Dismissal - particularly for business reasons - and Employment Protection

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Thematic Report 2011

Dismissal
- particularly for business reasons -
and Employment Protection

Contract No. VC/2010/1636

November 2011
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The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA and EU candidate and pre-candidate countries.

The Programme has six general objectives. These are:

1. to improve the knowledge and understanding of the situation prevailing in the member states (and in other participating countries) through analysis, evaluation and close monitoring of policies;

2. to support the development of statistical tools and methods and common indicators, where appropriate broken down by gender and age group, in the areas covered by the programme:

3. to support and monitor the implementation of Community law, where applicable, and policy objectives in the member states, and assess their effectiveness and impact:

4. to promote networking, mutual learning, identification and dissemination of good practice and innovative approaches at EU level;

5. to enhance the awareness of the stakeholders and the general public about the EU policies and objectives pursued under each of the policy Sections:

6. to boost the capacity of key EU networks to promote, support and further develop EU policies and objectives, where applicable

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## Glossary of abbreviations

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<tr>
<td>ACAS</td>
<td>Advisory, Conciliation and Arbitration Service (United Kingdom)</td>
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<td>CC</td>
<td>Civil Code</td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>EES</td>
<td>European Employment Strategy</td>
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<td>EFTA</td>
<td>European Fair Trade Association</td>
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<td>ELLN</td>
<td>European Labour Law Network</td>
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<td>ETO</td>
<td>Early Termination Option</td>
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<td>EU</td>
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<td>EU-27</td>
<td>European Union currently consisting of 27 member states</td>
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<td>EUR</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>UWV</td>
<td>Employee Insurance Schemes Implementing Body (Netherlands)</td>
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# List of country abbreviations

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Executive summary

The 2011 Thematic Report of the European Labour Law Network (ELLN) deals with the termination of employment relationships in the private sector at the initiative of the employer with a specific focus on dismissals for business reasons. It examines the situation in the 30 countries of the European Economic Area.

Formal and procedural requirements
A pre-dismissal meeting/hearing is only required in a few countries. In some countries, workers’ representatives must be informed and/or consulted with in case of dismissal. A written notice of dismissal is required in a majority of countries. While the employer is generally obliged to instantly state the reason(s) for dismissal in some countries, he is only obliged to do so upon the employee’s request, if at all in others.

Notice periods
All countries do know a notice period, but some countries require a certain minimum service with the employer. Statutory minimum notice periods vary from one country to another, though a period between two and six weeks is considered a ‘reasonable’ period in most countries. In a clear majority of countries the principle of seniority is applied, resulting in an increase in notice periods in steps with the continuity of service. The room allowed for collective bargaining varies.

Involvement of specific bodies
In some countries other institutions are involved when an employer decides to dismiss an employee. Two types of institutions can be distinguished in this regard: public authorities or courts, on the one hand, and workers’ representatives on the other.

In countries in which workers’ representatives have a say in dismissal proceedings, the question must be addressed how ‘collective protection against dismissal’ relates to protection offered to the employee individually by national law. This is particularly true if the involvement of workers’ representatives affects the ability of employees to fight their dismissals.

Personal scope
The interpretations of notions, like employee, employment contract and employment relationship vary widely between the countries, the consequence being that different categories of employees are excluded from employment protection. Those mostly excluded are employees of public authorities, managerial staff, (dependent) self-employed persons, domestic workers and employees who have reached the regular retirement age. More importantly, some categories of employees are not excluded from all employment protection, but fall under alternative regimes. These regimes sometimes provide for less and
sometimes for more protection. Whether the difference in treatment of blue and white collar workers is acceptable is currently being discussed in the few countries that still apply this distinction.

Additional requirements to determine whether an employee is entitled to dismissal protection include defining a threshold of the number of employees employed per establishment/undertaking and the definition of a qualifying period. In Germany, the Federal Constitutional Court provided an elegant solution to this problem by creating an additional form of protection for employees in small companies. It must also be noted that certain dismissals are not excluded from protection, such as discriminatory dismissals or dismissals connected with an employee’s trade union or an employee’s pregnancy.

Special attention should be paid to the exclusion of employees who perform temporary employment. Fixed-term contracts are usually not covered by employment protection. However, many countries have adopted legislation to prevent the abuse of the use of fixed-term contracts, as is also required by EU Directive 99/70/EC requirement. Our analysis underlines the importance of such legislation.

**Probationary period**

In most of the countries employees are excluded from the most important forms of protection against dismissal during their probationary period. In order to protect the employee against abuse, the majority of the countries provide for restrictions in the use of probationary periods, such as the definition of a maximum period of term. Moreover, the probationary period usually needs to be agreed upon between the employer and employee and must often be made in writing. Furthermore, the exclusion of the protection against dismissal does not leave the employee completely vulnerable, as he may have the possibility to challenge the dismissal in exceptional cases, for instance, when it is in breach of non-discrimination law or an abuse of power. However, it is extremely difficult for the employee to prove such cases, as the employer is often not obliged to give a reason or justification for the dismissal.

The countries show a wide variation in terms of the lengths of probationary periods, most of them have limited it to either three or six months, with strict rules on when and how the probationary period may be deviated from. The probationary period can only be extended in a minority of countries when the employee is not able to work during this period due to a reason that is not influenced by the employer.

Related to the issue of a probationary period is the use of fixed-term contracts as a means to test an employee for a longer period without being subjected to the dismissal protection legislation. Although it is not possible to prove the abuse of fixed-term contracts in this way, it is a known and recognised practice in several countries. However, abuse of consecutive fixed-term contracts is prevented by legislation, as also required by EU Directive 99/70/EC.
Possible reasons for dismissals
In all countries, the freedom of termination, though it may be acknowledged in principle, is subject to certain limitations. All national law systems require the existence of reasons for dismissal. In some countries the relevant provisions are fairly vague with the courts enjoying far-reaching powers to flesh out the reasons for dismissal. In some countries legislators attempted to further concretise the reasons for dismissal by enumerating situations in which unilateral terminations are, in principle, considered admissible.

Automatic lawfulness of dismissal seems to be a very limited legal concept in the countries surveyed. Automatic unlawfulness, on the other hand, is more often used. Status-related prohibitions of dismissal can be found both in the context of workers’ participation and in the context of protection against dismissal of particularly vulnerable persons. Prohibitions of dismissal related to specific situations can, for instance, be observed in the context of transfers of undertakings where dismissals are prohibited in all countries in accordance with Article 4(1) of Council Directive 2001/23/EC.

Dismissal for business reasons
Dismissals for business reasons always require a business decision to be taken by the employer first. Such a decision may be necessary on account of factual circumstances (a sudden drop in demand, for instance), but always entails an employer’s response to such circumstances.

Managerial prerogative
A key question with regard to dismissal for business reasons is whether and to what extent a legal order acknowledges the right of the employer to take certain entrepreneurial decisions. In principle, all countries surveyed acknowledge that a certain ‘managerial prerogative’ exists either in the sense that a court may not dictate a ‘better’ or ‘more appropriate’ entrepreneurial policy or that an employer is allowed to respond to external circumstances within a ‘band of reasonableness’. In some countries the ‘managerial prerogative’ even has constitutional roots, in particular, when the right to take entrepreneurial decisions is regarded as being part of constitutionally protected entrepreneurial freedom.

What the acknowledgment of a ‘managerial prerogative’ essentially comes down to is a certain degree of judicial self-restraint in the area of dismissals for business reasons. Courts do, however, fully examine the lawfulness of such decisions. This means that possible legal boundaries, whether based on statutory law or collective agreements, must be respected by the employer. The feasibility of an entrepreneurial decision, on the other hand, is in principle not examined by the courts. The court may only step in when an entrepreneurial decision amounts to an abuse of rights. What is more, courts in some countries check whether an employer who decides to dismiss an employee has properly implemented it. It is in this context that some courts ascertain whether there really is a causal nexus between, for instance, a restructuring decision and employees becoming redundant. In addition, courts in some countries may ascertain whether there is an actual business need to take a given entrepreneurial decision. In particular, courts may weigh the interests of the employer and of the employee by determining whether there is a fair trade-off between what can be
gained from taking a given entrepreneurial decision and the harm caused for employees. In other national systems, however, such a weighing of interests is not possible. In these countries employers are, for instance, free to shut down a plant even if the economic advantage to be expected from such a decision is minor or even non-existent. In some countries the consequences of judicial self-restraint seem to have been hampered by the fact that employers are under a considerable burden of proof when intending to dismiss employees for business reasons. In addition to that, other instruments exist which may be seen as ‘compensating’ for the acknowledgement of a ‘managerial prerogative’. In some countries, for instance, employees enjoy a certain priority right to reinstatement after having been made redundant by the employer.

The extent to which a legal order acknowledges a ‘managerial prerogative’ impacts on other elements of dismissal protection. If an employer essentially has an unlimited right to take business decisions, restrictions on his right to select employees for dismissal may become more or less meaningless.

**Principle of proportionality**
A key question of dismissal law is whether and to what extent the principle of proportionality represents a benchmark when determining the lawfulness of a dismissal. The content of and limits to the principle of proportionality vary from country to country. What can be said, in any event, is that courts in many jurisdictions raise the question whether a dismissal is really necessary or whether it could be avoided by taking other (less harmful) measures. Accordingly, the law in some countries provides that a dismissal for business reasons is unlawful if there is a vacancy in another part of the undertaking or in another undertaking belonging to the same company. In some countries the employer may even be obliged to ensure that the employee can be further employed in another company belonging to the same group. In other countries a dismissal is not possible if further employment can be secured by amending the terms of the existing contract (with the consent of the employee). Finally, employers are obliged to provide further training or retraining (at their own expense) before being allowed to dismiss an employee for business reasons.

**Selection of employees for dismissal**
Another crucial question with regard to dismissals for business reasons concerns the selection of employees for dismissal if such dismissal in principle is legal. In many countries this decision is essentially left to the employer who is regarded as enjoying the relevant ‘freedom to select’ as part of his ‘managerial prerogative’. In other countries there are statutorily determined criteria which need to be considered by the employer when selecting employees for dismissal. In most countries a ‘social selection’ has to take place based on criteria that determine the ‘social status’ of an employee and which vary from one country to another. Legal systems also differ in terms of the extent to which employers can include ‘interests of the company’ part of the equation. Sometimes the ‘seniority principle’ (‘last in first out’) is applied, which leads to loyalty being rewarded, but may raise doubts with regard to the prohibition of age discrimination. Accordingly, the issue must be raised whether the criteria applied by the employer are fair and transparent, consistent and not discriminatory.
Again, it should be noted that the involvement of workers’ representatives might (partly) make up for missing regulations on the selection of workers for dismissal. If workers’ representatives have a say in dismissal proceedings the employer might not have a free hand in selecting workers for dismissal.

National law systems also vary widely with regard to the legal consequences of an employer’s violation of the relevant regulations. These range from nullifying a dismissal to the affected employee’s claim for damages.

**Entitlements in case of lawful termination**

The most important and most often regulated entitlement for employees in case of a dismissal is a severance payment. Other entitlements are supporting employees to find further employment, either with the same employer (via ‘priority hiring’) or elsewhere (via for instance an outplacement service). Since notice periods, severance payments and unemployment benefits serve related goals, their relationship is analysed. This analysis shows that since they are applied in different stages of the dismissal process they are sequentially related, meaning that in general they cannot be enjoyed simultaneously or cumulatively.

In the majority of the countries severance payment is regulated by statutory law, but can be supplemented by collective agreements. The entitlement to severance payment is in the majority of the countries limited to dismissals for economic reasons. Some countries have additional requirements, such as a threshold to the size of the company, a qualifying service period and the type of contract. As far as the method of calculating the severance payment is concerned, two general methods can be distinguished, which are both based on the service period and a percentage of the average salary of the employee. Some countries deviate from the two main methods, in the sense that older employees are receiving higher payments. In terms of the level of severance payment the countries vary widely.

Severance payments are not very much in line with the concept of flexicurity as promoted in the European Employment Strategy (EES). It makes it possible for the employer to pay off the duty to find alternative employment for the redundant employees. Although these ideas are discussed in several countries, in most countries severance payments are still the most important means for protection against dismissal, because it shows a direct effect and is considered to be a decent gesture of the employer towards the employee. Entitlement to measures like guidance to other work and retraining is less widely used across the countries.

**Remedies in case of unlawful termination**

In general four main remedies can be distinguished: reinstatement, dismissal compensation, compensation in lieu of notice, and damages. Each of them serve a different purpose, however, the first two are most widespread among the countries. As the consequence of the remedy reinstatement is the most comparable one between the countries, most of the attention is paid to this. In many countries this is considered to be the strongest remedy, nonetheless, in some countries it is hardly ever claimed and rarely granted by courts.
What is to be understood by compensation varies widely within the countries, as does the amount of the compensation. In some countries compensation in lieu of notice is the most important remedy, since it ensures that the unlawful dismissed employees at least get what they should have received if the dismissal rules were properly applied. The remedy damages also has many meanings, for the purpose of this report it is understood as what the employee can claim on top of a dismissal compensation. As such the aim of this remedy is to further compensate the employee for the loss of the job.

Litigation
In all countries access to a court against a dismissal is available, in most cases to a specific labour tribunal. In some countries also additional procedures ex post or ex ante are available. Some countries make access to a court more complicated by additional arbitration, conciliation or negotiation. Appeal against the decision is in most cases possible, but not always, especially in case of specific procedures. The time limit to start these procedures differs widely. Especially in case of nullification of the dismissal, this time may be short. The countries have various ways to protect employees during the time that the court procedure takes. In most of the countries the burden of proof in dismissal cases lies, in principle, with the employer, especially regarding the presence of a sufficient ground for dismissal. In eight countries the burden of proof lies, in principle, with the employee. Several countries have more subtle systems to divide the burden of proof.
1. Introduction

1.1 Intention of the report

The 2011 Thematic Report of the European Labour Law Network (ELLN) deals with the termination of employment relationships in the private sector at the initiative of the employer with a particular focus on dismissals for business reasons. It provides an overview of the commonalities and differences in the national systems with regard to the most important issues, like formal and procedural requirements, notice periods, involvement of specific bodies, personal scope probationary periods, possible reasons for dismissals, dismissals for business reasons and entitlements, remedies and litigation.

1.2 Relationship with other studies

The general topic of the termination of employment relationships has already been studied by the European Commission. In 1997, an initial report was drawn up, which was updated in 2006 for the 15 old EU member states and extended in 2007 for the 12 new member states. These reports deal with the termination of employment relationships in general, including the scope of the rules, termination by mutual agreement, dismissals on personal and disciplinary grounds, on the initiative of both employee and employer, as well as termination for economic reasons.

The aim of this year’s Thematic Report is not to provide an update of these reports. Instead we aim to present an analytical overview of the most important features of the national systems on termination of the individual employment relationship at the initiative of the employer with a specific focus on termination for business reasons.

1.3 Background

The rules on dismissal protection are at the heart of labour law. One of the major differences between a worker and an independent contractor is that the former enjoys a certain degree of protection against unilateral termination by the other party to the contract. In addition the rules on dismissal protection are closely related to other elements of labour law. A certain amount of protection against termination might, for instance, be an essential precondition for putting workers’ rights into practice, because without protection against dismissal, a worker may feel discouraged from claiming holiday rights or pay that is overdue. Dismissal protection is also important from an economic point of view. It may be, for instance, that the higher the level of dismissal protection is, the more likely a worker is to invest in his capabilities, as he can in that case be relatively sure that his expenditures will bear fruit.
There are, however, three more specific reasons to look more closely at the systems of dismissal protection in Europe. The first is a legal reason, the second a political one and the third a scientific reason.

The first reason for focussing on dismissal protection lies in the fact that the position of workers has become the underlying subject of a certain ‘juridification’ at the constitutional level. Article 30 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), whose provisions are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (Article 51(1) sentence 1 of the Charter ), enshrines a right to protection in the event of unjustified dismissal. Article 30 reads: “Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices”. By referring to ‘national laws and practices’, it clearly stipulates the importance of paying close attention to what ‘national laws and practices’ encompass in terms of dismissal protection. There is more to Article 30, however, because a right to protection in the event of unjustified dismissal on the European level, albeit having to be put within the context of existing ‘Community law and national laws and practices’, undoubtedly raises the question whether and to what extent a set of core rules on dismissal protection should exist that must be complied with at national level.

The second reason for focussing on dismissal protection is that the rules on the termination of employment have increasingly become part of a sometimes heated debate on employment policy. Prompted in part by the recent financial and economic crisis, dismissal protection has attracted interest from an employment policy point of view both at the European and the national level. As far as the European level is concerned it should, in particular, be noted that the so-called Agenda for New Skills and Jobs (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Agenda for New Skills and Jobs: A European Contribution Towards Full Employment – COM 2010, 0682 final) states that a ‘better functioning of labour markets’ is a key priority. In this context the discussion focuses, for instance, on whether a wider use of “open-ended contractual arrangements, with a sufficiently long probation period and a gradual increase of protection rights, access to training, life-long learning and career guidance for all employees” could become a ‘possible avenue for discussion’. Against this background it seems worthwhile to take a closer look at probationary periods provided for in national law and the scope of dismissal protection regulation in general. Another objective of the Agenda for New Skills and Jobs is to place ‘greater weight on internal flexibility in times of economic downturn’. Against this background it is interesting to ascertain to what extent national law obliges an employer first offer further training or re-training before an employment relationship can be terminated.

A third reason, closely related to the former, for putting dismissal protection at the centre of a comprehensive comparative study are the increasing calls from economists to loosen workers’ protection so more jobs can be created and to introduce more fairness in the labour market by improving the prospects for newcomers, in particular. In this context, for instance, the OECD recently called for the Spanish Government to ease employment protection legislation for permanent workers by further reducing severance pay for all new permanent contracts. In addition, the OECD called upon the Government to consider
introducing a single contract with initially low, but moderately increasing severance payments linked to job tenure. In our view, lawyers should contribute to this important debate by providing further information on the legal systems, pointing to the overall legal context and calling attention to possible legal limits to deregulation in the area of dismissal protection which may, in particular, arise from international law.

1.4 Scope of this study

As has already been mentioned, the focus of this study is on dismissals for business reasons. The explanation for this particular focus essentially is the practical importance of this form of dismissal. Another explanation is the recent financial and economic crisis which has highlighted the problems that come with such dismissals. Though dismissals for business reasons often arise in the context of insolvency proceedings, little attention will be paid to the specific regulations in this area, because this would lead to a range of additional questions that could not be properly addressed in the framework of this study.

There are also other limits to what will be discussed in this survey. From a legal point of view, there are two major issues that are not dealt with in more detail: termination agreements and collective bargaining. Termination agreements certainly deserve attention, because they may be the instrument of choice for employers to evade dismissal protection rules. While termination agreements have recently become the subject of intense legal regulation (notably in France), there are signs that protection of employees in case of termination of the employment relationship by mutual consent is (nearly) non-existent in some countries. However, dealing with termination agreements in more detail would have meant going beyond the scope of this study. As for collective bargaining, it goes without saying that this is highly relevant in the context of dismissal protection. Collective agreements may, for instance, contain specific rules on dismissal protection which complement statutory rules. In some countries social partners enjoy far-reaching powers to either disregard what has been fixed by legislators or to flesh out norms on dismissal protection found in codes of law. Such arrangements will be dealt with in this study to the extent possible. Taking full account of how collective bargaining contributes to dismissal protection will remain the subject of further research.

Apart from this it must be mentioned that the authors of this study are fully aware of the fact that the fixing of the terms in employment contracts has recently been made easier for employers in some countries. The result has been a diminished importance of dismissal protection legislation. It is against this background that this study provides some information on the use of fixed-term contracts in the countries concerned without addressing the details of the corresponding regulations in depth.

The Collective Redundancies Directive is also excluded from this study, as its relevance was already discussed in the ELLN’s 2010 Thematic Report.

Finally, it should be underlined that the legal set-up of dismissal protection is the exclusive subject of this report. A considerable gap seems to exist in some countries between the rules
of dismissal protection and their implementation in practice. Protection against dismissal may be one of the issues most worthy of an empirical study. To provide such a study would, however, have been beyond the means of the authors. Some attention will nonetheless be paid to this aspect on an incidental basis.

1.5 Methodology

This comparative study is based on the information provided by the national experts, who are members of the European Labour Law Network (ELLN), in national reports in response to a questionnaire developed by the management of the ELLN after consultation with the European Commission and the Scientific Committee of the Network. The national reports describe the situation in as well as in the 30 members of the European Economic Area, including all 27 European Union member states. These 30 countries are referred to in this report as ‘the countries’. The names of the countries are abbreviated in passages in brackets and in tables, but written in full in the main text.

In order to compile a thematic overview it is necessary to classify the practices in the different countries in certain groups. The systems in the countries are therefore sometimes described in an analytical way, and do not necessarily use the same terminology or classification used in the national systems. This was, however, to make the systems comparable.

In some chapters of this study reference is made to ILO Convention 158 of 1982, the so-called Termination of Employment Convention. The Convention was mainly used as a starting point for discussion and a backdrop for outlining and explaining the national systems. It is fully recognised that the Convention has not been ratified by many countries in Europe.

Please note that reference to ‘he’, ‘his’ or ‘him’ encompasses both genders.

Prof. Dr. Guus Heerma van Voss, Co-ordinator of the European Labour Law Network, and Prof. Dr. Bernd Waas, Co-organiser of the European Labour Law Network

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2. **Formal and procedural requirements**

This chapter deals with formal aspects of dismissal protection law, starting with a brief description of the legal sources where such requirements can be found. This is followed by aspects including receipt of dismissal notice and whether notice must be in writing and the obligation to give reasons for the dismissal.

2.1 **Legal sources**

Formal requirements and procedures that must be followed by the employer in case of dismissal can arise from statutory law as well as from collective agreements. In addition, procedural requirements can be based on the employment contract. Instruments of ‘soft law’ may also play a role: in Ireland, statutory law requires an employer to give the employee a notice in writing no later than 28 days after he enters into a contract of employment, which specifies the procedure the employer will follow prior to and for the purpose of dismissing the employee. In addition it is expressly provided that the extent, if any, of the employer’s compliance or failure to comply with such procedure or with the provisions of any approved Code of Practice will be taken into consideration to determine whether a dismissal is unfair.

2.2 **Receipt of notice of dismissal**

Many countries have specific rules on receipt of the statement containing the dismissal. In Belgium, France and Luxembourg, for instance, the employer must make use of either registered mail or a bailiff who serves the notice of dismissal. In some countries receipt of the notice by the employee may be difficult to prove for the employer, even if he did use registered mail. This is the case, for instance, in Germany, where the ‘safest’ method of dismissal is the handing over of a ‘letter of cancellation’ by the employer in the presence of a third party. In Lithuania, the requirement was recently introduced that employees who receive a notification of dismissal from their employer must acknowledge receipt of the notification in writing. At present it is unclear, however, what the legal consequences of failing to meet this obligation are. In Latvia, it is the employer who has to prove that the employee was properly notified of the dismissal. Accordingly, employers try to ensure that employees acknowledge receipt of the notice of dismissal in writing.

2.3 **Pre-dismissal meeting/hearing**

With regard to “reasons related to the worker's conduct or performance”, Article 7 of ILO Convention 158 states that “the employment of a worker shall not be terminated (...) before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity”.

In some countries a pre-dismissal meeting or at least a hearing may be obligatory before an employee can be dismissed. In France the employer must summon the employee to a pre-dismissal meeting by registered post or by letter handed over personally to the employee. The employer must allow at least five working days to elapse between the first presentation of the summons letter to the employee and the date of the meeting. In the meeting, the employer must give reasons for the dismissal. Following the pre-dismissal meeting, the employer must wait two working days before sending the dismissal letter to the employee.

In Finland and Luxemburg (if the company has a workforce of at least 150 employees), the employer is also obliged to arrange a hearing. In Norway, a pre-dismissal meeting must also take place. If no such meeting was arranged, the dismissal is not necessarily considered invalid. Instead, whether the omission bore any significance for the decision to issue the notice of termination must be evaluated. The employer carries the burden of proof that the omission had no impact on his assessment. In Iceland, employees have since 2008 been entitled to consultations with the employer regarding the end of the employment relationship and the reasons for termination under relevant collective agreements in the private sector. In Slovenia, in case of dismissal due to incapacity or misconduct, the employee must be granted an opportunity to defend himself. In the United Kingdom, a dismissal is likely to be procedurally unfair if no consultation with the individual has taken place, unless such consultation would be utterly futile.

2.4 Written form

In most countries, the notice of dismissal must be in writing (e.g., BE, BG, CY, CZ, FR, EL, HU, IS, IT, LV, LT, NO, PT, RO, SK, SI, ES, SE). In Estonia, a notice must be either in writing or must at least be reproducible in writing. In Germany, on the other hand, notice must be given in writing with dismissals in ‘electronic form’ (email) being expressly prohibited.

Labour laws vary widely with regard to what information the employer must provide to the employee in writing. Fairly detailed information is required in some countries. In Romania, for instance, the employer is obliged to put in writing, i.e., the grounds for dismissal, the term of notice, a list of all vacancies within the enterprise, the period for filing an action and the competent court where the dismissal can be contested.

The legal consequences of non-compliance with the written form also vary from one country to another. In Estonia, if the notice as such is not in writing, the dismissal will be void, while disobeying the obligation to state the reasons for dismissal in writing only results in a claim for compensation. In Latvia, a dismissal is void if the employer did not indicate the factual and legal reasons for dismissal in writing. In Poland, the notice of dismissal is to be in writing, yet even an oral notice is fully effective, while in Italy and Romania, a verbal dismissal is null and void. In Luxemburg, even verbal dismissals can effectively terminate the contract of employment. However, they give rise to a ‘formal irregularity’ in the sense that the employee is entitled to damages (limited to one month’s salary), even if the grounds for dismissal are valid. In Norway, in case of a verbal dismissal, there is no deadline for initiating legal proceedings. If the employee takes legal action within four months of the date of the
notice of termination, the notice shall be ruled to be invalid, unless specific circumstances make this clearly unreasonable. In Ireland, an employer who proposes to dismiss employees by reason of ‘redundancy’ must give them notice in writing of the proposed dismissal. Failure to do so affects the employer’s entitlement to claim a rebate from the Social Insurance Fund, not the validity of the dismissal itself.

In France, where an employee is dismissed without the correct procedure being observed, but on well-founded and valid grounds, the court will order the employer to comply with the prescribed procedures and award the employee compensation which must not exceed one month’s wages.

No written form required

No written form is required, for instance, in Austria, Denmark, Liechtenstein and Malta. In practice, however, termination in writing is the norm because employers otherwise face difficulties with regard to proving the termination of the employment relationship. In Finland, the written form is not required, either, however, the employer is obliged to arrange a pre-dismissal hearing.

2.5 Statement of reasons for dismissal

In many countries the employer is required to state the reasons for dismissal when giving notice (Chapter 2.5.1). In some countries, the employer must state the reasons for dismissal when asked to do so by the employee (Chapter 2.5.2). In yet other countries, the law requires the employer to provide further statements when giving notice (Chapter 2.5.3). No such obligations only exist in Austria and Belgium.

2.5.1 Statement of reasons for giving notice of dismissal

In many counties (e.g., BG, CY, CZ, EE, FR, LV, LT, PL, PT, SK, ES) the employer is obliged, when giving notice, to inform the employee about the reasons for dismissal. In Iceland, employers are often obliged to do so according to relevant collective agreements.

Labour laws may vary with regard to how specific the employer must be when stating the reasons for dismissal. In Bulgaria, the Czech Republic and Slovakia, for instance, the statement of the employer must be sufficiently concrete linking the facts of the case to the abstract ground of dismissal.

2.5.2 Statement of reasons for dismissal upon request of the employee

In some countries (e.g., IE, IT, LI, LU, NL, NO, UK) the employer is only obliged to state the reason for dismissal upon the employee’s request.
In **Ireland**, for instance, when an employee is dismissed, the employer is required, if requested, to provide the employee, details of the principal grounds for dismissal in writing within 14 days of the request. No sanction, however, is prescribed if the employer fails to comply with the request to state the reasons for dismissal. In **Italy**, once the dismissal letter is received by the employee, he has 15 days to request the employer to state reasons for the dismissal, if they have not already been provided within the scope of the dismissal. The employer shall communicate the reasons for the dismissal in writing within seven days. If the employer does not provide the reasons in due time, the dismissal does not take effect.

In the **United Kingdom**, the employer is required to give a written statement of the reasons for dismissal if the employee has one year of continuous employment. In **Denmark**, the employee is entitled to be informed about the reason for his dismissal if he has been employed continuously for a period ranging between 8-12 months (depending on the respective legislation or collective agreement). In **Germany**, there are no (explicit) statutory provisions with regard to stating the reasons for an ordinary dismissal. However, upon the employee’s request, the employer may be obliged to inform the employee accordingly as part of a contractual duty of good faith.

