities and employee representatives and, second, consulting the latter on the proposed collective dismissals.

In **Belgium** *"collective dismissals"* means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, over a period of 60 days, the number of redundancies is:

- at least 10 in enterprises which, during the calendar year preceding the redundancies, on average employ more than 20 and less than 100 employees;
- at least 10 per cent of the number of workers in enterprises which, during the calendar year preceding the redundancies, employ at least 100 but less than 300 workers;
- at least 30 in enterprises which, during the calendar year preceding the redundancies, employ on average at least 300 employees.

In **Denmark** redundancies must, within a period of 30 days, amount to:

- at least 10 in a firm which normally employs above 20 and less than 100 employees;
- at least 10% of the number of employees in firms which normally employ 100 and under 300 employees;
- at least 30 in firms which normally employ at least 300 employees.

The collective redundancies provisions do not apply in the case of dismissal of employees who are not affected by the stoppage of an undertaking as a result of a judicial decision, e.g. where dismissals may be caused by a bankruptcy decree leading to closure of a firm.

In **Germany** there is a collective dismissal if the number of workers to be dismissed within a period of 30 days is:

- at least 5 employees in establishments with more than 20 and less than 60 employees;
- at least 10 per cent of the employees, or at least 25 employees in establishments with more than 60 or less than 500 employees;
- at least 30 employees in establishments with more than 500 employees.

In **Greece** there is a collective dismissal when more than 5 employees are dismissed in an enterprise or part thereof, where 20 to 50 workers are employed. Where more than 50 workers are employed, a collective dismissal involves 2-3% of employees, with a maximum of 30. It is prohibited to dismiss more than 30 employees. The exact percentage is determined every semester by ministerial decision in accordance with developments in the labour market.

In **Spain** collective dismissals are allowed on grounds of *force majeure* or on economic, technological, organisational or production grounds; in practice, these grounds are deemed to exist when the adoption of the measures proposed by the employer are designed to help surmount a difficult economic situation or to guarantee the future viability of the company and of jobs within the company through more appropriate organisation of resources. The thresholds are also in line with the criteria of the Community directive. Thus, "collective dismissals" means dismissals which, over a period of 90 days, affect at least:

- 10 employees, in companies employing fewer than 100 employees;
- 10% of the workforce, in companies employing between 100 and 300 employees;
- 30 employees, in companies employing 300 or more employees.

The termination of the employment contracts of the entire workforce of a company is also defined as a collective dismissal, provided that the number of employees concerned is greater than five.

In order to avoid certain fraudulent practices, whereby job cuts are fragmented over successive periods of 90 days, the rules state that if a company, during these successive periods and with a view to reducing the workforce, makes individual dismissals which numerically do not exceed the legal threshold for each period taken in isolation, but which exceed the threshold when all periods are added together, the new job cuts will be declared null and void.

In **France**, proposals to dismiss 10 or more employees within a 30-day period are subject to specific rules.

In **Ireland**, when an employer proposes to make redundant a number of workers at the same establishment, he or she must observe a number of procedural obligations imposed by the *Protection of Employment Act 1977*, implementing *EEC Directive 75/129*. The number of employees which have to be dismissed for the Act to be operative depends on the size of the establishment. For example, in an establishment where the employer employs between 21 and 49 workers, the Act applies if five or more employees are dismissed within a period of 30 days; in an establishment where there are more than 300 employees the Act applies if 30 or more are dismissed within 30 days.

In **Italy**, up until recently, the only regulation in the field of dismissals came from an old interconfederal agreement on 1965, applicable exclusively to the industrial sector. After two convictions by the *Court of Justice* due to failure to apply *Community Directive 75/129*, the Italian system has finally conformed to the Community one with the approval of *Law 223/1991*. Also included in this law is a definition of collective dismissal, which is taken to mean a reduction of personnel effected by *"enterprises which employ more than fifteen employees and that, as a consequence of a reduction or transformation of activity of work, intend to dismiss at least five workers over a period of one hundred and twenty days, in each or more production units within the same province"*.

In **Luxembourg** the law regards as *"collective dismissals"* all dismissals made by an employer on non-personal grounds that affect:

a) at least 7 workers in the same 30-day period, or
b) at least 15 workers in the same 90-day period.

In the **Netherlands** a collective dismissal concerns 20 or more employees within a period of three months within the territorial competence of the *Labour Office*.

In **Austria** a *"dismissals early warning system"* comes into force whenever the following numbers of employees are dismissed within a 30-day period:

- at least 5 employees in companies with between 20 and 100 employees;
- at least 5% of the workforce in companies with between 100 and 600 employees;
- at least 30 employees in companies with more than 600 employees;
- at least 5 employees aged 50 or over.

In **Portugal** collective dismissals are defined as either the dismissal over a period of three months of two or more employees in companies employing 50 or fewer workers or the dismissal of five or more workers employing 51 or more workers. The dismissal must be based on the closure of the enterprise, or of different sections, or the reduction of personnel for structural, technological or economic reasons.

In **Finland** the employer is entitled, in accordance with the *Employment Contracts Act*, to terminate an open-ended contract if for economic or production reasons or for other comparable reasons the work has diminished significantly and not just temporarily and, bearing in mind his work skills and capacity, the employee cannot reasonably be transferred to or trained for new tasks.

The procedure in the event of collective dismissals varies according to the number of employees dismissed. Where more than ten employees are dismissed or laid off, a special extended cooperation procedure must be applied. If agreement is not reached, this procedure must go on for three months before the employer can take redundancy measures.

When *Council Directive 75/129/EEC* and *92/56/EEC* on collective dismissals had to be implemented in **Sweden**, the rules were found to be substantially the same as those governing what, in Sweden, is known as dismissal as a result of shortage of work (redundancy), i.e. dismissal through no fault of the employee (*see above Title I, Chapter I*). Sweden has, on the whole, retained its rules unamended with one or two additions to comply with the Directive. No specific definition of the term *"collective dismissals"* has been introduced into Swedish legislation. The rules are applicable to all dismissals which are not related to the employee in person or the way in which he works; the provisions on information for, and negotiations with, the union also apply when only one employee is expected to be affected and the rules on notifying the administrative authorities apply when at least five employees are affected.

In the **United Kingdom** the legislation purporting to give effect to the *EEC Directive on Collective Redundancies* was amended in 1995 following infringement proceedings (Cases *C-382/92* and *C-383/92 Commission v United Kingdom*). An employer contemplating the dismissal as redundant of 20 or more employees at one establishment within a period of 90 days must consult either employee representatives elected by the employees who may be dismissed or representatives of the recognised trade union, and must also notify the *Department of Trade and Industry*. If the employer is proposing to dismiss 100 or more employees, then consultation must take place not less than 90 days before the first dismissal takes effect, and otherwise at least 30 days beforehand.

CHAPTER 2
INFORMING THE ADMINISTRATIVE AUTHORITIES

As indicated above, the administrative authorities in Member States have to be informed about details of collective dismissals, such as the numbers involved, the identity of the employees, whether the representatives of the employees have been informed and consulted, etc.

In **Belgium** a *Royal Decree of 1976* provides that the employer who envisages a collective dismissal is obliged to send a copy of this information to the director of the regional office of the *State Employment Agency*. The employer must also give the director, by registered letter, the following information:

- the name and address of the enterprise;
- the number of employees, who work there;
- the reasons for the dismissal;
- the number of employees to be dismissed along with their sex, age, job qualifications and position in the enterprise and the consultations which have taken place in conformity with the collective agreement mentioned above.

The employer is not allowed to dismiss the employees before a period of thirty days has elapsed, which commences on the day on which the regional director is notified. The director can extend this period to 60 days. In that case the employer must be informed at least a week before the first period of 30 days has expired. The employer can appeal against the director's decision to the governing body of the *State Employment Agency*, which will decide within a period of 30 days. An appeal does not suspend the decision. The *Royal Decree of 1976* applies also to a closure of an enterprise which is not the consequence of a judicial decision.

In **Denmark** the employer is obliged to give to the employees or their representatives all necessary information, in writing, on the reason for the redundancies, the number of employees who are to be made redundant, the number of employees who are normally employed in the firm and also when the redundancies are to be carried out. A copy of this written information must be sent to the Labour Market Board. The redundancies may be carried out 30 days after the information has been sent to the *Labour Market Board*. If the employer, after negotiations with the employees or their representatives, still wants to dismiss, the Board must be informed. Violations of obligations are punishable by payment of fines and compensation paid to the employees in question and equivalent to 30 days wages.

In **Germany** the information which is to be given to the works council (*see below*) and the works council's written reaction have to be forwarded to the Labour Exchange together with the announcement of the collective dismissals. In the case of collective dismissals, the *Labour Exchange* has the power to delay for not more than two months. In addition, it may give permission to introduce short-time work during this period. If the *Labour Exchange* has made such a decision the employer does not require the works council's agreement for the introduction of short-time work.

In **Greece**, where employers and employee representatives reach an agreement concerning collective dismissals, that agreement will be forwarded to the public authorities. The dismissals have to take place within a period of 10 days after the agreement has been handed over to the public authorities. Where there is no agreement the authorities will exercise their right of control over the proposed dismissals.

In **Spain** the termination of employment contracts on economic or technological grounds requires the prior consent of the workers' representatives. If this is not forthcoming, the dismissals must be authorised by the labour authorities. The legal definition mentioned above, concerning the circumstances justifying dismissal, limits the labour authorities' powers of discretion as regards the granting or refusal of the authorisation; the authorisation must be granted when the case presented makes clear that the measures proposed by the company are legally justified. In almost all cases the authorisation is applied for by the company, even though the law provides that in exceptional situations the workers themselves may apply for the authorisation via their representative.

In **France** the labour authorities must be informed of any plan to dismiss more than ten employees. They do not need to grant authorisation but can ensure that the employer adheres to the staff representatives consultation procedure and the statutory welfare requirements. They can point out shortcomings on the part of the employer in this respect, but their position is not binding on the judges if the case goes to court.

In **Ireland**, where the *Protection of Employment Act 1977* applies, the employer must notify the Minister for Labour and the employees' representatives at least thirty days before the first dismissal is due to take effect and again at least 30 days before the first dismissal, the employer must consult with the employees' representatives. The penalty for non-compliance is prosecution by the *Department of Labour Inspectorate*.

In **Italy** *Law 223/1919* has identified the director of the *Provincial Labour Office* as the public authority competent to formulate proposals regarding planned collective dismissals in those cases where it has not been possible to directly reach an agreement between the employer and the worker's union structure (*see below*).

In **Luxembourg** the employer must forward the information communicated to the workers' representatives to the labour authorities, which pass it on to the Labour Inspectorate. The employer must notify the labour authorities of the proposed collective dismissals before consulting the workers' representatives, who have the opportunity to submit their observations on the proposed dismissals to the labour authorities. The employer is not allowed to send notices of dismissal to the employees before first having notified the labour authorities. Collective dismissals may take place only after a delay of 75 days, during which period the labour authorities are obliged to make every effort to find a solution to avoid the dismissals. The delay can be extended up to 90 days. It can also be reduced to the term of notice that the individual employee is entitled to.

In the **Netherlands**, in cases of collective dismissals, the *Regional Director of the Employment Office* and the relevant trade unions have to be informed. During the one month waiting period following notification, the Director must be kept informed of developments concerning the employer's

consultations with the trade unions and the works council. The waiting period of one month is not observed when the enterprise is bankrupt or when, according to the judgment of the *Ministry of Social Affairs and Employment*, a waiting period would jeopardise the employment situation of the enterprise a whole.

In **Austria** the employer must notify the planned dismissals to the Labour Market Service in writing 30 days before the first dismissal. The notification must state, among other things, the reasons for the dismissal, the number and class of regularly employed employees, the number and class of the employees affected, as well as their age, sex, qualifications and length of service, and the accompanying social welfare measures. At the same time, evidence of consultation with the works council must be provided. Dismissals carried out before receipt of the notification by the Labour Market Service or during the 30-day period of notice are invalid in law. During this period the Labour Market Service consults the employer, the works council and the representation groups, in which all relevant support measures are discussed. Once the 30-day period has elapsed the dismissals can be carried out. The purpose of prohibiting dismissals during this 30-day period is to allow support measures to be utilised in order to prevent the jobs being lost or to allow the Labour Market Service to find new jobs for the workers affected.

In **Portugal** the employer is obliged to transmit in writing to the administrative authorities details of the grounds for the dismissal, the number of workers in the company (by department), and the number and occupational categories of the workers to be dismissed. The Ministry of Employment participates in the bargaining procedure between the employer and the workers' representatives to promote conciliation and ensure adhesion to the set procedures. The final decision must also be transmitted to the Ministry of Employment. Since the adoption of the *Decree-Law of 1989*, collective dismissals no longer require prior administrative authorisation.

In **Finland** there is an obligation under the *Employment Contracts Act* to inform the labour authorities in writing that negotiations aimed at reducing the workforce have been initiated in the company. If the negotiations result in a change in the situation, the authorities must be informed of this too.

In **Sweden** the *1974 Act*, as amended in 1994 in accordance with *Directive 75/179/EEC* and *92/56/EEC*, lays down that an employer who intends to make a cutback which will affect at least five workers or a total of at least 20 over a 90-day period must inform the *County Labour Board* in the county where the cutbacks are to be made. Notice of possible redundancies shall be submitted:

- at least two months before the cutback if up to 25 employees are affected,
- at least four months before the cutback if over 25 and under 100 employees are affected,
- at least six months before the cutback if over 100 employees are affected.

The notice shall contain all relevant information on planned redundancies, particularly:

- the reason for the planned redundancies,
- the number of employees to be made redundant and the category to which they belong,
- the number of employees normally engaged and the categories to which they belong,
- the date on which the cutback is to be implemented and the period during which the redundancies are to be effected.

As soon as possible, and in any case one month at the latest before the cutback, the employer must provide the following additional information in writing:

- information on the employees affected by redundancy,
- relevant information on the primary negotiations to be initiated by the employer prior to the redundancies under the *Co-determination Act* or a collective agreement,
- a copy of the written notice submitted to the other party.

The *County Labour Board* can require the employer to produce this additional information on penalty of a fine. If the employer could not have foreseen the need to cut back as far in advance as indicated above, notice shall be submitted as soon as possible but never later than one month before the cutback. Instead of giving notice, the employer can, within the same period, inform the *County Labour Board* in writing that he has had primary negotiations on changes in his company with the local union with which he has a collective agreement. This information must be submitted at the latest at the time laid down for notice and the relevant information must also be supplied.

An employer who deliberately or through gross negligence fails to give notice can be required to pay a special penalty to the State and may be liable to a fine or imprisonment for providing incorrect information.

In the **United Kingdom** the employer must notify the *Department of Trade and Industry* of the proposed redundancies within the same time periods as are set out in *Chapter 1 above*. In the notice the employer must state the date on which consultation began. The employer must also provide the Department with such other information as it may require. The penalty for failure to notify is a fine. Where the employer is a limited liability company, a director or manager who fails to notify the Department may incur personal liability if guilty of fault or neglect.

CHAPTER 3
INFORMING AND CONSULTING EMPLOYEE REPRESENTATIVES

The process of informing and consulting the trade union, works council or shop stewards must take place before the dismissals occur.

In **Belgium** the employer who has to dismiss employees collectively must inform and consult the employees as indicated in *Collective Bargaining Agreement No 9 of 1972*. In the absence of a works council or a union delegation, the employer will inform and consult with the employees themselves or with their representatives. The consultation will cover the possibility of avoiding or limiting the dismissals, as well as the possibility of mitigating their consequences. To this end the employer must give the employees' representatives the necessary information; providing in writing the reasons for the dismissals, the number of employees to be dismissed, the average number of employees occupied in the enterprise and

the date on which the dismissals will take place. This information enables the employees' representatives to formulate observations and suggestions.

Enterprises which employ, on average, 50 or more employees are, in accordance with inter-industry wide collective agreement No 27 concluded in the *National Labour Council*, obliged to inform the works council or the union delegation immediately when there has been a delay of more than three months in the payment of the official social security contribution to the *National Insurance Service*, or in the payment of tax contributions or value added tax to the Department of Finance. The employer also has the duty to inform the *Office for Enterprises in Difficulties*, which was set up by the *Department of Economic Affairs*.

In **Denmark**, if an employer intends to make collective redundancies, then negotiations with the employees or their representatives must begin as soon as possible. The purpose of the negotiation is to reach an agreement on how either to avoid the redundancies or to limit their numbers and also on how to alleviate their effects.

The employer has an obligation to give to the employees or their representatives all the information necessary, in writing. If the employer, after the negotiations, still wants to dismiss, then the *Labour Market Board* must be informed in writing. As soon as possible and at the latest 10 days after the above information has been provided, the employer must indicate who will be made redundant. Violations of the obligation to inform and to negotiate are punishable by the payment of a fine. If the Board is not duly informed, employees are entitled to compensation equivalent to 30 days wages.

In **Germany** the employer must inform the works council in writing at an early stage giving the reason for the dismissals, the number of workers to be dismissed, the number of workers employed in the establishment and the period within which the dismissals are planned to take effect.

In **Greece** the employer has to inform the employee representatives in due time and in writing about the reasons for the collective dismissals, the number of workers involved, their sex, age, qualification, etc. On the initiative of the employer both sides will examine the possible consequences of the collective dismissals during a period of 20 days. Employee representatives can call upon the help of a legal counsel.

In **Spain** the employer must open a period of consultation and negotiation of 30 days (15 days in the case of companies with fewer than 50 employees) with the workers' representatives, who must be furnished with all relevant information and documents. The parties concerned must negotiate in good faith with a view to reaching an agreement, covering not only the reasons for the proposed measures and the possibility of avoiding and reducing their effects, but also the measures needed to soften their impact. When the terminations proposed will affect more than 50% of the workforce, the employer must provide the workers' representatives with a detailed report on the company's turnover, accompanied by a chartered accountant's report and a company viability plan for the future; for companies of fewer than 50 employees, the balance sheet and the profit-and-loss accounts for the past three years will suffice. The workers must be notified of the date upon which the consultations are to commence.

In **France** the works council must be informed and consulted on any planned collective dismissal, but the procedure is more stringent when the plan concerns ten or more employees. In this case the works council can bring in a chartered accountant to analyse the company's situation, and the employer must draw up a redundancy programme designed to avoid or reduce the dismissals and to compensate those workers whose dismissal cannot be avoided.

In all cases the employer must, in the absence of a collective agreement, draw up selection criteria concerning the workers to be dismissed and submit these to the works council for its opinion.

In **France**, workers are entitled to severance pay, for which there is a statutory minimum amount. However, the redundancy programme will often provide for higher financial compensation, especially if the company resorts to voluntary retirements.

In **Ireland**, where the *Protection of Employment Act 1977* applies, the employer must notify the *Minister for Labour* and the employees' representatives at least thirty days before the first dismissal is due to take effect. Also at least 30 days before the first dismissal, the employer must consult with the employees' representatives. The penalty for non-compliance is prosecution by the Department of Labour Inspectorate.

In **Italy** the *Law 223/1991*, passed to implement *EC Directive 75/129*, establishes that those enterprises which intend to proceed with a collective dismissal are obliged to give written notice to the plant-level union structure and to the external unions (to external unions only if the plant-level structure does not exist). Said notice must contain the following information: a) the reasons which determined the situation of redundancy; b) technical, organisational or productive reasons for which it is considered impossible to adopt suitable measures to totally or partially avoid dismissals; c) number, job status and occupational job profile of the redundant workers; d) the timing of collective dismissals; e) possible measures to address the social consequences of said dismissals.

Within seven days from the date of receipt of the communication, the plant-level union structures and the external unions may request a joint analysis between the parties in order to verify the reasons that contributed to the situation of redundancy and the possibility of using the redundant personnel differently, or at least in part, within the same enterprise. This process must be completed within 45 days from the receipt of the communication of collective dismissals. Should this deadline expire without any agreement between the parties, a conciliation procedure by the *Provincial Labour Office* will follow (*see above*).

In cases of collective dismissals an additional term of notice, which may vary between one or two months, has to be respected once the information and consultation requirements have been fulfilled.

In **Luxembourg** any employer who envisages a collective dismissal is obliged to consult beforehand with the representatives of the employees, namely the personnel delegates, the works council and the trade unions with whom a collective agreement has been concluded. Consultation must consider the possibilities of cancelling the collective dismissal, or at

least diminishing the number involved. The employees' representatives are entitled to all useful information enabling them to make constructive proposals. They have to receive, in writing, information on the reasons for the dismissal, the number of workers involved, the number of workers employed and the period during which dismissals are envisaged to take place. There must be a minimum period of ten days between consultation with the employee representatives and notification to the employees of the dismissal.

In the **Netherlands** the works council and the trade unions must be consulted.

In **Austria** the employer must inform the works council in writing of any planned dismissals. The information must contain the reasons for the measure, the number and class of employees affected, their qualifications, the criteria for their selection, and the period during which the planned measure is to be implemented. Any planned accompanying measures to avoid hardship for the workers affected must also be notified.

In **Portugal** the employer is always obliged to inform and consult the works council (the workers' committee, composed exclusively of elected workers). In the case of a disciplinary dismissal, the works council delivers a reasoned opinion which the employer must take into consideration but need not necessarily follow. In the case of an economic dismissal, the role of the representatives is also important from the legal point of view: the works council is entitled to be informed and consulted and even to negotiate, particularly in the case of a collective dismissals procedure.

There is an additional period of notice for collective dismissals, which can vary from one month to two months after fulfilment of the information and consultation obligations. In **Portugal** this period may be as long as 90 days.

In **Finland** negotiations concerning part-time employment, lay-offs and dismissals for production reasons or on economic grounds and staffing arrangements connected with these must be conducted under a cooperation procedure prescribed by the Cooperation Act. The same procedure must also be used for similar consequences arising as a result of a transfer or merger of companies.

This means that, before the employer decides on measures that will have significant repercussions on his staff situation, he must negotiate about the reasons for and effects of the measures and about alternative measures with the employees, or their representatives, affected by the measures. The employee representatives may be office-holders elected in accordance with collective agreements, representatives of occupational groups or departments, health and safety officials or certain other representatives mentioned in the Act. Before the cooperation procedure is initiated, the employer must fulfil his obligation to inform by issuing the information needed for the negotiations. In the case of negotiations aimed at reducing the workforce, the possibility of retraining or transferring the workers must also be considered.

In **Sweden** the employer is obliged, under the general rules on cooperative negotiation in accordance with the *Co-Determination Act*, to initiate negotiations with the local trade union if important changes are to be made to his company or to the working and employment conditions of the employees, before he takes a decision to make anyone redundant; this is known as the obligation to initiate primary negotiations. In application of *Directives 75/129/EEC* and *92/56/EEC*, an annex to the *Co-Determination Act* was issued on 1 January 1995 specifying that the employer who is in no way bound by a collective agreement is still obliged to initiate negotiations with all affected employees' organisations at the workplace before he makes a decision involving redundancies. At the same time a provision was introduced to the effect that the employer, in connection with primary negotiations, shall inform the other party in writing of:

- the reasons for the planned redundancies,
- the number of employees to be made redundant and the categories to which they belong,
- the number of employees normally engaged and the categories to which they belong,
- the period during which the redundancies are to be effected,
- the method used to calculate any compensation over and above that provided for by law or collective agreement in the event of redundancy.