### 2.5.3 Requirement of further statements

In some countries (*e.g.*, **IE, PT, SE**) the law provides for further statements the employer must provide when giving notice. In **Ireland**, the employer is required to provide the employee with a redundancy certificate setting out how the statutory lump sum payable has been calculated. Failure to do so, however, does not impact on the validity of the dismissal. In **Portugal**, a notice of dismissal must contain confirmation of the cumulative occurrence of all legal requirements that allow the termination of the employment contract. In addition, the amount of compensation that will be paid as well as the place, date and manner of its payment must be cited. In **Sweden**, the employer is obliged, upon request by the employee, to state the circumstances upon which the notice of termination is based. The employer must also state the procedure to be followed by the employee in the event that the employee intends to claim that the dismissal is invalid or to claim damages.

### 2.6 Concluding remarks

A pre-dismissal hearing is required in only a few countries. The lack of a respective obligation may (at least in part) in some countries be compensated by establishing a duty to involve workers’ representatives before dismissing an employee. Most national laws provide that dismissal must be in writing. The consequences of non-compliance with the written form vary extensively, however. Striking differences between national laws are also found when it comes to an obligation on the part of the employer to state the reasons for dismissal.
3. Notice periods

Article 11 of ILO Convention 158 states that “a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof”. A period of notice is the period of time that lies between giving notice and the date on which the employment relationship effectively terminates. The primary aim of a notice period may be to give the employee some time to adapt to the impending termination of his employment relationship and to find or arrange for an alternative job. In this sense it can be said that notice periods contribute to the protection against dismissal (though that protection is limited in time). The longer the period of notice the stronger the protection. No period of notice is required when the employee “is guilty of serious misconduct that is of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period” (Article 11 of ILO Convention 158).

After a brief examination of the area of application of the provisions on periods of notice, we will show that national laws differ considerably with regard to the length of the notice period, in particular. In many countries, however, the principle of seniority is applied to determine the period of notice in individual cases.

Substantial differences also exist between the national systems with reference to the extent to which notice periods can be extended (or even reduced) by way of individual agreements or collective bargaining.

3.1 Area of application

In almost all countries periods of notice are provided by statutory law. In Belgium, general periods of notice are established by a collective agreement extended by the state. These periods of notice apply if no specific collective agreement has (equally) been extended by the state. In Italy, periods of notice apply to all the employees regardless of the regime they fall under, however, they are determined by a collective agreement or relevant custom or equity, their duration depending on the seniority and qualification of the employee.

In several countries the area of application is confined by further requirements, which include (1) minimum continuity of service, (2) special rules for small businesses, (3) a distinction between blue and white collar workers and (4) differentiations between certain types of contracts.

Ad. 1 Minimum continuity of service

In some countries (BE, CY, IE, UK) a threshold is applicable with regard to periods of notice. In Belgium and Cyprus, a continuity of service of at least six months is required for the application of the provisions on periods of notice, whereas in Ireland and the United Kingdom, a continuity of service of 13 weeks or one month, respectively, is required.
Ad. 2   Small businesses

In Germany, small employers are privileged when it comes to periods of notice. Employers and employees can agree to reduce the statutory minimum period of notice (of four weeks) if the employer does not employ more than 20 employees on a regular basis.

Ad.3   Blue and white collar workers

In a few countries (AT, BE, DK, EL) statutory law differentiates between blue collar and white collar workers. As a result, blue collar workers are often significantly less protected than white collar workers. A case in point is Austria: the statutory minimum period of notice is shorter than the equivalent period which applies to white collar workers (14 days vs. six weeks). In addition to that, the minimum period of notice can be disposed of either individually or on the basis of a collective agreement (it is mandatory for white collar workers). Finally, employers are not restricted with regard to possible dates of termination when dismissing blue collar workers while they face restrictions with regard to white collar workers. In Denmark, a statutory regulation of the period of notice is in place for white collar workers, while the relevant regulation applicable to blue collar workers is found in collective agreements (with the latter provisions usually far less beneficial for blue collar workers). In Greece, statutory periods of notice are applicable only to white collar workers, while periods of notice are not provided at all for blue collar workers.

With regard to Belgium, the Constitutional Court declared in a judgement delivered on 7 July 2011, that the different legal regimes applying to blue and white collar workers were in breach of the constitutional principle of equal treatment and have to be revised by the legislator within a period of two years (for further details, see also 5.3).

Ad. 4   Types of contract

In Bulgaria, there are different periods of notice for fixed-term employment contracts and contracts of an indefinite duration (similar: Poland). In some countries differentiations exist between other types of contracts. In Germany, for instance, statutory notice periods as well as possible dates of termination can be modified in an individual contract if the employee is employed as a so-called ‘temporary help’ for a short period of time.

3.2   Equivalence of dismissals by employers and terminations by employees

The laws in a few countries (e.g., BG, CZ, IS and LI) explicitly state that periods of notice must be the same for employers and employees. In Liechtenstein, where an agreement provides for different notice periods, the longer period is applicable to both parties. If an employer gives notice on operational grounds, a shorter period of notice for the employee may be determined by way of an individual or collective agreement. In Germany, on the other hand,
it is expressly prohibited to fix a period of notice to be observed by the employee that is longer than a period of notice that applies to dismissals by the employer.

3.3 Minimum periods of notice and admissible dates of termination

Statutory minimum periods of notice vary from country to country. In the Czech Republic, for instance, the minimum period of notice is two months. In Austria, the minimum period of notice is six weeks, in Germany it is four weeks. In Belgium, the general statutory minimum period of notice is 35 days (for blue collar workers), in Bulgaria it is 30 days, in Cyprus and in Ireland it is one week (see also Table 1).

Table 1 Overview of statutory minimum periods of notice to be taken into account by the employer

<table>
<thead>
<tr>
<th>Minimum notice period</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>IT, EL (blue collar workers)</td>
</tr>
<tr>
<td>1 week</td>
<td>CY, IE, MT, UK</td>
</tr>
<tr>
<td>10 days</td>
<td>LV (incapacity employee)</td>
</tr>
<tr>
<td>2 weeks 14 days</td>
<td>PL, PT</td>
</tr>
<tr>
<td></td>
<td>AT (for blue collar workers), FI</td>
</tr>
<tr>
<td>15 days</td>
<td>EE, ES (objective reasons)</td>
</tr>
<tr>
<td>30 days 4 weeks 1 month</td>
<td>BG (contract of indefinite duration), HU, SI</td>
</tr>
<tr>
<td></td>
<td>DE</td>
</tr>
<tr>
<td></td>
<td>DK, FR, EL (white collar workers), IS, LV (economic reasons), LI, NL, NO, SK, SE</td>
</tr>
<tr>
<td>35 days</td>
<td>BE (blue collar workers)</td>
</tr>
<tr>
<td>6 weeks</td>
<td>AT (white collar workers)</td>
</tr>
<tr>
<td>2 months</td>
<td>CZ, LT, LU, NL</td>
</tr>
<tr>
<td>3 months</td>
<td>BE (white collar workers), BG (fixed-term contract)</td>
</tr>
</tbody>
</table>
In **Greece**, notice periods were reduced in 2010 across the board. For instance, the notice period was reduced from five months to three months (for terms of service of five to 10 years with the same employer) and from 24 months to six months (for terms of service of more than 20 years with the same employer).

**Admissible dates of termination**

Differences also exist with regard to possible dates of termination. In **Austria**, for instance, the law provides that the termination of white collar workers can, in principle, only be effected at the end of each calendar quarter. However, additional dates can be established both on the basis of an individual and a collective agreement as long as the given termination is effective at the end of a calendar month or on the 15th of a calendar month.

### 3.4 Principle of seniority

In many countries (e.g., AT, BE, CY, EE, FI, DE, EL, HU, IS, IE, PL, SE) statutory law fixes a minimum period of notice which is gradually extended in accordance with the employee’s length of service (principle of seniority). In some countries the principle of seniority does not apply. In **Latvia**, for instance, the law specifies different periods of notice which are not related to the length of service. In some countries, the application of the principle of seniority is limited to white collar workers. In **Austria**, for instance, the notice period for blue collar workers is generally 14 days, in **Denmark**, it varies from seven to 14 days, and in **Spain** it is 15 days, no matter how long the employee’s period of service has been. In **France**, the minimum period of notice is one month for employment relationships of less than two months and two months for employment relationships exceeding two months duration. However, a longer period can be agreed by collective agreement.

In **Bulgaria**, no principle of seniority is adopted in legislation. The parties to collective agreements may establish such a principle, however.

Labour law systems vary with regard to the steps to be considered when applying the principle of seniority. In **Austria**, as has been pointed out, four steps have to be taken into account, while there are three steps in **Iceland**, six in **Cyprus** and even seven in **Germany**.

In **Belgium, Italy** and **Norway** the principle of seniority is complemented by other criteria to determine the notice period. In **Belgium**, the principle of seniority is dependent on the amount of pay. Employees whose salary exceeds a certain amount may agree (after notice has, in principle, been given) on a period of notice to be observed by the employer. In the absence of an agreement between the parties, the matter will be referred to the Labour Court which, based on factors such as seniority, age and salary, will award the employee compensation in lieu of notice, if it concludes that the employer gave insufficient notice. In **Italy**, the principle of seniority is complemented by the qualification of the employee in order to determine the length of the notice period. In **Norway**, the principle of seniority is
complemented by fixed notice periods for older employees (> 50 years: 4 months; > 55 years: 5 months and > 60 years: 6 months).

In Germany, it is statutorily provided that an employee’s times of employment are not to be taken into account when applying the principle of seniority, if the times fall within a period prior to the employee’s 25th birthday. The ECJ (C-555/07), however, held this provision to be in breach of the prohibition of age discrimination arising from European Union law. Consequently, it is no longer being applied.

For a complete overview, see Annex 1.

3.5 Periods of notice and freedom of contract to parties concerned

In some countries (e.g., FI, HU) where the law gives room for disposing of the statutory rules, possible legal limits to this power equally to individual employment contracts and collective agreements. Labour laws vary with regard to the scope of freedom parties to the employment contract have to dispose of the statutory rules.

(1) Extending periods of notice
In some countries (DE, HU, IE) employer and employees can (at least in principle) only dispose of statutory law if the agreement is in the employee’s favour. In some countries, certain limits to freedom of contract apply. In Bulgaria, for instance, the parties to the employment contract can extend the statutory period of notice (of thirty days) up to a limit of three months.

(2) Reducing periods of notice
In some countries the parties to an employment contract may even reduce statutory periods of notice. In Finland, for instance, statutory law expressly provides for statutory periods of notice to be applicable only unless otherwise agreed. However, the employee’s notice period cannot be longer than the employer’s.

3.6 Periods of notice and collective bargaining

Countries, to a varying degree, provide for collective agreements disposing of the statutory rules.

(1) Extending periods of notice
In some countries (FR) statutory rules can be disposed of by way of concluding collective agreements, if the agreement is in the employee’s favour. In Bulgaria, for instance, the parties to collective agreements can extend the statutory period of notice with regard to certain types of dismissals on operational grounds by introducing the principle of seniority and, by doing so, extending the statutory period of notice in accordance with the length of
service of the employee concerned. In the **Czech Republic** and **Latvia** the partners to collective agreements are free to fix periods of notice as long as they are not shorter than the statutory minimum period (of two and one month(s) respectively).

(2) **Reducing periods of notice**

In some countries, *e.g.*, **Estonia** or **Liechtenstein**, the parties to collective agreements enjoy extensive power to fix periods of notice even if they are shorter than the basic period of notice determined by statutory law. In **Germany**, statutory notice periods (including the statutory minimum period of notice of two weeks) may be disregarded (and, accordingly, even be reduced) on the basis of collective bargaining agreements. The parties to an individual contract of employment can dispose of the statutory rules insofar as they refer to relevant collective agreements in their agreement.

3.7 **Contracts with a probationary period**

In most countries specific rules apply to probationary contracts (see Chapter 6.1). Among these rules are provisions fixing specific periods of notice. For instance, in **Bulgaria**, **Cyprus** and **France**, the party in whose benefit a probationary period has been agreed may terminate the contract without notice until expiry of the probation period. In **Estonia**, employment contracts may be terminated during the probationary period by giving no less than 15 calendar days’ advance notice thereof.

3.8 **Concluding remarks**

All countries provide rules on notice periods by statutory law. With the exception of two **Italy** and **Belgium**, where the general periods of notice have been defined in collective agreements. In most of the countries a period between two and six weeks is considered a ‘reasonable’ (minimum) period. In most of the countries the period of notice is based on the principle of seniority, while only few national laws specify a general period; in some countries the duration of the notice period also depends on the reason for the dismissal. Furthermore, notice periods may differ for different types of employees (in particular blue and white collar workers) and different types of contracts (in particular, fixed-term and indefinite contracts).

In the majority of the countries the law is semi-compelling and as such respects the freedom of contract, since it allows parties to the employment contract to deviate from the statutory rules. Nearly all countries allow such deviation when it is in the employee’s favour, *i.e.*, a longer period of notice. Only in a few countries, on the other hand, deviations which are disadvantageous for the employee, *i.e.*, a shorter period of notice, are also allowed. In many countries, there is a wider margin to deviate from statutory rules, in favour as well as to the detriment of the employee, by collective bargaining.
4. Involvement of specific bodies

In this chapter, the involvement of two types of specific bodies is addressed: that of public authorities and courts (Chapter 4.1) and that of worker representatives (Chapter 4.2).

4.1 Involvement of public authorities and/or courts

In **Malta**, the employer must notify the public employment service about the date of the commencement of all employment relationships as well as terminations or dismissals.

The most far-reaching involvement of public authorities can be found in the **Netherlands**. There the law provides for an external preventive check on the reasonableness of the termination, either via the permission of state authorities (administrative review) or via the requirement of a dissolution order by the judge (judicial review). With regard to the former, it should be noted that the employer is statutorily required to apply for a permission of termination. The permission procedure includes the obligation to hear both sides (employer and employee). Once permission is granted, which generally takes three to four weeks, there are no costs for the employer, other than those following from the notice period that has to be taken into account. In case the employer terminates the contract without permission, the employee can nullify it within a period of six months, in which case the employee can ask the court for a continuation of wage payment and for re-instatement in his job. Instead, the employee can claim damages on the ground of ‘clearly unreasonable dismissal’ when the reason for which the notice is given is false or when the consequences of the termination of the contract (including the provisions made by the employer like severance payments) are so unfairly grave for the employee that they outweigh the interests of the employer. As regards termination by a dissolution order, such order can be requested in case of serious reasons, which encompasses a change of the circumstances under which the contract was concluded. In such a case, the judge may set a compensation which may serve as severance payment.

In all countries certain categories of employees are specifically protected against dismissal. Generally, there are two groups that have to be considered in this regard: employees who are particularly vulnerable, on the one hand, and employee representatives on the other. With regard to employees who belong to either the first or to the second group, there are often specific requirements that have to be met. In many countries prior permission by the court has to be granted to the employer who intends to dismiss such employees. This is the case in **Austria**, for instance. Often, prior permission by state authorities is needed when dismissing particularly vulnerable employees. This is the case, for instance, in **Germany** (dismissal of disabled persons) or in **Bulgaria** (dismissal of disabled persons, employees taking leave, mothers of children up to three years, etc.). In some countries the, approval of the given institution of workers’ representation is needed when dismissing such workers. This is the case, for instance, in **Belgium, Lithuania** and **Slovakia**.
4.2 Involvement of workers’ representatives

According to Article 13(1) of ILO Convention No. 158 “when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment”.

A good example of this is France, where an employer who proposes to dismiss workers on economic grounds must summon and consult the works committee or staff delegates and inform the competent authority of the proposed dismissals. The employer should indicate to the staff representatives the economic, financial or technical reasons for the dismissals, the number of workers concerned, the categories of workers affected, the proposed criteria for the order of dismissals, the number of workers employed in the establishment and the provisional timetable for the dismissals (the works committee or, in its absence, the staff delegates must be summoned for consultation twice). The interval at which these two meetings are to be held varies depending on the number of employees affected. After consultation with the works committee or staff delegates, the employer defines the criteria for setting the order of dismissals. These criteria must take into account family responsibilities, particularly in the case of single parents; length of service in the establishment; the situation of employees whose re-entry into the labour market is difficult (disabled persons or elderly employees) as well as skills.

Information of and consultation with workers’ representations as illustrated by the example of France, is always necessary in cases of mass redundancies as required by Council Directive 98/59/EC. It must be stressed, however, that in some countries (AT, FI, DE, LT, PL, PT, SK, SI, SE), institutions of workers’ representation are even involved in the process of dismissing a single employee.

In Austria, the employer has to inform the works council about his intention to dismiss an employee. The employer is not obliged, however, to state the reason(s) for dismissal. The works council has one week to respond. If the works council gives its consent, the employee cannot claim that the termination is socially unjustified. If the works council remains silent, the employee can claim that the termination is unlawful. If the works council objects to the termination, the employee can additionally claim that another employee would be affected less because of being less ‘vulnerable’. The period within which court proceedings can be initiated by the employee is two weeks after the employer has informed the works council about the dismissal. As a result, legal certainty exists for employers with regard to possible court proceedings within about three weeks starting when the initial (first) information of the works council about the employer’s plans to dismiss an employee is provided.
In **Germany**, the employer is obliged to inform the works council about the impending dismissal and in particular about the reasons for dismissal. If the works council was not (properly) informed, the dismissal is unlawful and, consequently, null and void. The works council has a (limited) right to oppose the dismissal within one week (in case of ordinary dismissal). Before making its statement, the works council has to hear the employee who is to be dismissed, if possible. If an objection by the works council is based on certain statutorily fixed grounds, the employer may be obliged to further employ the dismissed employee until the end of the court proceedings.

In **Poland**, the employer must, before dismissing an employee, consult with a trade union representing the employee. In the process, an employer is obliged to ascertain whether the employee to be dismissed is represented by a particular union. In **Slovenia**, if thus requested by the worker, the employer must inform the competent trade union in writing about the intended dismissal. The union may oppose the termination if it is of the opinion that there are no justified reasons or that the dismissal procedure does not conform to the statutory requirements. If a trade union opposes the ordinary termination for reason of incapacity or misconduct, and if the worker requests the suspension of the effect of the termination from the employer, the termination of the employment contract shall not be effective until the expiration of the period within which the arbitration or the court procedure may be introduced. In **Finland** and **Sweden**, before making a decision on a dismissal for reasons of redundancy, an employer is obliged to negotiate with the competent trade union. The negotiation initiative must be taken at such a time as to ensure that the negotiation becomes a natural and effective part of the employer’s decision-making process.
5. Personal scope

Article 30 of the Charter of Fundamental Rights of the EU defines: “Every worker has the right to protection against unjustified dismissal”. This text suggests that the personal scope of dismissal protection in Europe is not restricted to employees, but includes every worker. ILO Convention 158 concerning the Termination of Employment at the Initiative of the Employer states that the aim of dismissal protection legislation is to provide protection to all employed persons in all branches of economic activity (Article 2). But this Convention allows the exclusion of certain categories of employed persons, like temporary employed workers, workers serving a period of probation or a qualifying period of employment, and workers engaged on a casual basis for a short period. However, one must realise that the Convention dates to 1982. More recent EU legislation, for instance, the directives on equal treatment in employment and on fixed-term contracts includes those groups and even provides for specific protection. The coverage of dismissal protection in the legislation of European countries shows wide variations in practice. Such differentiations are the result of national preferences.

In this context, the aim of this chapter is to examine how the 30 countries of the ELLN have dealt with these issues in their dismissal legislation. Hence, this chapter begins with an analysis of how the countries define the personal scope of their dismissal protection law, and as such indicates who is included and more specifically, who is excluded. Secondly, it analyses which categories of employees enjoy additional protection. Thirdly, it identifies which categories enjoy no or less dismissal protection since that category either falls outside the scope or within a specific regime that is additional or alternative to the general dismissal protection legislation. The chapter concludes with a reflection of the findings in relation to the context outlined above.

5.1 Who is included and who is excluded

The dismissal protection legislations of the 30 countries, in various ways, define which employed persons fall within their scope. The two most dominant ways are:
1) by definition of a key notion and
2) by the use of additional requirements, i.e., the definition of a threshold on the number of employees per establishment/undertaking and the definition of a qualifying period.

Ad 1. Personal scope by definition of key notion
In many countries the personal scope for dismissal protection law is set by the definition of a key notion. In general, three different notions are used:
- Employee (AT, DM, FI, FR, DE, EL, IS, IE, IT, LI, LU, MT, NO, SK, SE, UK);
- Employment contract (BE, EE, LV, LT, NL (Civil Code), PL, PT, RO, SI); and
- Employment relationship (BG, CY, IE, NL (public law)).
The choice of the relevant notion is determined by the extent of the scope of the dismissal protection legislation. The choice for the terms ‘employee’ and ‘employment contract’ is usually restricted to classical types of employment contracts with the employee in a clear relationship of subordination to an employer who exercises ‘authority’. The term ‘employment relationship’ is often used in a wider sense, including for persons who personally perform labour for another party.

In some countries, separate concepts are used for various parts of the dismissal legislation. For instance, in the Netherlands, the private law rules have a narrow concept and the public law rules have a wider one. In Ireland, the employment equality legislation applies a broader definition than the unfair dismissal legislation, as it includes individuals who agree with another person personally perform any work or service for that person.

In other countries there are other differentiations. For example, the notion ‘employee’ is in Denmark by the distinction between white collar and blue collar workers. The United Kingdom distinguishes between employees (included) and workers (excluded). In Italy, the notion ‘employee’ has different meanings within the two dismissal protection regimes: Article 2118 of the Civil Code covers home workers, domestic workers, workers in a probationary period, managers and workers above 65, who meet the retirement requirements, while all other employees are covered by the more protective regime of Article 2119 of the Civil Code.

With respect to the second key notion, the interpretation of ‘employment contract’, the interpretation of Romania is rather similar to the traditional types of employment contract described above, while that of Poland is restricted to contracts for an indefinite period.

In Bulgaria and Spain, no personal scope is set on the law on dismissal protection, since it applies to all workers, regardless of the sector of activity and includes the public sector. As such, it can be called universal.

In conclusion, the analysis shows that, in general, the scope is wider when the notion ‘employment relationship’ is used than when the notions ‘employee’ or ‘employment contract’ are used. However, the actual definitions of these notions vary significantly among the countries, resulting in different categories of employees to be excluded. Table 2 presents which employees are most often explicitly excluded based on the various definitions.

<table>
<thead>
<tr>
<th>Category employees</th>
<th>Excluded in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees of public authorities</td>
<td>AT, BE, FI, EL, LV, NL, NO, SK, UK</td>
</tr>
<tr>
<td>Managerial staff / CEOs</td>
<td>AT, EE, FI, DE, HU, IT, LV, LU, NL, RO, SE</td>
</tr>
</tbody>
</table>
From a comparative perspective it is interesting to note that some countries have explicitly included these categories of employees. For instance, employees of public authorities (civil servants) are included in Ireland and Sweden, dependent self-employed persons are included in public law protection in the Netherlands, managerial staff is included in Ireland, Liechtenstein and Romania, while domestic workers are included in Belgium and France. Furthermore, it should be noted here, that some of these employees, in particular employees of public authorities (civil servants) are protected by another regime (see for further elaboration Chapter 5.3).

**Ad 2. Additional requirements**

Additional requirements used to determine the personal scope of dismissal protection are the definition of either a threshold of the number of employees employed per establishment/undertaking or a qualifying period.

The first form of additional requirement, the *threshold* of the number of employees, can, for instance, be found in Austria (5 employees per establishment), France (10 employees per undertaking) and in Germany (10 employees per establishment). In Austria, this implies that if this requirement is not met, the law on dismissal protection does not apply, albeit with the exception of protection against discriminatory dismissals. In Germany, employees in small firms enjoy additional judicial protection by the courts based on the fundamental right of profession and the general principle of good faith. As is ruled by the Federal Constitutional Court, this means that a dismissal of an employee of a small establishment may be null and void if it is in contradiction with the dismissal protection law. In France, this means that employees of small firms are covered by dismissal protection legislation, however, they are not entitled to the minimum compensation rule of six months wages in case of the lack of a real and serious cause for dismissal.

The second form of additional requirement is that employees need a *qualifying period* of continuous work for the employer. This is found in Austria, Cyprus, France, Germany, Ireland, Slovenia and the United Kingdom.

The length of this qualifying period varies per country. It is, for instance, 52 weeks in Ireland (except in cases of pregnancy-related dismissals or dismissals for trade union membership),
the United Kingdom (in case of potentially fair dismissal only) and Greece. In Austria, Cyprus, France (related to the already mentioned compensation rule) and Germany, it is six months. In some countries this period can be extended. In Cyprus, this is possible up to 104 weeks by written agreement between employer and employee. In Denmark, the period can be extended up to 8-9 months by a collective agreement (including blue collar workers) and/or up to 12 months for employees covered by the White Collars Act.

In some countries, a qualifying period also applies indirectly, namely the probationary period, since during this period employees are covered by a less protective regime. This form of coincidence between qualifying period and probationary period is evidenced in Cyprus, Germany, Ireland, Italy, Slovenia, and Sweden (for further details, see Chapter 6.1).

5.2 Additional protection

Some employees enjoy additional protection against unilateral termination of the employment relationship by the employer because of their position or circumstances. In general, they can be subdivided into four categories. The first category of employees enjoys additional protection because of the position they have as an employee representative within the company. In essence, this form of protection does not primarily aim at protecting the individual employee, but to ensure effective employee participation. The second and third categories of employees enjoy additional protection because they are considered to be more vulnerable due to their personal situation. The last category refers to employees who are protected against victimisation because of the use of their rights. In Table 3, the existence of this form of protection in the various countries is presented.

Table 3 Groups of employees enjoying additional protection.

<table>
<thead>
<tr>
<th>Category of employees</th>
<th>Specification employees</th>
<th>Extra protected in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>members or delegates of trade unions</td>
<td>BE, BG, CY, EE, FR, EL, HU, IE, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI, SE, UK</td>
</tr>
<tr>
<td></td>
<td>shop stewards</td>
<td>DK, EE, FI, FR, HU, IS, NO, PT, ES, SE</td>
</tr>
<tr>
<td></td>
<td>members of a (European) works council</td>
<td>AT, BG, DK, FR, DE, EL, HU, LT, LU, NL, PL, PT, SK, SI, ES, SE</td>
</tr>
<tr>
<td></td>
<td>member of a company board</td>
<td>DK, DE, FR, HU, NO</td>
</tr>
<tr>
<td></td>
<td>member of a safety committee</td>
<td>BE, CY, EE, FI, FR, EL, HU, IS, LU, NO, PT, SK, ES, SE, UK</td>
</tr>
<tr>
<td></td>
<td>member of an employment tribunal/dispute committee</td>
<td>FR, LT</td>
</tr>
<tr>
<td></td>
<td>employee on a granted leave</td>
<td>BG, CY, IT, LV, LT, NO, PL</td>
</tr>
<tr>
<td>Category of employees</td>
<td>Specification employees</td>
<td>Extra protected in</td>
</tr>
<tr>
<td>------------------------</td>
<td>--------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>pregnant employee</td>
<td></td>
<td>BE, BG, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IS, IE, IT, LV, LT, LU, NL, NO, PL, PT, RO, SK, SI, ES, SE, UK</td>
</tr>
<tr>
<td>during a treatment related to a human reproduction procedure</td>
<td></td>
<td>BG, HU, IT</td>
</tr>
<tr>
<td>maternity/paternity leave</td>
<td></td>
<td>AT, BE, BG, CY, CZ, DK, EE, FI, DE, EL, HU, IS, IE, IT, LV, LT, LU, MT, NL, NO, PL, PT, RO, SK, SI, ES, SE, UK</td>
</tr>
<tr>
<td>parental leave</td>
<td></td>
<td>BG, CZ, DK, EE, FI, DE, HU, IS, IT, LV, LT, LU, MT, NL, NO, PL, PT, RO, SK, SI, ES, SE, UK</td>
</tr>
<tr>
<td>parents of young children</td>
<td></td>
<td>BG, EL, HU, IT, LT, NO, RO, SK</td>
</tr>
<tr>
<td>employees on adoption leave</td>
<td></td>
<td>BG, FI, HU, IE, IT, LV, LT, LU, NO, PL, PT, SI, SE, UK</td>
</tr>
<tr>
<td>employees on care leave</td>
<td></td>
<td>BG, DE, HU, IT, LU, NO, RO, PL, SI, SE</td>
</tr>
<tr>
<td>employees on educational leave</td>
<td></td>
<td>BE, BG, IT, LV, SE</td>
</tr>
<tr>
<td>employees who have been called to military service and/or civil service</td>
<td></td>
<td>AT, BE, CZ, FI, EL, HU, LT, NL, NO, PL, SK / AT, FI, HU, SK, SE</td>
</tr>
<tr>
<td>employees who have been elected for a political function</td>
<td></td>
<td>BE, BG, CZ, NL, SK</td>
</tr>
<tr>
<td>employees who are disabled</td>
<td></td>
<td>AT, DK, DE, EL, LV, LT, NL, NO, SI, SE</td>
</tr>
<tr>
<td>employees who are ill or on (work-related) sick leave</td>
<td></td>
<td>BE, BG, FI, LV, NL, NO, PL, RO / CZ, FR, HU, LV, LT, LU, MT, NO, SK, SI</td>
</tr>
<tr>
<td>rehabilitating employees in the occupation</td>
<td></td>
<td>BG, FR, LU</td>
</tr>
<tr>
<td>employees who are on quarantine leave</td>
<td></td>
<td>BG, RO</td>
</tr>
<tr>
<td>older workers</td>
<td></td>
<td>HU, SI</td>
</tr>
<tr>
<td>workers who are entitled to pension within X-years</td>
<td></td>
<td>LT, PL</td>
</tr>
</tbody>
</table>

**Category 2**
Protection because of vulnerability due to certain leave

**Category 3**
Protection because of vulnerability due to illness, disability or age
<table>
<thead>
<tr>
<th>Category of employees</th>
<th>Specification employees</th>
<th>Extra protected in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 4 Protection against victimisation</td>
<td>employees who have filed a complaint against the employer for the exertion of rights by an employee in an admissible manner</td>
<td>BE, CY, LV, PT, ES</td>
</tr>
<tr>
<td></td>
<td></td>
<td>AT, DE</td>
</tr>
</tbody>
</table>

Although the categories of employees in this table have been presented as being comparable between the countries, it should be noted that it shows a simplified picture. Different countries have specific interpretations. The aim of this table is to give an impression of what types of employees are especially protected in the countries, without being specific about the definitions and processes through which this protection is provided. For example, in Sweden the concept of shop steward is not used, but additional protection is provided to trade union representatives at the local company level. Another example of this is Luxemburg, whose employee representatives/delegates enjoy additional protection, but do not necessarily represent a trade union, since they can be independent delegates.