The employer shall also submit a copy of the notice given to the *County Labour Board*.

An employer who fails to fulfil his obligation to inform and negotiate may have to pay damages to the union organisations.

In the **United Kingdom**, the legislation purporting to give effect to the *EEC Directive 75/129/EEC on Collective Redundancies* was amended in 1995 following infringement proceedings (Cases *C-382/92* and *C-383/92 Commission v United Kingdom*). An employer contemplating the dismissal as redundant of 20 or more employees at one establishment within a period of 90 days must consult either employee representatives elected by the employees who may be dismissed or representatives of the recognised trade union, and must also notify the *Department of Trade and Industry*. If the employer is proposing to dismiss 100 or more employees, then consultation must take place not less than 90 days before the first dismissal takes effect, and otherwise at least 30 days beforehand.

CHAPTER 4
COMPENSATION

Various forms of compensation are awarded in collective dismissal cases.

In **Belgium**, when the collective dismissal coincides with the closure of an enterprise the dismissed employees are entitled to a premium for each year of seniority (up to a maximum of 20 years) and for each year of age above 45, up to a specified ceiling.

In **Germany** the works council can enforce a social plan, which is established either by agreement with management or through the decision of an arbitrator. The plan is not confined to financial compensation. It may include programmes on re-training, transfer of the employees to other plants and the like. There is no minimum nor maximum limit to the compensation.

In **Spain** compensation is equivalent to 20 days' wages per year of seniority, up to a ceiling of one year's wages. In companies with fewer than 25 employees the employer pays only 60% of the compensation (12 days), with the remaining 40% (8 days) being paid direct by the Wages Guarantee Fund, with no possibility of recovering the sums paid to the employer.

In **Ireland** an allowance based on seniority is paid to those employed for at least two years.

In **Italy** the *Law 223/1991* gives special social treatment to workers who have suffered collective dismissal and who have at least twelve months seniority at the time of dismissal. These workers are entitled to an allowance for a maximum period of twelve months, which is raised to twenty-four months for those who are over 40 years old, to thirty-six months for those who are over 50 years old. The amount of the allowance is determined by the law.

In the **Netherlands** agreement on a social plan, including compensatory payments, is often concluded.

In **Portugal** compensation for seniority is awarded and is based on one month's salary per year of service or a fraction thereof.

In **Finland** an employee who has lost his job because the employer has been forced to reduce his workforce for economic or production reasons is entitled to severance pay and, in certain cases, to a training allowance. The conditions of eligibility for severance pay are as a rule that the employee must be over 50 but under 65 and that he has been employed by the same employer for the last five years (or for eight years by two employers).

In **Sweden** a severance payment, redundancy benefit, early pension or other financial compensation may be granted under either a collective agreement or a redundancy agreement. If the employment situation makes this necessary, older employees may be given early retirement under the State pension scheme (*see above Title I, Chapter 4*).

In the **United Kingdom** the amount of redundancy payment depends on age and length of service: one-half a week's pay for every year of employment between ages 18 and 21; one week's pay for every year's service between ages 22 and 40; one and a half week's over 41. There is a dual ceiling: a maximum amount of weekly pay which can be counted, and twenty years for length of service, making the maximum amount which can currently be awarded GBP 6,300.

TITLE III
PROTECTED GROUPS

In most Member States there are provisions, mostly either by Acts of Parliament or by collective bargaining, giving special protection against dismissal. Prominent amongst those are the following cases: pregnant employees; sick employees; those on military service; employee representatives.

CHAPTER 1
PREGNANT EMPLOYEES

(*see also Part I, Title III, Chapter 7 - Suspension of Employment Contract*)

In **Belgium** the employer, according to the *Labour Act of 1971*, is not allowed to take any action which implies the unilateral termination of the employment relationship with the pregnant employee or new mother during a given period. This *"protected"* period starts on the day that the employer is informed by the employee about the pregnancy and ends a month after the post-natal rest period (8 or 14 weeks after the confinement). The employee may inform her employer in any way; a medical certificate is not obligatory, although it is preferable for reasons of proof. During this protected period the employee may only be dismissed for reasons which have nothing to do with her physical condition; e.g. serious (just cause), economic or technical reasons. If there is an illegal dismissal the employer must pay compensation equal to three months' wages.

In **Denmark** an employer is not allowed to dismiss an employee because he or she has claimed parental leave or for any other reason related to pregnancy, birth or adoption. The sanction for breach of this obligation is re-instatement or compensation for economic and non-economic loss. Compensation cannot exceed 78 weeks pay.

In **Germany** it is forbidden to dismiss a woman during the period from the beginning of the pregnancy until four months after the woman has given birth to a child. Only in very exceptional cases, where continuation of employment would be absolutely intolerable, is dismissal possible. In such cases, the *State Office for Labour Inspection* is required to give its consent. The prerequisites for such exceptions are extremely demanding.

In **Greece** it is forbidden to dismiss a woman during the period from the beginning of the pregnancy until one year after the woman has given birth to a child, except for serious reasons not related to lowered productivity due to pregnancy (*Article 15 of Law 1483/1984*).

In **Spain** the duration of the suspension of the employment contract for maternity leave is 16 consecutive weeks, increasing to 18 weeks in the case of multiple births. The exact dates of the leave are chosen by the employee, the only proviso being that at least six weeks must be taken after the confinement. When both spouses work, the father is entitled to take the final four weeks' leave. At the same time, if it is considered that the pregnancy poses a risk to the health and safety of the employee in question, or that the work might adversely affect her pregnancy or her breast-feeding, the employer must take the necessary measures to avoid exposing her to such risk, by adapting her working conditions or working hours. These measures can include, as appropriate, a ban on night work or even assignment to another workplace or another job compatible with the employee's state. The Constitutional Court has declared the dismissal of an employee on grounds of pregnancy to be null and void; this principle has even been extended to terminations of contract during the probationary period and to decisions not to extend

a fixed-term contract until its full term, despite the post being maintained and another worker being recruited.

In **France**, in addition to the entitlement to maternity leave from 6 weeks before confinement to 10 weeks after confinement, the mother is also entitled to unpaid parental leave (provided she has a minimum of one year's service in an enterprise with a minimum 100 employees) for a maximum duration of two years.

In **Ireland** maternity leave is governed by the *Maternity Protection of Employees Act 1981*. Female employees are entitled to a period of maternity leave of at least 14 weeks, if notice is given to the employer at least four weeks before the expected date of birth of the child. The exact dates of the leave are chosen by the employee but the period of leave must cover the last four weeks before and the first four weeks after the expected date of the birth. During the period of leave the employment relationship is suspended. If the employee notifies the employer in writing at least four weeks before the expected date of return to work, she is entitled to return to her former job on exactly the same terms as before.

In **Italy** women cannot be dismissed from the beginning of pregnancy to one year after the child's birth and in this period a woman who resigns has the right to compensation in lieu of notice as if she was dismissed. The labour contract can be terminated only when just cause for dismissal is proved, e.g. if the enterprise terminates its activity, the specific work for which the woman was hired ends, etc.

In **Luxembourg** the labour contract is suspended for a period of 8 weeks before confinement and 8 weeks after confinement, during which period the mother is not allowed to allowed to work. During the period of pregnancy, up to 12 weeks following the confinement, no dismissal can take place.

In the **Netherlands** the employment contract may not be terminated by the employer during the pregnancy and during the period after the confinement in which the employee is entitled to maternity benefits plus an additional 6 weeks. Also the employer may not terminate the contract of employment for reasons of confinement.

In **Austria**, as in Germany, a woman may not be dismissed during her pregnancy or in the four months after giving birth. Dismissal requires court approval.

In **Portugal** maternity leave is 98 days, at least 60 of which must be taken after the confinement. Parental childcare leave may also be taken, for between six months and two years (those entitled are the mother, the father or the adopting parent). The law exempts pregnant women from night work and from overtime and prohibits their dismissal, unless with the consent of the Ministry of Employment.

In **Finland** it is also laid down that an employee's contract may not be terminated on the grounds of pregnancy and that the employer may not terminate the employee's contract during maternity leave, parental leave, paternity leave or child care leave. This prohibition is as good as absolute, with termination being possible only if the employer's activity ceases.

According to the **Swedish** *Employment Security Act*, pregnancy is not a valid reason for dismissing an employee. The *Parental Leave Act* provides further protection for parents who use their statutory entitlement; dismissal/firing is prohibited and the employee may break off his/her leave and go back to work on the same terms as before, without having to accept less favourable benefits or working conditions, or an unsuitable transfer. A woman who is expecting a baby, has just given birth or is breast feeding is entitled to a transfer with the same employment-related benefits if, under a regulation on health and safety at work, she is not allowed to continue her normal work. If she cannot, because of her pregnancy, carry out physically demanding tasks she is entitled to be transferred and retain her employment-related benefits from, and including, the sixtieth day before the expected date of birth. If the employer cannot transfer her, the woman is entitled to leave with a benefit corresponding to sickness benefit. If the employer fails to comply with the *Employment Security Act*, the dismissal can be declared invalid and damages are payable. Damages are also payable for non-compliance with the *Parental Leave Act*.

In the **United Kingdom** there is a right for all employees to 14 weeks' maternity leave. During this period the woman must be treated as if at work in respect of all contractual benefits other than remuneration. This right is contingent upon complying with an extensive series of notification requirements. A woman is prohibited by her employer to return to work during the period of two weeks starting with the day on which childbirth occurs. There is a further right, for women who have been employed for a period of at least 2 years, to return to employment at any time up to 29 weeks from the week in which childbirth occurs. If the employer refuses to allow her to return she has rights analogous to those for dismissal. On her return to work, her pay, seniority, pension and other rights must be no less favourable than when she left. She must comply with extensive notification requirements.

CHAPTER 2
SICK EMPLOYEES

(see also Part I, Title III, Chapter 7 - Suspension of Employment Contract)

In **Belgium**, in the case of sickness or an accident, a term of notice given during the period of incapacity to work will only commence at the moment when the employee restarts work. If the employee becomes ill or has an accident during the course of the term of notice, the notice period is suspended. Notice given by the employee however, has full effect. The employer is allowed to terminate the contract if the employee's incapacity to work lasts for over six uninterrupted months; on condition that the employer pays the employee compensation equal to six months' remuneration.

Special regulations exist for white-collar workers during the trial period and for white-collars who are engaged with a contract for a definite period or for precisely indicated work. During the trial period the employer can terminate the contract without having to pay compensation if the employee is ill for more than eight days. The same rule applies in the case of a contract of definite duration or for a specifically indicated job lasting less than three months. In the case of a contract for a definite period of more than three months or for a precisely indicated job which is expected to last longer

than three months, the employer can terminate the contract if the incapacity exceeds an uninterrupted period of six months; on condition that compensation equal to three months of wages is paid to the employee.

In **Denmark** there is a right for employees to be absent due to illness and accidents. In certain cases, absence because of illness and accidents both outside and at work is regarded as a fair reason for dismissal.

In **Germany**, dismissal for illness can be legal, bearing in mind its economic impact.

In **Greece** the labour contract is, in cases of illness, suspended, provided that the illness is of a short duration: one month for seniority of 4 years, up to 6 months for seniority exceeding 15 years.

In **Spain** the contract of employment remains suspended until the worker regains full health or is declared a permanent invalid. In exceptional cases of chronic illness, including repeated and intermittent but justified absences from work, the employer may dismiss the worker on objective and justified grounds; however, the legal conditions attaching to this are so strict that in practice this cause for dismissal is never used.

In **France** case law has laid down that illness suspends the labour contract. Even if prolonged, illness never constitutes a case of *force majeure*. The employer is not allowed to terminate the contract unless he can demonstrate disruption of the company and the need for a permanent replacement.

Protection is stronger in the case of occupational diseases and industrial accidents. The contract of employment is suspended and dismissal is prohibited in every case. On his return to work the employee has a full right to redeployment.

In **Ireland**, under the *Unfair Dismissals Act 1977*, a dismissal because of the employee's illness or medical incapacity to work is usually a *"fair"* dismissal – i.e. not unlawful.

In **Italy**, as regards sickness and work accidents, employee protection has increased mainly due to collective bargaining. During sickness the suspension of the contract, with job protection, lasts for periods usually determined by collective agreements according to the employees seniority, generally with the exclusion of employees on trial. Beyond these periods an employee is usually entitled, under collective agreements, to a further period of leave of unpaid absence, e.g. four months according to the metalworkers' agreement. During these periods employees can be dismissed only in the (extreme) case where a just cause is proved. At the end of the period it is debatable whether an employee, who is still sick, can be discharged. In practice the Court usually holds that the employee can be legitimately discharged in this case by considering the persisting sickness as either a justified reason or a case of impossibility to perform (such as to justify the termination of the labour contract).

In **Luxembourg** the law prohibits dismissals due to incapacity for work:

- for up to 26 weeks, starting from the date of commencement of the incapacity for work (manual workers);
- during the remainder of the month in which incapacity for work commenced and for the subsequent three months (white-collar workers).

In the **Netherlands** the employment contract cannot be terminated by the employer during the first two years of illness but this provision may be waived by a collective agreement.

In **Austria** sick employees do not normally have any special protection against dismissal. However, the dismissal can be deemed socially unjustifiable in the context of dismissal protection under employees' representation legislation when, as required, the interests of the company are weighed against the interests of the employee. The key points to be considered in this process are the employee's age, length of service with the company, family situation, the size of the company, the number of employees, the company's economic situation, the medical prognosis, and the question of whether the illness has been caused by an industrial accident or the company's working conditions.

In **Portugal**, in cases of temporary illness, the execution of the contract of employment is suspended.

In **Finland** sickness constitutes grounds for dismissal only if it results in a permanent and substantial reduction of the employee's working capacity. It has often been stipulated that the employee should be entitled to an invalidity pension if dismissal is to be considered, but in practice it has in certain cases been held that constantly recurring prolonged periods of sickness can constitute grounds for dismissal.

In **Sweden** an employee's right to be absent from work as a result of sickness or injury is, in principle, unrestricted. Sickness is not, as a general rule, a valid reason for dismissal. The employee may be dismissed only if the sickness leads to a permanent reduction in working capacity which is so serious that he can no longer produce work of any value. An employee who is too sick to work and who does not seem to be getting any better after a long period of sick leave shall, in the normal way, receive an old-age or invalidity pension. In recent years a great deal of importance has been attached to rehabilitating employees in order to reduce the number of invalidity pensions; an employee is, furthermore, obliged to begin rehabilitation after being on sick leave for over four weeks. The fact that the employer has to take considerable responsibility for both employment security and health and safety at work, and is expected to adapt conditions to the individual's requirements does not mean that the employment relationship cannot be terminated if there is no work suitable for the sick person at the workplace and it is impossible to transfer him.

In the **United Kingdom** the absence of an employee due to sickness or disability may in a few extreme cases amount to frustration of the contract, bringing it to an end automatically. This may occur where there is little prospect of recovery so making further permanent employment impossible. The main consequence of characterising the sickness in this way is that the employee cannot claim to have been dismissed for purposes of the law on unfair dismissal.

In most cases of ill-health or disability, the employer must decide whether or not the absence warrants dismissal. If the employee has 2 or more years' continuous employment he or she may complain to an industrial tribunal that the dismissal is unfair. There are no set rules, only the general requirement that the employer must act *"reasonably"* in all the

circumstances, having regard to equity and the substantial merits of the case. In assessing whether such a dismissal is fair or unfair in cases of long-term ill-health, the tribunal will generally be guided by factors such as:

- could the employer be expected to wait any longer, and, if so, how much longer, for the employee to return?;
- the nature, length and effect of the illness or disability;
- the importance of the job and the possibility of temporary replacement;
- the effect of continued absence on other employees, and on output and sales; and
- whether a fair procedure of medical investigation and consultation with the employee has been followed.

In the case of persistent short-term absences, the employer is normally expected to make a fair review of the employee's attendance record and the reasons for the absences, give the employee an opportunity to make representations and to dismiss only after appropriate warnings to the employee that he or she will be dismissed if attendance does not improve.

CHAPTER 3
EMPLOYEES ON MILITARY SERVICE

(see also Part I, Title III, Chapter 7 - Suspension of Employment Contract)

In **Belgium** the employee who has to perform military service cannot be dismissed from the moment that he informs his employer of the date of call-up until one month after the end of his service, except for *"sufficient"* reasons which have nothing to do with his military service. Only employees with contracts of indefinite duration benefit from this protection. A fixed-term contract is not affected by military service; it runs its normal course and will be terminated when this has expired. Neither does the protection operate during the probation period: this period may be suspended in the case of military service but the employer may always terminate it. In the case of unfair dismissal, the employee is entitled to compensation equal to the compensation paid for dismissals without notice. If the unfair dismissal has meant that the employee has not been able to work before or after his military service, the employer must compensate the employee for that loss with a payment of three months' maximum remuneration for manual workers or six months' for white-collar workers. This rule applies also to conscientious objectors. Military service was abolished in Belgium in 1994.

In **Denmark** an employee with at least 9 months seniority with the employer has a right to leave in the case of military service. It is forbidden for the employer to dismiss an employee because he makes use of this right. The sanction is compensation with a maximum of 26 months pay.

In **Germany** protection against dismissals due to military service is regulated by the *Act of 14 April 1980*. It is strictly forbidden to dismiss a worker during the period from which the order to be drafted is received until the end of the military service. The same is true for each further period of drafting for exercises, etc. The Act further specifies that military service as such is never a justification for dismissal. Even in the case of dismissal for economic reasons military service cannot be a factor which would lead to the selection of a certain person to be dismissed. In any conflict on such a matter the employer would have the full burden of proof. The above refers to ordinary dismissals. Extraordinary dismissal remains possible, though it can only be declared at the end of the military service with a term of notice of two months.

In **Greece** military service suspends the execution of the labour contract provided the worker has seniority of at least six months. The worker is re-hired and is entitled to work for at least during one year. During his military service he can only be dismissed for reasons which have to be approved by a special commission. In the absence of such approval, the employer will have to pay compensation of six months of wages.

In **Spain** military service suspends the execution of the individual employment contract. The worker has a right to get his job back and must return to his job within a maximum period of 30 days after completion of the military service.

In **France** military service causes the contract of employment to come to an end. The employee is, however, entitled to be reintegrated at his request in the same job or in a job of the same professional qualification. The employer is freed from this obligation if it can be proved that the original or an equivalent job has been abolished. The time spent in military service is not taken into account in the calculation of the seniority of the employee. Where reintegration is not possible, the employee benefits from a priority to be hired during a period of 12 months. Collective bargaining has supplemented these legal rules by either providing that the employment contract is suspended during military service or by limiting the powers of the employer as far as reintegration is concerned.

In **Italy** job security and seniority are recognised for all workers performing military service.

In **Luxembourg** obligatory military service has been abolished. There is no specific employment protection for those carrying out military service.

In the **Netherlands** the employment contract cannot be terminated by the employer for reasons of military service.

In **Austria** an employee who has to perform military service/alternative civilian service may not be dismissed from the moment of receiving his call-up papers/assignment papers until one month after completion of the service. Exemptions from this rule are possible only with the agreement of the court, in the case of closure of the establishment or reduction of the establishment's operations, or with the agreement of the employee in court. Periods of notice of dismissal already running at the time of call-up are frozen, i.e. the remainder of the period of notice only resumes after completion of the military/alternative civilian service.

In **Portugal** compulsory military service suspends the contract of employment. The employee is not entitled to remuneration but is guaranteed his job back with no loss of seniority.

In **Finland** there is a special Act *(No 570/1961)* on the continuation of conscripts' employment relationship. It lays down that the employment relationship of a Finnish citizen

called up for compulsory military service may not be suspended by the employer on these grounds or terminated by the employer during the period of such service.

In **Sweden** employees are entitled to unpaid leave for military and other service in the forces which they have a statutory obligation to perform. The law also provides protection against dismissal. Employees are entitled to return to work at the latest two weeks after informing the employer and cannot be given a greater reduction in employment-related benefits than that resulting from the interruption. If the employer fails to comply with the rules, the employee is entitled to damages. An illegal dismissal can be declared invalid.

There is no compulsory military service in **Ireland** and the **United Kingdom** but in the United Kingdom there is legislation providing for the safeguarding of the employment and reinstatement of those on military service.

CHAPTER 4
EMPLOYEE REPRESENTATIVES

(see also Part I, Title III, Chapter 7 – Suspension of Employment Contract)

In **Belgium** workers' representatives enjoy specific forms of job security. Members of the works council or of safety and health committees can be dismissed only for economic or technical reasons recognised as such by the competent joint committee. Where there is found to be just cause for dismissal, the employer must bring the case before the *Labour Court* before terminating the contract. Where there is found to be insufficient cause, compensation is due. There is no compulsory reinstatement. Compensation may be as high as eight years' remuneration. Union delegates may be dismissed for any reason not linked to the performance of their union activity. These may be economic or technical reasons, or personal reasons unrelated to the worker's trade union activity. The dismissal may also be for just cause.

In **Denmark** safety representatives (by Act), shop stewards and work's council members (by collective agreement) can only be dismissed if there is a *"compelling"* reason for so doing. Redundancy is not a compelling reason if other, *"ordinary"* workers could have been dismissed. In cases of unlawful dismissal, representatives are entitled to re-instatement or damages. There is also an Act prohibiting dismissal on grounds of membership or non-membership of a trade-union.

In **Germany** members of works councils and other bodies of the work constitution (as well as of the staff representation structure in the public sector) can only be dismissed by extraordinary dismissal during their term of office and within a period of one year thereafter. During the term of office the employer requires the consent of the works council. If the works council refuses its consent the employer may appeal to the *Labour Court*. The *Labour Court* must grant the employer's request if a cause for extraordinary dismissal is proved. There is a special protection for members of the body organising the works council's election and for those who are candidates for works council membership. They can only be dismissed by extraordinary dismissal in the period between nomination until six months after the result of the election is published.

Greece introduced legislation to protect trade union delegates in 1951. They may be dismissed only on certain grounds laid down by law in a limitative list (*Law of 1982*) and following a decision by an ad hoc committee composing a judge, a workers' representative and an employers' representative. Members of the *Trade Union Council* are also protected.

In **Spain** workers' representatives cannot be dismissed (during their period of office and one year thereafter) for reasons linked to the execution of their representation duties. If the Labour Court finds the dismissal unjustified, the worker has the choice of reinstatement or compensation. In the case of both collective and individual dismissals for economic or technological reasons, workers' representatives enjoy protection; this protection also extends to individual or collective job transfers for economic or technological reasons. If the dismissal is for disciplinary reasons an adversarial procedure must first be initiated, allowing the worker concerned and the other workers' representatives to be heard.

In **France** there is an elaborate system of protection for employee representatives. Central to the protection against dismissal is the *Labour Inspector* who exercises administrative control of the dismissal. In such cases, preceding consultation with the works council has to take place. The Labour Inspector organises an inquiry and has the authority either to grant or to refuse the dismissal. Silence, after a period of 15 days, equals rejection of the dismissal. Whether the dismissal is discriminatory or justified will be examined. Authorisation may be refused on grounds of public interest. The decision of the *Labour Inspector* is subject to appeal. Dismissal without authorisation is null and void and the representative is entitled to reinstatement with back pay.

Dismissal for trade union activities is illegal in **Ireland** under the *Unfair Dismissals Act 1977*. However, dismissal for trade union activities is unfair only if either the activities were carried on outside working hours, or were inside working hours but permitted under the contract of employment.

In **Italy** workers' representatives enjoy special protection – in addition to the general protection granted to all workers – against discriminatory dismissals and transfers. *Act No 300* provides that, in cases of dismissal of union representatives and also of members and candidates for the works committee, on joint demand by them and their union the *pretore* (judge of first instance) can order, at any stage of the proceedings, the immediate reinstatement of the employee, if he believes that the elements of proof produced by the employer to justify the dismissal are irrelevant or insufficient. The employer who does not obey the order of reinstatement, in addition to the wages due to the employee, must pay a sum equal to those wages to the public pension fund.

In **Luxembourg** workers' representatives enjoy some degree of protection against dismissal during their period in office and for six months thereafter. Candidates for election enjoy protection during a period of three months, starting from the date of introduction of the lists of candidates. In cases of

dismissal, the President of the Labour Tribunal can order reinstatement. In cases of dismissal for just cause, the employer can suspend the worker's contract of employment and ask the Tribunal for a judicial dissolution of the contract.

In the **Netherlands** employee representatives enjoy job security as follows: members of the works council and the health and safety committee cannot be dismissed, whilst others, e.g. former members or candidates for membership can only be dismissed provided the Judge of the Canton agrees. In a number of collective agreements the protection of works council members has been extended to shop stewards. Trade union membership is not accepted as a valid reason for dismissal by Directors of Regional Employment Offices, dealing with requests for authorisation of dismissals.

In **Austria**, in principle, works councils members can only be dismissed with court approval. This protection begins on the date of their acceptance of the election and ends three months after completion of their term of office. Under the industrial relations legislation, this rule also applies to the other office-holders. The court can agree to the dismissal: 1. in the case of the establishment closing down or reducing its operations, in which case it must be examined very closely whether the proprietor can continue to employ the works council members without incurring substantial loss to himself; 2. in the case of long-term incapacity for work, e.g. through severe injury or chronic illness; and 3. in the case of persistent breach of duty.

In **Portugal** the law prohibits dismissal on grounds of union membership or union activity and lays down a number of specific rules – of little significance – governing the dismissal of workers' representatives on disciplinary or economic grounds (preference over other workers of the same service and category). However, the workers' representatives are entitled to special compensation if the tribunal annuls their disciplinary dismissal or if there is found to be a violation of the preference entitlement in the collective dismissal: this special compensation amounts to two months of salary per year of service, with a minimum of 12 months.

In **Finland** the *Employment Contracts Act* contains a special provision concerning the protection of employee representatives against dismissal. They can be dismissed by the employer only if the majority of the employees they represent give their assent or if the work ceases completely and other work in keeping with their capabilities cannot be arranged. The collective agreements may in many cases contain additional provisions on the protection of employee representatives against dismissal.

In **Sweden** special legislation gives union representatives entitlement to leave and pay to fulfil their union mandate. According to the law, the employer may not prevent representatives from carrying out their mandate, or downgrade their working conditions or terms of employment because of it. When the mandate is over representatives shall be guaranteed the position they would have had, had they not been representatives (or an equivalent position) and the same pay increases. If their old job has changed, e.g. because of technological developments, the employer is obliged to provide training. Representatives have priority for continued employment when the order of priority for redundancies is set, if this is likely to affect union activities at the workplace. A union representative's mandate is not a valid reason for dismissal and such dismissal therefore represents an infringement of the statutory employment security regulations. It is, furthermore, an infringement of the right of association and can mean that high damages are payable to both representative and union.

According to the regulations on health and safety at work, the safety representative is an ordinary union representative and is covered by this legislation. Under the *Work Environment Act*, however, special protection is also afforded. Safety representatives are entitled to any leave required for their duties and they retain their employment-related benefits. They may not be prevented from carrying out their duties or expected to accept less favourable working conditions as a result. When the mandate is over they must be guaranteed the working conditions and terms of employment they would have had (or equivalent), had they not been representatives.

In the **United Kingdom** every employee has the right not to be unfairly dismissed by reason of membership of, or participation in, the activities of an independent trade union. Every employee has the right *"as an individual"* not to be penalised for, or deterred or prevented from joining, an independent trade union or taking part in its activities at an appropriate time by sanctions short of dismissal imposed by the employer.

CONCLUSIONS

1. Rules concerning the termination of the employment contract vary enormously between Member States, in terms of content and procedure. Rules do not always apply to all employees, e.g. part-timers and/or small firms may be excluded.

2. Individual dismissals have to be justified by the employer in a majority of Member States, namely in **Denmark, Germany, Spain, France, Ireland, Italy, Luxembourg**, the **Netherlands, Portugal, Finland, Sweden** and the **United Kingdom**. In the other Member States partial rules may apply. The reason that the employer has to prove in order to justify the dismissal has to do either with the capacity or conduct of the employee, or relates to the requirements of the enterprise.

3. In only a few Member States are employee representatives (by law) involved in one way or another in the dismissal procedure. This is especially the case in **Denmark, Germany, Spain, Italy**, the **Netherlands, Austria, Portugal** and **Sweden**. The involvement is mostly confined to information and or consultation, though in **Denmark** negotiation and binding arbitration may follow. In **Sweden** the employer is obliged to initiate negotiations and give the union an opportunity to exert influence before he takes his decision.

4. In most Member States a term of notice and/or corresponding compensation is either to be served or paid. The length of the term of notice varies considerably – taking seniority and/or other criteria into account – from one week to four years in some cases. In a number

of countries, e.g. **Belgium, Germany** and **Italy** and there are still differences between blue- and white-collar workers. The most notable difference between blue- and white-collars exists in **Belgium**. There is however a bill in **Luxembourg** to harmonise the terms of notice between blue- and white-collar workers at the level of the latter group of workers, thus harmonising upward.

5. In **Denmark, Spain, France, Ireland, Italy, Luxembourg,** the **Netherlands, Austria, Finland** and the **United Kingdom** additional forms of compensation are to be paid. Wide differences in amounts of compensation exist. In **Sweden** special compensation is often payable under collective agreements, contracts of employment or special redundancy agreements.

6. In only one Member State does the Government directly intervene in individual dismissals, namely in the **Netherlands**. In more than 15 per cent of the cases the intervention of the Dutch *Labour Exchange Office* has had a positive effect.

7. As far as remedies are concerned it should be noted that compensation and not reinstatement is the most common form in cases of illegal dismissal. Possibilities for reinstatement are provided for in **Denmark, Germany, Spain, France, Ireland, Italy, Luxembourg,** the **Netherlands, Austria, Portugal, Sweden** and the **United Kingdom**. In practice however reinstatement is not widely used. Again there are considerable differences concerning the implementation of this remedy. In **Luxembourg** a government sponsored bill on labour contracts also foresees a certain form of reinstatement.

8. As far as collective dismissals are concerned the *1975 Directive* plays an important role by making information and consultation mandatory, by involving the administrative authorities as well as employee representatives of the employees and by imposing an additional term of notice. In **Greece** and **Spain**, in the absence of agreement by workers' representatives, an authorisation by the administrative authorities is necessary. Specific compensation is due in **Belgium, Germany, Spain,** the **Netherlands** and **Portugal.**

9. Most Member States provide special protection in one form or another against dismissal for certain groups of employees. Most prominent amongst these protected groups are pregnant and sick employees, those on military service and employee representatives. Wide differences exist, again, in terms of content and procedure.

PART III
COLLECTIVE DETERMINATION OF WORKING CONDITIONS

TITLE I
THE COLLECTIVE AGREEMENT

INTRODUCTION

The term *"collective bargaining"* has two meanings. In a broad sense, it is a process of interest accommodation which includes all sorts of bipartite or tripartite discussions relating to labour problems, directly or indirectly affecting a group of workers. A narrower but more precise definition views collective bargaining only in connection with bipartite discussions leading to the conclusion of agreements. Collective bargaining here involves a process of negotiations between individual employers or employers' associations and trade unions, possibly leading to the conclusion of an agreement. In the following analysis, emphasis will be placed on the narrower definition and its function in the private sector.

CHAPTER 1
PARTIES TO THE COLLECTIVE AGREEMENT

The parties to a collective agreement are, generally, individual employers and employers' associations on the one hand and trade unions on the other. Collective bargaining from the employees' perspective is largely the function of trade unions.

In a number of Member States trade unions need to satisfy certain requirements in order to be able to conclude collective agreements.

In **Belgium** only the more representative trade unions can be party to a legally binding collective agreement. The criteria for representativeness of the workers' central organisations are the following: they must have an inter-occupational character; be established at national level; be represented on the *Central Economic Council* and the *National Labour Council*; and have at least 50,000 members. In accordance with these criteria, three trade unions are recognised as being representative.

In **Germany** a trade union must be represented at more than one plant in order to qualify as a party to a collective agreement. The *Federal Labour Court* has established this and a whole range of other criteria to be observed by associations as parties to collective agreements. The association has to be created for an indefinite time; it must have a corporate structure; have a certain strength in order to be taken seriously by the employers' side and be independent from employer and State influence and from political parties. Finally members should be able to influence the associations' activities.

In **Greece, Spain, France** and **Luxembourg** the trade union must be a representative organisation. In **Spain** the criteria are spelt out in great detail.

In **Greece**, trade unions and employers' associations are required to be representative and incorporated in order to be entitled to conclude legally binding agreements. Under the terms of Article 6, para 1 of *Law 1876/1990*, only one trade union organisation can be considered representative for the purposes of bargaining and concluding collective agreements. Assessment of representativeness is based on the number of voters at the last elections for the nomination of the union's executive board. A new feature in the 1990 reform is that the individual employer who employs at least 50 workers is entitled to conclude company-level collective agreements.

In **Spain** collective bargaining above company level is attributed exclusively to the workers' trade unions and employers' associations. Corporate bargaining, in which company trade union sections, company committees and personnel delegates are allowed to take part, remains very significant.

In **France**, five confederations have been recognised by the government as being representative at inter-industrial level. The organisations affiliated to these confederations qualify automatically as being representative at lower levels, i.e. at sectoral, regional, *départemental*, local and enterprise level. Other organisations may qualify to be representative if they can demonstrate that they satisfy the required qualities, which are interpreted fairly liberally (essentially, these are independence, a certain level of experience, and an established presence).

In **Luxembourg** only national trade unions are competent to conclude collective agreements. Sectoral and enterprise level unions are unable to do so.

In **Ireland** a trade union must hold a negotiation licence, issued by the *Minister for Enterprise and Employment* under the *Trade Union Act 1941* (as amended), in order to be able to engage in collective bargaining. The licence is issued if certain conditions are met, including minimum membership requirements and the lodging of a deposit with the *High Court*.

In the **Netherlands** every trade union is legally entitled to conclude a collective agreement provided that it complies with very minor formal requirements.

In **Austria** the capacity of trade unions to conclude collective agreements must be officially recognised by the *Bundeseinigungsamt* (Federal Arbitration Office). To be granted such recognition they must be active over an extensive territorial and professional area and have substantial economic significance either by virtue of the size of their membership or the extent of their activities. The Austrian *Gewerkschaftsbund* (Trade Union Confederation), with its 14 craft unions, is outstandingly important.

In **Portugal** only registered trade unions and employers' associations have the legal capacity to conclude collective agreements. Registration takes place with the *Ministry of*

Labour and Social Security. There are no specific criteria of union representation.

In **Finland** the collective agreement is governed by the *Collective Agreements Act (No 436/1946)*. Under this Act, collective agreements can be concluded by one or more employers or registered associations of employers and, on the employees' side, only by a registered association of employees. The associations' actual aim must be to uphold the interests of the two sides of industry.

According to **Swedish** legislation, collective agreements shall be concluded between the employers' organisation or the employer on the one hand and the employees' organisation on the other. There are, however, no rules on representative distribution or other conditions governing being a party to a collective agreement.

In the **United Kingdom** trade union recognition for purposes of collective bargaining depends upon the agreement of the employer.

In **Italy** no specific requirements are stipulated and in **Denmark** union recognition is based on agreement with the employer's organisation.

In some countries work councils can also conclude agreements, often in the shadow of employer-trade union bargaining. This is notably the case in **Spain** and to a lesser extent **Germany** and the **Netherlands**.

In **Belgium**, **Spain**, **Ireland**, **Italy**, **Portugal**, and the **United Kingdom** union or workers' delegates may also engage in collective bargaining. In the **United Kingdom** workplace bargaining is largely carried out by shop stewards.

CHAPTER 2
NEGOTIATING RIGHTS AND OBLIGATIONS

In a number of Member States there is neither a right nor an obligation for either side to bargain or negotiate. Bargaining is a function of the power relationship between the employer and employees and depends largely on the relative strength of the employees' collective organisation. This is notably the case in **Denmark**, **Germany**, **Greece**, **Ireland**, **Italy**, the **Netherlands**, **Austria**, **Finland** and the **United Kingdom**.

In **Belgium** the Constitution grants workers the right to consultation and collective bargaining.

In **Greece**, however, collective bargaining is recognised in the Constitution as an element of trade union freedom.

In **Ireland**, on the other hand, the courts have held that the constitutional provisions on freedom of association do not imply a right on the part of trade unions to be recognised by an employer for collective bargaining purposes.

According to **Swedish** legislation, the relationship between employers and members of employees' organisations who are, or have been, employed by the employer carries an obligation to negotiate. This obligation to negotiate applies to all sides – employer's organisation, employer and employee's organisation. A party who is obliged to negotiate must attend the negotiation meeting and, if necessary, present a reasoned proposal for a solution to the problem. On the basis of case law, the parties must also hold objective discussions and make a concerted effort to reach an understanding, firstly by clearly presenting their position and the reasons for it. There is no obligation to reach a decision. On the basis of case law, the employer who states that he does not wish to conclude a collective agreement with the other party at the beginning of negotiations is not neglecting his obligation to negotiate. He is, however, still obliged to participate in objective discussions.

In the **United Kingdom** the right of independent trade unions to use the legal process to obtain recognition from employers was removed in 1980. This means that, at present, there is no legal duty on an employer to recognise a trade union for collective bargaining purposes. Trade union recognition and bargaining are entirely voluntary matters for management to decide upon.

In other countries there is a legal duty to bargain, namely in **Greece**, **Spain**, **France**, **Luxembourg**, **Portugal** and **Sweden**.

In **Greece**, pursuant to *Article 4, para 1, of Law 1876/1990*, unions and employers have the right and the obligation to bargain with a view to concluding a collective labour agreement, and they must conduct the bargaining in good faith.

In **Spain**, there is an implicit duty to bargain, in the sense that the party which receives an invitation to bargain is under an obligation to do so in good faith with a view to reaching an agreement. There is however no obligation to reach an agreement. Also, the party invited to bargain may reject the opening of a bargaining procedure on certain grounds (e.g. lack of legitimacy of the party proposing the bargaining, or rules relating to the structure of the collective bargaining that prevent bargaining in a particular area or on certain issues, etc.), when it is not a question of revising an agreement that has already expired.

In **France** this duty to bargain has, since 1982, existed at industry-wide and enterprise level. It is not, however, a duty to reach agreement; neither is there a specific sanction for refusal. At industry level bargaining must take place over minimum wages (every year) and job classifications (every 5 years). At enterprise level bargaining must cover such subjects as the right of expression, training plans when none have been negotiated at industry level, annual wage bargaining by categories of employees, actual working hours and the organisation of working-time. Sanctions exist if one side refuses to bargain.

In **Luxembourg** the employer is legally obliged to engage in negotiations, when required by a representative organisation. If the employer wishes to negotiate within the framework of an employers' association or together with other employers of the same trade, negotiations may be postponed for a maximum period of 60 days. There is, however, no duty to conclude a collective agreement.

The same is true in **Portugal**, where the *Constitution* recognises the right for the trade unions to bargain collectively. In case of unjustified refusal to negotiate in good faith, the administrative authorities may impose working conditions by way of regulation.

In certain specific cases there may be an obligation to bargain, e.g. in the case of collective redundancies in **Den-**

mark and the **Netherlands**. In the **Netherlands** also in the case of mergers.

Collective bargaining in Member States is, therefore, greatly dependent on power relations, which vary considerably according to the degree of union organisation and a host of regional, sectoral and other variables.

CHAPTER 3
LEVELS OF COLLECTIVE BARGAINING

Bargaining takes place at different levels, e.g. plant, enterprise, industry, and inter-industry. There are notable differences between Member States.

In **Belgium**, **Denmark**, **Germany**, **Greece**, the **Netherlands**, **Austria**, **Finland** and **Sweden** the most significant bargaining is carried out at industry level.

In **Germany** collective agreements concluded at company level between a trade union and an individual employer are rare. Industry level agreements are the norm and are often regionalised, i.e. they cover only a certain region of an industry.

The situation in **Denmark** is very similar to that in **Germany**, i.e. the most important bargaining is done at industry level.

The same goes more or less for **Greece** and the **Netherlands**.

In **Greece**, *Law 1876/1990* added two new bargaining levels, i.e. enterprise level and industry-wide level, to the existing bargaining levels, i.e. occupational level and national multi-industry level.

In **Spain**, the law does not define bargaining levels but it stipulates that the scope of application of collective agreements will be that defined between the parties. In practice, it is a broadly decentralised system, albeit with some centralisation tendencies. The law provides that, through multi-industry agreements or collective agreements, the most representative trade unions and employers' associations may establish the structure of collective bargaining and even lay down the rules for resolving conflicts of competition between agreements in different areas and the principles of complementarity of the various recruitment units.

In **Ireland** collective bargaining tends to be localised, so that many agreements are negotiated at company or even plant level. Industry-wide agreements are quite rare. In 1987 a tripartite *Programme for National Recovery* was agreed upon containing central pay guidelines, and new Programmes were negotiated in 1991 and 1994, the latter is entitled the *Programme for Competitiveness and Work*.

In **Italy** the collective bargaining structure was reformed after the tripartite agreement between the government, unions and the *Confindustria* of 23rd July 1993. This agreement envisages two bargaining levels. The first is the national industry-wide level, which remains the most relevant. The second is the company level or the regional/provincial level for those industries fragmented into many small enterprises. The power to negotiate at this second level is given to both the plant-level union structures and external unions.

In **Portugal** the level at which bargaining takes place depends amongst other things on the level of organisation of the employers. Enterprise agreements represent only 20 or 25% of total collective agreements.

In **Sweden** the negotiation system was, for a long time, highly centralised; the framework for overall salary increases, for example, was established by negotiation at inter-industry level. Distribution was then usually decided through negotiations which were subject to the peace (i.e. non-dispute) obligation, first at industry and then at enterprise level. During the 1980s and 1990s, the trend has been towards decentralisation, and negotiations on pay levels and general conditions of employment tend to take place at industry level. Within the framework established at industry level there are negotiations at enterprise or even plant level. In recent years, employers have expressed the wish for agreements on pay and general conditions to be reached locally between the employer and the local trade union.

In the **United Kingdom** the main focus of bargaining in the private sector is at plant and company level. There has been a widespread decline in the extent to which basic pay rates are set by multi-employer negotiations with trade unions. Within the private sector there has also been a decline in local bargaining supplementing multi-employer deals.

The reasons for the lack of collective agreements concluded at European level are clear; the necessary power relations at that level are lacking; neither the European employers' associations nor the trade unions have the necessary mandate from their national members to conclude such agreements. Certain *"enterprise agreements"* can, however, be noted, e.g. *BSN*, *Thompson-Grand-Public* and *Bull*.

CHAPTER 4
CONTENT OF THE COLLECTIVE AGREEMENT

a) The Normative Part

The content of the collective agreement is decided by the contracting parties and consists of individual and collective normative stipulations. The former include wages, cost of living and overtime provisions, fringe benefits (additional holiday pay, sickness benefits etc), job classifications, working hours, time-off, training, job security, safety, non-contributory benefit schemes, etc. Collective normative stipulations relate to worker participation, procedural rules etc. There is, generally, no limit to the possible subject matter of agreements.

Although it is difficult to make general statements in this area, some observations can be made.

In **Belgium** the list of working conditions dealt with by collective bargaining is as follows:

- initiation of new employees at the place of work;
- hours of work;
- annual leave;
- public holidays;
- general criteria for dismissal and engagement;
- guaranteed weekly wage;
- guaranteed monthly salary;
- guaranteed minimum wage;
- transport of workers;
- allowance to supplement benefits payable under sickness-invalidity insurance scheme in the event of incapacity for work;

- information and consultation about general prospects and matters pertaining to employment in the undertaking;
- status of the trade-union delegation;
- facilities granted to workers' representatives on works councils and safety committees;
- collective dismissals;
- payment for extra work or overtime;
- provision of work clothing;
- equality of remuneration;
- pay scales for young workers;
- allowances for certain older workers;
- employment and remuneration of handicapped workers, trainees, temporary workers and students;
- benefits reserved for trade union members only;
- time-off for trade union training;
- justified absences, with or without pay, for discharge of civic duties or to attend to family matters;
- early retirement scheme;
- operation of the guaranteed subsistence fund in the event of unemployment, sickness or accident;
- organisation of shift work;
- work schedules;
- travel allowances;
- grading, promotion;
- pay increments for work deemed to be dangerous, unhealthy or unpleasant.

More recent matters dealt with include:

- the fixing of the guaranteed minimum wage;
- provisions relating to the employment of temporary workers;
- restrictions on supplementary and complementary work;
- recommendations with a view to prohibiting the employment of retired public servants;
- complementary schemes for the payment of early pensions (payable by employers);
- equality in respect of conditions of work for adult and young workers;
- part-time work;
- allowance of time-off to attend further education courses;
- further reduction in working hours;
- the introduction of fixing the conditions of work and remuneration of intermediate-level staff;
- the prohibition or limitation of individual or collective dismissals for economic reasons;
- the re-deployment, re-training and priority of re-engagement for workers laid off by the undertaking;
- the harmonisation of the status of blue-collars and white-collars; and,
- the introduction of new technologies.

In those Member States where negotiations take place at sectoral level, e.g. in **Germany**, particular circumstances in individual companies cannot be taken into account and, thus, negotiations are sometimes of limited relevance for the more prosperous enterprises within the area covered by the agreement.

In **Spain**, there are no obligations as to what the collective agreement must contain. The parties concerned are therefore at liberty to specify the issues they wish to bargain on. As regards the possible or legally acceptable content, collective agreements may, with due observance of the law, cover economic questions, work questions, trade union questions and in general all questions concerning working conditions and the relationship between the workers and their representative organisations on the one hand and the employer and employers' associations on the other. The law distinguishes between the normative and the obligatory parts of the collective agreement, each being treated differently and with different effects: consequences of the expiry of collective bargaining at the end of the ordinary duration, scope of the authorities' sanctioning power in the case of non-execution of the terms of the collective agreement, etc. However, the law does not define what differentiates the normative part from the obligatory part of the collective agreement; in practice, however, problems arise, generally as to the particular nature of one clause or another. Although the legal literature is not entirely consistent in this matter, case law tends to adopt a pragmatic approach of allowing the agreement's normative character or obligatory character to be declared explicitly.