Furthermore, the table aims to demonstrate generalities in terms of categories of employees protected in at least two or more countries. This means that very specific types of employees that were only reported by one country were not included. Thus, for instance, the highly protected member of the social labour inspection in Poland and the additional protection for employees with family responsibilities in Iceland have not been included in this table.

With regard to those generalities, the table shows that categories of employees who are especially protected by EU directives are also generally protected in the different member states. For example, employee representatives/delegates are not only protected by national law and preferences, but also by Article 7 of Directive 2002/14/EC and Article 10(3) of Directive 2009/38/EU. The same applies to pregnant employees, who are also protected by Article 10 of Directive 92/85/EEC, and for employees on parental leave, who are also protected by Clause 5(4) of the revised framework agreement on parental leave, adopted by Council Directive 2010/18/EU. Furthermore, the table demonstrates that a substantial number of countries also provide additional protection for members of a safety committee, employees who have been called to military service or civil service, disabled employees and employees who are ill.

Not shown in this table, yet nonetheless important and covered in all countries, is the specific protection of employees who are vulnerable to discrimination, which is also covered by EU directives: Article 3(1)(c) of Directives 2000/43/EC and 2000/78/EC and Article 14(1)(c) of Directive 2006/54/EC.

In general, additional protection means that the respective employee cannot be dismissed if he falls within a certain category. Thus, for instance, the protection of an employee who fills
a relevant position in a trade union in Bulgaria is protected for as long as he holds that position and up to six months after leaving that position (also: HU, LV, NO, RO). However, this protection is not unconditional in all situations. It does not apply if the employer can demonstrate that the position or situation of the employee is not the reason for the dismissal (e.g., FR, MT, NL, SE, UK), or that there is a substantive reason (e.g., DK, FR, EL, IS, NO). These reasons include grounds related to the incapacity of an employee to properly and efficiently perform the job or gross misconduct of the employee (e.g., AT, BE, BG, CY, FR, IS, IT, LV, PL, PT, SK), and economic, technical or organisational reasons (e.g., AT, BG, CY, CZ, FI, IS, IT, LV, LT, LU, NO, PL, PT, SK). However, the employer has to often take account of more formal procedural requirements to dismiss an employee who enjoys special protection based on one of these reasons (see Chapter 2).

5.3 No or lower protection

No or lower dismissal protection, in general, occurs in three situations. Firstly, it can be the consequence of an explicit exclusion from the scope of dismissal protection law, resulting in either no protection or protection by a specific regime. Secondly, no protection can also be the consequence of the failure to fulfil additional requirements, i.e., a company size threshold and a qualifying period. Thirdly, no protection can also be the result of the nature of the employment contract, such as probationary and fixed-term contracts.

Ad 1. No or alternative protection by explicit exclusion

As indicated in Table 2 (see above), some categories of employees are explicitly excluded from the personal scope of dismissal protection law, including publicly appointed employees, self-employed persons and employees who have reached normal retirement age. Besides explicit exclusion by definition of the personal scope, explicit exclusion can also be the result of a given situation of the employer, such as the closure of the enterprise or bankruptcy of the employer. In the latter case, the consequence may be that the employees enjoy no protection against dismissal as such, e.g., Bulgaria (closure of the enterprise), Lithuania and the Netherlands (bankruptcy). However, alternative protection is usually provided by specific regimes. It is not conceivable that the existence of an alternative regime is reason for an explicit exclusion. This is the case in Greece, the Netherlands, Norway, Romania and Spain where a specific regime exists for civil servants or in Portugal and Spain where a specific regime exists for domestic workers. The same is true for countries in which different regimes apply for white and blue collar workers, which in practice means that blue collar workers are often less well protected than white collar workers (e.g., AT, BE, DK, EL). Less protection is provided to blue collar workers with respect to notice periods (see Chapter 3.1).

An interesting issue relating to the difference in treatment of white and blue collar workers was addressed in a recent case in Belgium (7 July 2011), where the Constitutional Court judged that the different legal regimes which apply to blue and white collar workers were in breach of the constitutional principle of equal treatment, a condition the legislator must remedy within a two-year period. In the past Germany also distinguished between blue and white collar workers, but abandoned this practice as it was deemed a violation of equal
treatment as defined in the Constitution. A similar discussion is also ongoing in France. In Greece, on the other hand, the court concluded that such a distinction does not violate the constitutional principle of equality. In the wider context of EU equal treatment legislation, in particular Directive 2000/78/EC, the European Court of Justice might arrive at a similar conclusion if asked to make a preliminary ruling. Article 3(1)(c) of the Directive stipulates that the Directive applies to all persons regarding equal treatment in employment and with reference to working conditions, including dismissals and pay. The question is whether the difference in treatment of white and blue collar workers can be justified by occupational requirements (Article 4(1) Directive 2000/78/EC) and whether the objective is legitimate and the requirement proportionate. If not, this could have far-reaching consequences for those countries that traditionally distinguish between these types of workers.

One good example of a lower level of protection related to the application of an alternative regime for employees who are excluded by definition of the personal scope, can be found in Italy, where Article 2118 of the Civil Code (which covers home workers, domestic workers, workers in a probationary period, managers and workers who are entitled to retirement pensions) provides for payment in lieu of the notice period in case of a summary dismissal without good cause. All other employees, however, are covered by Article 2119 of the Civil Code, which provides for the payment of compensation that may go beyond the amount of the payment in lieu of the notice period; thus, compensation may under the same circumstances result in a higher amount.

One last group of employees that is excluded from dismissal protection law, albeit not by the legislation itself, but by practice, are employees who perform undeclared or illegal work. In Cyprus, for instance, this applies to the case of migrant workers from third states, who have less protection because they are treated differently. This difference in treatment is particularly evident in the number of cases in which the employer, according to the standard individual employment contract, is allowed to dismiss the employee without observing any notice period. Such practice was supported by case law, because working without a permit was deemed illegal and void ab initio and as such harmed the public interest, which had to be protected against the interests of the illegal employee (Case of 20 June 2007, No 49/2006, Gary Wayne White vs. Athletic Association Kition Larnaca et al.).

Ad. 2 No protection as a consequence of additional requirements
As mentioned above, some employees are excluded from general dismissal protection law because additional requirements are not met: a threshold of the number of employees in an establishment/undertaking and a qualifying period. The consequence is total exclusion, i.e., there is no dismissal protection at all. In Slovenia, for instance, an employee only enjoys dismissal protection if the employer employs more than ten employees and the employee has a service period of more than six months. The same is in principle true for Germany, however, as described above, the Federal Constitutional Court has established extra-judicial protection based on the fundamental right of protection of the profession and the general principle of good faith.

The failure to meet these additional requirements does not always result in the exclusion of all dismissal protection measures. For example, in Austria, the failure to meet the additional
requirements does not result in an exclusion of protection against discriminatory dismissals. In Ireland, it does not result in an exclusion of the protection against dismissals linked to the employee’s membership of a trade union or an employee’s pregnancy.

**Ad. 3  No or lower protection due to the nature of the employment contract**

In general, dismissal protection legislation only applies to indefinite employment contracts and excludes employees who work on a fixed-term contract. The underlying reason for this exclusion is that a fixed-term contract does not need to be terminated, since it ends *ex lege* after a certain period (for example, one year) or on a fixed date (e.g., DK, FR, EL, LI, LU, NL, PL, SI, SE). Nonetheless, this does not always result in total exclusion. Especially in the case of premature termination of the fixed-term contract, employment protection may be applicable, as is the case, for instance, in Luxembourg, the Netherlands, Poland, Slovenia and Sweden. The opposite is the case in Ireland, where the expiry of a fixed-term contract that is not renewed is deemed a dismissal, unless there is a signed written agreement that unfair dismissal legislation will not apply.

Furthermore, a fixed-term contract may become subject to dismissal protection law. This may be the case because of its duration, which, for instance, is 10 years in Liechtenstein, or in case of misuse of successive fixed-term contracts. Directive 99/70/EC on fixed-term work requires protection against the abuse of fixed-term contracts. Usually, the sanction in case of such misuse is the application of protection against dismissal. The importance of this aspect should not be underestimated. As Annex 2 indicates, temporary employment, which includes fixed-term contracts, represents a significant percentage of overall employment within the European Union. On average, 8 to 14% of the employment relationships in 2010 consisted of temporary employment, applicable in a substantial number of countries (FI, FR, DE, NL, PL, SI, ES, SE); this figure is even higher in other countries, ranging from 15,8% in Sweden to 24,9% in Spain and 27,3% in Poland. The use of temporary employment within the EU on average has increased over the last decade (2000-2010) from 11,8% to 14%, the result of an increase in temporary employment in a majority of EU countries (AT, CY, CZ, EE, FR, DE, IS, IE, IT, HU, LU, MT, NL, NO, PL, PT, SK, SI).

No or lower protection may also be the case during the period marked as a probationary period in an indefinite contract. A third case which can be distinguished is when fixed-term contracts and the probationary period fall together (for further details on both of these issues, see Chapter 6.3).

**5.4 Concluding remarks**

In order to define which employees are covered by employment protection law, the 30 countries use three key notions, namely employee; employment contract; and employment relationship. In general, these notions determine the extent of the personal scope, *i.e.*, the types of employees covered by the legislation. This is the broadest for the notion ‘employment relationship’ and the narrowest for the notion ‘employee’. The actual interpretation of these notions, however, varies significantly between the countries, as a
consequence of which different categories of employees are excluded. Those who are mostly excluded are public, managerial staff, (dependent) self-employed persons, domestic workers and employees who have reached normal retirement age. More importantly, some categories of employees are not excluded from all employment protection, but fall under alternative regimes. These regimes may provide lower or higher levels of protection. However, even when they provide less protection, these forms of protection still reach the level of protection stipulated in ILO Convention 158. Whether the difference in treatment of blue and white collar workers is still acceptable is currently being discussed in the few remaining countries which still apply this distinction.

Additional requirements to determine whether an employee is entitled to dismissal protection include the definition of a threshold of the number of employees working for an establishment/undertaking and the definition of a qualifying period. It must be noted that while the second requirement is mentioned in Article 2(2) of ILO Convention 158, the first is not. The question hence is whether employees of small businesses should be covered by at least a minimum form of dismissal protection. The German Federal Constitution Court offered an elegant solution to this problem by creating an additional form of protection for such employees. It should also be noted that certain dismissals are not excluded from protection, such as discriminatory dismissals, as is for instance the case in Austria or dismissals linked to the employee’s membership of a trade union or an employee’s pregnancy, which is the case in Ireland, for instance. This additional protection is not only derived from EU directives, but is also a result of national preferences.

Special attention should be paid to the exclusion of employees who perform temporary employment. Many countries have already adopted legislation to prevent the abuse of the use of fixed-term contracts, regardless whether this is required by EU Directive 99/70/EC. The significance of such legislation is underlined by our analysis.
6. **Probationary period**

A probationary period is a period that takes place at the beginning of an employment relationship. During this period, both parties have the possibility to determine whether the job, the way it is performed and their cooperation meets their expectations. When the employment contract is terminated during the probationary period, the employee usually has a lower level of protection as compared to the level offered in a solid employment contract.

In this chapter we examine where the basic rules on probationary periods are found in the 30 countries (statutory law, collective agreements, individual employment contracts) and what these basic rules entail. These rules deal with the duration of the probationary period and its possible suspension. The second part of this chapter deals with the application of dismissal protection law during the probationary period, and the third and final section focuses on the relationship between the probationary period and fixed-term contracts.

### 6.1 Basic rules and length of the probationary period

**Basic rules of the probationary period**

As Table 4 reveals, the employment legislation in the majority of countries provides basic rules for the probationary period. Most countries have statutory rules which are sometimes complemented by case/law; a smaller group of countries includes such rules in collective agreements and one country bases its rules on custom. In this last country, **Iceland**, the statutory law only provides rules for the probationary period of craft apprenticeships (*iðnnemar*), which are applied to other workers in practice and as such have developed into a custom. No general rules exist in **Denmark** (only a specific rule for white collar workers) and no statutory rules on the probationary period at all are provided in the **United Kingdom**.

### Table 4 Basic rules on probationary period

<table>
<thead>
<tr>
<th>Basic rules in</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutory law</td>
<td>AT, BE, BG, CY, CZ, EE, FI, FR, DE, EL, HU, IE, IT, LV, LI, LT, LU, MT, NL, NO, PL, PT, RO, SI, ES, SE</td>
</tr>
<tr>
<td>Specific law</td>
<td>DK, IS</td>
</tr>
<tr>
<td>Collective agreements</td>
<td>SK / FI, FR, IT, NL, NO, PT, ES, SE</td>
</tr>
<tr>
<td>Case law</td>
<td>FR</td>
</tr>
<tr>
<td>Custom</td>
<td>IS</td>
</tr>
<tr>
<td>None</td>
<td>UK</td>
</tr>
</tbody>
</table>
In general, the personal scope of the rules on the probationary period covers all employees. Some exceptions exist, however. In **Denmark**, for instance, it is only regulated for white collar workers, and as mentioned above, in **Iceland**, it is only regulated for craft apprenticeships, yet applied to all employees in practice. In **Latvia** and **Lithuania**, probationary periods may not be applied to minors, which is also the case for employees in **Lithuania** who are employed as a result of a competition or election, by passing qualification exams, or when the change of employer is the result of a transfer.

In many countries the probation period has to be explicitly agreed upon between the employer and employee in order to be effective (AT, BG, DK, HU, IS, IE, IT, LV, LI, LT, NL, NO, SI, SE). Often, this agreement needs to be in writing, for instance, as a clause in the individual employment contract (e.g., BG, CY, CZ, HU, IE, IT, LV, LT, LU, NL, NO). If such a (written) agreement is absent, the consequence may be that the probationary period provided by the law applies (e.g., EE, MT). Another consequence may be that the probationary period is to be considered non-existent, meaning that the employment contract begins without a probationary period (e.g., AT, LV, LT, NL, NO). The latter also implies that dismissal protection legislation applies fully. Thus, if the employer, for instance, determines in the first month that the employee’s performance is unsatisfactory, he is bound by the dismissal protection legislation. 

*Duration of the probationary period*

Most of the countries have clear rules about the duration of the probation period. It is possible to deviate from (in practice meaning to extend) this duration, but this is usually very restricted. If it is possible at all, it is often required to be completed in writing by either a collective agreement or an individual contract. Furthermore, the rules are strict in the sense that deviation from the standard period is often also limited to an absolute maximum. Thus, for instance, in **Hungary**, the standard probationary period provided by law is one month, but through an individual contract or collective agreement it is possible to deviate from the law up to three and six months, respectively. Any agreed period that extends beyond three or six months will be considered invalid (this is similar in, e.g., DK, LI, LT, SI). In the **Netherlands**, a period that is longer than the absolute maximum is even considered null and void, with the effect that it was never supposed to have existed, which implies that the employer may also not apply the standard probationary period provided by law. In general, the employee seems to be protected by legislation since the formal requirements and possibility to deviate from the standard legislative provisions is restricted. The consequence of the failure to comply with these requirements is that the deviation is invalid or even null and void.

In terms of the duration of the probationary period, virtually all countries provide for an absolute maximum (see Table 5). Although Table 5 shows a wide range of duration, the majority of countries provide for a maximum probationary period of 3 or 6 months. The longest probationary period is found in **Cyprus**, where the standard probationary period provided by law is six months (26 weeks), but can be extended up to two years (104 weeks) by written agreement. Only one country, **Luxembourg**, has also included a minimum
probationary period of two weeks: hence, no probationary period or one that is thus, when a probation period is agreed upon, it cannot be shorter than two weeks.

Furthermore, in order to establish a maximum probationary period, a distinction is sometimes made between different types of workers. Belgium and Denmark, for instance, provide different periods for blue and white collar workers. France also distinguishes between types of workers (workers/employees; middle management; and upper management) in case of indefinite contracts, whereas different periods apply for fixed-term contracts. Other countries, like Finland, the Netherlands and Portugal also differentiate between types of contract, while in Hungary and Slovakia a distinction is made for periods that deviate from the statutory length of individual or collective agreements.

In some countries (CY, DE, EL, IE, IT, SI) the probationary period corresponds with the qualifying period of service if the dismissal protection provided by law is to apply. This indicates that there is a relationship between the two: the probationary period equals the qualifying period. This implies that the employer is not bound by the dismissal protection legislation or by a less favourable regime, even if the employer and employee have not explicitly agreed on a probationary period (as is required in Ireland and Slovenia, for instance), due to the equal duration of the qualifying period.

**Table 5  Maximum duration of probationary periods**

<table>
<thead>
<tr>
<th>Maximum duration</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 days</td>
<td><strong>BE</strong> (blue collar workers)</td>
</tr>
<tr>
<td>1 month</td>
<td><strong>AT</strong></td>
</tr>
<tr>
<td></td>
<td><strong>NL</strong> (fixed-term contract)</td>
</tr>
<tr>
<td>2 months</td>
<td><strong>NL</strong> (open-ended contract)</td>
</tr>
<tr>
<td>3 months</td>
<td><strong>CZ</strong></td>
</tr>
<tr>
<td></td>
<td><strong>DK</strong> (white collar workers)</td>
</tr>
<tr>
<td></td>
<td><strong>HU</strong> (by individual contract)</td>
</tr>
<tr>
<td></td>
<td><strong>IS</strong></td>
</tr>
<tr>
<td></td>
<td><strong>LV</strong></td>
</tr>
<tr>
<td></td>
<td><strong>LI</strong></td>
</tr>
<tr>
<td></td>
<td><strong>LT</strong></td>
</tr>
<tr>
<td></td>
<td><strong>PL</strong></td>
</tr>
<tr>
<td></td>
<td><strong>SK</strong> (standard)</td>
</tr>
<tr>
<td>4 months</td>
<td><strong>EE</strong></td>
</tr>
<tr>
<td></td>
<td><strong>FI</strong></td>
</tr>
<tr>
<td></td>
<td><strong>RO</strong></td>
</tr>
<tr>
<td>Maximum duration</td>
<td>Countries</td>
</tr>
<tr>
<td>------------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>
| 6 months         | BE (white collar workers)  
|                  | BG        |
|                  | CY        |
|                  | DE        |
|                  | HU (by collective agreement) |
|                  | IT        |
|                  | NO        |
|                  | SK (by collective agreement) |
|                  | SI        |
|                  | SE        |
| 12 months        | BE (white collar workers)  
|                  | EL        |
|                  | IE        |
|                  | MT        |
| 24 months        | CY        |

No fixed length of probationary period

Five countries are not included in Table 5, namely France, Luxembourg, Portugal, Spain and the United Kingdom. The United Kingdom is not included because no probationary period is provided. France, Luxembourg, Portugal and Spain are excluded, because they apply a distinct system of defining the duration of the probationary period, resulting in not just one maximum period but in several. As mentioned above, France distinguishes between types of employees as well as types of contract (indefinite or fixed-term). In Luxembourg, the duration of the probationary period depends on the employee’s level of education and wage. The general maximum duration is six months. This is reduced to three months if the employee has no professional qualification (‘certificat d’aptitude technique et professionelle’) and extended to 12 months if the monthly wage is higher than a specific amount (for 2011: €3,858.34).

In Portugal and Spain the duration of the probationary period depends on the professional activity and the type of contract (fixed-term or indefinite). Thus, in Portugal, for instance, in the case of an indefinite contract, the following periods apply: 90 days for general professions; 180 days for specially qualified professions; and 240 days for management jobs and higher level functions. In the case of a fixed-term contract the probationary period is related to the duration of the fixed-term: 15 days for contracts up to six months and 30 days for contracts equal to or longer than six months. In Spain, the maximum duration is also limited with reference to company size: in a company that has fewer than 25 employees the probationary period may not exceed three months.
Extension of the probationary period

The purpose of the probationary period is for the employer and employee to ‘test’ the new employment relationship, and a substantial number of countries (BG, EE, FI, LV, LI, LT, NO, SK, SI) provide the possibility to extend the probationary period in case the employee is not able to perform the job. By suspending the probationary period, the employer and employee still have the opportunity to ‘test’ the new employment relationship. This applies, for instance, if the employee is ill or if the initial phase of the employment relationship involves training only. In Norway, for example, the notice period can be extended if the employee was absent and when his absence was not caused by the employer. The duration of the extension of the probationary period equals the period of absence. In Finland, the maximum probationary period of four months may be prolonged to a maximum of six months if the employer provides specific, work-related training for the employee, which lasts for a continuous period of over four months. In Estonia, the option to suspend the probationary period is not regulated by law, however, in accordance with a statement by the Minister of Social Affairs, the period can be extended in case of illness, maternity leave, military service, etc.

On the other hand, some countries’ legislation explicitly stipulates that the probationary period may not be extended beyond the legal maximum, and if it does, it will be considered invalid or null and void (e.g., HU, LU, NL).

Consecutive probationary periods

None of the countries has indicated that the probationary period can be agreed on in consecutive contracts, neither when it is established in an indefinite-term, nor in a fixed-term contract. Hence, some countries have indicated that this is explicitly prohibited, since a consecutive probationary period will be considered void (e.g., NL). As such, the legislation on probationary periods seems to protect the employee in that he is only subject to this period with a no less favourable level of protection for a strictly limited period in the employment relationship. However, as will be explored in the final section of this chapter, this may carry the risk that employers will abuse consecutive fixed-term contracts rather than accepting a probationary period which is limited in duration.

6.2 Application of dismissal protection law during the probationary period

In general, the probationary period is characterised by the fact that normal employment protection rules do not or do not fully apply, making it easier to terminate the employment relationship. Regulations concerned with notice periods, rules requiring the employer to give a reason or justification for the dismissal as well as rules on severance payments do not apply at all or only apply in a modified form. To what extent the termination of the employment relationship becomes easier for the employer also depends on the general dismissal protection system. For instance, in a system where the employer can dismiss an employee without being obliged to provide any motivation when he takes the notice period
into account or pays compensation amounting to the due notice (e.g., AT, BE, EL, IT), the non-application of the rule to justify the termination may have less impact than not applying the regulations on the notice period. On the other hand, in a system where the employer is obliged to give a reason or justification for the dismissal and has to take account of the notice period (e.g., BG, CZ, FR), the non-application or modified application of both these rules will have a more substantial impact. To gain a better understanding about the relation between dismissal protection law and the probationary period, this section addresses these two issues: notice periods and the obligation to give reasons or to justify the dismissal. However, an exception is found in Estonia where no distinction is made between the probationary period and regular conditions, which implies that the employment protection regulations apply to their full extent.

**Requirement of a notice period during the probationary period**

Generally, the rules on notice periods do not apply during the probationary period. This means that when a notice period is agreed on, the employment relationship can be terminated immediately, without taking account of any notice period or payment in lieu of notice. In a substantial number of countries alternative notice periods apply, which are generally shorter than those that need to be adhered to under normal circumstances (see Chapter 3.3). Table 6 presents an overview of the different notice periods within the countries during the probationary period. Note that these are the general periods based on what is provided by statutory or special law and that they can differ if agreed in an individual or collective agreement.

**Table 6** Notice periods during the probationary period

<table>
<thead>
<tr>
<th>Notice period</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>No notice period</td>
<td>AT, BG, CY, CZ, FI, EL, HU, IS, MT, NL, RO, ES</td>
</tr>
<tr>
<td>3 days</td>
<td>LV, LT, PL, SK</td>
</tr>
<tr>
<td>7 days</td>
<td>BE, IE, LI, MT, PL, PT, SI</td>
</tr>
<tr>
<td>14 days</td>
<td>DK, DE, NO, PL, SE</td>
</tr>
<tr>
<td>15 days</td>
<td>EE, PT</td>
</tr>
<tr>
<td>Variable period</td>
<td>FR, IT, LU</td>
</tr>
</tbody>
</table>

*Not in this table: UK because there are no rules on probationary period.*
Malta and Portugal are included twice in this table and Poland is included three times, since these countries provide different notice periods depending on the length of the probationary period. Thus, in Portugal, for instance, a notice period of seven days applies when the probationary period lasts over 60 days and 15 when it lasts over 120 days.

Related to the issue of the notice period is the time at which notice can be given. In most countries, in particular those in which no period of notice is required, this is possible at any time during the probationary period. Some countries, however, require a minimum period of service before notice can be given (e.g., BE, LI, MT). By establishing a minimum period of service, the employee is guaranteed to have at least a certain period to prove his suitability for the job. In Belgium, for example, a blue collar worker can only be dismissed after at least eight days of service and a white collar worker after one month. In Liechtenstein, notice may only be given at the end of the work week; in practice this means that there is a minimum period of service of five working days. In Poland and Slovenia, the general rule is that the probationary period should be served in full. Thus, in Slovenia, for instance, the employer may only prematurely terminate the employment relationship in very specific situations during the probationary period, such as extraordinary reasons related to the performance of the employee or bankruptcy of the employer.

Furthermore, many countries require notice to be given during the probationary period, if the notification falls outside this period, even if by only one day, the ordinary dismissal protection rules apply (e.g., LU, NL, NO).

Requirement of justification or reasons for termination during the probationary period

In the majority of countries the employer is in principle not obliged to give a reason or to justify the termination of the employment relationship during the probationary period (BE, BG, CZ, FR, EL, HU, IS, LV, LU, MT, NL, PL, PT, RO, SK, ES, SE). In some countries this does not differ from the regular conditions, e.g., in Belgium and Greece. In Italy and Lithuania, however, the employer is obliged to give a reason for the dismissal related to the performance of the employee of the tasks which were specified in the agreement on the probation. This is a peculiarity of the Italian system, in particular, since the dismissal protection legislation does not oblige the employer to give a reason for the termination of the employment relationship. In the Netherlands, the employer is not required to immediately give reasons for dismissals during the probationary period, however, he is obliged to state his reasons when requested by the employee.

More generally, the requirement to provide a reason or justification for the dismissal during the probationary period becomes an issue in many countries, when the employee challenges the dismissal. In several countries, grounds have been established by which an employee can challenge the dismissal. For instance, when a Hungarian or Slovakian employer has given a reason for the termination (which he is not obliged to do), the employee can challenge this in court, which will test the validity of the grounds for the termination. An Italian or Lithuanian employee can challenge the dismissal if the probationary period did not take place or if the employee is convinced that the probationary period should have yielded positive results; in other words, the employee disagrees with the employer’s conclusion that
his performance was unsatisfactory. This means that the court will have to assess whether the employer can sufficiently prove the unsuitability of the employee for the job (similar: EE, NO). More generally, many countries have acknowledged that an employee can challenge the dismissal if the employer has dismissed him for other reasons than what the probationary period is intended for. This implies that some judicial control over the employer exists when the dismissal’s intention is to circumvent ordinary dismissal protection law or when the act of dismissal is an abuse of power (e.g., EE, FI, HU, IT, LV, LU, NO, NL, PT, ES, SE). In Luxembourg and the Netherlands, for instance, a dismissal for other reasons, such as on economic grounds may be considered an abuse of the probationary period. In Sweden, for example, the employee can challenge the termination of the probationary employment contract on the grounds that it violates the freedom of association or the non-discrimination law. The latter, a violation of the non-discrimination law and of the equal treatment law is recognised in many countries, which of course is strongly related to EU directives on these issues (e.g., EU Directive 2000/43/EC, Directive 2000/78/EC and Directive 2006/54/EC).

6.3 Ways to establish a probationary period and relationship with fixed-term contracts

In general, probationary periods need to be agreed on between the employer and employee. That agreement can be concluded in two ways: either as a clause in an employment contract of longer duration (fixed-term or indefinite), or in a fixed-term contract for the duration of the probationary period.

In Estonia, both ways to establish the probationary period are accepted, as the probationary period is simply part of the employment relationship without being considered the initial phase of an indefinite-term or established within the scope of a specific fixed-term contract. In Germany too, a probationary period either may justify the conclusion of a fixed-term contract or may constitute an open-ended contract whose first element is the probationary period. In case of doubt, it will be the latter because establishment of terms requires a clear and unambiguous agreement which is free of any doubt.

Probationary period established in a clause in a contract of longer duration

In the majority of countries, the probationary period is construed as the starting period of an indefinite employment relationship (e.g., AT, DK, FR, EL, HU, IS, IE, IT, LI, LT, LU, MT, NL, PT, SK, SI). It is also occasionally incorporated in the beginning of a fixed-term contract which has a longer duration than the probationary period (e.g., NL, PT). Furthermore, as indicated above in Chapter 5.1, the agreement of a probationary period as part of a longer-term contract may coincide with a qualifying period of service.

Probationary period established by a fixed-term contract

In Bulgaria, Latvia, Poland and Sweden only the second option is applicable: a probationary period established in a fixed-term contract. In Poland, the probationary period is concluded by a fixed-term contract, referred to as ‘probationary employment contract’. The duration of
these contracts, in principle, is as long as the probationary period. Once this period elapses and the employment relationship is not terminated by the employer, the contract usually turns into an indefinite contract. In Sweden, at the end of the probationary employment, if neither the employer nor the employee informs the other party that they want the probationary employment contract to end, the probationary employment contract is automatically converted into an indefinite employment contract.

**Relationship between the probationary period and fixed-term contracts**

As indicated above, in most countries it is not possible to agree on consecutive probationary periods or to apply them in consecutive contracts. At most, the probationary period can be suspended or extended in some countries under specific conditions. In that sense, the employee is protected by the legislation as the period of no or less protection is strictly limited. Consequently, there is a risk that employers will ‘test’ the employee for a longer period by using fixed-term contracts. Although the use of fixed-term contracts is also limited (for instance, by restrictions defined in EU Directive 99/70/EC), it provides employers a longer period to ‘test’ an employee than is permissible during the probationary period. Meanwhile, this behaviour leaves employees deprived from employment security and dismissal protection for a longer period than anticipated. Such abuse is not concocted but indicated by several countries (e.g., FR, PL, SI).

### 6.4 Concluding remarks

In most countries employees are excluded from the most important forms of protection against dismissal during their probationary period. In order to protect the employee against abuse, the majority of countries provide for restrictions in the use of probationary periods, such as the definition of a maximum period of term. Besides this, the probationary period needs to be agreed on between the employer and employee and also often needs to be made in writing. However, exclusion from dismissal protection does not leave the employee entirely vulnerable, since he may be able to challenge the dismissal in exceptional case, for instance, when it is in violation with non-discrimination law or an abuse of power. However, these cases are extremely difficult for the employee to prove, since the employer is often not obliged to give a reason or justification for the dismissal.

The countries reveal a wide variation in terms of the duration of probationary periods, most of which are limited to either three or six months, with strict rules on when and how it can be deviated from. The probationary period can only be extended in very few countries when the employee is not able to work during this period for a reason that is not caused by the employer. Thereby the employer is given sufficient time to ‘test’ the employee for the agreed period. In other countries this is explicitly not an option and could result in an invalid extension of the probationary period.

Related to the issue of the probationary period is the use of fixed-term contracts as a means to test an employee for a longer period, without being subjected to the dismissal protection
legislation. Although it is not possible to prove the abuse of fixed-term contracts in this way, it is a known and recognised practice in several countries. Some of the countries that have mentioned this problem in their report also have a high percentage of fixed-term employment according to their Eurostat data, e.g., Poland with 27.3% and Slovenia with 17.3%. In case this represents an abuse of consecutive fixed-term contracts, employees can fall back on existing EU rules to prevent the abuse of fixed-term contracts (Directive 99/70/EC).
7. Possible reasons for dismissal

According to Article 4 of ILO Convention No. 158 on Termination of Employment of 1982 “the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”. According to the Charter of Fundamental Rights of the European Union “every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices”.

In some countries (FI, DE, EL, ES) constitutional law and in particular a constitutional ‘right to work’ (in the sense of Article 23 of the Universal Declaration of Human Rights) requires the state to provide a certain standard of employment protection. For instance, in Slovenia the Constitution obliges the state to ensure the protection of employment. As a consequence the right of the employer to terminate the employment contract is limited. In Portugal, the so-called principle of employment protection is based on the Constitution. Protection and a guarantee of labour is also provided for in the Bulgarian Constitution.

National laws, in any event, must determine under which conditions an employer will be allowed to terminate an employment relationship unilaterally. They can do so by either establishing relatively strict requirements or by using fairly ‘open’ norms. By establishing requirements they may or may not acknowledge that the employer is ‘in principle’ free to terminate the employment relationship and may thereby use the ‘freedom of termination’ as the ‘starting point’ of a dismissal regulation. Finally, national laws may provide that in certain cases a dismissal will actually be lawful automatically or, at the opposite end, unlawful. This section examines which approaches are found in national laws in Europe.

7.1 General issues on reasons for dismissal

7.1.1 Open or more substantive norms

Theoretically speaking, a system of dismissal protection can specify certain reasons which, if found to exist in a specific situation, result in a dismissal based on such reasons which in principle are regarded as being lawful. Valid reasons in this sense could be defined in a fairly open way to provide room to cope with an infinite range of situations, which can give rise to dismissals and give courts sufficient freedom to decide whether the legal requirements are being met in an individual case. Alternatively, valid reasons could be defined more concretely to ensure that the law is transparent and that the results of possible lawsuits or equivalent procedures are sufficiently foreseeable by the parties concerned.

7.1.2 Automatic lawfulness or unlawfulness

In addition, absolute reasons for dismissals could be established in the sense that meeting these requirements implies that the relevant dismissal will be considered automatically
lawful. On the other hand, legislators or courts may consider situations in which dismissals are automatically unlawful (and as a consequence establish possible reasons according to which dismissal is strictly prohibited).

‘Automatic lawfulness’ in this sense means that a court which determines the lawfulness of a dismissal in an individual case would have to accept the lawfulness of the dismissal if the relevant requirements are met without being able to consider the merits of the case and/or the interests of the parties to the contract. ‘Automatic unlawfulness’, on the other hand, would mean that the existence of given facts automatically determines that the dismissal is illegal.

7.2 Freedom of termination

In a few countries employers can unilaterally terminate an employment relationship without reasons, unless the worker to be dismissed enjoys specific legal protection due to either personal features or the given circumstances surrounding the dismissal. In Iceland, Greece, and Austria, for instance, employers are in principle free to dismiss workers. In Liechtenstein, the so-called principle of freedom of termination is acknowledged. Accordingly, employment protection is limited to protection against abusive dismissals, with statutory law listing (not exhaustively) nine reasons when a dismissal is abusive. In Denmark, it is in principle considered an essential part of the managerial prerogative to dismiss an employee at will. As far as national laws in principle guarantee the freedom of employers to dismiss workers, they have to ensure that the corresponding regulations are in line with ILO Convention No. 158 and the Charter of Fundamental Rights of the European Union.

7.3 Reasons for dismissal

7.3.1 Reasons for dismissal loosely defined

In most countries possible grounds for dismissal are established in a fairly open way. In Finland, for instance, dismissal is lawful for an ‘appropriate and grave’ reason. In Poland, statutory law is essentially silent on the issue of possible grounds for dismissal (termination of an indefinite contract must be ‘justified’) which, accordingly, have been fleshed out by the courts.

In most countries certain categories of possible reasons for dismissal can be found. Often, there is a dichotomy of possible valid reasons. In France and Luxembourg, for instance, the employer may unilaterally terminate an employment contract on personal or on economic grounds (provided these grounds are ‘real and serious’). In Sweden, a differentiation is made between personal reasons and redundancy (triggering the application of two partly different ‘systems’ of employment protection). In Spain, there are two major reasons that may justify a dismissal: non-compliance of the worker with lawful instructions of the employer and reasons relating to the business. In Romania, there is a basic differentiation between reasons that pertain to the employee and reasons that do not. Likewise in Denmark, a
dismissal may be justified (reasonably) based on reasons related to the employee or to the employer.

In many countries there is a trichotomy of possible valid reasons for dismissals, which can be based on misconduct, personal and economic reasons. In Hungary, for instance, an employee may only be dismissed for reasons relating to his ability, behaviour or to the employer’s operations. German law differentiates between dismissal on personal grounds, for misconduct and on business grounds. In the Netherlands (in the context of proceedings to gain the authorities’ permission for dismissal) and Italy, the law distinguishes between three possible grounds: issues pertaining to business economics; incapacity of the employee; and grave and permanent breakdown of the employment relationship. Norway differentiates between reasons linked to the company, the employer and the employee.

Slovenia distinguishes between four possible reasons: business reasons; incapacity; gross misconduct; and inability to perform work due to disability.

Hence, it can be said that legislators in the majority of countries have limited possible reasons for dismissal to loosely-defined categories at best.

7.3.2 Statutory lists of possible grounds

In other countries legislators have determined relatively concrete and exhaustive lists of possible reasons for dismissal.

A particularly illustrative example of this approach is Bulgaria. In Bulgaria, the list of possible reasons comprises, among many others: closure of (part of) the enterprise; downsizing of personnel; non-possession of the educational level or professional qualification required for the work being performed; refusal of the employee to follow the enterprise or a division thereof in which he works; and relocation of the enterprise or division. In total, 16 possible grounds for dismissal with notice and 11 grounds for dismissal without notice exist in Bulgaria. In the Czech Republic, there are seven possible grounds, three of which relate to dismissals for business reasons. In Cyprus, the legislator has identified seven reasons for dismissals on business grounds. In Estonia, a list of possible grounds reflects a dichotomy of employee-related reasons, on the one hand, and economic reasons, on the other. In Italy, the employment contract may only be terminated based on just cause (extremely serious misconduct of the employee) or for other justified reasons. Such reasons are understood to be either a serious breach of contractual duties by the employee (so-called subjective reasons) or reasons connected to the production, the organisation and to its operation (so-called objective/economic reasons). The statute sets out these reasons in more detail.

An enumeration of valid reasons for dismissal also exists in Latvia. In Portugal, apart from ‘just cause’ for dismissal (gross misconduct of the employee, raising a dismissal on disciplinary grounds), the employer may unilaterally terminate an employment contract only in five rather (exceptional) cases: collective dismissal; loss of jobs due to market developments, structural or technological changes related to the enterprise and an
employee’s failure to adapt. In Romania, five possible grounds exist. In Slovakia, a list of possible grounds also exists, which reflects the basic trichotomy of misconduct, personal and business grounds. In Finland, the relevant statute provides examples of situations in which a dismissal is not regarded as being legal because there are no proper underlying causes or because these causes are not sufficiently severe. One of these cases is when the employer hires a new employee for similar duties either before or after the termination. In Spain, there are three channels for dismissal: 1) ‘disciplinary’ dismissal which is determined by seven specific causes (lack of attendance, harassment, etc.); 2) ‘objective’ dismissal, which is determined by five specific causes (lack of proficiency, economic causes, etc.); and 3) ‘collective’ redundancy, which is related to economic, technical, organisational or production grounds and affects all or a large group of workers.

In the United Kingdom, so-called ‘potentially fair’ reasons are stipulated by statutory law. The most relevant ones include: capability and qualifications (‘capability’ assessed by reference to skills, aptitude, health or any other physical or mental quality); redundancy and ‘some other substantial reasons’ (the latter encompassing so-called ‘quasi redundancy situations’). In Ireland, a dismissal can be based on the capability, competence or qualifications of the employee to perform work of the kind which he was employed to do; the conduct of the employee; and the redundancy of the employee. In addition, it may relate to the employee’s inability to work or continue to work in the position he held without impeding his duty or restrictions imposed by or under any statute.

To sum up, it can be said that some national laws are significantly more concrete than others when it comes to establishing possible reasons for dismissals. It may also be fair to say in general that the more a legislator substantiates possible reasons for dismissal, the lower the need for courts to flesh out these reasons.

7.4 Automatically unlawful dismissal

Legislators in many countries have established reasons under which dismissals are either regarded as automatically unlawful or in any event subject to additional requirements which need to be met by the employer (see also Chapter 2). A major differentiation can be made between reasons that are based on certain features or the status of a person to be dismissed (status-related prohibitions), on the one hand, and reasons that relate to specific situations in which a dismissal takes place (prohibitions related to specific situations).

Apart from that, prohibitions of dismissal are found in collective agreements in some countries. If such prohibitions exist (and are legally acknowledged, in principle), the question may arise how they relate to the elements of statutory protection affecting all (including workers who are outside the reach of collective bargaining).
7.4.1 Status-related prohibitions for dismissal

(1) Dismissal protection in the context of workers’ participation

Status-related prohibitions of dismissal aim rather at guaranteeing the proper functioning of the rules on workers’ participation than at dismissal protection of the individual worker concerned.

On the European level, Article 7 of Directive 2002/14/EC requires member states to ensure that employee representatives, when carrying out their functions, enjoy adequate protection and guarantees their ability to properly perform the duties they have been assigned. A similar provision is made in Article 10 of Council Directive 94/45/EC with regard to members of European works councils.

Other status-related prohibitions of dismissal in the context of the regulation of workers’ participation are found in many countries. In Austria, for instance, an employer is not permitted to dismiss an employee on account of planned, present or former activities in a works council. Similar provisions can be found in Belgium and in Germany. In Estonia, when an employer terminates an employment contract with an employee representative during their term of office or within one year of the expiry of their term of office, the termination is deemed cancelled and null and void, unless the employer proves that the employment contract was terminated on grounds permitted in the relevant statute.

In many countries prior permission by the competent body of workers’ representatives is required before dismissing a workers’ representative. For instance, in Belgium permission by the central trade union body is required when dismissing an employee who is a member of the trade union leadership at the enterprise. In Bulgaria, permission by a trade union body is necessary for the dismissal of an employee who is a member of a national, branch or territorial trade union body or of a trade union leadership at the enterprise. In Spain, union representatives may require the employer to grant a prior hearing to other representatives. In Germany, dismissal of a works council member is limited to extraordinary circumstances and in addition, requires either consent of the works council or a court decision substituting for the missing consent. In France, prior permission by the labour administration is required. In Estonia, an employer has to collect the opinions of the employees who selected the given individual to represent them or that of the trade union about the termination of the employment contract. The employees who selected the individual to represent them or the trade union must give their opinion within ten working days of being asked about it. The employer must take the employees’ opinions into account. He has to justify his decision to disregard the employees’ opinions. In Hungary, prior consent of the higher ranking trade union body is required before terminating employment by ordinary dismissal. The relevant trade union body shall be consulted prior to terminating the employment relationship of such an official by extraordinary dismissal. A similar regulation is applied to a president and member of a workers’ council. Prior consent of a workers’ council is required in this case.

Other individuals who enjoy special protection are employees who have been called up for military service; employees on leave to exercise a public office; lay judges of employment tribunals, social security tribunals, mutual fund administrators (France), labour courts
(Germany) or labour dispute commissions (Lithuania), members of the municipal councils (Bulgaria). In addition, status-related prohibitions of dismissal exist which are attributable to the prohibition of discriminatory dismissals (based, in particular, on gender, race, colour, ancestry, national or ethnic origin, sexual orientation, religious or philosophical conviction, age, disability).

In France, dismissal protection of the relevant categories of workers means that such individuals cannot be dismissed without prior administrative authorisation. If the authorisation is absent, the dismissal is void and reinstatement will be ordered.

(2) **Dismissal protection of particularly vulnerable persons**

Other status-related prohibitions of dismissal take into account the particular vulnerability of the individual to be dismissed and a specific need to legally protect such persons. Dismissal of particularly vulnerable persons may be prohibited altogether (during the period in which such vulnerability exists). Particularly vulnerable persons usually include disabled persons and pregnant workers.

With regard to workers on parental leave, Clause 5(4) of the Framework Agreement on Parental Leave of 8 March 2010 (Council Directive 2010/18/EU) requires member states to take the necessary measures to protect workers against (less favourable treatment or) dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice.

If dismissal of particularly vulnerable persons is not prohibited altogether, there may be a requirement to request prior permission by a competent body before dismissing the relevant employee. In Belgium, for instance, prior permission by the labour inspectorate is required to dismiss a pregnant employee or an employee who is the mother of a child that has not yet reached the age of three years. In Bulgaria, prior permission from the labour inspectorate is needed to dismiss pregnant women, mothers of children up to the age of three years, employees who are occupational rehabilitees and employees suffering from certain deceases. In Germany, the prior consent of state authorities is needed before dismissing a disabled person. And in France, a dismissal of an employee who is unable to work due to health reasons is void without verification by a work physician. Moreover, the employer is obliged to try to find other, suitable employment for the (physically) disabled employee.

### 4.2.2 Prohibitions of dismissal related to specific situations

Prohibitions of dismissal may relate to specific situations. For instance, dismissals due to a transfer of an undertaking are prohibited in all countries in accordance with Article 4(1) of Council Directive 2001/23/EC.
Laws in many countries have identified various situations in which dismissals may be prohibited. In Austria, employers are prevented from dismissing workers who have filed claims against the employer which are not necessarily unjustified. In some countries prohibitions of dismissal aim to protect workers exercise their constitutional rights. For instance, in Germany a dismissal based on trade union activity is null and void because it violates the constitutional guarantee of freedom of association, which is ‘horizontally’ applicable to the relationship between an employer and employee. In Liechtenstein, a dismissal is deemed abusive, and consequently unlawful, if it is the result of the employee exercising a constitutional right, unless the exercise of such a right breaches an obligation arising from the employment relationship or substantially impairs cooperation within the establishment.

7.5 Automatically lawful dismissal

Though examples of reasons for dismissal exist which make the dismissals automatically unlawful, legislators and courts in Europe seem to be extremely reluctant to acknowledge reasons which lead to a dismissal, and on the contrary, are regarded as automatically lawful in the sense described above. Automatic lawfulness, in other words, is a very limited legal concept. In the United Kingdom, a dismissal is automatically justified if it is based on national security concerns. In Germany, there are no ‘absolute’ reasons for dismissal in the sense that certain possible grounds would result in a dismissal being ‘automatically’ lawful. Even in cases of gross misconduct which are punishable by a penal court, a comprehensive weighing of the interests by the court of both the employer and employee has to take place, taking into account all relevant circumstances of the individual case.

7.6 Concluding remarks

National laws differ when it comes to substantiating possible reasons for dismissal. While there are examples for ‘automatically unlawful’ dismissals, it is difficult to find examples of dismissals which are regarded as ‘automatically lawful’.
8. Dismissal for business reasons

As previously explained, dismissals for business reasons lie at the core of this report. This chapter deals with the core issues of dismissals for business reasons, namely managerial prerogative (Chapter 8.1), proportionality (Chapter 8.2) and selection of employees (Chapter 8.3).

8.1 Managerial prerogative

Dismissals based on business reasons are specific because an entrepreneurial decision (to close down a site, to reduce manpower, etc.) is always involved, while this is not the case in the context of, for instance, dismissals due to misconduct or personal reasons. Against this background, the question must be addressed whether and to what extent such decisions can be the subject of judicial control.

The issues that must be addressed are whether or not a legal system acknowledges a ‘managerial prerogative’ of the employer in the first place and, if so, what the elements of this prerogative are. In this context a closer look at the legal foundations of ‘managerial prerogative’ may be worthwhile.

Acknowledging a ‘managerial prerogative’ essentially entails a certain ‘self-restraint’ on the part of the courts; the key question, however, is to what extent judges withdraw from a full legal examination with regard to determining the lawfulness of dismissals for business reasons. In the following, we will show that there are considerable limits to ‘judicial self-restraint’ in most countries.

Judicial self-restraint in any event is restricted to a legal examination and does not concern the factual conditions of a dismissal. Therefore, it is interesting to take a look at the sharing of the burden of proof between the parties to the employment relationship in this context. Finally, attention will be paid to the fact that although national systems may acknowledge a managerial prerogative, there may also be elements that (partly) compensate for the corresponding ‘judicial self-restraint’ that comes with it in principle.

8.1.1 Principal acknowledgement of managerial prerogative

In the vast majority of countries the managerial prerogative is either explicitly or implicitly acknowledged insofar as judges do not (or in any event not fully) examine the question whether an entrepreneurial decision, which may lead to the loss of job opportunities, makes sense economically. Accordingly, a broad margin of discretion is given to employers to organise and operate the company even if this leads to job losses. Specifically, the entrepreneurial decision to restructure or downsize is not questioned with reference to its economic rationality. It is not for the courts to decide whether the entrepreneur’s decision was necessary or feasible.
The way in which the managerial prerogative works can be illustrated by referring to some examples: in Germany, the Federal Labour Court explicitly stated that it is not the task of the courts to dictate a ‘better’ or ‘more proper’ entrepreneurial policy. In the United Kingdom, the so-called ‘band of reasonable responses’ test is applied. In judging the reasonableness of the employer's conduct, the courts must not substitute their decisions with the course they believe the employer ought to adopt. In Ireland, the function of the various bodies assigned jurisdiction is to decide whether this was a case of redundancy, not why it occurred. In Italy as well, judges regularly operate under self-restraint as far as the assessment of managerial decisions is concerned. In addition, they are statutorily prevented from assessing the economic and organisational choices made by the entrepreneur, such as the externalisation of tasks initially performed by the employee who has been dismissed.

Under Swedish law an employer is either dismissed for personal reasons – for example, the incapacity of the employee – or for reasons of redundancy. Two partly different ‘systems’ of employment protection apply, depending on whether the employee is dismissed for personal reasons or for reasons of redundancy. The employer must always be able to show (and prove) a just cause for dismissal. However, redundancy per se amounts to a just cause. Recent case law has emphasised this considerable respect for the managerial prerogative inherent in statutory employment protection regulation. Consequently, employers have extensive possibilities to reorganise and plan the process leading up to transfers, redundancy and dismissals; which practically, from the individual employee’s perspective, sets aside important rules, such as the seniority rules and the last-in-first-out principle. With regard to dismissals for personal reasons the just cause requirement is strict, and the employer's obligation to try to avoid dismissal by taking less radical measures first weighs heavily.

Acknowledgment of the managerial prerogative is often part of the broader picture of opportunities that come with entrepreneurship and the risks involved. For instance, in Luxemburg managerial prerogative is regarded by the courts as corresponding to the risks an entrepreneur regularly has to face. Accordingly, the entrepreneur is seen as enjoying the power to create, modify or close down an undertaking, a power which allows him to take the measures he considers necessary, even if they lead to redundancies.

8.1.2 Legal basis of managerial prerogative

Though managerial prerogative is widely acknowledged, its legal basis varies from one country to another.

In Denmark, it is a general principle - explicitly stated in the basic agreements between the main organisations - that the employer has the right to direct and manage work (the managerial prerogative). In some countries the managerial prerogative is a consequence of a constitutional guarantee of entrepreneurial freedom which, for instance, is enshrined in the Constitutions of Germany and Italy. In Iceland, managerial prerogative, which encompasses the right to terminate employment in accordance with the employer’s needs, is neither established in law nor collective agreements, but is derived from the nature of the
employment relationship. Finally, in Liechtenstein the principle of freedom of termination is acknowledged, which is considered to encompass managerial freedom.

8.1.3 Managerial prerogative: the extent of judicial review of dismissals for business reasons

What acknowledgement of a ‘managerial prerogative’ essentially comes down to is that the courts’ examination of dismissals for business reasons is limited. Or put differently: certain elements of decision-making on the part of the employer are considered to be outside the scope of judicial scrutiny.

In the following, the boundaries of that ‘judicial self-restraint’ will be looked at in more detail.

Full examination of lawfulness of entrepreneurial decision

Managerial prerogative amounts to far-reaching judicial self-restraint, with courts (essentially) not examining business decisions that form the basis of dismissals for economic reasons. What judges do examine, however, is whether or not an entrepreneurial decision conforms to the requirements that may arise from statutory law, from (binding) collective agreements or from the employment contract itself. In Denmark and Finland, for instance, the employer’s prerogative is regarded to be limited by the employer’s competence. Limits to this competence may be derived from legislation, binding ‘non-statutory law’, established case law, the contract of employment or relevant collective agreements.

In Cyprus, the lawful exercise of the employer’s right to decide on the size of his workforce must be premised upon the redundancy reasons established in law (modernisation or other change in the method of production or organisation; change in the products, etc.). A reduction of the workforce for other reasons renders the dismissals unjustified and thus unlawful. Similarly, employers in the Czech Republic are bound to statutorily defined reasons for dismissal (closing down, relocation or restructuring of the employer’s undertaking). In Portugal, though the managerial prerogative is acknowledged in principle, under the so-called principle of employment protection an employer is only allowed to dismiss an employee on business grounds in exceptional cases.

Reasonableness of entrepreneurial decisions subject to judicial self-restraint

While judges fully examine whether a decision taken by the employer contradicts the legal requirements, such decisions are subject to limited judicial control at best when it comes to the question whether they are reasonable or not.
(a) Judicial review of entrepreneurial decisions as such

Acknowledgment of the managerial prerogative means that business decisions of an entrepreneur are basically not scrutinised by the courts. However, in some countries judges may challenge entrepreneurial decisions under extraordinary circumstances. In Germany, for instance, entrepreneurial decisions are reviewed by the courts insofar as they may be ‘evidently irrational’, arbitrary or may amount to a clear abuse of rights. For instance, if the decision to found an independent company and to move certain tasks to this company is primarily aimed at dispossessing employees of their right to dismissal protection, such a decision is unlawful.

Similarly, in Greece the managerial prerogative may not be abused. Exercising this prerogative in accordance with the good faith principle, the employer must consider, along with the interests of the undertaking, the interests of his workers, and should also respect the equal treatment principle. In Italy, the economic or organisational choices of an employer may only be questioned in case it is clear that they have been taken simply to dispose of an employee for personal reasons. Similar tests are applied, for instance, in Denmark, Latvia and Sweden. In Finland, courts may examine whether an entrepreneurial decision is a mere pretence used to cover up the true reasons for a dismissal. Procedural fairness (in particular with regard to information shared with workers’ representatives) also plays a role in this context.

In Ireland, redundancy cannot be used as a cloak to weed out employees who are regarded as less competent or who appear to have health or age-related issues. Where selection procedures for redundancy or a consultation process to seek alternatives to redundancy are laid down in an employee’s conditions of employment, whether by collective agreement or in an individual employment contract, these should be followed.

In the United Kingdom, the courts check whether the decision taken by the employer is within a ‘band of reasonable responses’. This (very broad) test has two components: the reasonableness of the actual decision (substantive fairness) and the fairness of the procedure by which that decision was actually reached (procedural fairness). The entrepreneurial decision is protected as long as it is within this ‘band of reasonableness’. This test confers wide discretion on the employer whose substantive decision to dismiss is unlikely to be successfully reviewed. This results in the managerial prerogative being reinforced. Therefore, most cases turn to the procedural fairness of the dismissal.

(b) Judicial review of the implementation of a decision by the employer

In many countries judicial self-restraint is restricted to the entrepreneurial decision as such and does not extend to its implementation by the employer. In Germany, for instance, the employer has to prove, first, the existence of facts that prompted a given entrepreneurial decision, secondly, the consequences for job opportunities, and, third, that only employees will be dismissed whose jobs are directly affected by the entrepreneurial decision. In addition, the employer may be obliged to prove that he has really begun to implement his decision by taking distinct measures. In many other countries as well (CZ, EL, LT, LU and SI,
for instance), the courts may in particular examine the causal nexus between a restructuring decision and employees becoming redundant. In addition, courts in some countries may even ask whether the ultimate ratio-principle, if applicable, was properly applied by the employer. In Germany, courts regularly look into whether a given entrepreneurial decision makes dismissals inevitable. In Austria, the employer must demonstrate that there are no alternative jobs in the establishment.