In **France** the law distinguishes between the *"convention collective"* (collective agreement covering all the terms and conditions of employment and remuneration and the social guarantees) and the *"accord collectif"* (collective agreement covering only one or a few themes). However, this distinction has no particular impact, since the conditions governing the formation and effectiveness of the two are identical. The contracting parties are free to decide on the content of the "*convention collective*" and the "*accord collectif*". It is only when its extension is envisaged that the "*convention collective*" must in principle cover a certain number of themes listed in the law.

In **Italy** the majority of collective agreement stipulations concern individual aspects, e.g. wages, benefits, cost of living allowances, job classification, working-time, holidays, and, in part, the protection of union officers. The content and format of these clauses, like the entire agreement in general, are not predetermined by law, but are left to the contractual autonomy of the parties, the single limitations being that collective stipulations contrary to imperative legal norms are null and void, unless they provide for economic and normative conditions more favourable to the employees.

In **Luxembourg** legislation lists a number of items every agreement must contain; e.g. additional payment for night-work, payment for dangerous, unhealthy and difficult work, equal treatment and cost of living allowances.

In the **Netherlands** the distinction between the obligatory and the normative part of an agreement is significant. The obligatory rules relate only to the contracting parties and do not engage individual members. The major part of agreements concern normative stipulations; wages, additional pay, working time, vacations, overtime etc. The agreements may also contain rules concerning worker participation, recruitment policies, investment, etc although this occurs less frequently than in some other Member States. Additional social security is becoming an increasingly important subject for collective bargaining.

In **Austria**, most collective agreement rules concern the mutual rights and obligations arising directly from the contract of employment, e.g. minimum wages, special pay-

ments, bonuses, expense allowances, working hours and periods of notice.

In **Portugal** the law lists certain subjects collective agreements cannot deal with, such as social security benefit schemes. In general the content of collective agreements is here also rather meagre.

In **Finland** the collective agreement is a normative document which, in accordance with the *Collective Agreements Act*, sets out the conditions that are to be applied *"in the employment contract or the rest of the employment relationship"*. According to the Act, a valid collective agreement must be in writing. The usual normative provisions in Finnish collective agreements include those on wages and procedures for setting them, the time and place for the payment of wages, management of work, working time, holidays, layoffs, dismissal and obligation to carry out work. Other provisions that may be included in the normative part are those concerning occupational safety and health, social matters, employee representatives and monitoring and application of the agreement.

According to **Swedish** legislation, collective agreements must govern conditions of employment and the relationship in general between employer and employee. This definition is so broad that it covers all aspects of the employment relationship, i.e. not only pay and conditions of employment but also rights relating to supervisory functions and industrial management. The collective agreement is still the most important form of control in Sweden, although legislation has been playing an increasingly important part in recent decades. Labour legislation contains compulsory rules which the parties cannot reject by agreement, and optional rules which allow the parties to reach an alternative agreement. Specific types of optional rule may be relinquished to the disadvantage of the employee only by collective agreement and not by personal agreement. According to the procedure introduced in implementation of the *EU Directive*, collective agreements may deviate from the law only within the limits laid down in the Directive. In the public sector this means that a collective agreement cannot be concluded on the exercise of public authority or on matters which have to be decided by politically elected bodies. There is no express prohibition, however, and it has proved difficult to make a distinction between political democracy and employee status.

In the **United Kingdom** no distinction is drawn between the normative and obligatory part of a collective agreement. There has been little change in the range of subjects covered by agreements in recent years despite efforts by unions to enter new areas such as equal opportunities.

The material content of the normative part of collective agreements is influenced by the fact that in some countries collective agreements can derogate from legal provisions, e.g. in **Germany**, **Italy** and (on working-time) in **France**. In **Ireland**, however, only in very few cases can agreements have any normative effect, where they are registered according to a special procedure under the *Industrial Relations Acts*.

In a wider sense, it has to be noted that governments also set a number of normative issues, either on a permanent basis or from time to time when a crisis situation has to be mastered.

As far as the first case is concerned, reference can be made to the setting of legal minimum wages in a number of Member States which have to be respected in collective agreements and individual contracts.

In the second case, governments may intervene to ensure the implementation of certain macro-economic policies, e.g. with regard to wage moderation, employment creation, etc.

b) The Obligatory Part

The obligatory part of the collective agreement refers to the rights and obligations of the parties to the agreement. The main obligation is the (relative) peace obligation, according to which neither of the parties is, for the duration of the collective agreement, permitted to initiate industrial action against the other party with the intention of altering the conditions laid down in the agreement.

The peace obligation is recognised in **Belgium**, **Denmark**, **Germany**, **Greece**, **Spain**, **Luxembourg**, the **Netherlands**, **Austria** and **Sweden**. Implementation differs widely amongst Member States.

In **France** there is no peace obligation as such, but a much weaker principle. The *Labour Code* provides that parties to a collective agreement are bound not to do anything which might compromise the faithful implementation of the agreement within the limits laid down in the agreement itself.

In **Italy** there is no peace obligation unless provided for in the collective agreement.

In **Portugal** the peace obligation remains the subject of debate.

In **Finland** the obligatory part of the collective agreement concerns the rights and obligations of the parties to the agreement. Any rules that extend the statutory embargo on strikes and lockouts (*"peace obligation"*) belong here. The *Collective Agreements Act* contains, however, a statutory prohibition on taking action, during the period covered by a collective agreement, against individual provisions of the agreement or against the agreement as a whole. The embargo on strikes and lockouts comprises both an active and a passive part. The active part involves an obligation for the parties to the agreement to ensure that members do not break the embargo, while the passive part involves an obligation to avoid taking measures oneself that break the embargo. Infringement of the embargo may be punishable by a fine (maximum FIM 130 000).

In **Sweden** the peace obligation is binding on the parties to a collective agreement and their members and to members who leave the organisation during the current agreement period. The peace obligation also affects a broader circle. If a peace obligation applies to an area covered by an agreement, outside organisations may not cause, support or be involved in industrial disputes in the area in question. An organisation may not, furthermore, take industrial action with a view to undermining or changing a collective agreement which already exists at the workplace, even if that organisation is not bound by the agreement. The prohibition

applies only to measures associated with working situations to which the *Co-Determination Act* directly applies. Industrial action to reach a collective agreement can therefore be taken against a foreign company which has a collective agreement but which is not associated with the Swedish labour market in such a way that it is covered by the *Co-Determination Act*. The purpose is to counteract social dumping through foreign low-pay competition.

In the **United Kingdom** there is no contractual peace obligation binding on the collective parties. Any term of a collective agreement restricting the right to take industrial action is binding on individual workers only if a number of stringent conditions are met:

- the collective agreement must be in writing;
- it must contain a provision stating that the term shall or may be incorporated in the contract;
- it must be reasonably accessible at his place of work to the worker to whom it applies and be available for him or her to consult during working hours;
- the trade union or unions party to the agreement must be independent; and
- the contract of the worker must expressly or implicitly incorporate the term.

CHAPTER 5
BINDING EFFECT

As far as the binding effect of a collective agreement is concerned, there is a striking difference between the situation in the **United Kingdom** on the one hand and in the other Member States on the other.

In the **United Kingdom** a collective agreement is conclusively presumed not to have been intended by the collective parties to be a legally enforceable contract, unless the agreement is in writing and contains a provision which explicitly states that the parties intend the agreement to be a legally enforceable contract. In practice, this is rare. Although there are some *"single union no-strike agreements"*, with provision for *"binding arbitration"* it is unusual for these to contain a clause making them legally enforceable. There does not appear to be any significant desire on the part of the collective parties for legal enforceability. In most cases however the courts accept that the substantive terms and conditions of the collective agreement (e.g. on wages, hours, etc.) are incorporated into the individual employment contract, but this does not mean that collective agreements are treated as compulsory minimum terms of employment. It is possible for the employer and the individual worker to derogate from the terms implied from the collective agreement.

In **Ireland** collective agreements are generally not considered to be legally enforceable, although court and tribunal decisions have occasionally suggested otherwise; there are, except in very rare cases, no means whereby the agreements can have normative effect. They can however become legally binding at the level of the contract of employment where they are *"incorporated"* into it, a process which is usually achieved through the employee signing a statement confirming the status of an agreement or a series of agreements as terms of his or her employment.

In **Finland** the *Collective Agreements Act* contains a list of those who are bound by the collective agreement. These are on the one hand the parties to the agreement and on the other those who are bound by the agreement without being party to it. They are the members (associations, employers and employees) of the social partners' organisations. The collective agreement as such is not binding on those who are not members of organisations, but an employer who is bound by the agreement must abide by its terms even in his relations with non-union employees.

The *Collective Agreements Act* lays down that the normative provisions of the collective agreement have an automatic binding effect on the employment relationship. This means that a provision of the employment contract that conflicts with a provision of the collective agreement to the detriment of the employees is null and void. The provision of the collective agreement should be applied instead.

An employer who is bound by a collective agreement and who deliberately infringes a normative provision of the agreement or should have realised that he has infringed such a provision may be punishable by a fine (maximum FIM 130 000).

In **Sweden** collective agreements are binding on the parties to the agreement and the members of the organisations which have concluded the agreement. Those bound by a collective agreement cannot legitimately conclude agreements which are in contravention of the collective agreement. Members of an organisation which is bound by a collective agreement are automatically bound by it and anyone who leaves the organisation is still bound by the agreement until it has expired (this also applies to the peace obligation). Collective agreements are, in principle, based on the assumption that the employer may not apply less favourable conditions to employees who are not members of the organisation involved in the collective agreement than to those who are. An employer who fails to comply with this provision may be liable to pay damages to the other party to the agreement – the union. A non-member employee cannot, however, plead rights on the basis of the collective agreement.

In other Member States the normative part of the collective agreement is considered to be legally binding and sets minimum conditions which can be improved upon, e.g. by other collective agreements at a lower level, individual contracts, custom or even at the employer's initiative. This is the case in **Belgium**, **Denmark**, **Germany**, **Greece**, **Spain**, **Italy** (for practical purposes), the **Netherlands**, **Austria**, **Portugal** and **Sweden**.

In **Belgium**, **Spain**, **Luxembourg** and **Austria** the agreement is under certain circumstances binding on all employees, whether or not the employee is a member of the relevant union.

In **Denmark** a collective agreement is binding upon the employer *vis à vis* all employees whether or not they are organised but it is not binding upon unorganised employees. The peace obligation does not bind a non-unionised employee, who can strike without having to pay a *"bod"* (or fine).

In **Spain**, those bargaining on behalf of the employees and employers must be representative, i.e. they must represent

the majority of the employees and the employers. If they are, the collective agreement has a validity *erga omnes*. If they are not, the collective agreement applies only to the employees and employers affiliated to the signatory trade unions and employers' associations.

In **France**, the agreement is binding on the signatory employer or all the employers affiliated to the signatory organisation. It applies to all of their employees, whether or not they are affiliated to the signatory trade unions. In principle, the terms and provisions of the collective agreement must improve on the statutory provisions in favour of the employees; however, on some matters (working hours) the collective agreement may adjust the statutory provisions in a way which is not necessarily more favourable to the employees.

With regard to individual contracts, the collective agreement has an automatic and binding effect: it is equivalent to a mandatory Act.

In **Germany**, **Greece**, **Italy** and the **Netherlands** normative rules in collective agreements only have a legally binding effect on employment relationships when the employee is a member of the contracting union and in **Germany** when the employer is a member of the contracting employers' association. In practice, however, non-union members receive the same conditions as union members.

In **Greece**, the rule is that the collective agreement applies in principle to the members of the signatory trade unions and employers' associations. There are two exceptions to this rule. Firstly, the National General Collective Agreement, which lays down the minimum working conditions, applies to all workers in Greece. Secondly, when the employer is bound by a company-level collective agreement, the terms and provisions of the agreement apply to the contracts of employment concluded with the employer.

CHAPTER 6
DURATION

Due to the autonomy of the contracting parties the duration of collective agreements varies greatly.

In many cases agreements tend to be for a certain period (very often one or two years) and end automatically at the date of expiration.

In **Italy**, according to the tripartite agreement of 23rd July 1993, the duration of the national collective agreement is fixed at four years for non wage clauses and two years for clauses covering pay. The second level collective agreement lasts for four years.

In **France** and the **Netherlands** a maximum term of 5 years is granted for specific topics in the collective agreement .

In **Portugal** the legally prescribed period is two years, with the exception of one year for the determination of pay.

In **Finland** collective agreements can be concluded for a maximum of four years. On the basis of legal practice, the normative provisions of the collective agreement are regarded as having an *"aftermath effect"* even after the agreement has expired. This effect can, however, be overridden if the parties to the employment contract agree that other conditions than those laid down in the collective agreement will apply in the employment relationship.

In **Sweden** collective agreements on pay and general conditions of employment are concluded for a specific period – usually 1-2 years – but there are no specific rules about this. There are also collective agreements which do not cover conditions of employment but govern the relationships between the labour market organisations, e.g. negotiation procedures and industrial action. Agreements of this kind run until further notice, with a specific period of notice, and can be in force for a very long time. Even agreements with a time limit quite often have a clause to the effect that the agreement will automatically be extended if notice of termination has not been given a certain length of time before the end of the contract period. As in the case of contracts, notice of termination of collective agreements must be given in writing.

In a number of cases, framework agreements or agreements providing for general working conditions outside the area of pay may be of indefinite duration, with the option of giving a term of notice. In countries such as **Belgium**, **Germany**, **Greece**, **Spain** and **Austria** the individual normative part remains in effect until the conclusion of a new collective agreement (the aftermath effect).

CHAPTER 7
EXTENSION OF THE NORMATIVE PART

In a number of countries the normative part of the collective agreement may be extended by government decree to all employers and employees within a sector or a branch of industry. In such a case the collective agreement functions as a legal provision.

Extension of agreements is only possible in **Belgium**, **Germany**, **Greece**, **Spain**, **France**, **Ireland** (under certain circumstances), **Luxembourg**, the **Netherlands** and **Portugal**.

In **Greece** an agreement which covers 60 % of the workforce is normally eligible for extension; in the **Netherlands** the same applies for an agreement covering *"an important majority"* of the workforce and in **Germany** one of the criteria for extension is that 50 % of the employees in question are covered.

In **Spain** in branches with difficulties in reaching collective agreements, the *Ministry of Labour* may take the initiative for extension.

In **France** extension of a collective agreement is by directive of the Employment Minister. The procedure leading up to it may have been initiated by the government or at the request of employers' or trade union organisations. The extension makes the agreement applicable to all enterprises – and hence all workers – in the sector in question.

In **Ireland** the agreement may be registered with the *Labour Court*, in which case the terms of the agreement become legally binding on the parties and on all other workers and employers covered by it, even those who were not a party to the negotiations. Registration, however, is rare.

In **Austria** a collective agreement can be declared a statute by the Federal Arbitration Office and thereby become legally

binding outside its scope of application (but only for the same type of employment relationships).

In **Portugal** collective agreements may be extended where there are no employers' associations or trade union organisations involved in concluding them.

When there is a recognised lack of collective bargaining in a sector, a decision may be taken by the Employment Minister to extend to this sector a collective agreement applicable in a closely related sector, following a procedure fairly similar to that governing extensions.

In **Finland** the provisions of the *Employment Contracts Act* on employers' obligation to apply at least the conditions included in a national collective agreement currently in force in the sector mean that there is an automatic mechanism by means of which the national collective agreement as a whole is made mandatory for employers who are not bound by the collective agreement. There is no equivalent obligation for employees to abide by the provisions of the collective agreement.

CHAPTER 8
COVERAGE

One of the most important yardsticks with which to measure the importance of collective bargaining is not so much the number of agreements but the number of employees actually covered. In general one can say that in most cases middle management, executives or higher personnel are covered to a lesser extent by collective bargaining and that collective agreements concern mostly blue and other white collar workers.

In certain countries coverage is wide, e.g. in **Belgium, Germany, Spain, France, Finland** and **Sweden** national or industry wide agreements may cover 80% or more of the total labour force. In **Denmark, Luxembourg,** the **Netherlands** and **Austria** collective agreements cover some 70% of private sector employees.

In **Sweden** collective agreements are binding on the parties to the agreement and, unless otherwise specified in the agreement, also on members of the organisations which are party to it. As so many Swedish employees are members of trade unions and there are inter-trade agreements which cover almost the whole of the labour market, the vast majority of employers and employees are covered by collective agreements. There is no legislation on coverage. As inter-trade agreements directly cover the majority of employees, there has so far been no need for this. Collective agreements, furthermore, also indirectly bind the majority of other employees who belong to a trade union without a collective agreement and non-union labour, because they, either explicitly or implicitly, prevent the employer from applying less favourable rules to outside employees. The idea behind this is that the employer should not be able to acquire cheaper labour by using workers who are not members of the union which concluded the collective agreement. There are, however, collective agreements which accord certain benefits only to members of the organisation which signed the agreement. The rules of a collective agreement may apply even if the employer does not have a collective agreement. The general standards laid down in a trade agreement are often taken to apply to all workplaces in the sector if no other rules have been agreed at the individual workplaces. Supervisory and managerial staff are usually covered by collective agreement – sometimes a special collective agreement, sometimes a collective agreement which includes special rules for employers' representatives. These representatives may not use their union rights in such a way that they are in opposition to the employer when representing him against the employees. Special solutions may therefore have to be found, e.g. in respect of rights relating to disputes.

In the **United Kingdom** there has been a decline in the coverage of collective agreements and other wage-fixing machinery from a peak of 85% of employees in 1975 to less than 50% in the mid-nineties. This has been steeper than the decline in union membership, from a peak of 57% in 1979 to 30% in 1995.

CONCLUSIONS

1. Collective bargaining continues to play an important role in the setting of wages and working conditions in a majority of EC Member States. Coverage, especially by way of national or industry-wide collective agreements, may be 80% or more of the total labour force. Usually middle-management is not covered by a collective agreement.

2. Parties to a collective agreement are usually individual employers and employers' associations on the one hand and trade unions on the other.

3. In the **United Kingdom,** however, workplace bargaining is largely carried out by shop stewards. In other countries, e.g. **Belgium, Germany, Spain** and **Italy,** works councils and/or workers' or union delegates may also engage in collective bargaining, sometimes in the shadow of employers-trade union bargaining.

4. In a number of countries only representative trade unions can be party to a collective agreement. This is the case in **Belgium, Greece, Spain, France, Luxembourg** and **Austria.** In **Germany** a trade union must be represented at more than one plant in order to qualify as a party to a collective agreement.

5. In a number of countries there is no general right or duty to bargain. This is the case in **Belgium, Denmark, Germany, Ireland, Italy,** the **Netherlands, Austria, Finland** and the **United Kingdom.** A duty to bargain exists in **Spain, France, Luxembourg, Portugal** and **Sweden.**

6. Wide differences exist regarding the levels of bargaining. In certain countries, e.g. **Denmark, Germany, Greece, Austria** and **Sweden** and to a lesser extent the **Netherlands,** most bargaining is done at industry level, with enterprise level bargaining being less significant.

   In **Ireland** bargaining is conducted either at a tripartite, national level, or at plant or industry level. In the **United Kingdom,** on the other hand, the main focus of bargaining is at plant and company level.

In other countries, e.g. **Belgium, Spain, France, Italy,** and **Portugal,** bargaining may simultaneously take place at different levels.

In **Luxembourg** negotiation takes place either at enterprise or at sectoral level.

Agreements concluded at European level are very rare.

7. The content of the collective agreement consists mainly of individual normative stipulations, which cover wages and conditions in their widest sense. Mostly there is no limit to the possible subject matter, the (debated) borderline being the area of managerial prerogative. Collective agreements can also contain collective normative stipulations, e.g. concerning worker participation.

8. The peace obligation is recognised in **Belgium, Denmark, Germany, Greece, Spain, Luxembourg,** the **Netherlands, Austria, Finland** and **Sweden.** It is still a subject of debate in **Portugal.**

9. The normative part of the collective agreement is binding and sets obligatory minimum standards in the majority of EC Member countries, e.g. in **Belgium, Denmark, Germany, Greece, Spain, France, Italy,** the **Netherlands, Austria, Portugal, Finland** and **Sweden.**

10. A collective agreement in the **United Kingdom** has, unless provided for, no legally binding effect. It is, as a general rule, a gentleman's agreement which, even when incorporated into the individual employment contract, is not treated as a compulsory minimum term. There is no desire on the part of the collective parties for legal enforceability. In **Ireland** agreements are generally not thought to be legally binding, except when *"incorporated"*.

11. Extension of collective agreements is legally possible in **Belgium, Germany, Greece, Spain, France, Ireland, Luxembourg,** the **Netherlands** and **Portugal.** In **Finland** it is automatically effective when the collective agreements fulfil certain criteria defined in law.

TITLE II
COLLECTIVE DISPUTES

INTRODUCTION

Divergence of interests between employers and employees, possibly leading to industrial conflict, where the freedom or the right to strike and, to a lesser extent, the lock-out take a central place, is inherent in a system of industrial relations in which freedom of labour and freedom of enterprise are guaranteed. Collective bargaining without the right to strike merely amounts to collective begging. In order to channel possible conflicts or even to prevent them from emerging, many forms of handling these situations have been developed. These solutions rarely transfer with ease between Member States. As above, the following comparative exercise will concentrate on the situation in the private sector.

CHAPTER 1
DEFINITIONS

A distinction can be drawn between individual and collective labour disputes.

An individual labour dispute essentially concerns the individual labour relation, while a collective dispute involves several employees acting in combination. A conflict involving one individual may become collective if collective interests are at stake, e.g. freedom of association, when a shop steward has been dismissed without just cause.

Concerning collective labour disputes, a distinction is theoretically made in most Member States between conflicts of interest and conflicts of right.

Whereas the latter concern the interpretation and application of existing contractual clauses, typically involving courts, the former relate to changes in the establishment of collective rules and require conflicting economic interests to be reconciled with a view to reaching a solution on the basis of legal or collective procedures.

In practice, however, this distinction is often of little significance, e.g. in **Belgium, Greece, Spain, Italy, Luxembourg,** the **Netherlands.** In some Member States, e.g. **Ireland** and the **United Kingdom,** no distinction is made at all. In others, e.g. **Denmark, Portugal, Finland** and **Sweden** the distinction is significant.

In **Belgium** the distinction between conflicts of right and conflicts of interest has no practical impact at all. Indeed it is not possible to maintain that there are in Belgium appropriate, exclusive or different ways to settle conflicts of right on the one hand and conflicts of interest on the other hand. Both kinds of dispute can give way to collective action, while certain collective disputes of rights, e.g. concerning the election for works councils, can also be dealt with by the *Labour Courts*.