(c) Judicial review of business needs

Moreover, courts in some countries may ask whether there are urgent business needs for dismissal.

In Austria, the weighing of interests takes place in the sense that business needs are related to the impairment of the employees’ substantive interests. In case of a plant closure or downsizing, however, the interests of the employer prevail. In Greece the courts hold the view that the exercise of the managerial prerogative has to serve the objective interests of the undertaking and not the selfish interests of the employer. In Italy, though judges in general are reluctant to investigate the motivations upon which the managerial decision has been adopted, some court decisions have underlined the fact that restructuring decided on the sole ground of making the company more profitable, violates the principle of social responsibility laid down in the Constitution. In Portugal, the courts relate the amount saved by dismissing employees to the costs of the intended business reorganisation and, in particular, to the money needed to hire new staff.

In contrast, employers in Finland and Sweden can close business units even if they are economically prosperous. It is not necessary for an economic advantage to be expected from such a decision.

8.1.4 Dismissals for business reasons: Bearing the burden of proof

Although the managerial prerogative may essentially be acknowledged, courts in some countries put the employer under a heavy burden of proof in certain cases.

In the Netherlands, state authorities (in case authorisation for dismissal is requested by the employer) and/or the courts will examine whether the economic grounds are plausible on the basis of documents provided by the employer and usually verified by accountants. However, state authorities do not have to examine the plausibility of the economic reasons if the competent trade union declares that the dismissal is necessary.

The courts in Germany hold the view that it is difficult in some cases to discern the decision to dismiss employees from the underlying entrepreneurial decision. This is the case, for instance, if dismissals are attributable to a decision by the employer to reduce manpower. The fact that the decision to dismiss an employee may be a direct consequence of the relevant entrepreneurial decision affects the burden of proof: the closer an entrepreneurial
decision comes to the decision to dismiss, the more an employer is required in court proceedings to substantiate his assessment that there is no longer any need to employ certain employees.

8.1.5 Means of ‘compensation’ for judicial self-restraint

In some countries judicial self-restraint with regard to dismissals on economic grounds is partly ‘compensated’ for. For instance, in order to ensure that the employer’s reasons for exercising the right to reduce his workforce in Cyprus are genuine and permanent, the legislator has granted the employee the right to be rehired for the same position within eight months. In Sweden and Norway, employees who are dismissed for reasons of redundancy enjoy a priority right to re-employment within a period of nine months after termination of the employment relationship under the condition that the employees are sufficiently qualified and have been employed with the employer in total for more than twelve months during the last three years. However, this priority right of employees who are made redundant requires the employer to hire regular staff and is not triggered by the mere use of temporary agency work by the employer. In Norway, the priority right to re-employment lasts for a period of 12 months. In Finland the system is similar to Sweden’s, with a period of nine months. In Germany, the courts specifically addressed the fact that dismissals on economic grounds are often based on prognosis decisions taken by the employer. Employees who are affected by such dismissals may claim reinstatement if the prognosis decision, albeit being perfectly reasonable at the time when it was taken, turns out to be wrong at a later date.

8.1.6 Concluding remarks

A ‘managerial prerogative’ is acknowledged in virtually all countries. National law systems differ, however, with regard to the scope of the accompanying judicial self-restraint,

8.2 Proportionality

As described earlier, the freedom of employers to dismiss workers on operational grounds is restricted in all countries and requires the existence of reasons for dismissal. In case of dismissals for business reasons, a judicial review of the employer’s decision is restricted to a certain extent in all national laws.

In the following, two issues will be addressed. The first question examines whether or not the courts use the criterion of ‘proportionality’ when determining the lawfulness of dismissals for business reasons. The second question relates to the rules which apply in national law systems to determine which workers will be dismissed in case of redundancy.
8.2.1 General questions

This principle of proportionality may be understood to comprise three elements:
- First, the intended dismissal must be capable of ensuring that the aim – which is to adapt staff corresponding to the manpower requirements – can be achieved (suitability);
- Second, dismissal must be necessary in the sense that no other means are available to achieve this aim (necessity); and
- Third, dismissal must be reasonable or appropriate in the sense that the burden for workers, on the one hand, and the result intended by the employer, on the other, must not be entirely out of proportion (reasonableness or proportionality in the narrow sense).
What this element essentially boils down to is a weighing of interests of the parties concerned.

The main focus of the principle of proportionality may be categorised as the second element, which may also be referred to as the ultima ratio-principle.

A comparative analysis of different labour law systems faces two major obstacles when it comes to answering the question whether and to what extent a principle of proportionality is applicable. One obstacle is, on a more abstract level, that what precisely is understood by the principle of proportionality may vary from one country to another. As a consequence, though the principle may be (formally) applied by the courts in different countries, the results may differ considerably. Another obstacle is that courts may apply the principle (or at least certain elements of it) without using the relevant language. Consequently, even if courts do not expressly refer to proportionality, they may (either ‘consciously’ or ‘unconsciously’) use the underlying legal concept (or parts of it) to arrive at a certain ruling.

We must also bear in mind that national laws differ considerably in what is regarded to be elements of the principle of proportionality and what is not. For instance, in Germany it is virtually self-evident that a possible duty to transfer the employee to another part of the undertaking before dismissing him is considered to form an (essential) part of the principle of proportionality or, to be more concrete, the ultima ratio principle. In other legal systems this understanding is considered to be odd. For instance, in Sweden, though a duty of the employer to offer an alternative job is fully acknowledged in principle, such a duty is not seen as being an element of ‘proportionality’, but forms part of a completely different reasoning. When questions under the heading ‘principle of proportionality’ are addressed, they are not to be misunderstood as forcing different laws under a uniform dogmatic ‘umbrella’. Instead, the principle of proportionality should essentially be understood as a token for efforts that may or may not be required from the employer by law to avoid the dismissal of an employee.

8.2.2 Principle of proportionality in general

Though the importance of the principle of proportionality is difficult to measure, a line can be drawn between countries on which the principle is evidently important and others where the principle is of very limited importance at best.
(a) Importance of the principle of proportionality

**Germany** is an example of a country where the principle of proportionality and *ultima ratio* are expressly referred to by the courts. As for proportionality in the narrow sense, the courts regularly engage in a comprehensive ‘weighing of interests’ without using the term ‘proportionality’. In other countries courts apply the concept of proportionality but use different language. In **Austria**, for instance, the courts engage in a ‘weighing of interests’ of the parties concerned, which comes very close to applying the principle of proportionality. In **Greece**, the *ultima ratio* principle is applied alongside the principles of fairness and proportionality. In **Spain**, though the principle of proportionality is not enshrined in legislation, the requirement that dismissals on business grounds need to be ‘reasonable’ may in individual cases lead to an obligation on the part of the employer to consider alternative measures.

Other countries where the principle of proportionality plays an important role are **France**, **Lithuania** (possibility of further employment), **Norway** (further employment, possibly after further training), **Slovakia** (examination of possibility of further employment, priority of modification of terms of employment) **Slovenia**, and **Sweden** (duty to transfer, possibly after some training).

(b) Insignificance of the principle of proportionality

In some countries the principle of proportionality and/or *ultima ratio* are not applicable to dismissals or play a very restricted role at best.

In **Belgium**, for instance, no legal obligation exists in principle, except where determined otherwise in collective agreements to apply tests or principles of fairness or proportionality. Nor is there an obligation to weigh the interests of the parties involved. Finally, no obligation of the employer exists to consider alternative or, in any event, less drastic measures, such as other employment in the company or group of companies or (re)training. In **Luxemburg**, no principle of proportionality applies in cases of dismissals on business grounds, either. Other countries where the principles of proportionality or *ultima ratio* play a very limited role, at least in the area of dismissals on business grounds, are **Bulgaria**, the **Czech Republic**, **Denmark**, **Finland**, **Ireland**, **Liechtenstein** (where only the doctrine of ‘abuse of rights’ is applied), **Malta**, the **Netherlands** and **Poland**. In **Estonia**, no principle of proportionality is applicable, though it is statutorily provided that the interests of both parties shall be taken into account when dismissing an employee. In **Romania**, no principle of proportionality applies, either. Statutory law stipulates some gradual measures the employer may implement in case of economic difficulties, prior to dismissal. In addition, if the employer fails to consider opportunities such as alternative employment, the courts may arrive at the conclusion that the business reasons put forward by the employer were not ‘serious’.

In the **United Kingdom**, there is no proportionality test in unfair dismissal law and, in particular, no principle of dismissal as the *ultima ratio*. Rather, the ‘UK test’ is based on reasonableness with considerable deference to the managerial prerogative. With respect to
dismissals for redundancy, there is an obligation to consider suitable alternative employment.

However, even if there is no explicit principle of proportionality, the courts may achieve similar results in some cases by applying certain procedural standards. In Cyprus, for instance, in case of dismissals on operational grounds, employers are bound to provide the necessary information and opportunity to the workers’ representatives for consultation on measures to limit the unfavourable impact of the dismissal, including the search for alternative employment. This standard has been repeatedly invoked by the courts in order to justify decisions declaring a number of redundancies unlawful by reason of the employer not having consulted with the trade unions in order to find a less severe solution.

Apart from that it should be noted that the involvement of workers’ representatives is required in many countries, with one of the reasons being to ensure that dismissals are ‘in proportion’ and ‘reasonable’. In particular, the obligation of employers to consult employee representatives, which exists in many countries, may lead to the employer considering less invasive measures such as the relocation of workers or training activities. In Portugal, the employer is even statutorily obliged during the information and consultation procedure prior to collective dismissals, to consider alternatives to redundancy.

In the Netherlands, authorities whose consent for dismissal may be required have to examine whether the intended termination of the contract is reasonable. This judgement may include efforts such as training, education and coaching on the job. In addition, it may include an effort to provide further employment in another part of the undertaking. If an employer asks for the employment relationship to be dissolved by court order, no ultima ratio principle applies. An absence of efforts on the part of the employer to avoid dismissal may be reflected by the amount of severance payment granted.

**Ultima ratio principle (necessity)**

As has been described above the principle of proportionality may be understood to comprise an ultima ratio-principle in the sense that dismissal must be regarded as being necessary and forming a means of last resort. What application of such ultima ratio-principle essentially may boil down to is whether there is a possibility of further employment of the employee singled out for dismissal.

In some countries, there is in principle no obligation on the part of the employer to consider alternatives to dismissal. This is, for instance, the case in Bulgaria, the Czech Republic, Denmark, Iceland and Liechtenstein. The same applies to Cyprus and Ireland. There, however, a redundant employee loses the right to compensation if he rejected an offer from the employer for suitable alternative employment.

In many other countries dismissal on operational grounds can only be used as an ultima ratio and accordingly as a means of last resort. Consequently, an employer has to consider all less ‘harmful’ options at hand before dismissing an employee.
(a) Further employment in the undertaking or company

Labour laws provide different answers when it comes to the question whether and to what extent employers have to take account of the possibility of further employing a worker before dismissing him on operational grounds. In Germany it is statutorily provided that a dismissal on business grounds is not possible if other opportunities exist for the employee to be further employed either within the establishment or in another establishment belonging to the same enterprise. An obligation on the part of the employer to offer further employment in the company, if possible and reasonable, also exists in Finland, France, Greece, Italy, Latvia, Lithuania, Norway, Slovakia, Slovenia, Spain, and Sweden. In Italy, the employer has to prove that no other employees have been hired to perform the same or similar task(s) initially assigned to the dismissed employee. In Ireland, the dominant view is that in a redundancy situation, there is an onus on an employer to offer any reasonable alternative positions to the employee whose position is being made redundant. In Portugal, it is statutorily provided that an employer in case of dismissals based on the employee’s failure to adapt has to prove that there are no alternative jobs for the respective relevant employees in cases of certain dismissals on business grounds. In Sweden the employer must have tried and ruled out the possibility of providing the employee with alternative work. This duty is restricted to available positions, and qualified by the employee possessing sufficient qualifications. However, in cases of redundancy dismissal and the competition about available positions within the redundancy unit an employee with better priority can be provided with alternative work carried out by a fellow employee with inferior priority, which may result in the dismissal of the latter.

In some countries the obligation of the employer to offer further employment prior to dismissing an employee is, at least in principle, restricted to undertakings in Austria, Estonia and Lithuania.

Although not applying to the time prior to dismissal, it may be interesting to mention priority rights to re-employment in this context, which exist in a few countries. In Sweden, for instance, any employment opening within nine months from the expiry of the former employment should be offered to employees dismissed due to redundancy, on the condition that the employees are sufficiently qualified and have been employed with the employer for more than twelve months in total during the last three years. The order of employees being offered employment is decided based on the last-in-first-out principle.

(b) Further employment within a group of companies

In France, employers are obliged to do their utmost to redeploy employees within the company or the group of companies, irrespective of the number of redundancies and headcount. In Finland, if the employer de facto exercises control in personnel matters in another enterprise or group of companies, he is obliged to determine whether it is possible to fulfil the above-mentioned duties by offering the employee work in other enterprises under his control.
In some countries, like Austria and Germany, there is, in principle, no obligation to find suitable alternative employment within a group, though such obligation may exist in exceptional cases. For instance, in Germany, a contract of employment may have a ‘group of companies dimension’ in the sense that the obligation to work from the very start was defined in a way which allowed the employee to be temporarily assigned by the employer to other companies of the group. Furthermore, if in the past the employee regularly performed his work duty at the other company, this may give rise to the expectation of further employment at that company in case of dismissal on the part of the employee being legally protected. However, further employment at another group can only foreclose a dismissal on business grounds if the employer is in a position to ensure such employment in another company. In very few cases in Italy, the employer has been deemed to be obliged to also take into account employment within the companies belonging to the same group. In Greece, it is unclear whether this obligation encompasses a duty to offer further employment in another company of a group.

(c) Further employment after modification of terms

In Austria, if an employee rejects a reasonable offer of the employer to amend the existing contract, he cannot claim that the employer did not search for job alternatives. Even if this comes with a wage loss of around 15%, it may still be ‘reasonable’. In Estonia, before dismissing an employee the employer has to adapt the workplace and modify the employee’s working conditions, unless the changes will cause disproportionately high costs for the employer. In Italy, it is up to the employee who wants to avoid dismissal to demand from the employer to be assigned a task at a lower professional level and to demonstrate that such a task exists within the company. In Slovakia, too, dismissal is only admissible if the employee is not willing to accept other appropriate (suitable) work offered to him by the employer.

(d) Further employment after retraining or further training

In Germany, an offer of alternative employment may encompass the duty to provide ‘reasonable’ re-training or further training in order to prepare the employee for the new job. By judging the ‘reasonableness’ of re-training or further training, a court must take into consideration the prospective duration of further employment, the possible success of the training measures and the cost arising for the employer. An obligation on the part of the employer to offer retraining in order to continue the employment relationship with an employee also exists in Estonia, Finland, Greece (ultima ratio principle) Norway and Sweden. In Italy, on the other hand, no obligation for (re)training is recognised either by law or by case law or by collective agreements in case of individual dismissal for economic reasons.

Weighing of interests

With regard to dismissals on business grounds the courts in Germany hold the view that there is very little room for an independent weighing of interests by the courts. The reason is
that the necessary balancing was already anticipated by legislation which, first, entails the need for ‘urgent business interests’ and, second, requires the employer to ‘select’ the employee for dismissal by taking into account his need for social protection.

8.2.3 Concluding remarks

The principle of proportionality is applied in a few countries, though there is no uniform understanding of what precisely the principle encompasses. In most countries the principle seems to play a limited role at best. In some of them, like the United Kingdom, the standard is one of ‘reasonableness’ rather than of ‘proportionality’.

8.3 Selection of employees for dismissal

8.3.1 General questions

In case of dismissals on business grounds it is often not obvious who is to be dismissed. If the employer, for instance, decides to reduce manpower by a certain percentage in order to improve the performance of the company, the question is which employees must be dismissed. Theoretically speaking, there are two basic options that determine this issue:
- One option would be to leave it to the employer to decide on the persons to be dismissed;
- Alternatively, the law could provide criteria whose application leads to the determination of a circle of persons to be dismissed. As for the latter option, ‘social’ or other criteria may apply.

8.3.2 Selection essentially left to the discretion of the employer

In some countries employers enjoy far-reaching discretionary powers to determine the persons to be dismissed. Provisions which provide particular protection for specific categories of workers (particularly vulnerable employees and employees who serve as workers’ representatives) may, however, restrict this power.

Employers enjoy far-reaching powers of selecting employees for dismissal in many countries (e.g., BE, DK, FI, FR, IS, LI, LU, PL, RO, SI, ES and UK). In Bulgaria, selecting employees for dismissal is statutorily acknowledged as a right of the employer in cases of closure of part of an enterprise, downsizing of personnel or reduction in the volume of work. Even employees who are specifically protected may be selected for dismissal, though in this regard prior permission by the labour inspectorate or of a trade union body is required.

In the Czech Republic, Hungary, Latvia, Lithuania, Slovakia and Slovenia, the selection of employees for dismissal is considered a prerogative of the employer as well. The same applies to Estonia. There, the selection of workers for dismissal was made even more flexible by an amendment in 2009 which emphasised the managerial prerogative in this area of law.
The decision taken by the employer may not be discriminatory, however. Apart from this, certain categories of workers are specifically protected from dismissal and, as a consequence, may not be selected for dismissal or at least enjoy a preferential right to keep their job. In Ireland, it is statutorily provided that the selection of an employee for dismissal shall be deemed to be unfair if it is based on the age, race, colour or sexual orientation of the employee or the dismissal of an employee who is exercising or proposing to exercise his or her adoptive, carer’s, maternity or parental leave rights. Similarly, if the selection for dismissal is in contravention of an agreed procedure relating to redundancy and there are no special reasons justifying a departure from that procedure, the dismissal will also be deemed to be unfair.

In some countries, although the employer principally enjoys wide discretionary powers to select employees for dismissal, that power is restricted by relevant collective agreements. A case in point is Finland, where nationwide collective agreements at branch level often contain clauses on the choice of which employees to make redundant. The main principle is generally the ‘last-in-first-out’ principle, which is often ‘softened’ by allowing the employer to retain particularly important employees. In some cases, the employer is also obliged under these collective agreements to consider the ‘social status’ of employees.

### 8.3.3 Selection criteria

**a)** *Seniority principle (‘last-in-first-out’)*

A few countries provide for employees to be selected for dismissal based on their seniority (which may raise questions with regard to the prohibition of (indirect) age discrimination).

In particular, in Sweden the statutory seniority rules imply that the selection of employees is to be made in accordance with each employee’s total period of employment with the employer. In principle, the order of dismissals encompasses all employees of the same production unit and is covered by the same collective agreement (redundancy unit). If an employee is actually dismissed, he has a priority right to re-employment. The order of employees being offered employment is decided in accordance with the last-in-first-out principle. In deviation thereof, an employer with at the most ten employees may, before the order of dismissals is determined, exempt at the most two employees, who, in the opinion of the employer, are of particular importance for the future activities. Violation of the rules on selecting employees for dismissal leads to damages. The seniority rules are ‘semi-compelling’ and the employer and trade union may, in virtually all respects, deviate from the statutory rules when deciding the order of dismissals. The principal restriction is that the determined order of dismissals must not contravene so-called good labour market practice, which in principle means that it may not be outright discriminatory or offensive.

In the Netherlands, the selection of employees for dismissal is also based on seniority. The criterion of ‘seniority’ is to be applied in accordance with the existing ‘age pattern’.
(b) ‘Social criteria’

**Germany** may be a good example of a system where the selection of employees is made on the basis of applying ‘social criteria’. The criteria that have to be taken into account in the context of so-called ‘social selection’ are: continuity of service, age of the employee, obligations to support family members and disability. Employees who are protected from being dismissed altogether (members of work councils, in particular) remain outside the scope of ‘social selection’ at the outset. The same applies, in principle, to employees who are protected from dismissal on the basis of relevant collective agreements. Though this may result in employees, who are outside the scope of such agreements, facing a considerably higher risk of being dismissed, the courts would only interfere with collective bargaining if the application of the corresponding collective agreements lead to ‘abrasively faulty’ results. Business interests only play a limited role. Employers are allowed to put employees outside the scope of ‘social selection’, if their continued employment, in particular because of their knowledge, abilities and achievements or because of the need to secure a balanced personnel structure of the enterprise, seems appropriate in the light of legitimate business interests. Violation of the rules on the ‘social selection’ of employees for dismissal leads to the resulting dismissals being null and void.

In other countries, the required application of ‘social criteria’ may be less ‘rigid’. In **Italy**, the criteria of selection (seniority within the company, family burdens) are provided by law only in case of collective dismissals as defined by national law. However, case law requires the employer to make his choice in accordance with the principles of fairness and good faith in individual dismissals as well, which may lead to the statutory criteria being applied by analogy.

**German** law also provides a good example for the role collective bargaining can play in the process of applying ‘social criteria’. If a collective agreement contains rules on the concrete weighing of the statutorily-fixed criteria, ‘social selection’ is subject to a limited review by the courts only. Furthermore, if an agreement was reached between the employer and the works council about which employees should be dismissed (so-called ‘list of names’), it is legally presumed that the dismissals were prompted by ‘urgent business needs’. What is more, the courts are limited in their review of the results of ‘social selection’. In **Austria**, certain ‘social selection’ only takes place if the works council rejects the dismissal. In such cases the courts have to compare the social situation of the employees involved with regard to, in particular, children, employment prospects and age. There is a heavy burden of proof on the employee.

In **France**, an employer must determine the order of redundancies based on the following legal criteria: number of dependants, in particular for single parents; the employee’s length of service; the employee’s situation, which would make finding new employment particularly difficult, notably for disabled and older employees; and the employee’s skills assessed in light of his professional category. In case of dismissals on economic grounds, the employer must establish a so-called employment protection plan which determines an order of redundancies by applying these criteria. In addition, the criteria selected to determine the order of redundancies may only be fixed after the employer has consulted with the works council and/or the staff delegates on this issue.
(c) Age pattern

In the **Netherlands**, the selection must be made on the basis of the so-called ‘reflexion rule’. Based on this rule, the employees who perform the same or exchangeable functions are divided into five age groups. Depending on the percentage of employees within the group related to the overall number of employees within the company, the number of employees to be selected per age group is determined. For further selection within each group, the seniority principle (last-in-first-out) applies. Certain employees can be lawfully excluded from the selection. Among them are employees who are irreplaceable due to specialised knowledge and competences without which the performance of the company may become problematic.

(d) Fairness

In the **United Kingdom**, the employer has, in principle, a free hand to select employees to be made redundant. The only limitation is that the criteria must be fair and transparent, consistent and not discriminatory on any of the protected grounds (*e.g.*, sex, race, disability), nor must the grounds used fall into the categories identified as automatically unfair for the purposes of the unfair dismissal legislation (*e.g.*, pregnancy, trade union membership and activities). Traditionally, employers have used the last-in-first-out principle as the main criteria for selecting employees for redundancy, but the compatibility of this with the age discrimination legislation has been challenged.

(e) Involvement of workers’ representatives

Some countries try to achieve a ‘fair’ selection of employees to be dismissed by establishing procedural requirements rather than substantive rules. In **Norway**, a dismissal on business grounds requires individual consultation with each employee affected by these dismissals. In addition, employee representatives often take part in defining selection criteria. As a result, the selection of employees to be dismissed is seen as a process of balancing the two sides of interests. The courts will later determine whether the (evaluation) process has been carried out in a balanced manner.

In **Portugal**, in the event of collective dismissals, employers specify the relevant criteria, which shall be timely presented to the employees and the employee representatives. In general, collective dismissals can only take place if a formal procedure is followed, whereby the affected employees, their representative bodies and governmental entities are informed and consulted. Once criteria for selecting employees for dismissal are established, the employer must justify the dismissal decision accordingly.
8.3.4 Concluding remarks

The selection of employees for dismissal is regarded as forming part of the ‘managerial prerogative’ in many countries and is thus left to the discretion of the employer. In most other countries ‘social criteria’ are to be applied by the employer when selecting employees to be dismissed. Even if ‘social criteria’ are applicable, there may be limited room for taking the interest of the employer (or the company) into account. National law systems vary with regard to how far the outcome of the selection procedure can be influenced by collective agreements (and/or challenged by an individual employee in court).
9. **Entitlements, remedies and litigation**

In this chapter three issues are addressed: 1) the entitlements following from a lawful termination; 2) the remedies available for an employee in case of an unlawful termination; and 3) the litigation options when an employee wants to challenge the dismissal.

9.1 **Entitlements in case of lawful termination**

This section deals with the entitlements following from a lawful termination. Often the employee is compensated in some way financially for his loss of income as a result of a dismissal, even in case the dismissal in itself is lawful. For instance, according to Article 12 of ILO Convention 158, an employee whose employment has been lawfully terminated shall be entitled to:
- some form of severance payment directly paid by the employer or a fund consisting of employer contributions, or
- benefits from unemployment insurance or assistance or other forms of social security, or
- a combination of both.

For this report, the interest lies in particular on the obligations of the employer. However, it is important to judge these obligations in relation to the rights of the employee under the social security system. Article 12 of ILO Convention 158 further stipulates that the severance payment should be based on the length of service and the level of wages.

Other entitlements could be developed in the context of the European Employment Strategy (further: EES). The general aim of the EES is to create more and better jobs throughout Europe and therefore encourages Member States to develop active labour market measures, which includes assistance to find further employment and lifelong learning. These two measures require the involvement of both, the employer and employee. With reference to the subject of this section, this means that the employer cannot simply terminate the employment relationship without also taking measures to support the employee in finding new employment, or at least to enhance the employee’s chances in finding a new job. However, in practice such measures are not often found in legislation, rather in collective agreements. These measures often have a collective character and are not to be invoked on an individual base.

However, both ILO Convention 158 and the EES leave room for the countries to deal with these issues in accordance with their national laws and practices. Furthermore, the EES is so-called soft law, which means that its policy guidelines are not legally binding on the member states. ILO Convention 158 has not been ratified by all countries. Consequently, there are differences in how these issues are regulated within the 30 countries. Since the measures to support the employee in finding further employment or to enhance his opportunities on the labour market have also been dealt with in Chapter 8.2, in the context of the principle of proportionality, we briefly discuss it here in as far as it involves obligations for the employer after the employment relationship has been terminated, for instance, the obligation of ‘priority hiring’ or the use of an outplacement service. The largest part of this section
therefore deals with severance payment; how it is regulated, which method is used to calculate it; whether it is limited and whether it is subject to tax. This section begins with the relationship between the notice period, severance payment and unemployment benefits.

9.1.1 Relationship between notice period, severance payment and unemployment benefit

As discussed in Chapter 3.1 of this report, all ELLN countries’ legislations have notice periods. The aim of a notice period in general is to grant the employee some time to find or arrange an alternative for the job lost. The general aim of severance payment is more or less the same, yet focuses more on compensating the loss of income due to the termination of the employment relationship. The aim of unemployment benefits is similar in the sense that it provides the dismissed employees an alternative income for a certain period during which they are without employment. Since the aim of these three issues is closely related, it is to be expected that there is a relationship between the three of them. Whether this is the case and to what extent is the subject of this section. Furthermore, some considerations are made regarding the reasons for the widespread use of severance payment.

Relationship between notice period and severance payment

Given the general aim of the notice period, it seems unreasonable that the employer is also obliged to provide severance payment: with the notice period, the employer already grants the employee time to find alternative employment and with that, an alternative source of income. This relation is reflected in Germany, for instance, where statutory severance payments are not due if the employer has observed the notice period. Nonetheless, severance payment may have to be paid when this is specified in a social plan. However, Germany represents a minority (see below, Chapter 9.1.2), because in most of the countries statutory severance payments are due without any consideration of the notice period (e.g., AT (old system), BG, CY, EE, FR, RO). In most of the countries there is therefore no relation between notice periods and severance payments, other than that the severance payment prolongs the period during which the employee can search for further employment without relying on social security, i.e., unemployment benefits. For this discussion, the length of the notice period is important as well. The ILO principle, by which severance payment is to relate to the length of service, should be included in the notice period as well, if the notice period replaces severance payment.

In Belgium, a special kind of relationship exists. When the notice period is longer than three months, the severance payment is reduced equally. Thus, if the notice period is five months, the amount of the severance payment is reduced by the amount of wages that equals those two months above the minimum of three months. In Greece, a comparable concept exists: when the employee is dismissed without a notice period, the employee can claim full statutory severance payment. This implies that if a notice period is observed, severance payment is reduced by (a proportion of) that period.
Relationship between severance payment and unemployment benefit

In the vast majority of countries no relationship exists between the severance payment and the unemployment benefit (AT, BE, BG, CY, CZ, DK, FR, DE, EL, IS, IE, IT, LI, LT, LU, MT, NL, NO, PL, PT, RO, SK, SI, ES, UK). As far as a relationship between the two exists, it is because the employee is not eligible for unemployment benefits for as long as the severance payment provides an income. The underlying idea is that as long as the employee is provided with some form of income by the employer, whether it is called wage, salary or severance payment, the employee is not eligible for an unemployment benefit which aims to provide the employee with an income for a certain period.

A nice illustration of this is provided by Belgium, where an employee may receive a provisional unemployment benefit during the litigation procedure on the termination of the employment relationship. If the employee wins this procedure, he has to return the benefit, because entitlement to this is replaced by the right on a severance payment of the employer. If the employee loses the procedure, he may keep the provisional unemployment benefit, (since the provisional benefit becomes a definitive benefit), except in the case of a justified immediate dismissal for gross misconduct. In the latter situation the entitlement on unemployment benefits can be suspended temporarily for the future.

Finland and Sweden are not included, since severance payments are not regulated by statutory law

Overall, the notice period, severance payment and unemployment benefits serve more or less the same goal, however, in different stages of the dismissal procedure. The notice period grants the employee time to find other employment, while the former employment relationship is not yet actually terminated. Severance payment follows the notice period as it provides an income based on the wage after the actual termination date, which is often the day after the last day of the notice period. The unemployment benefit follows the severance payment, which in this respect is often considered an income that renders the employee ineligible for the benefit. As a result, the notice period, severance payment and unemployment benefit cannot be enjoyed simultaneously nor cumulative, hence, they are, in general, sequentially related. However, in some cases the severance payment is paid as a lump-sum which can be enjoyed simultaneously with unemployment benefits.

Exceptions to this can be found in Estonia and Slovakia. In case of redundancy, an employee in Estonia has the right to an additional payment from the Unemployment Insurance Fund on the severance payment the employer is obliged to pay. In Slovakia, employees entitled to severance payment are also entitled to the payment of wages during the notice period. As such, the payment of wages during the notice period is dependent on the entitlement to severance payment.
9.1.2 Underlying reason and regulation of severance payment

The above demonstrates widespread use of severance payment as a consequence of lawful termination of the employment relationship and gives rise to the general question why the employer has to pay severance payment. This question becomes pertinent, in particular, when it is considered in the context of the European Employment Strategy (EES) and the concept flexicurity that forms the heart of this strategy. The concept flexicurity stands, in short, for employment security instead of job security, and as such involves less stringent protection to preserve employment in a certain job combined with the use of active labour market policies in order to attain new or further employment. These active labour market policies include measures such as training and re-education and the use of outplacement services. Also, measures such as ‘priority hiring’ fit into this context, because the main objective is to ‘guide’ an employee from job to job. With a well functioning labour market, job protection is not necessary, because the employee would never be without employment for a long period.

A typical example of this is Sweden, where no statutory regulation on severance payments exists. Although regulation on severance payments is found in collective agreements, so-called Employment Security Agreements or Transition Agreements, the main focus of these agreements is on the realisation of the employee’s employability in the open labour market. It seems that the same can be said about the relevant collective agreements in Germany. There, too, the focus has been more on improving the chances of employees affected by dismissal to find a new job (outplacement, further training, start-up premiums, etc.) instead of receiving the more ‘traditional’ severance payments only. These approaches are also reflected in the regulations in Romania, where the lawfully dismissed employee is entitled to ‘active measures to counter unemployment’. In Slovenia, this approach is reflected in the fact that an employee, who refuses to accept another job with the employer, loses his right to severance payment. In this regard, for instance, discussions have taken place in Finland initiated by the employer’s associations. However, they seem to be exceptions.

In an ideal situation of flexicurity job protection by means of severance payment is not appropriate, since the employer could easily pay instead of fulfilling his duty to find alternative employment for the redundant employees. It is also often argued that severance payments make the labour market more rigid, because it not only prevents the employer from dismissing the employee too easily, but also make the employer more reluctant to hire an employee, because it is so expensive to terminate the employment relationship. A reflection of this can be found in Estonia, where in December 2009 the amount of severance payment was lowered from a four-month average salary to a one-month average salary as part of a package of measures to introduce the principle of flexicurity in Estonian labour law. It is also a repetitive argument in the discussions on how to create a more flexible labour market in other countries.

The EES was introduced in 1997 and has been promoted ever since by the EU. However, in most of the countries it does not seem to be reflected in employment protection legislation. Since 2006, there have been discussions in some countries along the lines promoted by the EES, particularly in Austria, Estonia, Finland, Portugal and Slovenia. Although not always
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of flexicurity,

but because the rules did not meet their objectives.

Noteworthy,

is quite remarkable

statutory severance payments are widespread within the countries.

Again,

is not so surprising,

the EES does not promote an abandonment of severance payment,

but it is implicitly inherent to the general concept of flexicurity.

Furthermore,

inherent to employment protection law that aims to protect the job rather than the employment in order to obstruct dismissals that may be too frivolous.

Severance payment is generally also considered a decent gesture by the employer towards the employee;

not only towards the employee who is being dismissed,

but also to those who remain,

since it is an indication that the employer will treat his employees decently (e.g., Ireland).

Severance payment also turn a lawful,

but unreasonable dismissal into a reasonable dismissal,

because the employee is compensated for the loss of his employment (e.g., in the Netherlands).

**Regulation of severance payment**

In the majority of countries (AT (old system), BG, CY, EE, FR, DE (with regard to dismissals for business reasons, if a relevant payment was offered by the employer), EL, HU, IE, LV, LT, LI, NL, PL, PT, RO, SK, SI, UK), the severance payment is provided by statutory law.

In some countries it is only regulated by collective agreements (e.g., BE, DE, MT, SE) or in individual contracts (IS, MT, NO, SE). In Finland it is based on tradition.

Freedom of contract is mostly reflected in collective agreements when it comes to deviations of statutory severance payment which is an advantage for the employee (e.g., BG, FR, DE (social plan), HU, LV, LI, LU, RO, SK, SI, UK).

This is less often possible in individual contracts between the employer and employee (LI, NL - mainly managerial staff, SK, UK).

Two other forms can be distinguished by which statutory severance payment can be modified in favour of the employee.

In Estonia, statutory severance payment can be complemented by the Unemployment Insurance Fund. And in Ireland, a tradition of an extra gratia payment by the employer on top of the statutory severance payment.

Deviations that negatively affect the employee, i.e., a severance payment that is lower than that defined in the law, is only permitted in Bulgaria when this is agreed upon between the individual employer and employee.

Although the possibility to deviate from the statutory severance payment exists in these countries, it should be noted that this possibility is not used in practice in all countries. In Luxemburg, for instance, this is rather exceptional in practice.
Scope of the right on severance payment

The scope of entitlement to severance payment is, in general, defined in three ways: by reason for the dismissal; by a threshold on the size of the company; and/or by a qualifying period. Since the last two coincide with the general requirements which determine the scope of dismissal protection, we refer to Chapter 5. The analysis here is restricted to those countries that only require such additional conditions with respect to severance payment. Furthermore, this section concludes with a brief reflection on the entitlements to severance payment in case of termination of a fixed-term contract.

- Definition of the scope by reason for dismissal

In the majority of the countries entitlement to severance payment exists in case of dismissal for economic reasons (e.g., BE, CY, CZ, EE, FR, EL, IE, IT, LV, LU, NL, PL, PT, RO, SI, ES, SE, UK). Other reasons may give rise to an entitlement to severance payment in only a minority of the countries (e.g. BG, EL, HU, IT, NL, SI, ES). In Spain, for instance, an employee is not entitled to severance payment only when he is dismissed for disciplinary reasons. In Liechtenstein, severance payment is restricted to certain exceptional cases only, for instance, the dismissal of an employee over 50 and of those with a service period of at least 20 years.

The situation in Germany differs, where the law provides rules for severance payment, hence, the employee is not entitled to it when the employer has observed the notice period. Nonetheless, the employee could be entitled to severance payment if this is regulated in a social plan.

With respect to the Netherlands, it should be noted that a distinction is made between the track the employer chooses to terminate the employment relationship. When the employer takes the first track, obtaining permission from the UWV (an administrative body), no obligation for severance payment exists, while taking the second track, dissolution by the cantonal judge, implies that the settlement of severance payment is part of the judgement.

- Defined by a threshold

In Poland, only employees of an employer who employs at least 20 employees are entitled to severance payments in case of a dismissal for economic reasons.

- Defined by a qualifying period of service

In Greece, the law has recently been amended and only entitles employees with a service period of at least twelve months to a statutory severance payment. Other qualifying periods explicitly related to severance payments can be found in Slovenia (one year) and France (two years).
- Severance payment and fixed-term contracts

In most of the countries the entitlement to severance payment only exists in case of the termination of an indefinite duration. This is the consequence of the general exclusion of fixed-term contracts from employment protection legislation, as discussed in Chapter 6. Justification for this exclusion relates to the fact that fixed-term contracts often end *ex lege*, thus without giving notice and at a pre-defined moment. The employee knows from the beginning of the employment relationship that it is in principle temporary and that he has to search for other employment by the end date of the contract. This differs significantly from the situation of an employee with an indefinite contract and is not prepared for the termination of his contract. It is precisely in this context – a situation in which the employee is not prepared for the termination of the employment relationship that a few countries acknowledge that an entitlement to severance payment arises when the fixed-term contract is terminated prematurely (*e.g.*, NL, PL, SI). In Spain, however, temporary employees are also entitled to severance payment when the expected period of employment is completed, albeit based on a lower salary (12 instead of 20). Thus, for instance, when an employee has completed a two-year contract, he is entitled to severance payment for a service period of two years multiplied by a 12-day salary (severance payment = 2 x 12 day salary).

### 9.1.3 Methods to calculate severance payment, limitations and tax

In general, two methods to calculate severance payments can be distinguished. Both methods are based on the service period and the salary of the employee, however, in the first method, the service period needs to be multiplied by (a percentage) of the salary, thus:

\[
\text{Severance payment} = \text{service period} \times (\%) \text{ salary}
\]

The salary to be multiplied can either be:
- a **weekly** payment subject to a statutory cap (IE, UK);
- a (percentage of a) **monthly** payment (AT, CY, FR, DE (case law), NL, PT, ES); or
- a (percentage of an) **annual** payment (IT).

Just as many countries (DK, EE, EL, HU, LV, LT, LU, PL, SK, SI) apply the second method, in which the service period equals either a fixed amount or a fixed number of monthly salaries, thus:

\[
\text{Severance payment} = \text{service period} = \text{fixed amount or x monthly salary}
\]

More specifically, when an employee with a service period of seven years is dismissed in for instance, severance payment will be 7 times the amount of a 20-day salary. In **Poland**, this same employee falls within the range of a service period of two to eight years, which entitles him to a severance payment of two months. As such, the first method seems to do more justice to the actual service period.
Some countries (FI, LI, MT, NO, SE) are not listed here; since there is no statutory law on severance payment, there is no generally defined. However, when severance payment is agreed upon in an individual contract by collective agreement, the method of calculation is also defined in these documents.

Methods that can be distinguished from these two general ones can be found in Bulgaria, Estonia, France, the Netherlands and Slovenia.

Bulgaria completely deviates from the two main systems, as severance payment depends on the period of unemployment, i.e., severance payment equals regular payment up to one month of unemployment at most. This is extended if provided for in a collective agreement.

In Estonia, the employer is obliged to pay one month’s salary in case of dismissal due to economic reasons, while the employee additionally has a right to receive severance payment from the Unemployment Insurance Fund. The amount of this severance payment is calculated using the second method.

In the Netherlands, no method is determined by legislation, however, the circle of cantonal judges has agreed on a recommendation which includes a formula for calculating the severance payment. This formula resembles the first method described above (service period x monthly payment, therefore, it is clustered there), yet it differs in two ways. Firstly, the service period is weighted based on the age of the employee (similar: CY, UK). Secondly, it deviates because of a third factor, a correction factor, which needs to be taken into account (thus: service period x monthly payment x correction factor). Based on this correction factor, the facts surrounding the termination of the employment contract are taken into account. This influences the amount of the severance payment, since the multiplier of the correction factor becomes smaller than 1 when the facts surrounding the termination are primarily attributable to the employee, and larger than 1 when those facts are primarily attributable to the employer. This factor also includes elements such as measures that enhance the employability of the employee and to what extent both, the employee and the employer, have contributed to this employability.

France and Slovenia are also clustered within the first method, since the basic method to calculate the amount of severance payment follows this principle, however, they differ because the percentage of the monthly salary is weighted. More explicitly, in France, when the service period is longer than ten years, 1/5th of a monthly salary is added to the basic minimum salary. In Slovenia, the weighing of the salary is as follows: when the service period is 1–5 years, it is to be multiplied by 1/5th of the monthly salary, when it is 5–15 years, this is 1/4th of the monthly salary and when this is over 15 years, it is 1/3rd of the monthly salary. The result of this is similar to that of the weighted years of service used in Cyprus, the Netherlands and the UK, namely that it is relatively more expensive to dismiss an older employee than a younger employee.
**Limitations**

In many countries a maximum severance payment is determined which equals a certain number of monthly payments (see Table 7). In some countries it is possible to deviate from the fixed payments in contracts, collective agreements or in social plans for as long as the deviation is more favourable for the employee (e.g., BE, FR, HU, LU, SI, ES, UK). In Slovenia, though, this possibility is limited to tenfold the amount of the severance payment provided by law. It is also possible in Slovenia to deviate in a negative sense, if this is agreed on by the employer and employee, and if a large number of jobs are jeopardised due to the severance payment.

In most countries severance payment is paid directly by the employer, except in Austria and Cyprus. Austria is an interesting case in this respect since two systems are in place. The old system, which is still applicable, is quite similar to that of most of the other countries and obliges the employer to pay a certain sum based on the first method. The second system, which was introduced in 2003, requires the employer to pay a monthly sum into an Employee Provision Fund. At the end of his professional career, the employee can either have a full payment or a monthly pension payment in order to complement his retirement pension. As such, the underlying idea of this fund is to turn severance payments into a second pillar pension. However, when the employment relationship is terminated by the employer, the employee is immediately entitled to the money in the fund.

In Cyprus, an employee who is made redundant is entitled to compensation from the Redundancy Fund. There are some exceptions, though, including reaching the retirement age prior to the redundancy and when the employee unreasonably rejects an offer for alternative employment.

Generally, the maximum amount of severance payment is determined by referring to a certain number of monthly payments. Although Table 7 provides an indication of the maximum amount of severance payments in terms of the number of monthly payments in some of the countries, it should be kept in mind that the two methods outlined above are applied. This implies that limitations in terms of the amount seem to be more drastic for the first method than for the second one, as it does not fit into the underlying concept of receiving a payment that does justice to the period of service. With respect to the second method we must note that we have taken the number of monthly payments linked to the longest period of service. This was done to provide a picture of maximum severance payments indicated by the number of monthly payments. The focus on the maximum amount of severance payment is interesting since it gives an impression of the level of dismissal protection in terms of the maximum costs for an employer to dismiss an employee. It also enables us to explore any tendencies between the 30 countries in this respect.

**Table 7** Maximum amount of severance payments indicated by the number of monthly payments

<table>
<thead>
<tr>
<th>1 month</th>
<th>3 months</th>
<th>4 months</th>
<th>6 months</th>
<th>8 months</th>
<th>10 months</th>
<th>12 months</th>
<th>24 months</th>
<th>42 months</th>
<th>No limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>BG</td>
<td>CZ, DK, EE, PL</td>
<td>BE, LV</td>
<td>HU, LT</td>
<td>LI*</td>
<td>SK</td>
<td>CZ, LU, ES</td>
<td>EL</td>
<td>ES</td>
<td>CY, FR, NL</td>
</tr>
</tbody>
</table>


**NB1:** The Austrian system of severance pay resembles, after its reform, a second pillar pension system. The employee is entitled to the money that was transferred to his severance pay account by the employer (+1.53% of the income, paid each month by the employer to an employee provision fund) – either as a lump sum payment or, upon retirement, as a monthly (pension) payment. Before the reform, the maximum amount of severance pay was 12 times the monthly payment.

**NB2:** Finland, Malta, Norway and Sweden are not included, since severance payments are not statutorily regulated.

**NB3:** Although Ireland and the UK have limitations on the amount of severance payments that need to be taken into account, they are not included in the table, since these amounts cannot be translated into monthly payments (see below).

**NB 4:** Slovenia is not included because, as indicated above, it is limited to the tenfold of the statutory maximum, which cannot be translated into monthly payments.

**NB 5:** Spain is included twice: 12 months limitation applies to dismissals for economic or objective reasons and 42 months limitation to unlawful dismissals.

* in case of termination of the employment contract with an employee older than 50 and a service period longer than 20 years

The table shows a wide variety in the maximum amount of severance payment defined by the number of monthly payments. At the bottom with one month we find Bulgaria, while at the top with no limitations we find Spain (42 months), and Cyprus, France and the Netherlands (no limitations). On average, severance payment is limited to seven months, however, its distribution does not allow the conclusion of a tendency towards those seven months.

In some countries (e.g., BE, CZ, DK) the duration of severance payment is limited by the type of grounds for the dismissal. Thus, for example, in the Czech Republic, the maximum amount of severance payment equals three months salary in case of lawful termination on economic grounds and up to 12 months in case of lawful termination due to the incapacity of the employee. Another distinction can be found in the personal scope of employment protection from which the entitlement for severance payment derives. In Denmark, the limitation only applies to white collar workers covered by the legislation which entitles them to severance payment. In Belgium (as noted above in Chapter 9.1.1) the amount of severance payment is linked to the length of the notice period which it compensates.

In the Netherlands, there is no limitation to the amount of severance payment, however, there has been an ongoing discussion for years whether it should be limited to a one-year pay for employees with an annual salary above €75,000.

Ireland and the UK are not included in Table 7, since their severance payment cannot be translated into monthly payments, nonetheless, they have determined a limitation. In Ireland, the ceiling on annual reckonable earnings taken into account when calculating the statutory lump sum is €31,200. In the UK, limitations to the amount of severance payment as well as to the duration have been specified: £380 per week up to 30 weeks and a maximum of 20 years of employment can be taken into account up to a maximum of £11,800.
While Table 7 demonstrates that many countries have a maximum to severance payment based on the number of monthly payments, it is interesting to note that Portugal has determined a minimum of three months. This can be higher if agreed by a collective agreement. In Romania, examples of a minimum amount of severance payment can also be found in collective agreements. For instance, the collective agreement for the trade sector stipulates that the severance payment should be no less than two monthly salaries, including all the rights owed to the employee up to the day of his dismissal.

**Tax**

In most of the countries severance payment is a gross payment and as such subjected to taxes (see Table 8). When severance payment is subjected to tax, two forms of taxation can be distinguished: (1) normal regime and (2) a specific, often more favourable, regime.

**Table 8** Net / Gross severance payment

<table>
<thead>
<tr>
<th>Net</th>
<th>Gross</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE, CY, IE</td>
<td>BG, CZ, DK, EE, FR, EL, HU, IT, LV, LI, LT, LU, NL, NO, PL, RO, SK, ES, UK</td>
</tr>
</tbody>
</table>

**NB 1:** In Slovenia the payment is not perceived as net or gross, yet as in accordance with the statutory law (ERA) or exceeding the limits as set by the statutory law.

**NB 2:** Finland, Malta and Sweden are not included, since severance payments are not regulated by statutory law.

The large number of countries that provide a gross income is probably attributable to the fact that in fiscal law, severance payments are considered to be salary-like. In Romania, for instance, severance payment is therefore subject to all taxes and contributions which normal salaries are subject to as well. In Austria, severance payment is only subject to tax when it is taken as a lump sum payment. In some other countries, severance payment is subject to a specific regime, often more favourable for the employee (see Table 9).

**Table 9** Applicable tax regime

<table>
<thead>
<tr>
<th>No tax</th>
<th>Ordinary tax regime</th>
<th>Special tax regime</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE, CY, LU</td>
<td>BG, CZ, EE, HU, IS, LV, LT, NL, NO, PL, RO, SK</td>
<td>DK – no social contributions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>FR – no social contributions, unless a certain level is exceeded which is fixed by either a sectoral or cross-industry collective agreement, or when this is not enshrined in law</td>
</tr>
<tr>
<td></td>
<td></td>
<td>EL – The first 60.000 Euros are tax free, the sum 60-100.000 is subject to a tax of 10 %, the sum of 100-150.000 Euros is subject to a tax of 20 % and the sum more than 150.000 Euros to a tax of 30 %</td>
</tr>
<tr>
<td></td>
<td></td>
<td>IE – statutory redundancy payments are not taxable; other forms of severance payment enjoy a standard exemption from tax of a fixed amount x service period plus an additional allowance of €10,000.- for persons who are not members of an occupational pension scheme</td>
</tr>
</tbody>
</table>
### 9.1.4 Other entitlements in case of lawful termination

Besides severance payment, employees also enjoy other entitlements in case of lawful termination. The aim of most of the measures employees are entitled to is to guide them from employment to further or other employment, either within or outside the company of the employer.

The measures discussed here differ from those discussed in Chapter 8.2 (proportionality), since these measures are to be applied after the employment relationship has been terminated. One set of measures aims to provide job security, while a second set aims to provide employment security.

An example of the first set is ‘priority hiring’ or ‘priority right to re-employment’ (e.g., CY, FI, LU, SE), which means that when the employer increases employment again following the dismissal, the employees dismissed for economic reasons have the right to be hired over other candidates. In Cyprus, for instance, this comprises a period of eight months and in Luxembourg one year.

Examples of the second set of measures can be found, for instance, in Finland, where a system of ‘change security’ applies. The aim of this system is to further employment, working skills and social aptitude for work in the labour market (to prevent drop outs). The system is built on a triangular relationship between the employee, employer and employment agency. Entitlement to measures to counter unemployment or the enhancement of the employee’s employability can, for instance, also be found in Germany (collective agreements), Romania and Sweden (see also Chapter 9.1.1).

However, when considered in the wider context of the EES, for instance, as sketched above, it is remarkable that the entitlement to the second set of measures in particular, which aim to provide employment security is not more widely used across the countries.

### Table: Tax regimes

<table>
<thead>
<tr>
<th>No</th>
<th>Ordinary tax regime</th>
<th>Special tax regime</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>IT – more favourable tax regime applies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>LI – more favourable regime concerning social contributions applies, if the severance payment has the character of an insurance or welfare benefit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>PT – only when the payment exceeds 1.5 x the average amount of the fixed remuneration of the last 12 months, multiplied by the years of service.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>SI – free from Personal Income Tax when in accordance with the statutory law and excluded from social contributions when the termination is for business reasons.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>ES – free from tax up to certain limits regulated by law</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UK – the first £30,000 are tax free</td>
</tr>
</tbody>
</table>

**NB:** Finland, Malta and Sweden are not included, since severance payments are not regulated by statutory law.
9.1.5 Concluding remarks

The most important and most often regulated entitlement is severance payment. Other entitlements are supporting employees to find further employment, either with the same employer (via ‘priority hiring’) or elsewhere (via for instance an outplacement service). Since notice periods, severance payments and unemployment benefits serve related goals, their relationship is analysed. This analysis shows that since they are applied in different stages of the dismissal process they are sequentially related, meaning that in general they cannot be enjoyed simultaneously or cumulatively.

In the majority of the countries severance payment is regulated by statutory law, but can be supplemented by collective agreements. The entitlement to severance payment is in the majority of the countries limited to dismissals for economic reasons. Some countries have additional requirements, such as a threshold to the size of the company, a qualifying service period and the type of contract. As far as the amount of the severance payment is concerned, two general methods can be distinguished, which are both based on the service period and a percentage of the average salary of the employee. Some countries (CY, FR, NL, SI, UK) deviate from the two main methods. In these countries dismissals of older employees are more expensive for the employer. Only Bulgaria and Estonia have completely different methods of calculation. In terms of the level of severance payment the countries vary widely.

Severance payments are not very much in line with the concept of flexicurity as promoted in the European Employment Strategy (EES). It makes it possible for the employer to pay off the duty to find alternative employment for the redundant employees. It also is often argued that severance payments make the labour market more rigid, because it not only prevents the employer to dismiss the employee too easily, but also makes the employer more reluctant to hire an employee, because it is expensive to terminate the employment relationship. Although these ideas are discussed in several countries, in most countries severance payments are still the most important means for protection against dismissal, because it shows a direct effect and is considered to be a decent gesture of the employer towards the employee. Entitlement to measures like guidance to other work and retraining is less widely used across the countries.

9.2 Remedies in case of unlawful termination

This section deals with remedies in case of unlawful termination and begins with the objective of the remedies, in the sense of job protection, compensation or employability (Chapter 9.2.1). This is followed by an analysis of the categories of unlawfulness and the scope of the remedies (Chapter 9.2.2). The third section deals with types of remedies in more detail and their significance (Chapter 9.2.3).

9.2.1 Aim of the remedies

In general, three aims of the remedies in case of unlawful termination can be distinguished.
The *first* aim of the remedies is to *protect the job*, meaning to provide job security for the unlawfully dismissed employee. The main remedy is reinstatement in the job, either at the employee’s request or *ex lege* when the unlawful termination is considered null and void, which may have to be decided in a litigation procedure. In general, the termination of the employment relationship is considered an *ultimum remedium* in these systems, a means of last resort.

The *second* aim of the remedies is to *provide compensation* to the employee for the loss of the job. This is principally in systems where the employer is able to terminate the employment relationship whenever he deems fit, even when it is unfair or unreasonable, for as long as it is compensated financially. Generally, the concept of the managerial prerogative plays a significant role in these systems, in the sense that the employer can dismiss an employee whenever he deems this necessary. In systems where reinstatement is an option, it is also possible for compensation to be provided as an alternative in case reinstatement is practically impossible or the relationship between the employer and employee has been damaged.

The *third* aim of the remedies is to protect employment for the employee rather than the specific job. This stems from the general idea that the aim of employment security is not to ensure that an employee can hold a specific job for as long as possible, but rather to provide the means for an employee to qualify to operate effectively on the labour market in general. Consequently, the main form of protection in this case is found in remedies such as providing support in the search for a new job, for instance, through an outplacement service or vocational training or (re-)education. This aim very much reflects the concept of *flexicurity* which is the heart of the European Employment Strategy (EES).

These three aims are ‘ideal types’. In most countries several of these aims are combined. Clear examples of this can be found in Austria, Lithuania, Luxemburg, the Netherlands, Poland and Slovenia. The ongoing discussion in Germany for a paradigm shift regarding the shifting of the focus from job protection to compensation is also interesting in this context. However, a more abstract distinction of these aims gives an indication of the tendencies among the countries. This is particularly interesting when reflected in the context of the EES, as the expectation is that the primary aim of the remedies in most countries would be to protect employment rather than the job itself or the mere payment of compensation. When considered in the context of the EES, the first aim, protection of the job, could actually obstruct a more flexible labour market, since it requires relatively much effort by the employer, who may be more likely to be obliged to reinstate the employee instead of supporting him in finding further employment. The second aim, compensation, on the other hand, could actually make the labour market too flexible, as the employer can relatively easily lay off employees as long as he pays for it, again instead of supporting the employee in finding further employment.

Table 10 presents the primary aims of the remedies in the 30 ELLN countries.
It is remarkable, however not surprising, that the aim of the remedies to provide employment security is only found in three Scandinavian countries. Thus, rather than job-protection or compensation mainly, the aim of the remedies is to enhance or improve the employee’s employability as a means of support in finding further employment, either with the same employer or on the open labour market.

Although the idea of prior dismissal protection as is the case in the Netherlands, may strongly indicate the general aim of job protection, this is not entirely the case in practice. Indeed, following the dual system, there are truly two aims. The main aim of the first system (permission from an administrative body) is to protect the job, while the key aim of the second system (dissolution of the employment contract by the cantonal judge) has developed in such a way that it ensures that the employee is, at least, well compensated for the loss of his job. In essence, the employer’s choice between these two systems is thus also a choice between a system that allows for a ‘cost-free’ dismissal of an employee, albeit with the risk that the permission is not granted, or a system that may be costly because of high dismissal compensation determined by the cantonal judge upon dissolving the contract.

Also interesting in this respect is Sweden, where the Employment Protection Act provides for reinstatement/nullification as the main remedy, and thus job protection, while collective bargaining provides for measures aiming at employment security. Consequently, the Swedish system also knows truly covers two main aims of dismissal protection by remedies.

### 9.2.2 Categories of unlawfulness and scope of remedies

**Categories of unlawfulness**

The dismissal of an employee may be unlawful for several reasons. As indicated in Chapter 7.4, some reasons for dismissal are considered automatically unlawful. These reasons may be status-related, for instance, with the employee being dismissed because he is an employee representative or related to a specific situation of the employee, for instance, because the employee is pregnant or takes parental leave.