In **Denmark** a conflict of right cannot be resolved by industrial action but has to be settled through a procedural system, which is subdivided into two branches: industrial arbitration and the *Labour Court*. In broad terms, conflicts over the interpretation of collective agreements are settled by arbitration, whereas conflicts over an alleged breach of the collective agreement, e.g. strikes in violation of the peace obligation, are dealt with by the *Labour Court* (or by the arbitrator if the parties concerned see fit).

In **Germany** the Labour Courts have sole competence for all disputes of right between the parties to collective agreements or between them and third parties.

In **Spain** it is necessary to differentiate between a collective dispute in the strict sense, in which the workers' general interests are implicated, and a plural dispute, which is a collection of individual disputes.

The general interest which characterises the collective dispute is, according to jurisprudence, that characteristic of a category, group or unit in an abstract sense. The size of the

group is unimportant. More significant is that particular workers are affected because of their belonging to a certain category and not because of individual characteristics.

Therefore, the central issue in a collective dispute does not correspond to the special circumstances of each individual, instead it affects a group as a whole. For some jurisprudence, the collective character of any dispute is presumed: *"whose morphology or structure has a reasonable aspect, without being preposterous or false, and the legal responsibility to dispute or prove the contrary of such is given to those who disclaim the said quality"*.

In relation to collective disputes the traditional distinction between conflicts of rights and conflicts of interests is accepted. In the former the meaning or scope of a valid norm, be it legal or agreed upon, is discussed. In the latter disagreements arise over attempts to modify the contractual status quo. The most important consequence of this distinction is that judicial bodies intervene in conflicts of right on the correct interpretation of that being discussed, whilst in conflicts of interest the possibility of solution imposed on the parties is not foreseen.

In **Italy** the distinction between individual and collective disputes and between disputes of right and disputes of interest is diminishing.

Although collective rights disputes may involve groups of employees or employers, they may be brought to court only when divided up into many individual claims (sometimes preceded or substituted by a *"pilot action"*); each court decision is binding only for the individual case. This does not, however, prevent the case decision from influencing both the behaviour of the employer and the decision of another judge (particularly in disputes over job classification, job evaluation and the application of piece-rate work systems). In dispute settlements by agreement, whatever their particular nature, the result is usually extended to all similar cases and, therefore, becomes *"collective"*.

It is true that in Italy interest disputes cannot be resolved by judges or other authorities because they are entrusted entirely to private settlement by the parties themselves (only indirectly helped by public mediation). The reverse, however, is not true. Rights disputes are not left to the exclusive competence of the judiciary. The traditional thesis outlawing strikes aimed at resolving these disputes, on the assumption that they could be properly handled only by recourse to the courts, has been totally abandoned. In fact, most rights' disputes – individual or collective – are handled and resolved by the collective parties through a process of conciliation and negotiation; recourse to a judge is the last resort.

In the **Netherlands** an occasional but uncertain distinction is made between conflicts of interest and conflicts of right.

In **Austria** legal disputes are to be brought before the ordinary courts (Labour Courts), while conflicts of interest can be settled by a conciliation procedure.

In **Portugal** the distinction between conflicts of right (the subject of which is the application of a rule of law) and conflicts of interest (the subject of which is the modification of one or more elements of the contractual status quo) is implicitly contained in the legislation. Conflicts of interest can be settled by conciliation, mediation and arbitration (within the meaning of the Collective Agreements Act), while conflicts of right are settled by the courts or, in the case of a collective agreement provision, by a *"Joint Committee"* (a committee voluntarily established by each collective agreement and composed of the same number of representatives of each of the signatory parties), which in practice has a very weak role.

Article 2 of the new Law of December 1990 stipulates that the two parties to an industrial dispute are entitled to demand a public debate concerning the initiation of strike action.

In **Finland** there is a special *Act on mediation in labour disputes (No 420/1962)*. It is aimed at encouraging the resolution of conflicts of interest between the parties to collective agreements. For this purpose there is a national mediator and an appropriate number of district mediators. Their tasks are generally to foster relations between employers and employees and their organisations, but above all to try to mediate in cases where notice of a stoppage has been given in order to prevent open conflict.

The distinction between conflicts of right and conflicts of interest is important in **Sweden**. A conflict of right cannot be resolved by industrial action. It has to be settled in the first place by negotiation between the parties – usually at local level initially and then, if the parties cannot agree, at federation level. If the parties are unable to resolve the conflict by negotiation, the case may then be taken to the labour court. The parties are thus usually required to have negotiated before taking the case to the *Labour Court*. Conflicts of interest are also solved in the first instance by negotiation between the parties but, in this case, it is not possible to appeal to an outside decision-maker as a last resort. Instead, the parties can put pressure on one another through industrial action. They can also call on a mediator to help solve the problem.

In the **United Kingdom** the distinction between collective and individual labour disputes, and between disputes of interest and of right, is of little practical relevance. The same applies to **Ireland**.

In **Ireland** the *Industrial Relations Act 1990* introduced major reforms of industrial relations, dispute settlements and Trade Union Law. The trade dispute is defined as *"any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment of any person"*.

In the **United Kingdom** the crucial concept is the *"trade dispute"* because certain acts, which would otherwise be unlawful, are protected from civil liability provided that they are *"in contemplation or furtherance of a trade dispute"*. The definition of a *"trade dispute"* has been narrowed since 1980 so as to restrict the area of immunity. It is limited to a dispute between workers and their own employer, so excluding disputes where the employer's own workers are not in dispute, demarcation and inter-union disputes, and political action against the government. Moreover, the dispute must relate wholly or mainly to one or more of the matters which constitutes the subject of matter of collective bargaining (e.g. terms and conditions of employment, recruitment, termination or suspension of employment, allocation of work,

matters of discipline, facilities for union officials, machinery for negotiation or consultation).

CHAPTER 2
PREVENTION AND SETTLEMENT OF DISPUTES

a) Conciliation and Mediation

(see also Part I, Title IV, Ch. 1)

The autonomy of the parties in establishing terms and conditions of employment has considerable influence on the way in which industrial disputes are prevented and settled in the Member States. The predominant system is conciliation or mediation, the rules of which are in many cases laid down by the parties themselves. The purpose of the conciliation or mediation procedure is to bring the parties together to reach an agreement.

Conciliation and mediation arise from and have their legal base in the obligatory part of the collective agreement, which allows the parties to stipulate mutual relations, rights and duties. In a number of countries the peace obligation is closely related to this and principally requires the parties not to take industrial action for the duration of the agreement aimed at changing any or all of the matters they had agreed upon when concluding the agreement.

Government mediation and conciliation services (or the *Labour Relations Commission* and the *Labour Court* in **Ireland**) are available in all Member States, with the exception of the **Netherlands** but they, in most cases, have a secondary role. Their purpose is to bring the parties together to conclude an agreement which will usually have the same effect as a collective agreement (*see Table 14 below for details*).

In **Belgium** union delegations and joint committees (composed of representatives of employers' associations and trade unions operating at industry level) play a primary role in the prevention and settlement of industrial disputes. If the employer and the union delegation cannot settle the dispute, they will call in the unions and the employers association(s). If no solution is reached the matter will be referred to the conciliation committee of the joint committee. Governmental conciliators play a role in bringing the parties together and may act as chairperson of the joint committees.

In **Denmark** disputes of interest will primarily be resolved by bargaining between the parties. The proceedings for such bargaining can be formalised by the conclusion of special agreements. The *Public Conciliation Service* will assist the parties in their bargaining and will seek to ensure agreement.

In **Germany** parties to collective agreements in most industries have formal conflict-settlement procedures to begin following the failure of negotiations. The mediation agreement obliges the parties to take part in the proceedings. Compromise proposals have to be accepted by the parties and have the same effect as a collective agreement. If no mediation agreement exists, or the agreed-upon mediation fails, the parties are free to take the conflict to state mediation. The latter plays in practice only a very minor role.

In **Greece** the conciliator, who is an official of the central *Ministry of Labour* or of the *Regional Labour Inspectorate* endeavours to resolve any industrial relations dispute. The mediation procedure is for cases where the negotiations to conclude a collective agreement fail. The parties are free to choose the mediator. If they do not do so a mediator is chosen, within the 48 hours following the lodging of the request for mediation, from the list of mediators and arbitrators drawn up every three years by the *Mediation and Arbitration Service* (if there is disagreement on the choice of mediator, a name is drawn from the list at random).

The parties have 20 days to reach an agreement with the help of the mediator. If they fail to do so, he submits his own proposal to them. If the mediator's proposal is rejected the arbitration procedure is launched. If the proposal is accepted the mediator invites the parties to sign it. The duly signed proposal has the same status as a collective agreement.

In **Spain** conflict resolution is in the first instance the responsibility of the parties themselves. Part of the mandatory content of the collective agreement is the establishment of the Joint Collective Agreement Committee, for the settlement of any disputes arising from application of the agreement. Conciliation and mediation are the official responsibilities of the Labour Inspectors and the administrative authorities. The agreements reached have the status of a collective agreement. In certain Autonomous Communities (the Basque Country, Galicia, Catalonia), multi-industry agreements have been concluded between the most representative trade union and employer organisations, which have introduced conciliation and mediation procedures in the case of collective disputes, with the government of the Autonomous Community providing financial support and resources. In January 1996 the trade union and employers' confederations concluded a national agreement for the out-of-court settlement of collective disputes, which opens up great possibilities of developing this type of conciliation and mediation procedure. Under the terms of this agreement, the parties concerned undertake to enter into obligatory mediation whenever one of them requests it, whereby the implementation of this mediation procedure temporarily suspends the possibility of giving in to pressure and in particular of launching a strike.

In **France** little or no use is made of the legally foreseen conciliation, mediation and arbitration procedures. However many industry-level collective agreements provide for a permanent conciliation committee. If no agreement exists or when an agreement is not applied, parties may be invited to an official conciliation committee at the request of one of the parties. The agreement between the parties can only be voluntary. There are national, regional and departmental conciliation committees. Mediation is always possible, after or outside of any conciliation procedure, following a proposal by the authorities or upon the request of one of the parties. The mediator will issue a set of proposals, which the parties are then free to accept.

In **Ireland** a conciliation service is provided by the Labour Relations Commission to assist parties to a dispute where direct negotiations under free collective bargaining have failed. Because there is no element of compulsion, efficiency depends almost entirely on the measure of co-operation forthcoming from the parties themselves. If agreement is not reached at conciliation a trade union may ask the *Labour Court* to investigate the dispute and to make a recom-

mendation for resolving it. The union will have to accept the recommendation. If both parties request the Court, they are under no legal obligation to accept the recommendation.

In **Italy** the conciliation procedures provided for in most national collective agreements are generally very effective in settling the large majority of conflicts arising out of the application of the agreements themselves. An important role has been played in the past few years by public conciliation and mediation in order to settle both disputes of right and conflicts of interest.

In **Luxembourg** legislation provides for conciliation and mediation. Parties are free to accept or reject proposed solutions. If accepted, these solutions are equal in status to collective agreements.

In the **Netherlands** conflicts are normally resolved by the parties themselves, or with the help of an *ad hoc* mediator. No formal machinery exists to promote the settlement of labour conflicts, save for the public sector.

In **Austria** the parties to a collective agreement can call upon the Federal Arbitration Office to mediate. The Federal Arbitration Office can only make an arbitration award for settlement of the dispute if both parties have previously undertaken in writing to abide by the award.

In **Portugal** both mediation and conciliation procedures exist. In cases of mediation the parties choose the mediator themselves; conciliation is initiated at the request of either or both parties or by the *Ministry of Labour*. Only conciliation plays an important role in practice.

Mediation in **Finland** is based on the *Act on mediation in labour disputes*, which lays down that a stoppage, i.e. strike or lockout, may not be initiated on account of a labour dispute if the national mediator has not been notified in writing at least two weeks in advance. The aim here is to give the mediator an opportunity to enter into negotiations with the parties in an attempt to settle the dispute. In certain exceptional cases where it is in the public interest, the Ministry of Labour can also bring forward the time for the beginning of the stoppage. Under the Act it is obligatory for the parties to take part in the negotiations conducted by the national mediator. On the other hand, compulsory conciliation is not possible under Finnish law. Neither of the partners can be forced to accept any conciliation proposals.

There is in **Sweden** a special state-sector conciliation institute which can appoint a conciliator to help management and labour to achieve a negotiated settlement where industrial action is imminent or has been undertaken and where, in the opinion of the conciliation institute, a conciliator could contribute to resolving the dispute. In most cases, the conciliator is appointed at the request of one or both parties to the dispute. Swedish legislation does not differentiate at all between *"conciliation"* and *"mediation"*. Legal texts use both concepts without any particular distinction. Conciliation is the normal procedure within the Swedish labour market in cases where the two sides of industry do not appear to be in a position themselves to resolve a conflict of interest. Conciliators have no powers. The only obligation on a party is that of attending any meeting called by the conciliator. The latter can rely only his own authority and creativity, together with the parties' desire to reach an agreement. In virtually all contractual disputes, the parties do reach agreement with the conciliator's assistance.

In the **United Kingdom** conflicts between the parties are first subject to bargaining and conciliation between the parties themselves. The most important form of governmental intervention in *"trade disputes"* is the *Advisory, Conciliation and Arbitration Service* using methods of conciliation, inquiry and arbitration with the consent of both parties.

b) Arbitration

(see also Part I, Title IV, Ch. 1 and Table 14 below for details)

Arbitration plays an important role in **Denmark, Germany, Greece, Spain** and **Luxembourg.**

In **Denmark** compulsory arbitration is laid down by collective agreements in cases of conflict over the interpretation of a collective agreement.

In **Germany** conflicts between the works council and the employer are to be resolved by an arbitration committee. Strikes and lock-outs are illegal.

In **Greece** the law stipulates four situations in which arbitration may be used:

a) by common agreement between the two parties in the course of the collective bargaining;
b) at the initiative of one of the parties, provided the other party has rejected mediation;
c) at the initiative of the trade union organisation accepting the mediator's proposal rejected by the employers' side;
d) at the initiative of the side accepting the mediator's proposal rejected by the other side (but this applies only to company-level collective agreements or collective agreements for organisations recognised as being of public benefit).

When mediation fails, each party can ask for official arbitration, which then becomes obligatory. In cases of important conflict, the *Minister of Labour* may call upon arbitration even before the mediation procedure has taken place. The decision of the arbitration board is equal to a collective agreement.

The arbitrator is chosen by common agreement between the parties from a special list of arbitrators, and is drawn at random if they cannot agree. He delivers his decision within 10 days following mediation (if there is no mediation in the next 30 days). The arbitral award has the same legal status as a collective agreement.

In **Spain** voluntary private arbitration is possible but not widely used. The two parties can ask the public authorities to arbitrate. In exceptional cases, obligatory arbitration may be imposed; the government can impose obligatory arbitration in the case of a protracted strike, taking into consideration the negative repercussions of the strike in question, the positions of disputing parties and the damage to the national economy. Rights disputes are brought before the *Labour Court*.

In **Luxembourg** arbitration is voluntary.

In **Austria** arbitration is used essentially in the same way as in Germany, but only for matters that can be settled by enforceable works agreements (e.g. the distribution of working hours over the week).

Arbitration is used to only a very limited extent within the **Swedish** labour market and only on a voluntary basis; there is no such thing as compulsory arbitration. Nevertheless, there are certain particular issues regulated by collective agreements, such as contractually-regulated insurances and piece-work rates, where the agreement states that arbitration should be resorted to in the event of a dispute. Arbitration to resolve a conflict of interest is very unusual.

In the **United Kingdom**, where a trade dispute exists or is expected, the *Advisory, Conciliation and Arbitration Service* may appoint one or more persons to mediate or to arbitrate, provided at least one party requests such a reference and both parties consent. Disputes may also be referred to the *Central Arbitration Committee*. The decision is not legally binding but the parties nevertheless embark on the procedure on the understanding that they will abide by whatever decision is reached.

TABLE 14: PREVENTION AND SETTLEMENT OF INDUSTRIAL DISPUTES IN THE MEMBER STATES

COUNTRY	CONCILIATION, MEDIATION AND ARBITRATION
Belgium	Special conciliation Committees of joint sectoral Committees often being chaired by government officials
Denmark	Bargaining between parties assisted by public compulsory arbitration laid down by collective conciliation service agreement over the interpretation of collective agreement
Germany	A conciliation committee can decide for the purpose of settling differences of opinion between employer and works council; in most industries agreed settlement procedures exist when collective bargaining was not successful; state mediation is possible.
Greece	Mediation by a special corps of mediators. Voluntary arbitration at the initiative of the parties, both during the collective bargaining process and during the mediation process, subject to certain conditions laid down by law. The arbitral award has the same status as a collective agreement.
Spain	*Joint Collective Agreement Committee* set up by the social partners; conciliation services provided by the public authorities. Private voluntary arbitration is rarely used. The two parties may ask the public authorities to arbitrate. There are important multi-industry agreements which introduce obligatory mediation procedures prior to strikes.
France	Permanent conciliation Committee provided for in agreements; rarely used possibility of official conciliation
Ireland	Conciliation services provided for by the *Labour Relations Commission*; the process is not binding. The *Labour Court* provides a service known as *"investigation of disputes"* (mediation); the recommendations are not generally binding.
Italy	Conciliation procedures in agreement; public conciliation services
Luxembourg	Legislation provides for obligatory conciliation; arbitration is voluntary; parties are free to accept proposed solution
Netherlands	Solution by bargaining with the help of ad-hoc Committees; no formal machinery
Austria	Compulsory arbitration partially provided for by law to settle disputes concerning the conclusion, modification or cancellation of works agreements. State arbitration possible in the case of collective agreements.
Portugal	Conciliation (provided by the Ministry of Labour), mediation and voluntary arbitration, or even obligatory arbitration. There are also joint committees set up by the collective agreements.
Finland	A national mediator conducts obligatory conciliation proceedings when there is a threat of a stoppage. The parties are free, however, to accept or reject the conciliation proposals.
Sweden	Where there are conflicts of interest, the parties can receive assistance in resolving the dispute from one or more state conciliators. A conciliator is appointed if industrial action is imminent or already underway and it is considered that conciliation will help to resolve the dispute. Conciliators have no powers over the parties.
United Kingdom	Solution by bargaining, assisted by the *Advisory, Conciliation and Arbitration Service* (ACAS). ACAS may provide arbitration provided that at least one party requests it and both parties consent; with consent of both parties disputes may also be referred to the *Central Arbitration Committee*, whose decision is not legally binding but normally followed.

CHAPTER 3
INTERVENTION BY THE COURTS

Intervention by the courts in collective disputes is an important feature in **Denmark, Germany, Greece, Spain, Ireland,** the **Netherlands, Portugal, Sweden** and the **United Kingdom** and is increasing in **France.**

In **Denmark** the *Labour Court* deals with conflicts over alleged breaches of the collective agreement and can impose fines.

In **Germany** the *Labour Courts* have exclusive competence to judge upon conflicts of right. Where necessary the Labour Court will intervene by way of injunction in order to prevent disproportionate damages. The same applies in the **Netherlands** and in **Ireland.**

In **Spain** the courts play an important interpretation role in collective disputes, in particular in disputes concerning the legality of the collective agreement or the simple interpretation of particular clauses. In certain cases, even under the disguised form of a conflict of interpretation, the judge could rule on a conflict of interests.

In **France** disputes concerning the interpretation or application of a collective agreement may be brought before the courts. In other disputes the courts occasionally intervene at the request of one of the parties, not to settle the dispute but to assess, having regard to principles or certain rules, the behaviour of the other party. The judges will sometimes nominate an observer or organise a negotiation process.

In **Austria,** as in Germany, the courts are competent to deal with disputes of rights. A special peculiarity of judgements in labour law cases is that the appeal against judgments given in the Court of First Instance in cases relating to protection against dismissal, and against judgments given by the Court of First Instance relating to claims arising from the termination of the employment relationship and judgments arising from employee representation matters, has no suspensory effect.

In **Sweden,** the *Labour Court* has jurisdiction for all legal disputes concerning collective agreements and other labour disputes, but never in a conflict of interests.

In **Finland** the Labour Court has jurisdiction in matters concerning alleged infringements of the embargo on strikes and lockouts based on the *Collective Agreements Act*.

An important intervention by the law in collective labour disputes takes place in the **United Kingdom** where the *High Court* may issue injunctions before, during or after the trial of an action. The most common form of injunction in such disputes is interlocutory, that is pending trial of the action.

CHAPTER 4
STRIKES

(*see Table 15 below*)

a) Freedom or Right

Although the right to strike was described by a leading British judge in 1942 as *"an essential element in the principle of collective bargaining"*, in a number of Member States there is no legally guaranteed right to strike.

The right to strike is explicitly recognised in the constitutions of **Greece, Spain, France, Italy, Portugal** and **Sweden**. There is also a right to strike in **Belgium**, in **Germany, Ireland, Luxembourg** and the **Netherlands**.

In **Denmark, Ireland, Austria** and the **United Kingdom** there is a freedom rather than a right to strike. In **Ireland** and the **United Kingdom** strike action is protected by certain immunities established by law. These immunities have been severely reduced since 1980 in the **United Kingdom**.

In **Ireland** while they have not been substantially reduced, strike immunities have been subjected to a greater degree of legal regulation. The proposal made in 1986 to change the Irish system from one of immunities to one of rights was not adopted in the *Industrial Relations Act 1990*.

In **Austria** the State's position on industrial action is neutral, striking being neither protected nor forbidden. The Austrian social partnership model has meant that strikes have not been an issue in Austria in recent decades. However, the separation of the legality of collective industrial action from individual industrial action is frequently criticised.

The right to strike belongs in most Member States to employees who organise their interests collectively. Individual actions are mostly excluded. In **Germany, Greece** and **Portugal** the right to strike belongs to the trade unions; in the latter case workers' collectives also have this right in situations where no trade unions exist. In some countries the right to strike is not defined.

In **Finland** there is first and foremost a freedom to strike. The right to strike is not guaranteed by the Constitution.

In **Sweden**, there is a constitutional right to undertake or organise industrial action. This applies to associations of employees and employers and to employers; individual employees are thus excluded. This right can be limited by legislation or by a collective agreement.

b) Lawful and Unlawful Strikes

The fact that there is a freedom or a right to strike does not mean that all forms of strike action are acceptable.

In **Belgium** the following are held to be unlawful: the work-to-rule; the go-slow and other forms of passive action; political and wild-cat strikes. Solidarity strikes are legal. The lawful strike suspends the individual employment contract. Special legislation provides for protection of essential supplies and services.

In **Denmark** there is freedom to take industrial action with the qualification that the goal to be obtained must be proportionate to the means used to obtain it. In case of conflicts of right, strikes are unlawful. Sympathy action is legal if provided for in collective agreements. Political strikes are illegal, as are generally, go-slows. There are no specific rules concerning the protection of essential services.

In **Germany** the leading principles for a strike to be legal are:

- the strike must respect the peace obligation;
- the strike must be preceded by a secret ballot of union members;
- the strike must be fair;
- the strike must be taken as a last resort.