---

**Table 10 General aims of the remedies**

<table>
<thead>
<tr>
<th>General aim</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Job protection</td>
<td>AT, BG, CY, CZ, DE, EL, HU, IT, LV, LT, NL, PL, PT, RO, SK, SE, SI</td>
</tr>
<tr>
<td>Compensation</td>
<td>BE, EE, FI, FR, IS, IE, LI, LU, MT, NL, ES, UK</td>
</tr>
<tr>
<td>Employment security</td>
<td>DK, NO, SE</td>
</tr>
</tbody>
</table>
A dismissal may also be unlawful, because a formal or procedural requirement has not been taken into account. For example, a prior permission of the competent body of the workers’ representative in the case of dismissal of an employee representative, or the required minimum notice period.

Furthermore, the countries use different ways of defining an unlawful dismissal; some countries have defined this in detail, while others have done this more loosely. Thereby there is a strong resemblance with the way in which countries have defined the reasons and grounds for the dismissal (see Chapter 7.1). Among these are the following:

- termination of the employment relationship before the end of the notice period and/or the required termination date (AT, CY, IS, LI, MT, PL, PT, SK)
- termination of the employment relationship is based on a prohibited ground, including fundamental rights (AT, DK, FR, EE, EL, IE, LI, LT, LU, NL, NO, PL, PT, RO, SI, ES)
- the termination is contrary to the general principle of law, e.g., good faith (EE, LI, NL) and morals (contra bonos mores) (AT)
- the termination is not in accordance with formal requirements, including those of specially protected employees (AT, EE, EL, IE, LU, NL, PL, PT, RO, SI, SK, ES)
- premature termination of a fixed-term contract (BE, MT, NL, PL, PT)
- termination of the employment relationship without an adequate severance payment (EL).

Among the more loose definitions we find, for instance:
- unfair (LU, PT, RO)
- unreasonable (DK, NO, SE, UK);
- clearly unreasonable (NL); and
- unjustified (PL).

In the majority of the countries (e.g., AT, BE, DK, EE, FI, FR, EL, HU, LI, LT, LU, MT, PL, RO, SK, SI, ES) the reason for the unlawfulness of dismissal determines the type of remedy the employee can claim. **Austria** is illustrative for this, since its legislation includes stipulations for such cases. Thus, when for instance the employer has not observed the required notice period and termination date, the employee can claim compensation in terms of earnings he would have received had these been correctly observed. When the employment relationship is terminated for reasons prohibited by law, the employee can claim that the dismissal was never valid and that the relationship therefore continues to persist. Another example is **Lithuania**, where the employee can claim damages in case of unlawful dismissal on economic grounds, while in other situations the main remedy is reinstatement in his job.

A substantial number of countries (e.g., BG, CY, CZ, DE, IS, IE, IT, LV, NL, NO, PT, SE, UK) more generally defines which remedy the employee may claim in case of unfair or wrongful dismissal. Table 11 shows the main remedies for unlawful dismissal.
Table 11 Main remedies in case of unlawful dismissal

<table>
<thead>
<tr>
<th>Remedy</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reinstatement</td>
<td>AT, BG, CY, CZ, DK, EE, FR, DE, EL, HU, IE, IT, LV, LI, LT, MT, NL, NO, PL, PT, RO, SK, SI, ES, SE</td>
</tr>
<tr>
<td>Dismissal compensation</td>
<td>BG, CY, CZ, DK, EE, FI, FR, DE, HU, IS, IE, IT, LI, LT, LU, MT, NL, NO, PL, PT, RO, SI, ES, SE, UK</td>
</tr>
<tr>
<td>Compensation in lieu of notice period</td>
<td>AT, BE, CY, EE, EL, HU, IS, IT, LT, LU, MT, NL, PT, SK</td>
</tr>
<tr>
<td>Damages</td>
<td>CZ, EE, HU, IS, IE, LU, NL, PT, RO, SI, ES, SE, UK</td>
</tr>
</tbody>
</table>

The two remedies most widespread among the member states are reinstatement and dismissal compensation. As could be expected and is confirmed by a comparison with the clustering in Table 10 above, the five countries in which reinstatement is not an option are all countries where the primary aim of the remedies is to provide compensation (BE, FI, IS, LU, UK). A similar comparison of compensation for dismissal cannot be made, although four of the six countries that do not provide this remedy are clustered as countries where the main aim of the remedies is to protect the job (AT, EL, LV and SK). The other two are clustered with compensation (BE) and employment protection (SE).

Besides these more widespread remedies, some specific remedies can be distinguished as well, including certificate of employment (CY), declarative or injunctive relief (IE), contract of employment (IT), and administrative sanctions (LV). However, since the focus of this report lies on the main issues and tendencies of dismissal protection legislation, these will not be further discussed.

Scope of legislation providing remedies

As indicated in Chapter 5, some countries have additional requirements, like a threshold regarding the size of the company or a qualifying service period, which set the scope of dismissal protection law, including claims on remedies. A clear example of this is found in Italy, where the possibility to claim a remedy depends on the regime that applies to the employee: Article 2118 CC which only in the payment of the due notice; or Act 604/1966 which provides the remedies of a new contract of employment or compensation. However, the latter Act only applies when it is adopted by an employer who employs less than 60 employees overall or less than 15 employees in an independent productive unit of the company. For other employers the remedy of reinstatement applies.
9.2.3 Type of remedies and their weight

As described above, four main remedies can generally be distinguished: reinstatement; dismissal compensation; compensation in lieu of notice; and damages. All of these remedies serve a different purpose in case of unlawful termination. What these purposes are and their weight will be analysed in this section. Since the consequence of the remedy reinstatement is the most comparable one between the countries, the focus will be on reinstatement.

Reinstatement

The remedy ‘reinstatement’ is the most widespread remedy among the countries. In general, when an employee successfully claims this remedy, the employer is obliged to continue the employment relationship with the employee as if the dismissal had never happened. As such, it is the strongest remedy an employee could wish for. Some countries have also indicated that this is an effective remedy (e.g., HU, IT), however, in other countries, there is a difference between the law and practice. More explicitly, even though the remedy of reinstatement exists, it is not often requested and if so, it is even more rarely granted by the courts (CY, DK, EE, IE, UK). In Ireland, for instance, in 2010 there were 217 determinations of unfair dismissal in favour of claimants and in nine cases only reinstatement was ordered. In other countries it is not particularly effective, because it does not correspond to the traditional labour relations. This is, for instance, the case in Latvia, where in practice employees who have filed a claim against their employer frequently become subject to victimisation by third parties, i.e., other employers. In Estonia, courts are not eager to grant a claim for reinstatement, either, instead, the contract is terminated by the court or labour dispute committee observing the requirements for a lawful termination of the employment relationship, including the notice period.

In general, the remedy reinstatement can successfully be claimed when the dismissal is found to be null and void. However, the outcome is not always reinstatement. In some countries (e.g., DE, FR, EL, NL) a dismissal that is deemed null and void is a dismissal that is considered to have never taken place, hence, the employment relationship was never terminated and the employee never lost his job and, therefore, a formal decision to reinstate is not necessary legally. However, an order by a court to reemploy the employee may be necessary in order to enforce the rights of the employee.

In Romania, the remedy reinstatement can have far-reaching consequences for the employer, in the sense that when an employee requests from the court to be reinstated in his previous job, the employer has to ensure that the employee returns to the post he was wrongfully dismissed from. In case the employer has shut down part of the company, the employer has to recreate the job for the specific employee, including the procedure of hiring the employee again.

On the other hand, there are situations in which a dismissal may be deemed null and void and as such gives rise to the claim for reinstatement, yet this may not be automatically the case. In the Czech Republic, for instance, it is up to the employer and the employee to
determine how to resolve the situation: reinstatement or dismissal compensation. A variant of this can be found in Portugal. When a Portuguese court finds a dismissal unlawful, the employee is entitled to the salaries due to idle time and for all material and moral losses; moreover, as a rule, he has the right to choose between reinstatement or compensation.

With the exception of a different outcome due to the legislative system, the failure of a successful claim for reinstatement can also be attributable to the existence of a limited defined scope of application. In Italy, for instance, a threshold with regard to company (more than 15 employees) needs to be met. In other countries a personal scope is defined for the application of this remedy. Thus, for instance in Malta, managerial staff is excluded and in Poland, employees with a fixed-term contract are excluded. In yet other countries, the scope is confined by material requirements. For instance, in Hungary, among several other reasons, the relocation of an establishment could, for instance, be such a material reason, and in Lithuania this is the case when the reason for the dismissal is economic, organisational or technical.

Dismissal compensation and compensation in lieu of notice

Although reinstatement is the most important remedy in most of the employment protection law systems, this is not the case in some countries (see also Chapter 9.2.2); instead, the remedies of dismissal compensation and compensation in lieu of notice are the most important.

In general, the aim of dismissal compensation is to compensate the employee for the loss of his job and not to preserve the job for the employee. The implication of this is that, other than with reinstatement, unfair dismissal will in most countries not be deemed null and void, but will instead be considered terminated or will be terminated by the court.

What is understood by dismissal compensation varies considerably among the countries. This variety can be illustrated by a brief comparative description of three countries’ case where this is considered the most important remedy: Finland, Luxemburg and the UK. In Finland, dismissal compensation for an unlawful termination based on collective grounds, for instance, equals the employee’s salary from 0 to 24 months. When the dismissal is unlawful because it is discriminatory, the employee can additionally get special compensation based on anti-discrimination legislation, which may reach up to €15,000. In Luxemburg, dismissal compensation is actually a severance payment, in addition to the possibility to claim damages (see below for the latter). In the UK, compensation reflects what is to be considered as just and equitable, given the loss suffered by the employee following the dismissal, in so far as that loss is attributable to action taken by the employer.

The amount of compensation also varies widely among the countries, with the lowest amount of three monthly salaries provided in Estonia and Poland and the highest amount of 42 monthly salaries provided in Spain.

The remedy of compensation in lieu of notice is of importance in those countries where the employer can dismiss an employee without stating a reason when giving notice (see Chapter
7.2). In principle, this is the strongest protection an employee in general be provided in these countries: ensuring that the notice period is at least observed and when it is not, that the employee receives compensation in the amount he was entitled to when the minimum notice period was observed. This is, for instance, the case in Austria and France. In Italy, this is the most important remedy for employees who fall within the less favourable regime of Article 2118 CC. This includes home workers, domestic workers, workers on probationary periods, managers and workers above 65.

**Damages**

The use of the word damages in this report is reserved for what the employee can claim in addition to dismissal compensation. As such, the general aim of the remedy damages is to further compensate the employee for the loss of his job. A clear illustration of this can be found in Luxembourg, where the employee is entitled to dismissal compensation by means of a severance payment and can claim damages in addition. These damages include economic loss (for instance, for the time spent being unemployed), moral damage (like seniority, type of grounds for the dismissal, and the general context of the dismissal), and a compensation in lieu of the notice period where this has not been observed. This remains much less clear in the Czech Republic, for instance, where the law provides that the employee can claim all damages suffered due to the unfair dismissal. Nonetheless, it is clear that this refers to additional claims on dismissal compensation. The problem may be that dismissal compensation also encompasses loss of income. In that case, damages may serve to compensate additional damage such as moral damage. In Sweden a dismissal lacking just cause can be declared null and void. This is not the case, however, if there is only a violation of the seniority rules. In addition, financial and punitive damages can be paid. Furthermore, as a main rule, if a dispute arises concerning the validity of the dismissal, the employment shall not terminate as a consequence of the dismissal prior to the final adjudication of the dispute. The employee shall be entitled to pay and other benefits under the duration of the employment.

9.2.4 **Concluding remarks**

The aim of these remedies is in almost half of the countries to protect the job, in the other half of the countries the main aim is to compensate the job loss, and in only three countries this is (also) to provide employment security. Within the majority of the countries, the reason for the unlawfulness of the dismissal determines the type of remedy the employee can claim. In general four main remedies can be distinguished: reinstatement, dismissal compensation, compensation in lieu of notice, and damages. Each of them serve a different purpose, however, the first two are most widespread among the countries. Since the consequence of the remedy reinstatement is the most comparable one between the countries, most of the attention is paid to this. In many countries this is considered to be the strongest remedy, nonetheless, in some countries it is hardly ever claimed and rarely granted by courts.
What is to be understood by compensation varies widely within the countries, as does the amount of the compensation. In some countries compensation in lieu of notice is the most important remedy, since it ensures that the unlawful dismissed employees at least get what they should have received if the dismissal rules were properly applied. The remedy damages also has many meanings, for the purpose of this report it is understood as what the employee can claim on top of a dismissal compensation. As such the aim of this remedy is to further compensate the employee for the loss of the job.

9.3 Litigation

9.3.1 Access to court or other procedures

There are several possibilities to challenge a dismissal in a legal procedure. These include access to a civil or ordinary court, a labour court, arbitration, conciliation and an employment tribunal. Table 12 shows which countries provide which possibilities.

Table 12  Litigation possibilities within the countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Civil / ordinary Court</th>
<th>Labour Court</th>
<th>Tribunal</th>
<th>Conciliation / negotiation</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Arbitration</td>
</tr>
<tr>
<td>Belgium</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Cyprus</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Denmark</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Estonia</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Individual labour disputes commission</td>
</tr>
<tr>
<td>Finland</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>France</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Germany</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Greece</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Hungary</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Iceland</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Ireland</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Rights Commissioner</td>
</tr>
<tr>
<td>Italy</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Latvia</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Arbitration</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Lithuania</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Luxemburg</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Malta</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Netherlands</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Norway</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Panels of lay judges</td>
</tr>
<tr>
<td>Poland</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Portugal</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Mediation</td>
</tr>
<tr>
<td>Romania</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Specialised panels of professional judges assisted by</td>
</tr>
</tbody>
</table>
In *Sweden*, some (a minority of the) disputes are first submitted to the civil/ordinary courts and can then be appealed to the Labour Court.

In most of the countries, the labour court is comprised of three judges: a professional magistrate and a representative of each side of the industry (e.g., AT, BE, LU, UK). In *Hungary*, the judge of the labour court works together with lay assessors. In *Norway*, the law provides for lay judges with a broad knowledge of industry to be appointed by the court’s administration in order to form panels in each county. Two-fifth of these lay people are recommended by both sides of the industry. The Labour Courts of *Finland* have two ‘neutral’ judges (one of these is the chair person), two judges representing employers and two representing employees.

Also, most of the countries provide one main litigation procedure to deal with disputes on the termination of the employment relationship (BE, BG, CY, CZ, FR, DE, EL, IS, LV, LI, LT, LU, MT, NL, PT, RO, SK). Others provide several procedures, which are linked to each other in different ways. In some countries, these procedures follow sequentially: first, one procedure needs to be followed, then the next can be taken. In a few countries, some of the procedures are *ex ante* to the termination, while others are *ex post*. In other countries, several judicial procedures and instances are offered as alternatives.

*Sequential litigation procedures*

As Table 12 shows, many countries offer several possibilities for litigation, however, these possibilities are often restricted to certain criteria. In *Austria*, for instance, arbitration of disputes is only possible when the employer and employee agreed upon it after the dispute began. Agreements reached before the dispute began are invalid. In *Hungary*, the opposite is the case, thus, the Hungarian Labour Code stipulates that when conciliation is agreed on by either an individual or a collective agreement, it should be reached before a dispute is brought before the labour court. In practice, though, such agreements are fairly sporadic. However, when a case is brought before the labour court, the first step for the court is to initiate conciliation, unless the case is about legal consequences or disciplinary liability. Only
when conciliation fails can the labour court deal with the case on its merits (similar: FR). In Slovenia, arbitration can be provided for in collective agreements. When this is the case, the employer and employee may agree to bring the case before the arbitration board/arbitrator. In Poland, conciliation prior to the court procedure is a possibility, however, in practice this route is rarely taken.

In Italy, conciliation and arbitration are mandatory before an employee of a small or medium-sized company (< 60 employees overall or < 15 employees in a unit) can bring a claim before the court. In Malta, prior to the commencement of litigation procedures, there is also an attempt for conciliation by the Department of Industrial and Employment Relations. When the dispute is not resolved, there are two possibilities depending on the type of contract (fixed-term or indefinite). In case of a fixed-term contract, the employee can bring a claim before the court and in case of an indefinite contract the employee can bring a claim before the Industrial Tribunal. In Sweden, before the Labour Court can deal with a legal dispute, local and central negotiation must have been conducted and must have failed. As a result, an overwhelming number of disputes are resolved by negotiation between the parties.

In the United Kingdom, too, conciliation is mandatory, however, this is only when a case has already been brought before the employment tribunal. This means that conciliation organised by ACAS takes place between the moment both parties have sent their responses and the moment the hearing takes place. Between those two steps a fixed period of consultation takes place within 13 weeks in general and within seven weeks in cases concerning deductions from wages, breach of contract on the termination and redundancy payments. In practice, about one-third of all the disputes brought before the employment tribunal are settled. Also, in the UK, mechanisms are developed to prevent disputes from being submitted to a full hearing. The first mechanism is a request by the PHR or the employment tribunal for a review of the case, which includes a costs warning when the party’s contentions have ‘no reasonable chance of success’. The second mechanism is the possibility of arbitration provided by ACAS in order to resolve a dispute of unfair dismissal by means as a voluntary alternative to taking the case to an employment tribunal. This is rarely used.

In Italy, the Netherlands and Norway, the first step to challenge a dismissal is extra-judicial, meaning that the employee can oppose the dismissal by sending a letter to the employer. In Italy and Norway, this letter needs to be followed up by a court procedure against the employer. In the Netherlands, this letter is only necessary if the employer did not follow the proper procedures. The effect of the letter is that the employment relationship is not legally terminated, however, in practice such a letter is usually followed up by a court procedure, either initiated by the employee to force reemployment or initiated by the employer to have the employment relationship dissolved by the court.

In Luxemburg, the employee is free to choose either send a letter to or object the employer. In case the letter is being used, the time limit to bring the case before the labour court is extended from three months up to one year.
Appeal

In **Belgium**, it is always possible to appeal a decision of the labour court and to have the case fully re-examined (similar: **LU, FR**). For purely legal questions, the decision can be brought to the Court of Cassation. In **Finland**, cases brought before the ordinary court can be appealed in two or three instances. There is no possibility to appeal the labour court’s decisions. This has usually been justified by the tripartite system of the court and the fact that all cases are based on collective agreements.

In **Denmark**, a conciliation decision of the joint committee cannot be appealed. In the **Netherlands** as well, it is not possible to appeal the decision of the administrative office or the cantonal judge. In the former case, however, the employee can start a civil procedure claiming that the dismissal is ‘clearly unreasonable’.

**Ex ante procedure and ex post litigation**

Although exceptional, it is interesting to highlight the situation in the **Netherlands**, since the protection of the employee starts with an **ex ante** procedure and is backed up by a procedure **ex post**. The **ex ante** procedure means that the employer requests permission to give notice to an administrative body, called **Uitvoeringsinstituut Werknemersverzekeringen** (further referred to as: UWV). The UWV decides on the permit on the basis of a Ministerial Decree and a large set of policy rules, formulated in agreement with the social partners. Basically, the test is on reasonableness and on compliance with policy guidelines from the Ministry. Employers who do not want to follow this procedure, or do not succeed in it, can also choose to send a petition to the cantonal judge to dissolve the employment contract for a ‘weighty reason’. The cantonal judge often complies with this request, but will order for the employee to be compensated financially. The amount of compensation is related to the weight of the grounds for termination.

When the employer gives notice without the required permission of the UWV or in contradiction with a prohibition to dismiss the employee, the employment relationship is terminated unlawfully and can be annulled by the employee. As already mentioned, under ‘sequential litigation procedures’ this can be done extra judicially by letter. However, this is often followed up by judicial litigation. Also, the termination of the employment relationship with permission of the UWV can be challenged by the employee on the basis of ‘clearly unreasonableleness’.

A similar **ex ante** litigation exists in **Portugal**, where the employee can file a preliminary injunction to request suspension of the dismissal.

In **Spain**, **ex ante** procedures can be initiated in case of collective dismissals, which need to be approved by the labour authorities. The employer as well as employee can appeal against a decision of the labour authorities by a higher administrative authority, whose decision can be appealed by the administrative courts. In addition, the employee can appeal the dismissal before a labour court.
Choice of instances

In several countries, the employee can choose which court or other body he will submit the case.

The first possibility is that the choice depends on the type of claim the employee wants to submit and the legal basis of that claim (DK, FI, IE). In Ireland, the choice of litigation depends on whether the claim is brought before the court as an unfair dismissal, a discriminatory dismissal or a wrongful dismissal. In Denmark, the litigation possibility is linked to disputes regulated by a collective agreement. When certain requirements are fulfilled, the parties are obliged to participate in a conciliation meeting held by a joint committee which is comprised of representatives from the parties to the collective agreement. The decision of the joint committee is legally binding and cannot be appealed. Only if the conciliation fails can the dispute be taken to an industrial tribunal. Disputes arising from a collective agreement can be brought before the joint committee by a trade union on behalf of an employee. The employee is free to bring the claim before the ordinary courts if the trade union does not bring the claim before a tribunal. Employees who are not bound by a collective agreement can always bring a claim before the ordinary courts. In Finland, the choice of court is also based on the legal basis the dispute arises from: when based on the Employment Contract Act, the ordinary court is competent, and when based on a ‘usual’ collective agreement, it is the labour court. In the latter situation, litigation by the labour court is preceded by a negotiation procedure.

In Estonia, the competence of the instance is based on the size of the claim. A wrongful dismissal can be challenged before the court, or if the dispute arises from the employment contract, either before the court or the individual labour disputes commission. The commission can deal with disputes ranging up to € 9,689. The commission is comprised of three judges: a law expert official appointed by the Minister of Social Affairs and one member from each side of the industry. Litigation by the commission is free of charge and is equally binding and executed as a decision of the court. Therefore, most employees choose this option.

In Slovenia, besides an arbitration and court procedure initiated by the employee, the employer can also be confronted with an administrative procedure initiated by the labour inspector for being in breach of provisions of labour law.

Specific features of labour litigation

Some countries have specific rules when labour procedures deviate from other procedures. This is mostly with reference to easy access for the employee to the court.

In Lithuania, the Code of Civil Procedures provides special rules for labour cases, which makes it easier for an employee to bring a claim and to deal with these cases in a short period of time. These rules include an exemption from the stamp duty for employees (in order to lower the costs and the formalities of the procedure). The court is also more active in collecting evidence, in involving third parties, exceeding the demands or applying
alternative means for the protection of infringed rights. Regarding aspects of time, the aim is to prepare labour cases within 30 days and to take a decision on the case within 30 days after the hearing. However, in practice, these deadlines are seldom met.

Employers in Poland who give notice are also obliged to inform the employee on the competent court to litigate the dispute and the time limit within which the employee can bring the dispute before that court.

In Slovakia and Bulgaria, employees are exempt from the obligation to pay court fees.

**Time within which the dismissal can be challenged**

In general, there is a time limit within which a litigation procedure can be initiated. When it is not challenged within that time period, the dismissal is considered valid or lawful. For the time limits in several European countries, see Table 13.

**Table 13**  Time limits for initiating a litigation procedure

<table>
<thead>
<tr>
<th>Time</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 business days (for a preliminary injunction)</td>
<td>Portugal</td>
</tr>
<tr>
<td>7 days</td>
<td>Poland</td>
</tr>
<tr>
<td>2 weeks</td>
<td>Austria, Norway (demand negotiations with the employer)</td>
</tr>
<tr>
<td></td>
<td>Sweden (nullification)</td>
</tr>
<tr>
<td>20 days</td>
<td>Spain</td>
</tr>
<tr>
<td>3 weeks</td>
<td>Germany</td>
</tr>
<tr>
<td>30 days</td>
<td>Estonia, Hungary, Romania, Slovenia, Latvia, Lithuania</td>
</tr>
<tr>
<td>1 month</td>
<td>Italy, Portugal (for individual termination), Bulgaria, Czech Republic, Netherlands, Norway (nullification + damages), Slovakia</td>
</tr>
<tr>
<td>60 days</td>
<td>Greece, Luxemburg, UK</td>
</tr>
<tr>
<td>2 months</td>
<td>Malta, Norway (nullification), Sweden (damages)</td>
</tr>
<tr>
<td>3 months</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td>4 months</td>
<td>Ireland, Netherlands, Norway (claim for damages only)</td>
</tr>
<tr>
<td>Time</td>
<td>Country</td>
</tr>
<tr>
<td>----------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>270 days</td>
<td>Portugal (for collective dismissal)</td>
</tr>
<tr>
<td>1 year</td>
<td>Belgium</td>
</tr>
<tr>
<td></td>
<td>Luxemburg</td>
</tr>
<tr>
<td>2 years</td>
<td>Finland</td>
</tr>
<tr>
<td>5 years</td>
<td>France</td>
</tr>
</tbody>
</table>

**Denmark:** is not included, since different time limits apply depending on the legal basis of the claim (legislation versus collective agreement).

**Norway** and **Sweden** are not included, since different time limits exist, depending on the type of claim the employee wants to bring before the court. This also applies to **Iceland**, where there are no statutory rules applying to time limits for initiating litigation procedures. Each case has to be considered as to its facts and circumstances and customary rules of omission apply.

In **Romania**, the time limit starts from the moment the employer communicates the decision on the dismissal, while in other countries this begins from the moment notice has been given (BG, EE, HU, IT, LV, LU, NL, PL, ES, SE) or from the effective date of termination (BE, CZ, IE, LI, LT, MT, PT, SK, SI, UK).

The regulated time limits are in general and cannot be exceeded. However, in **Germany**, under very special circumstances it is possible to challenge the dismissal after this period. In **Estonia, Latvia** and **Lithuania** this period can only be extended by a court when it found that the delay was due to justifiable reasons. In **Greece**, the time limit only applies when the employee claims that the dismissal is null and void.

As mentioned above, under an extra judicial procedure, the time limit to bring a claim before the court in **Luxemburg** is three months after notice is given, however, when the employee sends the employer a letter objecting the dismissal, this limit is extended to one year.

Some countries provide different time limits, depending on the type of claim the employee submits to the court. Thus, in **Ireland**, the time limit of six months applies to claims of unfair and discriminatory dismissals and the time limit of six years for claims on wrongful dismissals. In **Italy**, the employee has 60 days to oppose the dismissal by a written communication to the employer. After those 60 days, the employee has 270 days to initiate a court procedure. In the **Netherlands**, a time limit of two months applies when the dismissal is in contradiction with a prohibition, and a time limit of six months when notice is given without prior permission of the UWV. In **Portugal**, different time limits exist, in case of an individual dismissal (60 days) and in case of a collective dismissal (six months). Furthermore, a different time limit is set for the preliminary injunction in order to suspend the dismissal (five days).

### 9.3.2. Protection of the employee during the judicial procedure

One way of providing protection to the employee during the judicial procedure by which the dismissal is challenged is the ex ante assumption that is made with respect to the challenged dismissal. Two assumptions can be distinguished: 1) the termination is invalid, meaning that the employment relationship continues to exist during the procedure, and 2) the
termination is valid, meaning that the employment relationship is terminated until the court decides differently. Table 14 shows how this is organised in the European countries.

**Table 14** Status of dismissal during the judicial procedure

<table>
<thead>
<tr>
<th>Status of the dismissal</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assumption termination is invalid (contract continues)</td>
<td>CY, NL, NO, RO, SK, SI, SE</td>
</tr>
<tr>
<td>Assumption termination is valid (contract has been terminated)</td>
<td>AT, BE, BG, CZ, DK, EE, FI, FR, DE, EL, HU, IS, IE, IT, LV, LI, LT, LU, MT, NL, PL, PT, ES, SK, UK</td>
</tr>
</tbody>
</table>

The assumption that the dismissal is unlawful until the opposite is proven is very clearly stated in Article 6(1) of the Termination of Employment Law of **Cyprus**. In other countries, this is done less directly. With respect to **Bulgaria**, for instance, this is indirectly concluded based on the principle that the period from dismissal to it being declared wrongful is treated as a length of service and as an insurance period. The same is true for **Hungary**, where based on Section 10, Sub. 5 of the Labour Code, an unlawful dismissal of the employment relationship can only be terminated with a dissolution of the relationship by the court, which becomes effective on the day of the ruling. In practice, this means that if the decision of the court is taken 1 to 2 years after the (unlawful) termination as notified by the employer, the employee can claim lost wages and emoluments as well as damages over that period.

The **Netherlands** is named twice in the table, because a distinction must be made between dismissals with and without the required permission of the administrative body or without dissolution by the cantonal judge. In the first situation, the dismissal can be challenged for being ‘clearly unreasonable’, however, the presumption is that the termination is valid. In the second situation, the presumption is that the termination is invalid, because, with the exception of a summary dismissal, the employment relationship simply cannot be terminated without either the permission of the administrative body or without being dissolved by the cantonal judge.