Only in exceptional cases will the solidarity strike be legal, while the political strike is illegal. The strike suspends the employment contract. It is generally agreed that essential services and supplies must be kept going during industrial action

In **Greece** trade disputes are legal as are sympathy strikes in support of legal strikes, when the latter have consequences on the interests of the sympathy strikers. Lawful strikes lead to the suspension of individual employment contracts. Essential services are protected during strike action by legislation. The *Protection of Trade Union Rights Act of 8 December 1990* allows the dismissal of workers engaged in unlawful industrial action and to change the rules for the maintenance of essential services in public utilities during strikes.

In **Spain** a strike, in order to be legal, must be connected with a labour dispute. Political strikes are illegal, although case law defines the term *"political strike"* very narrowly, so that strikes which result from legislative reforms in the areas of social security and employment, or from government decisions in matters of economic, employment or social security policy, and which exert licit pressure on the public authorities, are deemed entirely lawful. In principle, secondary or sympathy strikes are illegal, unless the occupational interests of the workers are at stake. Sit-ins, occupations, works-to-rule and strikes in strategic sectors are presumed *iuris tantum* to be illegal because improper, unless it can be proven to the contrary that there is no intention to inflict disproportionate damage; however, intermittent strikes are presumed to be legal *iuris tantum* unless there is proof to the contrary that they are improper, in which case they would be declared illegal. Thus, a strike aimed at changing the terms and provisions of a collective agreement still in force is deemed illegal, unless the strike is aimed at achieving something other than novation of the agreement; thus, a strike is illegal throughout the period of validity of an agreement containing a social peace clause. A legal strike does not terminate the employment contract but merely suspends it. The Government can take measures to protect the country's essential services during a strike; this is one of the most sensitive issues for the development of a certain

type of strike, not only as regards proving that the activities are essential for the community but also as regards the intensity of the measures that the Government can adopt.

In **France**, in principle, the only types of strike that are legal (i.e. protected under the constitutional right to strike) are those in support of employment-related demands. But this latter concept is interpreted broadly. In practice, the condemnation of political strikes as illegal is now of little more than historical interest.

To enjoy constitutional protection the strike must involve a stoppage of work. It must be collective, but the sole employee of an enterprise has the right to strike. The stoppage of work must be in support of employment-related demands, which means that solidarity strikes which do not extend such demands are excluded from constitutional protection. Occupying work premises is, in principle, illegal, but does not always justify dismissal of the strikers.

Legal strikes suspend the strikers' employment contracts. The limit of the protection is found in the concept of gross misconduct.

In **Ireland** the *Industrial Relations Act 1990* sets out the basic statutory immunities; the Act protects those organising industrial action against tortuous liability in relation to: conspiracy; peaceful picketing; inducement of breach of contract of employment; or interference with the trade, business or employment of another provided in all cases that the act is done by a person *"in contemplation or furtherance of a trade dispute"*. The action of participating in the strike as such is not however protected, and may amount to a breach of the contract of employment, or at least may lead to a suspension of it. The decision of an employer to dismiss all strikers is unfair only to the extent that it is selective: i.e. a decision to dismiss all strikers may not amount to an unfair dismissal. In addition, the immunities set out above do not apply to industrial action conducted without a prior secret ballot or in disregard of its outcome, or in breach of agreed or customary strike and grievance procedures. Sympathetic and secondary action is to some extent included within the immunities.

In **Italy** political strikes directed against the government are not per se illegal. The sympathy strike is legal provided that there is a community of interests between the workers involved. Rotating strikes and go-slows are not illegal per se. Sit-ins and occupations are considered illegal under civil law. A legal strike suspends the execution of the individual employment contract.

In **Luxembourg** trade disputes, in order to be legal, have to be preceded by conciliation. The sympathy strike is of uncertain legality. A legal strike suspends the individual labour contract.

In the **Netherlands** a strike is, generally, legal provided that all employees of the enterprise or of the sector participate and that it is directed against the employer or the employers' organisation. The proportionality element is, however, an important criterion. Occupations and sit-ins are of uncertain legality. The strike suspends the execution of the employment contract. There is no legislation concerning essential services but strikes in essential services may be illegal.

In **Austria** industrial action is neither especially protected nor prohibited. It must therefore be assessed on the basis of the general provisions of civil law and penal law. In the process, a distinction must be made between industrial action as *"collective action by the strikers"* and the individual striker. Collective action is unlawful if it contravenes a valid contract, a legal prohibition or public morals. The participation of the individual employee or employer in the action is unlawful regardless of the legality of the collective action (and thus constitutes a breach of the contract of employment) if the employment relationship has not been terminated with the required period of notice. Breach of contract entitles the employer to dismiss the employee for persistent breach of duty and the employee to resign with substantial reason.

In **Portugal** the limits to the right to strike are not clear. During a strike trade unions and workers have to maintain services necessary for the safety and the maintenance of equipment and installations, whilst the Government has the power to requisition workers in order to secure the regular functioning of essential services.

In **Finland** the *Collective Agreements Act* is based on the fact that the statutory embargo on strikes and lockouts is relative. Only action directed against either an individual provision of the collective agreement or the agreement as a whole is forbidden. In practice, the embargo has been applied extensively, and in periods when an agreement is in force it is as good as absolute, with two exceptions: political demonstrations and, with certain restrictions, sympathy strikes are allowed.

During periods when no collective agreement is in force, there is extensive freedom to take industrial action. Unlawful strikes may, however, be deemed to give rise to liability to damages, but such issues have rarely arisen in practice.

For industrial action to be legal in **Sweden**, it must have been decided by a duly constituted organisation. The law on strikes is thus collectively framed. In the absence of a collective agreement, the action taken is to a large extent not subject to legal restrictions. Where a collective agreement does apply, there is in general an embargo on strikes but with some exceptions. The most important are sympathy strikes on behalf of another group conducting legal industrial action and picketing of an employer to force him to meet a clear and outstanding wage demand. Sympathy action may not have any independent motive of its own.

It is always an illegal act for an employer in a dispute to retain outstanding wages. There is a special law banning an employer from evicting an employee from tied accommodation during the course of a dispute. Criminal offences under general legislation, such as criminal damage, are of course also illegal when conducted during a labour dispute. Public-sector workers with administrative responsibilities are limited to certain kinds of industrial action, including strikes, lockouts and refusal to work overtime.

Further limitations may be found in collective agreements, such as those to protect one-man and family businesses, third parties and certain activities. A common provision of collective agreements is that industrial action may not be taken until the obligation to negotiate has been complied with.

As far as the legality of political action is concerned, public-sector workers are banned from taking action designed to

influence domestic political circumstances. Otherwise, the legal situation is somewhat vague. Case law reveals some scope for measures with a foreign political background, provided these are short-term protest or demonstration measures. With respect to sympathy action on behalf of a foreign party, the principle is that sympathy measures in Sweden are permissible provided the foreign dispute is legal under that country's labour legislation. The legal situation is less clear where the foreign dispute is illegal.

There is no requirement under Swedish legislation that industrial action should be appropriate, in proportion to the situation or socially justified. Nor is there any requirement to maintain vital communal services. In collective agreements the social partners have set certain limitations on behaviour presenting a danger to society. It is very clear that the government can ultimately intervene through legislation to put an end to a dispute seen as endangering society.

Legal industrial action suspends rights and obligations under the employment agreement for the duration of such action but the employment relationship continues. Legal industrial action cannot be a basis for dismissal. One exception, however, is where the dispute has continued for such a long period as to threaten the existence of the undertaking. Nor, under normal circumstances, is illegal industrial action an objective ground for dismissal. Under particularly serious circumstances, however, this may be the only way of resolving an illegal dispute.

In the **United Kingdom** a major part of the Government's strategy since 1980 has been to severely restrict the scope for lawful industrial action. This has taken place against a background of no legally guaranteed positive right to strike in the United Kingdom. There is no right of the individual to withdraw labour in combination with others. Industrial action is regulated by a series of common law wrongs, chiefly in tort (or delict in Scotland). These wrongs are restricted by a number of specific immunities from liability in tort where the action is taken *"in contemplation or furtherance of a trade dispute"*. Since 1980 major restrictions have been placed on lawful action by introducing *"step-by-step"* legislation which has whittled away the immunities so exposing an ever-widening area of industrial action to civil law liabilities. The torts and related wrongs have themselves been expanded by judicial interpretation.

Among the important liabilities are the following:

- an individual who takes part in a strike breaks his or her contract of employment, regardless of the circumstances which provoked it. The same applies to most action short of a strike. This is not protected by any immunity;
- an employee who is dismissed for participating in an strike may not claim unfair dismissal at all if the strike is unofficial, i.e. not authorised by a trade union, and may not claim unfair dismissal in respect of taking part in an authorised strike if all the relevant striking employees are dismissed; this protection against selective dismissal (e.g. as a strike leader) applies for only three months;
- the immunities for a trade union or individual who instigates or organises a strike are limited to certain specific torts, such as inducing a breach of contract or interfering with its performance, or threatening to do so;
- the immunities do not apply to secondary industrial action, or to action to enforce union membership or recognition, or action in response to the dismissal of unofficial strikers, or if the action takes place in breach of the complex requirements for a ballot.

Immunity in the **United Kingdom** is limited to disputes between workers and their own employer; and picketing is lawful only in small numbers by workers at premises of their own employer. The dispute must relate to matters which can be dealt with by collective agreement, making political strikes, in the broad sense, unprotected as well as placing hints on solidarity actions.

Since 1982, it has been possible for unions to be held responsible for torts committed by officers and members, if the action is authorised or endorsed by the union executive or principal officers.

Ballots are required before industrial action can be authorised or endorsed by a trade union. There is no general provision restricting industrial action in *"essential services"*, but in November 1996 the Government made proposals for restricting such strikes.

CHAPTER 5
LOCK-OUTS

(*see Table 15 below*)

Lock-outs by employers generally do not enjoy the same protection as the right or freedom to strike. Some Member States distinguish between offensive and defensive or retaliatory lock-outs.

In **Belgium** the *Supreme Court* has declared that there is a right to lock-out and that calling a lock-out does not in itself constitute an improper action. It appears, however, that the lock-out would only be legal in the case of an Act of God or of non-execution by the employees of their obligations under the employment contract.

In **Denmark** there is legal parity between the workers and the employers in the sense that the employer has the same right to lock-out as the workers have to strike.

In **Germany** the Federal Labour Court favours an asymmetric view, i.e. strikes and lock-outs need to be treated differently in order to retain the balance of bargaining power. If, in a region covered by a collective agreement, only a small proportion of the workers is on strike, a lock-out may threaten employer solidarity and thereby have adverse effects on competition.

If less than 25% of workers are on strike than the employers may lock-out another 25%. If between 25 and 50% of workers are on strike the employers may lock-out up to a total of 50% of the workforce. If 50% or more workers are on strike no further lock-out is allowed. The offensive lock-out is illegal.

In **Greece** the lock-out is prohibited by legislation.

In **Spain** the defensive lock-out is recognised in cases of strike action or irregular work performance where exceptional circumstances such as threats of violence exist; the

same applies in cases of sit-down strikes, occupations or other irregularities which greatly impede the normal work process. In practice, the circumstances in which employers resort to lock-outs are very exceptional.

In **France** the general principle is that the lock-out is unlawful. Exceptionally it becomes lawful where industrial conflict makes it impossible for the company to operate and for safety reasons.

In **Ireland** there is no specific statutory regulation of lock-outs, but where appropriate the immunities under the *Industrial Relations Act 1990* may protect employers as well.

The **Italian** *Constitution* does not refer to the lock-out. The retaliatory lock-out, i.e. the reaction to employees' violation of contract or refusal to accept irregular work, has traditionally been regarded as legal. The lock-out caused by the impossibility of continuing work (e.g. due to a rotating or partial strike forcing groups of non-strikers to be idle through lack of supplies) is clearly recognised as legal.

In **Luxembourg** the lock-out is recognised but its legal status is uncertain.

In the **Netherlands** lock-outs are not regulated by statute and their legal position is unclear.

In **Portugal** all lock-outs are prohibited by the Constitution.

In **Finland** the freedom to take industrial action also applies to lock-outs by employers, which have happened in practice, mainly in retaliation against industrial action by employees.

In **Sweden**, lock-outs and strikes are both classed as industrial action.

In **Ireland, Austria** and the **United Kingdom** for most legal purposes the character of the action as a strike or as a lock-out is of no practical significance.

TABLE 15: RULES FOR STRIKES AND LOCK-OUTS

COUNTRY	POLITICAL STRIKE	SOCIO-POLITICAL STRIKE	INDUSTRY STRIKE	SYMPATHY STRIKE	ACTIONS SHORT OF STRIKE	EFFECTS	LOCK-OUTS
Belgium	Legality contested		Legal	Legal	Not legal	S.i.e.c.	Permitted under restrictive condition
Denmark	Same rules as for industry strikes			Legal, if provided for in collective agreement	Generally not legal	Breach of employment contract	
Germany	Not legal			Only exceptionally legal	Not legal	S.i.e.c.	Defensive lock-out may be justified
Greece	Not legal	Allowed	Legal	Legal, if linked to the interests of industry strikes		S.i.e.c.	Prohibited by law
Spain	Not legal	Allowed	Legal	Legal, if linked to the interests of industry strikes	Not legal	S.i.e.c.	Defensive lock-out recognised under exceptional circumstances
France	Not legal	Allowed	Legal	Legal if the strikers can claim an occupational interest		S.i.e.c.	Lock-out normally unlawful except in emergency cases
Netherlands	Not legal	Allowed	Legal	Legal			
Finland	No restrictions (allowed in legal practice)	No restrictions (allowed in legal practice)	No restrictions when no collective agreement in force	No restrictions (allowed in legal practice)	Same rules as for industry strikes	S.i.e.c.	No restrictions when no collective agreement in force
Sweden	Not permitted for public-sector workers where it involves domestic politics. Otherwise, legal position is unclear	–	–	Permitted in support of legal primary action	Picketing, boycotts and other comparable action is permitted	S.i.e.c.	Same rules as for strikes

S.i.e.c. = suspension of individual employment contract

CONCLUSIONS

1. In the area of industrial conflict there are wide differences between national systems and few possibilities for harmonisation. Law on industrial conflict touches upon the delicate balances of power developed over long periods in industrial relations systems.

2. In most Member States the distinction between conflicts of interest and conflicts of right is of little practical significance. In **Denmark, Germany, Austria** and **Finland**, however, the distinction has meaning and consequence. Disputes of rights cannot be settled by strike or lock-out but by arbitration or by the courts. In **Portugal** conflicts of interest can be solved by conci-

liation, mediation or arbitration; conflicts of right by courts or joint committees.

3. The predominant system in the settlement of industrial disputes is undoubtedly conciliation or mediation. This is mainly the consequence of the autonomy of the social partners in establishing the terms and conditions of employment by way of collective bargaining. The most significant conciliation and mediation is done between the parties themselves.

4. Government mediation or conciliation services are available in all Member States (with the exception of the **Netherlands**) but in most cases have only a secondary role. Their purpose is to bring the parties together with the aim of concluding an agreement, which, if achieved, will usually have the same effect as a collective agreement.

5. Arbitration plays a role in the settlement of collective disputes in **Denmark, Germany, Greece, Spain, Ireland, Luxembourg, Finland** and the **United Kingdom**. It is only in **Denmark** (conflicts of rights), **Germany** (conflicts between works council and the employer) and **Greece** that the arbitration procedure is mandatory.

6. Intervention by the Courts in the settlement of collective disputes is important in **Denmark, Germany, Greece, Spain, Ireland**, the **Netherlands, Austria, Finland** and the **United Kingdom**. In **Denmark** and **Finland** the courts intervene to deal with breaches of the collective agreement. The **German** and **Spanish** *Labour Courts* have exclusive competence over conflicts of right; this applies to **Austria** too. The Courts intervene by way of injunction in **Germany, Ireland**, the **Netherlands** and the **United Kingdom**.

7. The right to strike is explicitly recognised in the Constitutions of **Greece, Spain, France, Italy**, and **Portugal**. There is a right to strike in **Belgium, Germany, Ireland, Luxembourg** and the **Netherlands**. There is freedom to strike in the event of a conflict of interest in **Denmark, Austria, Finland** and the **United Kingdom**.

8. In both **Ireland** and the **United Kingdom** a system of immunities against torts has been set up as the legal technique to protect the freedom of the right to strike. These immunities have been greatly reduced since 1980 in the **United Kingdom**.

9. The right to strike belongs to the trade union in **Germany**. In the other countries the right or the freedom to strike is the employees'. This can have important consequences regarding the legality of strike action.

10. It is extremely difficult, given the differences between the national systems and the legal nuances which prevail, to make general statements about which strikes are lawful and which strikes are unlawful.

11. As a general rule strikes in the Community have to be trade disputes in order to be legal. Political strikes are illegal, except, under certain conditions, in **Italy**. Sympathy actions are in most countries, apart from the **United Kingdom**, legal, provided that they support lawful actions and that they involve the interests of the sympathy strikers as well. Action short of strikes is in most countries considered to be illegal.

12. The lawful strike merely suspends the execution of the individual employment contract and is not a reason for a justified dismissal, except in the **United Kingdom** and perhaps **Ireland**, where an employee who takes part in a strike almost certainly breaks his or her contract of employment, and can be lawfully dismissed unless, in the case of a union authorised strike, the dismissal is of a selective nature within three months of the strike. A further exception is **Austria**, where as a rule there is similarly breach of the employment contract. A union representative (*"facklig förtroendeman"*) in **Sweden** holds a position halfway between a shop steward and a union delegate.

13. Essential services and supplies must be maintained during strike action in **Belgium, Germany, Greece, Spain, Ireland, Italy**, the **Netherlands, Austria** and **Portugal**.

14. Ballots are required before industrial action takes place in **Germany, Ireland** and the **United Kingdom**.

15. The lock-out does not, in general, enjoy the same status and protection as the right to strike. In **Denmark, Austria** and **Finland** there is legal parity between strike and lock-out. In **Belgium, Germany, Spain** the defensive lock-out is accepted but the legal detail and implementation vary widely. The legal position on the status of the lock-out is unclear in **Luxembourg** and the **Netherlands**, while in **Greece** and **Portugal** the lock-out is legally prohibited. In **Ireland, Austria** and the **United Kingdom** for most legal purposes the character of the action as a strike or as a lock-out is of no practical significance.

16. The above conclusions illustrate the diversity of law in the Member States on strikes and lock-outs.

TITLE III
WORKERS' RIGHTS TO INFORMATION, CONSULTATION AND PARTICIPATION

INTRODUCTION

The notion of the right of workers to information, consultation and participation in the decision making process of the enterprise they work in is put into practice in different ways in the Member States. In the following analysis the term *"worker participation"* will be used for all forms of worker involvement.

The term worker participation covers different forms of employee participation in decision making: information, consultation and co-decision, even some forms of self-mana-

gement. The term also includes participation in benefits, job enrichment schemes, quality circles etc.

An overview of regulations and practices in the different Member States shows a great variety in the machinery, respective competence and coverage of the various national systems of worker participation. This last point has much to do with fundamental differences between the mandatory and voluntary character of worker participation systems. The study is mainly limited to the private sector.

CHAPTER 1
MANDATORY AND VOLUNTARY SYSTEMS

In nine Member States (**Belgium, Germany, Greece, Spain, France, Luxembourg,** the **Netherlands, Austria** and **Portugal**) there are mandatory systems for works councils. In **Denmark** works councils are set up on the basis of intersectoral collective agreements but worker participation is also provided by law on the supervisory board of incorporated companies.

In **Italy, Ireland** and the **United Kingdom** arrangements are made on the basis of collective agreement or voluntary action by the employer.

In **Denmark** an inter-sectoral agreement was concluded in 1987 which provides for works councils to be set up in industrial and craft establishments employing 35 or more employees when recommended either by the employer or a majority of the workers. The works council comprises both management and worker representatives (including shop stewards). The council has essentially consultative powers and is entitled to co-determination on principles of personnel policy.

In **Ireland** there is no general mandatory system of worker participation and representation, although a statutory scheme exists for large parts of the public sector, and consultation arrangements exist in relation to health and safety matters and under specific EC Directives. Shop stewards act simultaneously as trade union officials and representatives of the whole workforce. They must be the appropriate persons in some circumstances to be consulted in conformity with the EEC Directives on collective dismissals and transfer of undertakings. It appears that mandatory systems provide for more extensive coverage of employees by worker participation than voluntary schemes.

In **Italy** the law gives some rights to those unions which sign collective agreements applied in each individual enterprise, and which form enterprise level union organisations in the industrial and commercial sector in enterprises with 15 or more employees, usually representing all workers. In addition to rights to information and consultation these works organisations can negotiate company agreements, especially with regard to wages, working time and job classification.

According to the tripartite agreement of 23rd July 1993, both plant-level union structures and external unions now jointly have the right to negotiate company-wide agreements.

In **Finland** there is a mandatory Act on cooperation in enterprises, which is applicable to enterprises which normally have at least 30 employees. The cooperation procedure prescribed by the Act is based primarily on the local negotiating system laid down in collective agreements. If necessary, a local agreement may be concluded whereby the cooperation takes place within a delegation. This is not compulsory, however, and a special cooperation body does not therefore have to be set up. There are thus no mandatory works councils.

In **Sweden,** there are a number of statutory structures for worker participation within the framework of normal work activities. For the most part, information, negotiation and other forms of participation involve the local trade union organisation with which the collective agreement was negotiated. Over large parts of the Swedish labour market one finds, moreover, extensive employee participation in accordance with guidelines set out in collective agreements.

In the **United Kingdom** there is no institutionalised system of worker participation, either at the level of the enterprise or the establishment. A certain stimulus to greater employee involvement is, however, provided for in legislation which requires companies with more than 250 employees to state in their annual report what they have done to promote employee involvement arrangements.

The *1990 Workplace Industrial Survey* found that the proportion of workplaces with formal functioning consultative committees has been falling, with fewer than one-fifth of workplaces having such a committee in 1990 compared with one-quarter in 1984. In the United Kingdom special emphasis has been placed on encouraging individual employee share ownership schemes as a means of greater involvement in the enterprise. This has been aided by various tax incentives.

CHAPTER 2
MACHINERY OF PARTICIPATION

a) Employee Representation on Managerial or Supervisory Bodies

A number of countries have employee representatives on the boards of incorporated companies. A distinction is made between representation on a supervisory board (two-tier system) and on a board of directors (one-tier system). The board of directors has final responsibility for the day to day running of the enterprise.

A supervisory board usually appoints and can dismiss the management board or the management team, responsible for the day to day running of the enterprise and lays down the general policies of the company. It may reject certain proposals and has the final decision on matters of major importance to the company.

Representatives of employees sit on the supervisory board in **Denmark, Germany, France** and **Austria,** and on the board of directors in **France** and **Luxembourg.** There are certain thresholds above which these systems apply: companies with 35 employees in **Denmark,** 50 employees in **France,** 500, 1,000 or 2,000 employees in **Germany** according to different models and 1,000 employees in **Luxembourg.** In **Greece** there is representation on the supervisory boards of certain large public enterprises. In **Ireland** worker representatives can sit on the board of a number of quasi-state enterprises under de *Worker Participation (State Enterprises) Act.*

The representatives are employees in **Denmark**, **France** and **Luxembourg** and employees or trade unionists in **Germany** and **Austria** (in **Austria**, at least ¾ of the works council members must be employees of the company).

The representation of employees on boards is a minority representation, namely from two to four members in **France**, one third in **Denmark**, **Germany** and **Luxembourg** (companies with 500-2,000 employees) and **Austria**. Quasi-parity representation exists in **Germany** for companies with 2,000 employees or more and parity representation exists in the German coal and steel industry.

In **Greece** employees are represented on the board of directors of the *Organization for Economic Recovery*, which aims to help enterprises in difficulty.

In **Spain**, the representation of employees on the boards of companies and of savings banks is a minority representation.

In all the cases employee representatives are full members of their respective boards. Only in **France** do they have solely an information role and no vote.

In the **Netherlands** incorporated companies having 100 or more employees in the Netherlands, a works council and more than a minimum of share capital (ca. 22 mill. DEM) are required to have a supervisory board, whose members are nominated by co-option. Like the shareholders, the works council can propose candidates and legally veto a nomination on certain grounds, which can however be cancelled by the *Court of Amsterdam*. In practice, however, it is very rare that a candidate can be successfully vetoed.

In **Finland** there is a special Act on employee representation on the boards of companies (*No 725/1990*). It applies to Finnish limited companies, joint-stock companies and other economic associations, insurance companies, commercial banks, cooperative banks and savings banks which normally have a minimum of 150 employees in Finland. The staff representatives are elected in addition to the members elected by the company to the decision-making body. They may make up a maximum of a quarter of the number of other members of this body, with a minimum of one and a maximum of four persons.

The staff representatives must be employees of the company. They have greater protection against dismissal in the same way as representatives under the Employment Contracts Act. They have the same rights and obligations as ordinary members, but they are not entitled to take part in discussions of matters regarding the appointment or dismissal of management staff, the conditions of managers' contracts, employees' conditions of employment or disputes.

b) Works Councils

Works councils are by far the most common form of employee participation in the Community. In **Belgium**, **Germany**, **Greece**, **Spain**, **France**, **Luxembourg**, the **Netherlands**, **Austria** and **Portugal** these bodies have been set up by legislation. The works council in **Greece** is optional.

In **Denmark** works councils have been established by agreement between the national workers' and employers' organisations.

In **Ireland** works councils have been set up by agreement at industry or enterprise level, or even at the employer's own initiative. The *Worker Participation (State Enterprises) Act 1988* provides for establishment of such structures in certain public sector organisations.

In some enterprises in the **United Kingdom** consultation committees are set up, usually as an adjunct to collective bargaining; these cannot, however, be equated to the works councils which exist in other countries.

The composition of the works council is divided into two main types. One is composed of workers only. This is the case in **Germany**, **Greece**, **Spain**, **Austria** and **Portugal**. The other type provides for a presence of management as well, which is the case in **Belgium**, **Denmark**, **France** and **Luxembourg**. In the **Netherlands** the works council is composed of employees only but joint meetings with management are held occasionally.

The coverage differs widely. Works councils have to be established in all enterprises with at least five employees in **Germany** and in **Austria**, with 35 employees in **Denmark** and the **Netherlands**, 50 in **Greece**, **Spain** and **France**, 100 in **Belgium** and 150 in **Luxembourg**. In the latter staff representatives are mandatory in all existing firms with 15 or more employees. In **Spain**, elections for staff representatives are mandatory in all enterprises with more than 10 employees, whereas in enterprises of between 6 and 10 employees staff representatives are elected only if a majority of the workforce decides to do so. In **Portugal** no threshold is fixed by law for the establishment of a works council.

Works councils are established at plant and enterprise level in all nine Member States concerned with works councils. In **Spain**, elections for representatives are mandatory at plant level but it is also possible, under the terms of a collective agreement, to elect a committee at enterprise level while maintaining representation at plant level.

In **Portugal**, the law permits the creation of coordinating committees for enterprise-level works councils and hence also of coordinating committees for group-level works councils.

Legislation in **Germany**, **France**, **Luxembourg**, the **Netherlands** and **Austria** also establishes works councils for groups of companies.

The powers of the works council vary widely in the different countries ranging from:

- a right to information on economic, financial and social matters;
- a right to be consulted;
- negotiating powers; and
- the right of co-decision (which is limited in most countries).

Only in **Belgium** is the works council entitled to information on a multinational group as a whole. Disclosure of information covers:

Basic information:

- company statutes;
- the competitive position of the enterprise in the market;
- production and productivity;
- financial structure of the enterprise;

- budget and calculation of costs;
- personnel costs;
- programme and general prospects for the future of the enterprise;
- scientific research;
- public aid;
- the organisation chart of the enterprise.

Annual information:
- up-dating the basic information;
- balance-sheet, profit and loss account, etc.

Periodic information:
- sales;
- orders;
- market;
- production;
- costs;
- cost prices;
- stocks;
- productivity;
- employment;
- programme.

Occasional information:
all important events, including new technologies and social matters such as:
- employment policy;
- structural changes;
- closure of enterprises;
- personnel policy.

The works council has advisory and consultative powers concerning:
Economic and financial matters:
- work organisation and productivity.

Social matters:
- supervision of labour standards;
- vocational training and re-training;
- structural changes;
- criteria regarding dismissals and recruitment;
- job classification;
- social rehabilitation of handicapped workers;
- use of language;
- destination of fines;
- new technologies.

Co-decision exists in the area social matters such as social welfare, the fixing of the dates of annual leave, working time, etc.

In **Denmark** the works council receives information from management on the enterprise's financial position and future prospects and is entitled to co-determination regarding personnel policy, meaning that there is an obligation to bargain in good faith. The same obligation exists regarding the day to day organisation of production and work and the implementation of any major change in the enterprise.

In **Germany** the economic committee (*see below Chapter 2 c)*) enjoys information and consultation rights regarding economic matters and personnel planning.

Where the works council has co-determination rights, management should provide the works council with full information in advance, i.e. at an early planning stage. The aim is to give the works council adequate opportunity to participate in decision-making by supplying it with the same information as management.

It is in the area of social affairs that the works council in **Germany** has its most developed right of co-determination. It can negotiate with the employer on matters not laid down by legislation or collective agreement, notably with regard to the following:
- matters relating to order within the establishment and the conduct of workers in the establishment;
- the beginning and termination of the daily working hours, including breaks and the distribution of working hours over the days of the week;
- any temporary reduction or extension of the normal working hours in the establishment;
- the time and place for the payment of remuneration as well as the method of payment;
- the establishment of general principles on annual holidays and the establishment of the vacation schedule as well as fixing the time at which vacation is to be taken by individual workers, if no agreement is reached between the employers and the workers concerned;
- the introduction and use of technical devices designed to monitor the behaviour or performance of the workers;
- arrangements for the prevention of accidents at work and occupational diseases and for the protection of health on the basis of legislation or safety regulations;
- the form, structure and administration of social services whose scope is limited to the establishment, enterprise or group of enterprises;
- the allotment and withdrawal of rooms, apartments or houses rented to workers in view of their employment relationship as well as the general fixing of conditions for the use of such facilities;
- questions related to remuneration arrangements in the establishment, including in particular the establishment of principles of remuneration and the introduction and application of new remuneration methods or modification of existing methods;
- the fixing of piece-rates, premiums and other comparable payments according to results, covering all aspects;
- the establishment of principles for the handling of proposals for improvements in work performance.

There are some cases, especially in large enterprises, where management by voluntary agreement with the works council has extended the works council's co-determination power.

On personnel matters, co-determination only refers to very few aspects, e.g. the content of guidelines on selecting the content of written questionnaires and on the establishment of general criteria for the evaluation of test results. As far as vocational training in the establishment is concerned, the works council has a relatively strong position in the selection of training personnel and the selection of workers who are allowed to participate in such programmes. In the case of envisaged dismissals, it can object to those which are *"socially unjustified"*.

In **Greece** the works council is entitled to information on the following areas:

- the modification of the legal structure of the enterprise, partial or total transfer, extension or reduction of the installations of the enterprise and the introduction of new technologies;
- the economic situation of the enterprise and its financial developments;
- modifications to the personnel structure, reduction or increase of personnel, overtime, etc;
- annual investment programmes in the hygiene and security services in the enterprise;
- proposed collective dismissals, transfer of enterprises, etc when there are no trade union sections in the enterprise.

In **Greece** co-decision exists for social issues such as the establishment of work rules and the hygiene and safety of the enterprise. Equally subject to co-decision are: new methods of work organisation; the introduction of new technologies; use of audio-visual equipment to control the presence and the behaviour of employees; holiday dates; reintegration of handicapped workers and victims of accidents in the enterprise, etc. These co-decision rights can only be exercised provided there is no trade union section in the enterprise.

In **Spain** the works council receives a great amount of information:

- every three months, about the general evolution of the economic sector to which the enterprise belongs, about the production and selling situation, production programmes and the probable evolution of employment within the enterprise;
- about the balance, production accounts and reports of the enterprise; the council must receive all appropriate documents;
- the council must know the types of work contract used in the enterprise, as well as the relative documents used for the termination of such;
- about sanctions imposed for serious misdeeds;
- every three months, it must receive information about statistics of rates of absenteeism and its causes, accidents at work and illnesses caused by the profession, rates of accidents, studies of the work environment and mechanisms used to prevent risks.

In addition to consultative rights the council is required to draw up prior reports (before decisions are taken by the employer) on matters directly linked to employment, working conditions and training. The council has negotiating rights, the scope of which have to be agreed upon with the employer. They may cover wide areas dealing with productivity, improvement of working conditions etc. The council is also empowered to convene strikes.

In **France** two types of information may be distinguished. Firstly, factual or regular information on the state of affairs of the enterprise. Secondly operational information on the motives, content and forecasts of decisions which have an impact on the working conditions of the employees.

In addition to consultative powers the works council has a working budget (0.2% of total salaries) and the possibility to obtain expert opinion (e.g. experts in accountancy and new technology) paid by the enterprise. The works council has exclusive competence in the domain of the management of social and cultural activities.

In **Luxembourg** the employer is obliged to inform and consult the council in writing, at least twice a year, on the economic and financial evolution of the enterprise. To this end specific information has to be provided for. Once a year there is information and consultation on the manpower needs of the enterprise.

In the **Netherlands**, the employer needs the consent of the works council in matters such as working time, remuneration schemes etc., except when these matters are already laid down in a collective agreement. The council also has the power to challenge an economic decision of the employer before the Courts. Council and employer must meet at least six times per year.

In **Austria** the powers of the works council cover four categories:

- general powers (monitoring the employer's adherence to the legal provisions concerning his employees, health and safety, welfare arrangements);
- consultation in staffing matters (recruitments, transfers, disciplinary measures, terminations of contract and dismissals);
- consultation on business matters (alterations to the establishment, participation on the supervisory board, objection to the management of the business);
- consultation in social matters (conclusion of works agreements, vocational training, courses, etc.).

The role of the works council in **Portugal** is to maintain the standard of working conditions. It is consulted over hours of work, health and safety, closures, bankruptcy and employment security.

In **Finland** there are no works councils, but the cooperation procedure laid down in the Cooperation Act includes a fairly extensive obligation on employers to inform and negotiate.

c) Shop Stewards and other Employee Representatives

In a number of Member States union delegates play an important role in the enterprise, whether of not a works council also exists. Their role is not so much to monitor decisions in the enterprise but to formulate and negotiate policies which the unions wish to see realised.

This is notably the case in **Belgium**, where union delegates are installed on the basis of inter-sector agreements. They handle individual and collective disputes, grievances, etc and may engage in bargaining.

In **Denmark** the shop steward may also conclude, as the local representative of the trade union, collective agreements with the employer.

In **Germany** an economic committee has to be established in enterprises with 100 or more employees to receive information on economic matters of concern to the enterprise.

Independently of the works council there are often shop stewards of the trade union in the establishment.

Greece has enterprise-level union delegates. In any one enterprise there may be many trade unions, but only one is designated as the most representative. The workplace branches are entitled to be given an office within the enterprise,

a notice board and the right to convene meetings on the premises. Workplace branches are provided for by law.

Supervisory boards at branch level in the metal-working and mining sectors are also established. These boards are composed of the representatives of workers, the State, the local administration and the enterprises concerned. These boards have information and consultation rights aimed at *"social control"* of the enterprises concerned.

In **Spain** the law provides that workers affiliated to a union may set up workplace branches within the plant or enterprise; no conditions are attached regarding representativeness. Those workplace branches which have a degree of representativeness as evidenced by their presence on the works council can elect a trade union delegate in certain enterprises or establishments with at least 250 employees; these trade union delegates have information and consultation rights similar to those of the works councils. These workplace branches also enjoy the same guarantees and prerogatives as works council members.

In **France**, in addition to the works council, there are also, in principle, elected workforce delegates in enterprises with more than ten employees. Since 1993, however, the employer has been entitled to decide, when there are fewer than 200 employees, that the workforce delegates will also fulfil the role of works council: in this case the same representatives perform the functions of workforce delegates and members of the works council.

In enterprises with more than 50 employees the representative unions may designate a trade union delegate (shop steward), whose role in particular is to conduct the collective bargaining at enterprise level.

In **Italy** there is an original form of representation in the workplace, based on the principle of the *"single channel"*. Union representation in the workplace provided for by *Article 19* of the *Statuto dei lavoratori* (*Worker's Statute, Law No 300*) and redesigned, in innovative terms, by the tripartite agreement of 23rd July 1993 in fact represents both a union members' structure for external unions and an organisation representing all the workers of each individual production unit (including non-union members). These representations exercise information and consultation rights under collective agreements or the law (for example regarding collective dismissals or transfers of undertakings) and handle, together with the external unions, the collective bargaining within the enterprise.

"Delegates" first appeared in the late sixties. They are directly elected at the shop-floor level and constitute the *"factory council"*. They handle grievances, deal with collective problems as well and engage in collective bargaining.

In **Luxembourg** workers' delegates have been established by legislation to handle grievances and discuss working conditions. They participate in the running of community programmes.

In **Austria**, when at least four works council members are to be elected (enterprises with between 51 and 100 employees), union representatives who do not belong to the enterprise can also be elected to the works council. However, at least three-quarters of the works council members must be employees of the enterprise.

In **Portugal** trade union delegates, established by legislation, are elected by the trade union members in the enterprise. If there is more than one union the delegates can establish an inter-union enterprise committee.

In **Finland** employee representatives in companies play an important part in implementing the collective agreement and representing the employees. In many cases, they also conclude local agreements on behalf of the employees they represent.

In **Sweden**, the union representative represents employees on trade union matters and is appointed by the local trade union organisation which concluded the collective agreement with the employer. The employer must be informed of the appointment in order that the legislation on trade union representatives, and its rules on time off work, reimbursement and special protection, can be applied. The specific tasks assigned to an individual union representative (e.g. conducting negotiations, power to sign agreements, etc.) are determined by the trade union organisation. It is also the trade union which determines the apportionment of trade union time. There are some workplaces with a few full-time trade union representatives but there are also workplaces where trade union responsibilities are shared among a large number of people, each of whom may spend only a few hours of each working week on trade union duties. The trade union representative is a very important figure in Swedish workplaces, given that the trade union organisations have been given ever increasing responsibilities, not only in purely trade-union terms but also in a wider social sense.

In **Ireland** and the **United Kingdom** shop stewards are the main trade union bargaining agent with the employer at plant and enterprise level.

d) Other Information and Consultation Rights

In all Member States there are legal rights for employees and/or union representative, either within the works council or in separate committees in the field of safety and health at the workplace. See the following *Part IV* for further details.

In **France** the employer has, within the duty to bargain at enterprise level, to give information to the union negotiations concerning average wages and standard deviation by category and sex, hours worked and the scheduling of working time.

In **Italy** the most important national agreements have introduced clauses obliging the employer or the employers' associations to inform the territorial unions or the *"delegates"* of their investment programmes and long-term business policies influencing employment and working conditions and, on occasion, to examine the same matters in conjunction with the unions.

In the **Netherlands** the trade unions are informed and consulted in case of collective dismissals and in case of mergers of enterprises. Trade unions also have a right to ask the court for an inquiry concerning the way the enterprise is managed. The inquiry is conducted by the *Court of Amsterdam* (*Enterprise Chamber*), which can issue injunctions.

In **Portugal** trade unions have the right to participate in the drafting of labour legislation.

In **Finland** employee representatives in companies play an important part in implementing the collective agreement and representing the employees. In many cases, they also conclude local agreements on behalf of the employees they represent.

In **Sweden**, employees can exert their influence in other ways than through the rules concerning representation on the board and trade union representatives. The *Co-Determination Act 1976* provides a number of participatory instruments for employees but ultimate decision making continues to rest primarily with the employer. It has not been an aim of legislation to reverse the power balance within the Swedish labour market. The name of the Act does, however, express an objective: a title better representing the Act's content might in fact be *"the Act on collective labour relations and employee consultation"*.

- Consultation. The employer has what is known as primary responsibility for consultation, i.e. the obligation to take the initiative in organising consultation with the local trade union organisation with which he or she has concluded a collective agreement before deciding to make any important changes in the activities of the enterprise or in the working or employment conditions of those employees belonging to the organisation. This rule is supplemented by one requiring, even in cases not important enough to invoke the primary consultation obligation, that the employer must nevertheless discuss the matter with the trade union before taking such a decision should the union request this. Even in cases where the trade union has not concluded a collective agreement, the employer is required to consult with the union if the issue particularly concerns the working or employment conditions of members of that organisation. Only in particular, exceptional cases may the employer take a decision before the negotiations required by these rules have been completed.
- Information rights. The employer is obliged to keep the trade union organisation with which he or she has concluded the collective agreement informed about the production and financial status of the enterprise, and about the guidelines in personnel policy. The employee organisation must also be given the opportunity to monitor accounts and documents and the employer is in principle obliged to assist in this investigation.
- Trade union priority in interpretation. In disputes concerning the duties of individual employees under the agreement, in the interpretation of rules in the agreement on employee participation and to a certain extent with regard to remuneration, the trade union's interpretation of the points at issue is to be adopted while the dispute is being resolved; in other words, until the parties receive a final ruling from the courts.
- Trade union veto. Should an employer intend to have work done by a person not employed by the enterprise, the employer is subject to a particular primary consultation obligation before taking such a decision. The trade union can prevent such action being taken if it can be assumed to give rise to the setting aside of legislation or collective agreements or otherwise be incompatible with generally accepted practice for agreements. These rules were abolished during 1994 and when they were reintroduced in 1995 a clause was added to the effect that the veto could not be imposed in a manner incompatible with the EU legislation, transposed into Swedish law, on public tendering.
- The *Co-Determination Act* calls on the social partners to conclude collective agreements concerning consultation in the company management and work management fields. Such collective agreements are in principle to be found throughout the labour market. To varying degrees, they encourage employee participation but cannot be seen as containing any element tangibly altering the balance of power in Swedish working life (*see also Part I, Title III, Chapter 2a)*).

In varying ways, the above forms of participation have been supplemented by collective agreements.

It has proved difficult in industry to achieve these objectives by means of rules on participation. Participatory agreements have included rules designed to strengthen the influence of employees within enterprises. Legislation to introduce *Directive 94/45/EEC* on the establishment of European works councils is currently in preparation. There are already examples of a number of voluntary agreements in this field within Swedish concerns, and negotiations on such agreements appear to be under way in the majority of Swedish enterprises affected.

In the **United Kingdom** the employer has a duty to disclose information to an independent trade union, which he or she has already recognised for collective bargaining purposes. The information must be such that without it the union would be impeded in collective bargaining to a *"material extent"* and such that the employer should disclose it in accordance with good industrial relations practice. The other statutory rights to information and consultation are those which have been adopted in order to implement EEC directives on collective dismissals and transfer of enterprises. The problem in the United Kingdom is that the only representative bodies of employees are the recognised trade unions. The effect of this is that an employer is free to avoid the statutory obligations to consult and inform by simply refusing to recognise or by de-recognising an independent trade union.

CONCLUSIONS

1. An overview of regulations and practices concerning information, consultation and worker participation in Member States shows wide variations regarding the source of worker participation schemes (mandatory versus voluntary), the machinery itself, the powers of the various institutions and the coverage as far as employees are concerned.

2. Most countries have mandatory legislative systems providing for worker participation schemes of one form or another, namely **Belgium**, **Germany**, **Greece**, **Spain**, **France**, the **Netherlands**, **Austria**, **Portugal** and **Finland**. In **Denmark** and **Sweden** industry-wide collective agreements and legislation both provide for some forms of worker participation. In **Ireland**, **Italy** and the **United Kingdom** arrangements are made on the basis

of collective agreements or voluntary action by the employer.

3. Employee representation on managerial bodies of enterprises is prominent in a number of countries. Representatives sit on the supervisory board in **Denmark**, **Germany**, **Greece**, **France** (public sector enterprises), **Austria**, **Finland** and on the board of directors in **France**, **Luxembourg** and **Sweden**. The coverage is widely different and ranges from enterprises with 25 employees in **Sweden** to enterprises with 2,000 employees or more in certain cases in **Germany**.

4. The representatives are employees in **Denmark**, **France** and **Luxembourg**, employees or trade unionists in **Germany** and **Austria**, trade-unionists in **Sweden**. In the **Netherlands** the works council has a limited influence on the nomination of all members of the supervisory board.

5. Employee representation on the managerial board is a minority representation in all cases except in **Germany** for one of three models.

6. The representatives are full members of the board except in **France**.

7. Work councils are by far the most common form of worker participation. They are established, either by legislation, collective agreement or on the enterprise's initiative, in all Member States except **Italy**, **Finland**, **Sweden** and the **United Kingdom**.

8. Works councils are either composed of workers alone (**Germany**, **Greece**, **Spain**, the **Netherlands**, **Austria** and **Portugal**), or of workers and management (**Belgium**, **Denmark**, **France** and **Luxembourg**).

9. The coverage of employees is widely different: ranging from enterprises with 5 employees in **Germany** to those with 150 employees in **Luxembourg**. In **Portugal** no threshold is set.

10. Works councils operate at several levels: at plant and enterprise level in **Belgium**, **Denmark**, **Germany**, **Greece**, **Spain**, **France**, the **Netherlands** and **Portugal**; and at national group level in **Denmark**, **Germany**, **France**, **Luxembourg**, the **Netherlands** and **Austria**. Work councils at European level are very exceptional.

11. The powers of the works council varies widely in the different countries, ranging from a right to information and consultation through to a right of co-decision making. Information is usually provided for economic, financial and social matters relating to the enterprise. Only in **Belgium** is the works council entitled to information on a multi-national group as a whole. Consultation concerns mainly the social consequences of economic decisions taken by management alone. The right to co-decision is confined to certain social matters and rather limited in countries such as **Belgium**, **Denmark**, **France** and **Luxembourg**; it is more extensive in **Germany**, **Greece**, the **Netherlands** and **Austria**.

12. In a number of Member States shop stewards and other employee representatives play an important role in the enterprise. There are union delegates in **Belgium** and **Portugal**, shop stewards in **Denmark**, **Spain**, **Finland** and the **United Kingdom**, worker delegates in **Spain**, **France**, and **Luxembourg**, union sections in **Greece** and **France** and plant level union representatives in **Italy**. Committees for health and safety at work operate in many Member States. A union representative (*"facklig förtroendeman"*) in **Sweden** holds a position halfway between a shop steward and a union delegate.

13. Trade unions have other information and consultation rights in **France**, **Italy**, the **Netherlands**, **Portugal**, **Sweden** and the **United Kingdom**.

PART IV
OCCUPATIONAL HEALTH AND SAFETY

INTRODUCTION

The history of national legislation to protect the health and safety of people at work in Europe goes back well into the last century. In the Member States of the *European Community*, progressive improvements have been made since that time, driven primarily by developing social policies. The pace of change and the general thrust of legislation has differed greatly however from one Member State to another due to wide differences in the industrial base, the expectations of the population and the influence of social and political cultures within which the legal frameworks have developed.

With the formation of the *European Community* and the development of policies of harmonisation in the approach to business, economic and social structures, it was logical that the health and safety of workers should receive Community attention. A new and powerful force for closer harmony between the legal provisions of Member States emerged. Examination of what has been achieved since the European Commission's first published Action Programme in the area of health and safety, in 1978, has shown a progressive and very significant change from the former total dependence on the development of national provisions to a stage where now, it is quite clear that the central role of the Community has found widespread acceptance.

A number of key developments have promoted the role of the Community giving it much wider powers to harmonise legislation of the Member States. These are principally the revisions to the *Treaty of Rome* brought about by the introduction of the *Single European Act* and the drive to complete the Single Market by 1992.

In a relatively short space of time, in the context of the development of health and safety law the main emphasis has changed from national laws, reflecting local initiatives to primary emphasis on the development and implementation of Community law. An illustration of this shift of emphasis is the UK *Health and Safety Commission*'s recent statements that the European dimension will in future represent the *"overwhelming share"* of its efforts in health and safety legislation, with domestic projects being pursued only where they are vital. Similarly, the principle aim of the new legislative frameworks currently being developed in Spain and Portugal is the implementation of the developing Community framework of law.

A major step forward in the Community programme came in 1989 with the adoption of a *Framework Directive (89/391/EEC) "on the introduction of measures to encourage improvements in the safety and health of workers at work"*. This provides a firm and broad ranging base on which a series of more specific directives can be built to cover particular sectors of employment, for example construction work, or particular subject areas of importance such as visual display units.

Whilst concern for manual workers in high risk activities has continued, there is now increasing attention paid to the working environment of other groups of workers, such as clerical and administrative staff in the business, finance and public sectors, and workers in the service industries, health care, and social and public services. This change of focus can be seen in Member States, with the introduction of new legislation on the health and safety aspects of new technology, ergonomic and biological hazards such as legionnaires disease, Hepatitis B, and AIDS, in addition to the more traditional hazard areas. Community action is also in progress in some of these areas and all are within the scope of the *Framework Directive*.

In the rest of this article we shall look in particular at the role and the significance of this work at Community level as regards the central objective of ensuring equality of protection for all workers throughout the twelve Member States. The requirements for achieving the basic standards set by the new *Framework Directive* are used as a basis for a critical review.

The following review shows how the law for the protection of the health and safety of workers in the community is moving forward in a more coordinated fashion than would ever be possible on the basis of national legislation alone. Indeed, it is now generally agreed that the development of Community law in this field, along with the process of consultation necessary to achieve it, has resulted in a much firmer foundation on which to create higher standards that are consistent throughout the Community.

TITLE I
LEGAL CONTROLS IN MEMBER STATES

Despite the diverse historical, cultural and legal backgrounds of Member States, which have given rise to a number of notable differences in their approaches to the control of occupational health and safety, here is a common pattern in the legislative system in which the following levels of control apply.

Firstly, in each of the Member States there is a basic framework of primary legislation establishing general principles and some specific requirements. This legislation generally creates the framework for more detailed and specific secondary legislation.

Next, secondary legislation, such as regulations, decrees, orders etc, sets out detailed requirements for compliance based on general principles established in the primary legislation.

Finally, there are codes of practice and technical guidance which provide a third tier in some Member States. Whilst breaches of codes and guidelines are not generally offences,

evidence of compliance or non-compliance may be used in legal proceedings.

Constitutional Provisions

In **Belgium, Greece, Spain, Italy, Luxembourg, Portugal** and **Finland** basic provisions relating to the control of health and safety at work are laid down in the national *Constitution*. Similar basic occupational health and safety principles are also established elsewhere in national *Legal Codes*. These include the **French** *Labour and Public Health Codes*, the **Dutch** *Civil Code*, the **German** *Industrial Code* and the **Spanish** *Penal Code*.

In the remaining Member States there are no provisions in Constitutional or national Codes referring specifically to health and safety at work. Protection of all individuals, whether at work or not, is provided however, by the *Civil Code* in **Belgium**. In **Denmark, Ireland** and the **United Kingdom** the civil or common law establishes a number of individual rights.

In the late 19th century, **Sweden** enacted legislation designed to protect employees from injury and disease. Since then, legislation has become steadily more general and more wide ranging in its objectives. During this century, there has been a gradual extension of insurance legislation as well as closer cooperation between the two sides of industry through sectoral collective agreements. Current workplace legislation reveals a holistic approach where protection for the working environment is viewed from a broad perspective and also includes the psychological environment, together with enjoyment and job satisfaction. The key law is the *1977 Work Environment Act*, which is very clearly framework legislation and shares a great many features with the *Framework Directive*. It has three constituent elements: the employer's overriding responsibility, cooperation between the social partners at the workplace and supervision by state authorities. Other legislation of importance to the work environment includes planning and construction legislation, legislation on dangerous substances and activities and also rules on job security, worker participation, working hours and equality.

Principal Statute

The extent to which legislation on health and safety at work has been brought together under a single comprehensive statute varies between Member States.

The following table outlines the range of approaches adopted.

TABLE 16: PRINCIPAL HEALTH AND SAFETY STATUTES

FRAMEWORK LAWS	
Denmark:	*The Working Environment Act 1975*
Greece:	*Health and Safety of Workers Act, 1985*
Spain:	*Protection against Occupational Hazards Act, 1995*
Ireland:	*The Safety, Health and Welfare at Work Act, 1989*
Luxembourg:	*The Law on Health and Safety of Workers, 1924*
The Netherlands:	*The Working Environment Act, 1980*
Finland:	*The Protection of Labour Act (No 299/1958, many amendments)*
Sweden:	*The Working Environment Act 1977*
United Kingdom:	*The Health and Safety at Work Act, 1974*
CODIFIED LAWS	
Belgium:	*Law of 1996 on the welfare of workers during the performance of their work.* General safety and health regulations (notably the 1952 *Law on Health and Safety of Workers and Cleanliness of Work and Workplaces*, and the 1978 *Law on Work Contracts*).
France:	The *Labour Code* (includes 1913 *Decree on health and safety at work* and the 1976 *Law on Prevention of Accidents at Work*).
Austria:	*Employee Protection Act, 1994* (Partial codification of employee protection, put into practice through Implementing Orders)
OTHER SOURCES	
Germany:	There is no one principal statute governing occupational health and safety. Provisions are found in various codes, acts, orders and rules arising from Federal and Lander authorities and Accident insurance Associations.
Spain:	The main laws which deal specifically with health and safety at work are the *Order to Approve the General Occupational Safety and Health Ordinance* 1971, the *General Law on Social Security* 1974, and the *Law on Workplaces*.
Italy:	Whilst the *Constitution*, *Civil Code* and *Penal Code* contain provisions for the protection of health and safety at work, the principal items of legislation on occupational health and safety is *Law No 833*, 1978 and the *Presidential Decree* of 1955 *on health and safety*, to which must now be added the *Legislative Decree* of 19th September 1994, No 626 which has incorporated the *Framework Directive 89/391* and the first seven specific directives.
Portugal:	No framework legislation, but legislation based on The *General Regulations of Occupational Safety and Hygiene* in Industrial Establishments 1966 and The *General Regulations of Health and Safety in Commercial Establishments, Offices and Service Industries.*

Rights and duties of employers and employees

In each Member State, employers and employees have certain rights and obligations relating to protection of health and safety at work, established in law. Employers' duties are summarised in Table 17. These obligations and duties vary widely in their nature and detail but in most cases there is a general duty to provide safe and health working conditions.

TABLE 17: GENERAL DUTIES OF EMPLOYERS TO PROTECT EMPLOYEES

Belgium	To ensure *"with the diligence of a good father"* that work takes place in suitable conditions for health and safety, and to observe the requirements of the law.
Denmark	To ensure by supervision that work is performed safely and without risks to health, and to ensure that requirements of the law are observed.
Germany	To organise undertakings (with regard to design and working methods) in such a way as to afford employees all such protection against hazards to health and safety as the nature of the undertaking permits, and to observe requirements laid down in the law and in occupational insurance regulations; taking into account commonly accepted, up-to-date technical standards, the current state of knowledge of occupational medicine and the result of scientific labour studies, provided that disproportionate hardship does not arise.
Greece	To ensure the life, health and welfare of employees (by providing proper means and ensuring satisfactory conditions and working methods) so far as the nature of the workplace permits; to make all necessary arrangements for the welfare of employees.
Spain	To adopt all necessary measures to ensure the safety and health of employees, by introducing an ongoing programme to improve existing levels of protection and adopting preventive measures in the case of changes to the working conditions that affect the performance of the work.
France	To maintain and manage premises in a state of cleanliness necessary for the health of workers and in such a way as to guarantee their safety; to ensure equipment is installed and maintained in the safest possible way, and to observe the requirements of occupational insurance regulations.
Ireland	To take all practicable measures to protect employees against inhalation of dangerous substances and to observe the requirements laid down in the law.
Italy	To take measures necessary in relation to the type of work and the state of technology to protect the physical and mental welfare for employees, and to implement measures required by the law.
Luxembourg	To observe the requirements of the law and of occupational insurance regulations.
Netherlands	To ensure the greatest possible degree of health and safety protection and to promote the greatest possible attention to welfare in the light of the best existing principles of technology and the current state of occupational health care, ergonomics and industrial sociology, unless this cannot reasonably be required.
Austria	To ensure protection of the safety and health of employees on all aspects relating to the work.
Portugal	To take measures necessary to protect the health and safety of workers.
Finland	*"The employer shall diligently take all measures that in view of the nature of the work, working conditions and the employee's age, sex, skills and other characteristics can reasonably be required in order to protect the employee against accidents at work and work-related ill-health. To this end, the working environment shall also be constantly monitored and appropriate measures taken to investigate and avert accidents, ill-health and hazards.* *In assessing risk factors due to working conditions, any risk of genetic or foetal damage shall also be taken into account.* *For the activities necessary to promote safety and health the employer shall have a programme that covers the need to improve working conditions at the workplace and the effects of the factors connected with the working environment. The safety and health objectives that can be derived from the activity programme shall be taken into account in the design and development of workplaces and shall be discussed with the employees or their representatives".* The Act also lays down special duties with regard to planning of the working environment and work.
Sweden	Employers must take any necessary measures to safeguard employees from ill health or injury. This includes maintaining premises, machinery, protective equipment, etc.; making arrangements for health care within the company on an appropriate scale for the activities conducted; paying attention to the special hazards of individual work; systematic planning, leadership and monitoring of activities concerning the working environment; investigation of injuries incurred at work; continually investigating hazards associated with activities and taking appropriate measures; documenting the working environment and drafting plans of action; organising adjustment and rehabilitation activities; ensuring that the workforce has a good understanding of working conditions and is informed about hazards in the working environment as well as possessing any necessary training and knowledge; adapting working conditions to the individual requirements of employees; consultation and cooperation with other employers where the workplace is shared; briefing the safety officer on any changes significantly affecting the working environment.
United Kingdom	To ensure, so far as reasonably practicable, the health, safety and welfare of all employees.

TITLE II
IMPACT OF THE EEC FRAMEWORK DIRECTIVE

The *Framework Directive* covers all sectors of activity, both public and private. The only workers excluded are the self-employed and domestic servants. Legislation in many of the Member States excludes some type of work, workers, or workplaces and will need to be extended to fully implement the directive. The scope and key elements of the Directive are shown in *Table 18*. The 'individual' Community directives in the future will have greater impact in practice because of the extensions required by the *Framework Directive*. This will apply particularly to the non-industrial and public sectors.

It is worth noting that existing legislation in a number of Member States goes further in scope than the requirements of the *Framework Directive*. In **Ireland** and the **United Kingdom** the self-employed are included, and legislation in **Greece**, the **Netherlands** and the **United Kingdom** affords protection to third parties who may be at risk from work activities.

In **Sweden**, the *Work Environment Act* covers any activity in which the employee performs work for the benefit of the employer. The only exceptions, for which other provisions apply, are work on board ship and household work. Important sections of work environment legislation also cover those undergoing training, those carrying out directed work while in institutional care, and those doing their military service and training within the defence forces. Employers themselves carrying out work and those running one-man or family businesses are covered by certain sections of the Act. Obligations under the Act also apply to those commissioning construction, or the installation of plant, those manufacturing, importing, transferring or supplying machinery, substances, products, etc. and those installing technical devices.

TABLE 18: SCOPE AND KEY ELEMENTS OF THE FRAMEWORK DIRECTIVE

Scope:
- The directive covers all sectors of activity, both public and private, but excludes domestic servants.

Duty on employers to:
- ensure health and safety of workers in every aspect related to work;
- develop an overall health and safety policy;
- assess risks, update assessments with changing circumstances, and to take preventative measures;
- record risks and accidents;
- inform workers and/or their representatives of risks and preventative measures taken;
- consult workers and/or their representatives on all health and safety matters;
- provide job specific health and safety training;
- designate workers to carry out activities related to the prevention of occupational risks;
- carry out health surveillance of workers.

Workers' rights, responsibilities and duties:
- right to make proposals relating to health and safety;
- right to appeal to the competent authority;
- right to stop work if in serious danger;
- responsibility for their own actions;
- duty to follow employers' instructions regarding health and safety;
- duty to report potential dangers.

General Duties of Employers

The *Framework Directive* requires all Member States to introduce fundamental changes to their legislation regarding the duties of employers. In future, employers will be required to take a more pro-active stance towards occupational health and safety, including the duty to be in possession of an assessment of the risks to safety and health at work, and to decide on protective measures to be taken in order to safeguard their workers.

Perhaps the most far reaching change that the Directive brings is a requirement for employers to adapt work to the individual, especially regarding the design of workplaces, the choice of work equipment, working and productions methods, with a view to alleviating monotonous work and work at predetermined work-rates. In this, the Directive goes further than legislation in probably all the Member States. **Sweden** may form an exception. This is clearly a key requirement which addresses the well-being of workers in a comprehensive way rather than focusing on specific hazards.

General provisions to take care of workers appear at first to vary between Member States. For example, in **Belgium** *"the diligence of a good father"* is required while in **Ireland** and the **United Kingdom** all reasonably practicable measures must be taken. Despite these and other general duties in Member States (*see Table 16*), all Member States must modify or extend their legal controls to ensure compliance with the Directive. The *Framework Directive* was transposed into United Kingdom law in 1992.

In **Italy**, *Framework Directive 89/391* and the first seven specific directives were adopted by *Legislative Decree No 626* of 19th September 1994.

Obligations of Workers

Specific health and safety obligations are imposed on workers in all Member States but there is considerable variation between Member States. In some cases, workers must not carry out wilful or intentional acts likely to endanger themselves or others, nor must they damage or remove protective equipment. There are also duties for workers to take care of their own and others health and safety and to report incidents and defects to supervisors or employers.

The *Framework Directive* will require changes in most Member States regarding both the responsibilities and rights of employees. Of particular importance is the duty imposed on workers to immediately inform both their employer and other workers with specific responsibility for the safety and health of workers, of any work situation they might reasonably consider represents a serious and immediate danger to safety and health. An obligation of this kind is laid down in **Sweden**'s *Work Environment Act*.

Provision of Information and Training

A number of important and far reaching requirements in the area of training and information are set out in the *Framework Directive*. Firstly, it extends the range of circumstances in which employers will be required to ensure that workers are provided with adequate job specific training and information. Training and information must be provided on recruitment, transfer or change of job, the introduction of new work equipment and new technology. Training must also be adapted to take account of any new risks and be repeated at regular intervals if necessary.

An employer will also be required to ensure that subcontractors and workers from outside undertakings, engaged in work at his or her undertaking receive appropriate instructions regarding health and safety risks. The main effect of the Directive will be the introduction of more job specific training and information in the Member States.

Right to Stop Work

The *Framework Directive* addresses this issue by stating that workers who, in the event of serious imminent and unavoidable danger, leave their work station and/or a dangerous area may not be place at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national law and practice.

Employers must also ensure that all workers are able, in the event of serious and imminent danger to their own safety

and/or that of other persons, and where appropriate steps, in the light of their knowledge and the technical means at their disposal, to avoid the consequences of such danger.

A number of workers' rights already exist in the law in Member States but these are limited. There is a right to stop work under specified circumstances in **Belgium, Denmark, Germany, Spain, France,** and the **Netherlands** but different criteria apply in each case. A worker in **Belgium** can stop work if the job entails a risk of which he or she was not informed. In **Spain,** a worker can stop work and quit the workplace in cases of necessity if he or she considers that the work in question poses a grave and imminent danger to his/her life or health. In **France,** it is accepted in practice that where any worker has a reason to believe that working conditions pose a grave and imminent danger to life or health he or she may, provided that the employer is informed immediately, withdraw from these conditions. Similarly in the **Netherlands,** an employee can stop work if there is reason to believe that there is danger for personal injuries. The employee is obliged to report this immediately. Any worker in **Germany** can stop work if the premises are contaminated by carcinogens and the level in the atmosphere cannot be adequately lowered. In **Austria,** employees who leave the danger area in the case of a grave and imminent danger to their life and/or health may not be discriminated against because of their action.

In **Italy,** *Article 14* of *Legislative Decree 626/1994* recognised the right of the worker to leave the work area immediately in the case of immediate unavoidable danger.

In **Finland** the employee has by law the right to refuse to carry out work that poses a grave danger to life or health for the employee himself or for other employees. The employer or his representative must be informed about such refusal as quickly as possible. The employee is not liable to pay compensation for any damage arising as a result of his refusal to carry out work.

In **Sweden,** individual workers are entitled to stop work if there is an imminent and serious risk to life and health. In such cases, the worker must immediately inform the employer or safety officer and cannot be held responsible for any damages resulting from ceasing work while awaiting a decision on whether the work should be resumed. A safety officer can also order work to be stopped in cases where there is imminent and serious danger to the life and health of employees and the situation cannot immediately be put right by requesting that action be taken by the employer. In the case of employees working alone, the only requirement is that it be advisable from a safety point of view to stop work. The *Labour Inspectorate* must be called in immediately and work must not be resumed until the Inspectorate has been able to give an opinion. A safety officer is also entitled to order work stopped immediately if there is an infringement of a ban imposed by the *Labour Inspectorate* or by the *National Administration of Occupational Safety and Health* (the two state supervisory authorities). The safety officer is not liable for any damages arising from cessation of work and, according to the jurisprudence on this point, employees should continue to be paid for the time work is stopped if there are proper grounds for the cessation ordered by the safety officer.

TITLE III
WORKPLACE ORGANISATION ON HEALTH AND SAFETY

Workplace Committees

The issue of health and safety at work is notable for the high level of consultation which takes place between interested parties in the development and implementation of policy. The setting for consultation is often the workplace committee.

The role of workplace committees is not addressed by the *Framework Directive,* but it does place a duty on employers to consult workers and/or their representatives and to allow them to take part in discussions on all questions relating to safety and health at work. This duty extends to the specific health and safety directives and may well result in broad changes to consultation and participation procedures in all Member States. In many cases the best way of handling the requirement to consult is through a health and safety committee.

The Directive extends the right to workers and/or their representatives to make proposals on health and safety and be consulted in advance on a number of issues. These include any measures which may substantially affect safety and health, and information on risk assessment and training. In addition, workers' representatives with specific responsibility for health and safety must be allowed adequate time off work without loss of pay and must be given the opportunity to submit their observations during inspection visits by the competent authority.

Already in Member States there are a range of provisions which go some way towards implementing these requirements of the Directive. Three distinct approaches to workplace organisation can be identified.

In **Germany, Spain, Luxembourg, Italy** and the **Netherlands** and **Austria** workers' councils elected by employees have various functions and rights relating to health and safety. These include rights to approve or reject measures proposed by the employer, assist in planning, monitor compliance with the legislation, be informed of relevant information, and to accompany inspectors on visits and consult with them.

In **Belgium** a special committee must be established to act as a forum for consultation between the employer and employee in all undertakings with more than 50 employees. Similarly, health and safety committees must be set up in all establishments which employ over 50 people in **Spain, France** and **Portugal.** In **Spain** committees are compulsory for certain companies, depending on number of employees and nature of risk.

In **Italy,** *Article 18* of *Legislative Decree 626/1994* provides that safety representatives are elected or appointed by the

workers within the plant-level union structure. In enterprises or production units which employ up to 15 employees, the safety representative is elected directly by the workers. Safety have the right to inform and consult and the power to promote measures to protect health and security in the work area, as provided for in the *Framework Directive*.

The third approach is followed by **Denmark**, **Finland** and the **United Kingdom** where safety representatives must be elected by workers. Representatives become members of safety committees and are entitled to given all relevant information and to consult the relevant inspectorates.

It would appear that in this area the impact of the *Framework Directive* will be most significant in **Greece** and **Ireland** where the same level of statutory provision for consultation does not exist.

In **Austria**, employee protection was completely re-structured by the 1994 *Arbeitnehmerinnenschutzgesetz* (Employee Protection Act), transposing EC legislation. An important change was the introduction of the obligation to provide occupational medical care for all employees (this obligation previously applied only to enterprises with more than 250 employees). The new rules obliging the employer to conduct risk assessments, and to document the results and the measures planned, permit more effective monitoring by the Labour Inspectorate. In addition, the participation of the works council and of the individual employees in employee protection has been extended.

In **Sweden**, employers and employees are under an obligation to conduct, and properly organise, work environment activities. In any workplace regularly employing at least five employees, one or more safety officers must be appointed to represent employees with regard to working environment issues and to endeavour to achieve a satisfactory working environment. The safety officer is appointed by the local trade-union organisation which has negotiated the collective agreement with the employer or otherwise by the employees themselves. Workplaces with at least 50 employees must have a safety committee comprising employee and employer representatives. The employee representatives are appointed by the local trade-union organisation which negotiated the relevant collective agreement or, if there is no such organisation, by the employees. Employees in smaller workplaces can request the establishment of a safety committee. The safety committee must participate in planning work-environment activities and monitor their implementation. At workplaces without a safety committee, the trade union may appoint a regional safety officer. The regional safety officer is an external appointment and the appointee is not on the employer's payroll.

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