In **Norway** and **Sweden**, this is the most important way to secure the interests of the employee during the procedure. In the event of a dispute about the lawfulness of the dismissal, the employee has the right to keep his job until a legally enforceable judgement is delivered. In other words, the employee has the right to continue his employment during the procedure. In **Norway**, the court can, only in certain special situations, decide that the employee cannot remain in his position during the procedure, because this would be ‘unreasonable’ towards the employer. However, the employer needs to explicitly request this. The opposite is the case where the notice of termination is given to a person during the probationary period or in cases of summary dismissals.

*No special provisions to protect the interests of the employee during the procedure*

Many countries **(BE, BG, CY, FI, FR, HU, IS, IT, LT, LU, MT, NO, PT, RO, SK, SI, UK)** have indicated that their system provides no special provisions to protect the interests of the
employees during the judicial procedures. This is, for instance, the case in Bulgaria and Romania, where the system only prescribes shorter terms by which disputes on unlawful dismissals should be dealt with: within three months by the regional courts and within one month after the appeal by the district court, and within 15 days by tribunals, respectively. This is similar in Denmark, where the industrial tribunal deals with disputes within 2 or 3 months. In Lithuania, the only form of protection is provided by a rapid handling of the dispute (in theory more than in practice), but also an active role of the court in dealing with the facts and claims of the dispute. In Portugal, special protection is only provided for extra protected groups of employees, including pregnant, puerperal or breastfeeding employees and trade union representatives. In Belgium, special protection during the litigation is only offered to the employee representatives in the works council and in the safety committee. Such employees have, for instance, the possibility to request further employment and payment of wages during a litigation procedure on the dismissal.

In Finland, no special protection is granted during the negotiations or the court proceedings. Moreover, unlawful dismissals are financially compensated in agreements in which it is also agreed that both parties will not raise the matter in public, in negotiations or in court procedures.

In Luxemburg, there is generally no protection for employees during the procedure, however, there are two exceptions. In case of specially protected employees, a special procedure exists, which allows the employee to claim preliminary further wage payments. In case of a dismissal with immediate effect, an employee may request unemployment benefits during the procedure. However, when the court decides that the dismissal was lawful, the employee has to return the benefits, because entitlement to these is replaced by a claim for wages towards the employer.

Request for preliminary employment protection

In Estonia, in theory, the employee can request preliminary employment protection during the procedure in which the dismissal is challenged. This preliminary protection includes continuation of the employment relationship, however, there is no case law indicating that someone has done this. Therefore, it is only a theoretical option at the moment, because there is no special protection during the procedure.

A similar set-up exists in Germany. In the light of sometimes long lasting court proceedings, the German Federal Labour Court has introduced the concept of ‘preliminary further employment’. This concept provides employees the right to claim immediate further engagement when their interest in maintaining work experience prevails over the interests of the employer. The court also ruled that the right of the employee only prevails over the interest of the employer when the termination of the employment relationship is obviously invalid or when the works council objected to the dismissal. The same applies to Austria, Greece, Latvia and Lithuania. In Austria, and Latvia preliminary further employment is only granted if the court has annulled the termination of the employment contract and the employer appeals that decision. As such, the court ruling has preliminary effect, since it entitles the employee to work or at least to receive wages until the dispute is settled in all
instances (similar: PL). However, the employee assumes the risk that the wages received have to be paid back in case the termination is assessed as being lawful and there has been no work during that period. In the Netherlands, in case the ex ante approval by the administrative body is not sought or takes too long, the employee can ask the court for a preliminary provision to give him access to his job. The courts usually judge that, in principle, a good employer should grant this, unless he gives sufficient grounds to refuse this.

In Liechtenstein, a preliminary injunction is actually only effective in case the dismissal is challenged for being without good cause followed by a complaint of discrimination. In other cases, i.e., ordinary dismissals (even when abusive) and extraordinary dismissals (even without good cause), it is not effective, because the remedy is compensation and not reinstatement, therefore, preliminary further employment is not considered. In case of an unlawful dismissal, the dismissal is either null and void or the notice period is extended, in which case the relationship automatically continues. Consequently, preliminary further employment is not needed.

**Demand for continued employment and continued pay of wages during the procedure**

A variation of the above protection is the demand for continued employment during the procedure and continued payment of wages. This is not only found in Belgium as mentioned above, but also for instance in the Czech Republic and Ireland. In the Czech Republic this means that when an employee makes such a demand, the employer either continues to employ the employee and pays his wages or pays compensatory wages if the employer does not want to continue the employment relationship.

In Ireland, the employee can ask for the employer to be restrained by a court order in case of an alleged wrongful dismissal. This restraint means that the employer cannot dismiss the employee and is required to continue to pay wages pending the trial. To secure such an order, the employee must demonstrate a very strong case.

**9.3.3 Burden of proof**

In labour law and in dismissal cases, it is often determined that the burden of proof should be on the employer, since he is in a better position to deliver evidence.

Table 15 shows how the burden of proof is organised within the 30 countries.

<table>
<thead>
<tr>
<th><strong>Table 15</strong> Burden of proof</th>
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<tbody>
<tr>
<td><strong>Country</strong></td>
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<tr>
<td>Austria</td>
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<td>Belgium</td>
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<td>Country</td>
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<td>Bulgaria</td>
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<td>Cyprus</td>
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<td>Liechtenstein</td>
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<td>Luxemburg</td>
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<td>Malta</td>
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<td>Netherlands</td>
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<td>Norway</td>
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<td>Poland</td>
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<td>Portugal</td>
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<td>Romania</td>
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<td>Slovakia</td>
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<td>Slovenia</td>
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<tr>
<td>Spain</td>
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<tr>
<td>Sweden</td>
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<tr>
<td>UK</td>
</tr>
</tbody>
</table>

**Burden of proof lies with the employer**

In most countries (BG, CY, CZ, DK; FI, HU, IT, LV, LT, MT, NL, NO, PT, RO, SK, ES, SE), the burden of proof in dismissal cases always lies with the employer. Since in Cyprus, Norway and Sweden the presumption is that the disputed dismissal is unlawful until proven otherwise, the burden of proof always lies with the employer. In Sweden, the employer must prove both the reason for dismissal and that there is just cause for dismissal (for example, that the employer has fulfilled his obligation as regards the duty to provide the employee with alternative work). In Bulgaria and Hungary, the burden of proof always with the employer, since the employee in Bulgaria only has to prove that he is unemployed because of the dismissal (in order to receive compensation) and in Hungary, the employer must prove the authenticity and substantiality of the reason for the dismissal. In the Czech Republic, the employer needs to prove that reasons for the dismissal exist, in Italy, the employer needs to prove the existence of objective/economic reasons for the dismissal,
while in Latvia and Lithuania, the employer needs to demonstrate the existence of the grounds for dismissal and that the procedural requirements have been followed correctly.

In Latvia, the employer always has to prove the lawfulness of the termination with notice. However, since it is difficult for the employee to contest the proof of the employer, the Supreme Court interpreted that Article 125 of the Labour Law states that although the employer has to prove the lawfulness, it is up to the employee to prove the unlawfulness of the notice for dismissal when contested by the employee. In effect, this ruling has split the burden of proof between the employer and employee.

In the ex ante procedure in the Netherlands, the burden of proof that the grounds of the termination are plausible lies with the employer. Also, when an employee annuls the dismissal because the employer has given notice without permission of the administrative body or in contradiction with a prohibition to dismiss the employee, it is the employer who bears the burden of proof. This is the result of the fact that in such a case the dismissal is null and void, thus has not actually taken place. Consequently, it is the employer who either has to initiate the procedure to acquire the permission of the administrative body or to have the employment contract dissolved by the cantonal judge. This only differs when the employee challenges the dismissal for being ‘clearly unreasonable’; in that situation the employee has to make a plausible case. However, during this procedure the employer has to provide relevant information that is in his possession.

In Romania, the employer has to submit all his proof on the first day of the trial. If he fails to do so, he loses the right to use it during the procedure.

In Slovenia, the burden of proof lies in principle with the employer, however, in case of a summary dismissal, the burden of proof lies with the party which terminates the employment contract.

In Spain, the burden of proof lies in principle with the employer, since he is always the one to start and prove that the alleged cause of the termination exists. This is then split with the employee, who has to prove other circumstances that may be relevant for the dismissal decision, including the service period, salary, place of work, union affiliation and the fact that the employee is an employee representative.

**Burden of proof lies with claimant (the employee)**

In other countries (AT, BE, EE, FR, EL, IS, LI, PL) the burden of proof lies in principle with the claimant, which in case of disputes about a dismissal is most often the employee. The fact that the burden of proof lies with the claimant or employee is based on the general principle of *actori incumbit probation* (burden of proof on the initiator of the procedure).

**Split and swift burden of proof**
A more subtle approach is when the burden of proof is split between the parties where they are in the best position to give evidence. In this respect it is also possible that the burden of proof swiftly during the procedure.

In Germany, the burden of proof is also split: first, the employee has to prove that the requirements for applying the Act on Dismissal Protection have been met, then the employer has to prove the reasons for the dismissal and that there are no alternatives for further employment. Thirdly, when the employer states and proves that such alternatives do not exist, the burden of proof goes back to the employer, who may prove this wrong and that it is possible and reasonable following re-training or further training. In Greece, the burden of proof splits when the employer is not obliged to provide grounds for the dismissal, in which case he has to prove that the procedural requirements are being adhered to.

In Luxemburg, the burden of proof lies with both the employee and employer, albeit that both have to prove something different. It is up to the employee to prove that an employment contract existed and that it was terminated by the employer. If the employer has given grounds for the dismissal, he has to bear the full burden to prove these grounds. If the employer has not given any grounds and the employee did not ask for them, the employer has nothing to prove, hence, the burden lies with the employee to prove that the dismissal was unfair, which in practice is very difficult to do.

In the UK, the burden of proof is split between the employee and employer who together have to prove several criteria in order to determine whether an employee has been dismissed due to redundancy. Thus, in order for an individual to bring a claim for unfair dismissal before the court, he must prove that he is an employee who has more than one year of service, is not exempted, and has been dismissed. The employer, on the other hand, has to show that there is a ‘potentially fair’ reason for the dismissal. The tribunal will then consider whether the dismissal was reasonable.

The division of the burden of proof in Ireland differs according to the type of claim. Thus, it lies with the employer in an unfair dismissal case, with the employee in a wrongful dismissal case, and shifts in a discriminatory dismissal case back to the employer where facts are established by the employee from which it may be presumed that discrimination of him or her has occurred.

In Belgium and Liechtenstein, the burden of proof shifts from the employee to the employer when the dispute concerns a summary dismissal. In that case the employer must prove that he had a good cause for dismissing the employee with immediate effect.

There are two situations in Liechtenstein where the burden of proof splits between the employee and employer. The first concerns a dismissal which is abusive, because notice is given on account of an attribute pertaining to the employee as a person. The second concerns a dismissal which is abusive, because the employee exercises a constitutional right.

In Belgium, the burden of proof shifts when the dismissal concerns extra protected employees.
Burden of proof depends on the judge

In France, the burden of proof depends on the judge, which means that the procedure is inquisitorial. The judge must “form its opinions after the elements furnished by both parties”, who of course must cooperate. This is a clear derogation to the principle ‘actori incumbit probatio’. In case of any doubts, the employee will win, as far as the question is the real and serious case of the dismissal.

Freedom of proof

In Denmark, the principle of ‘freedom of proof’ applies. This means that the burden of proof is not determined in advance and both parties are free to give as much evidence as they deem necessary. However, sometimes the burden explicitly lies with the employer. The latter is the case when the dismissal, for instance, concerns extra protected employees, including pregnant employees and employees on maternity leave. Also, the burden sometimes only lies with the employer, for example, when it comes to compelling reasons for the dismissal of a local trade union representative (shop steward).

Burden of proof in discriminatory dismissals

Directive 2006/54/EC on the burden of proof in cases of discrimination based on sex provides in Article 19(1) that when facts are presented “from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment” (same: article 8(1) Directive 2000/43/EC and Article 10(1) Directive 2000/78/EC). Translated to the situation of discriminatory dismissals, this means that the burden of proof shifts from the employee, who claims and shows that he is discriminated, to the employer who has to prove that this is not the case. Therefore, in cases of discriminatory dismissals in all countries, the burden shifts from the employee to the employer. As described above, this is explicitly specified in Irish dismissal law. This is also the case in countries where, in principle, the burden lies with the claimant, i.e., the employee. Thus, in Greece, for instance, the burden of proof only shifts to the employer when the employee claims that the dismissal is discriminatory. This is also the case in Iceland when the employee demonstrates that there is a probable violation of his or her rights as provided by the Act on Equal Status and Equal Rights of Women and Men. The same applies to all anti-discrimination legislation under Norwegian law.

Standard of proof

The concept of the ‘standard of proof’ implies that the quality of the evidence is tested less intensively in order to protect the employee.
In Austria, if the employee claims that the employment relationship was terminated for illicit motives prohibited by law, the standard of the burden is lowered: the employee does not have to prove, but merely indicate that one of the prohibited grounds is the reason for the termination. Also, the employer’s burden is lowered to make plausible that there is another reason than the alleged prohibited ground.

In Cyprus, the standard of proof is that of the balance of probabilities, which effectively means that when two equally conflicting testimonies are presented before the court, the benefit of the doubt will be given to the employee.

9.3.4 Concluding remarks

In all countries access to a court against a dismissal is available, in most cases to a specific labour tribunal. In some countries also additional procedures ex post or ex ante are available. Some countries make access to a court more complicated by additional arbitration, conciliation or negotiation. Appeal against the decision is in most cases possible, but not always, especially in case of specific procedures. The time limit to start these procedures differs widely. Especially in case of nullification of the dismissal, this time may be short. The countries have various ways to protect employees during the time that the court procedure takes. In most of the countries the burden of proof in dismissal cases lies, in principle, with the employer, especially regarding the presence of a sufficient ground for dismissal. In eight countries the burden of proof lies, in principle, with the employee. Several countries have more subtle systems to divide the burden of proof.
10. Conclusion

This report deals with the termination of the employment relationship in the private sector at the initiative of the employer and focuses in particular on dismissals for business reasons. As such, it provides an overview of the commonalities and differences in the national systems of the 30 countries belonging to the European Economic Area, with regard to the most important issues. In this chapter, some conclusions are drawn in terms of those commonalities and differences as shown by the analysis in the report.

10.1 Formal and procedural requirements

Considerable differences exist between national laws with regard to receipt of notice of dismissal, pre-dismissal meetings or hearings, the requirement of a formal notice in writing and, finally, an obligation on the part of the employer to state the reasons for dismissal.

In many countries the employer is obliged, when giving notice, to inform the employee about the reasons for dismissal. In some countries this obligation only exists upon the employee’s request. Some national legislators may hold the view that the employer is not obliged to state the reasons for dismissal ‘in advance’, but is only required to prove their existence in the course of court proceedings that may follow dismissal. However, an employee who received notice of dismissal must stand a fair chance of determining whether or not it is promising to initiate court proceedings. Information about the reasons for dismissal may be helpful in this regard. In some cases, it may be doubtful what exactly can be demanded from the employer under an obligation to state the reasons for dismissal. It may be asked, for instance, to what extent the employer needs to provide details of the individual case or whether the statement on the reasons for dismissal can remain on a more ‘abstract’ level. It should be noted, in any event, that the legal consequences of not abiding by an obligation to state the reasons for dismissal vary from one country to another: In one country it may have an impact on the admissibility of the dismissal while in another country the consequence may be a claim for damages.

Most countries require notice of dismissal to be given in writing. One purpose may be to guarantee legal clarity. Another purpose may be to disburden the courts from disputes on the question whether notice was even given in the first place.

With regard to an obligation to hold dismissal hearings or meetings, major differences exist between the national systems. In many countries there is no (universal) ‘right to be heard’. The differences that do exist between the national systems prompt a number of questions. It may be asked, for instance, whether and to what extent respect for the personal rights of the employee demand a ‘right to be heard’. Another question that may be asked is whether a pre-dismissal hearing or meeting implies that the decision taken by the employer is based on more solid ground. Finally, another question is whether the acknowledgment of a ‘right to be heard’ offers the prospect of reducing the number of subsequent court proceedings.
The time of receipt of notice is of crucial importance. Whether court proceedings are initiated in time (or are foreclosed) may depend on when exactly notice of dismissal was received by the employee. Receipt of notice triggers a period of notice and the judgement on the legality of the dismissal may depend on the facts that exist at the very time of receipt of notice. Given the importance of receipt of notice, it may be surprising that national laws seem to differ with regard to what precisely is required in that respect.

10.2 Notice periods

In almost all countries periods of notice are provided by statutory law. Yet an examination of actual notice periods applied in Europe leads to the conclusion that national legislations differ when it comes to determining a ‘fair’ or ‘reasonable’ period of notice. Drawing legal comparisons may be more fruitful in other respects. For instance, it seems worthwhile to ask whether and to what extent differences in notice periods that apply to certain categories of workers in a certain country are justifiable from a legal point of view. To give only one example: Is it ‘right’ to have different notice periods for blue collar and white collar workers? Other questions that may be worth addressing are to what extent the parties to the employment contract should be allowed to dispose of the statutory rules and how much room should be given to collective bargaining. With regard to the latter there may be different opinions, for instance, as to what extent the ‘social partners’ can be trusted with diminishing statutory periods.

10.3 Involvement of specific bodies

In some countries other institutions are involved when an employer decides to dismiss an employee. Two types of institutions can be distinguished in this regard: public authorities or courts, on the one hand, and workers’ representatives, on the other. The Netherlands are specific in empowering the former by pre-emptively checking the legality of dismissals. Such pre-emptive checks may discourage employers from dismissing employees too easily. At the same time, it offers the prospect of arriving at legal clarity at an early stage while in other systems legality of dismissal might only be determined after long and cumbersome court proceedings. As far as the involvement of workers’ representatives is concerned, a crucial question arises: What is the relation between ‘individual’ and ‘collective’ dismissal protection? While the involvement of workers’ representatives may form a valuable additional layer of protection, there may be a danger of reducing the ability of workers to fight their dismissals individually.

10.4 Personal scope

The personal scope of employment protection law is generally set by either the terms employee, employment contract or employment relationship. Although the actual definitions of these terms differ by country, it can, in general, be concluded that the term ‘employment relationship’ encompasses a wider scope of persons who personally perform labour for another party than is the case for the other two terms. Some categories of
employees, including employees of public authorities, CEOs and (dependant) self-employed persons, are widely excluded from the scope, in most cases because they fall under the protection of other laws specifically designed for those groups.

Additional protection is generally provided for four categories of employees: 1) employees with a vulnerable position within the company; 2) employees who are on leave for certain reasons; 3) employees who are ill, disabled or of older age and 4) employees who are subject to victimisation. Here again it should be noted that although the categories seem to be clear and uniform, different understandings and specific interpretations exist between the countries. Nonetheless, what this analysis illustrates is the general categories of employees who enjoy extra protection. Some of these forms of extra protection are also required in EU directives.

Lower or no protection is either the result of explicit exclusion, of additional requirements, or of the nature of the employment contract due to which a certain employee falls outside the scope of dismissal protection law. The latter, in particular, affects employees who work on a fixed-term contract, since such contracts end ex lege after a certain period and therefore do not need to be terminated. Combined with an increase in temporary employment within the EU-27 from 11.8% to 14% during the last decade, this group represents a substantial number of employees. In that sense, the analysis shows the significance of the adoption of legislation to prevent the abuse of the use of fixed-term contracts, as is also required by EU Directive 99/70/EC.

### 10.5 Probationary period

What is characteristic for the probationary period in nearly all countries is the fact that employment protection law does not apply during that period. The adoption of legislation that provides for restrictions on the use of probationary periods is also common to almost all countries. This involves, in particular, the definition of a maximum period of term, namely between three and six months in general. Furthermore, the formal requirements are often very strict, for instance, because they need to be explicitly agreed between the employer and employee and must often be made in writing. Despite the general exclusion, the employee is usually not left entirely vulnerable, since he may have the possibility to challenge the dismissal in exceptional cases, for instance, when the dismissal is in breach of non-discrimination law or an abuse of power. However, this is extremely difficult for the employee to prove, because the employer is often not obliged to provide a reason or justification for the dismissal.

Related to this issue is the use of fixed-term contracts as a means to test an employee for a longer period without being subjected to employment protection legislation. Although it is not possible to prove an abuse of fixed-term contracts in this way, it is a known and recognised practice in several countries. Some of the countries that mention this problem in their report also have a high percentage of fixed-term employment according to Eurostat data. In this respect, the analysis in this report again underlines the importance of the adoption of legislation to prevent the abuse of the use of fixed-term contracts, as is also required by EU Directive 99/70/EC.
10.6 Possible reasons for dismissal

It is striking that legislators in some countries depict possible reasons for dismissal in fairly concrete terms while in others, the provisions on reasons for dismissal are rather open. This may trigger the question of division of power (legislative and judicial branch) in the area of dismissal law. The more practical question may, however, be whether and to what extent the ability of legislators to consider all possible reasons for dismissal is limited from the outset.

10.7 Dismissal for business reasons

Regarding dismissals for business reasons, the concept of ‘managerial prerogative’ is of crucial importance. Legal comparisons can determine to what extent such ‘managerial prerogative’ is acknowledged in the national systems and where the limits to judicial self-restraint that comes with it are. While certain decisions may clearly lie within the realm of the employer (and accordingly, to be respected by the courts) judicial self-restraint may not be what is required in other areas. An examination of the national systems has, for instance, shown that there are differences with regard to the possibility of courts to independently weigh the interests of the employer and employees in case of dismissal on business grounds. As a result, a dismissal with the purpose of making a business (even) more profitable may be subject to close scrutiny by the courts in one country, while the courts in another country largely disregard this motive.

Though it may be fair to say that the principle of proportionality is applied in the area of protection against dismissal on business grounds in most countries, it is clear from a close examination of the situation in European countries that both the content of and the limits to the principle of proportionality vary considerably. The most important element of the principle might, in any event, be ‘necessity’. For instance, when deciding on the lawfulness of dismissal, the question whether a vacancy is available which could potentially be filled by the employee who is being dismissed is raised in many countries. Considerable differences exist, however, when it comes to answering the question what precisely can be expected from the employer in this regard. While a vacancy in another company belonging to the same corporate group must be taken into account in some countries, such a vacancy is disregarded in others. And while in one country the obligation of the employer to provide the employee to be dismissed with further training or retraining is far-reaching, no such obligation exists in other countries.

In the area of dismissal on business grounds, the selection of employees for dismissal is a major issue. There is a clear clash of interests because employers may aim to have a free hand (furthering the interests of the company), while employees may aim for protection against arbitrariness. What is more, there is an important ‘horizontal element’ to the problem, because offering one employee protection from being selected for dismissal necessarily leads to leaving another employee unprotected. Accordingly, there is what could be called a ‘matrix of interests’. National legislators’ approach differs with regard to including the interests of the company as ‘part of the equation’. The ‘horizontal element’ is
mostly a ´social selection´ required from the employer. A strict seniority rule (´last in first out´) is only found in Sweden. Though this rule may be less likely to guarantee that justice is served in individual cases, it has the advantage that it makes selection less burdensome for employers and may avoid conflicts among employees.

10.8 Entitlements, remedies and litigation

Entitlements include severance payments, priority hiring and assistance in finding further employment.

Although ILO Convention 158 and the European Employment Strategy provide impetus for the development of these kinds of entitlements, they also leave considerable room to the countries to deal with these issues in accordance with their national laws, practices and traditions. The analysis on the relation between notice periods, severance payments and unemployment benefits shows that the similar aims these measures serve is taken into account in all countries, implying that they generally cannot be enjoyed simultaneously or cumulative. The analysis also reveals a widespread use of severance payments in the 30 countries. The question why the employer has to pay severance payment has been discussed in recent debates in several countries. On the other hand, its widespread use is not apparent, since severance payment is a practical solution for compensating an employee if job protection is not attainable.

Basic rules on severance payments are found in the statutory law of most countries. They generally acknowledge the freedom of contract. In many countries it is possible to deviate from the statutory rules by collective agreements, as long as the collective agreement favours the employee and does not exceed a maximum amount. The calculation of the amount of severance payment is based, in general, on seniority applied essentially in two methods: Service period X (%) salary; or service period = fixed amount based on a specific number of monthly salaries. Although the methods to calculate the amount of severance payments are quite similar, the actual outcome, i.e., the actual extent of the severance payment varies considerably between the countries. In most countries, severance payment is considered a gross wage and therefore subjected to tax; however, in many countries, more specifically employee-friendly tax regimes apply.

With respect to remedies in case of unlawful termination of the employment relationship, three key aims can be distinguished in general: Job protection; compensation and employment protection. In the majority of countries the three aims are combined; however, conceptually the three aims can be distinguished and indicate common tendencies between the countries. In the context of the EES, this raises the expectation that most of the countries would aim for employment protection in a broad sense. In reality, this is not the case, however, as the key aim of the remedies is restricted to job protection or compensation in most of the countries. It can only be said for the Nordic countries that employment protection in the broad sense is an explicit and generally accepted aim.

In terms of remedy types, it is not surprising that in the vast majority of countries reinstatement and dismissal compensation are the most important remedies. Other
remedies are compensation in lieu of notice and damages. The remedy of reinstatement is generally understood in a similar way in the different countries. The effectiveness of this remedy, however, differs in each country; while some countries have indicated that it is very effective, others demonstrate that there is a significant difference between the law in the books and the law in action. In general, the remedy of reinstatement can be claimed successfully once the dismissal is found to be null and void. The general aim of compensation is to compensate the employee for the loss of his job, and sometimes even when the dismissal is null and void. What precisely is understood by compensation and what it comprises varies considerably among the countries. In countries where the employer is not obliged to give a reason for the dismissal, but is obliged to observe the notice period, the compensation in lieu of notice is the most important and effective remedy. As far as legislation provides for damages, the aim of this remedy is to further compensate the employee for the loss of his job. Here also, what these damages include varies significantly between the countries.

All countries provide employees access to courts or other procedures to challenge the dismissal. In many countries the specifics of employment law are expressed by the composition of the court: A professional magistrate and a representative of both sides of industry. Although most of the countries foresee one main litigation procedure, many of them also provide for other procedures that are all linked to each other. These procedures can be linked sequentially (first, one procedure needs to be followed, then the next step can be taken), or they are alternative (choice of instance, sometimes based on the type of claim). Some countries stipulate specific rules for the litigation procedure which are more favourable for the employee, in the sense that they facilitate access to the court, either by lower administration fees or by simplification of administrative requirements. To prevent lengthy procedures and, related to that, long periods of uncertainty about the dismissal, many countries foresee short time limits within which a dismissal can be challenged by the employee. In most of the countries, this varies between one and three months from the moment notice has been given.

In many countries, no special provisions exist to protect the employee during the litigation procedure. In some countries, though, provisions exist for the period of the litigation procedure on the presumption that the termination is invalid when the dismissal is challenged. This implies that the employment relationship continues to exist during the procedure. Another form of protection provided by some countries is the possibility to request preliminary employment protection, which includes the continuation of the employment relationship during the procedure.

In most of the countries, the burden of proof that the dismissal is lawful, not unlawful or unfair lies with the employer. This could also be interpreted as an additional means to protect the employee, in particular since it is often more difficult for the employee to prove the unlawfulness of the dismissal, simply because the employer is often not obliged to give the reason or justification for the dismissal when giving notice. Only a minority of countries adhere to the general principle of actori incumbit probation. Several countries, however, provide more subtle systems to divide the burden of proof.
10.9 General conclusion

In conclusion, the analysis of the report illustrates that many commonalities can be drawn from the countries on an abstract level. Yet a more detailed approach reveals that the countries show many variations in terms of definition and interpretation. Nonetheless, as these conclusions show, some tendencies can be found that may characterise the employment protection law of the European countries, in particular when compared with systems outside the European ambit. One of these is the belief that employees need to be protected against the loss of employment and to be supported in finding further employment.
## Annex 1  Table on Notice Periods

<table>
<thead>
<tr>
<th>Country</th>
<th>Years of Service</th>
<th>Notice Period</th>
</tr>
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<tbody>
<tr>
<td>Austria</td>
<td>Up to 2 years</td>
<td>6 weeks</td>
</tr>
<tr>
<td></td>
<td>2 years</td>
<td>2 months</td>
</tr>
<tr>
<td></td>
<td>15 years</td>
<td>4 months</td>
</tr>
<tr>
<td></td>
<td>25+ years</td>
<td>5 months</td>
</tr>
<tr>
<td>Belgium</td>
<td>Blue Collar Worker 6 months</td>
<td>35 days</td>
</tr>
<tr>
<td></td>
<td>5 years</td>
<td>42 days</td>
</tr>
<tr>
<td></td>
<td>10 years</td>
<td>56 days</td>
</tr>
<tr>
<td></td>
<td>15 years</td>
<td>84 days</td>
</tr>
<tr>
<td></td>
<td>20 + years</td>
<td>112 days</td>
</tr>
</tbody>
</table>
|                  | White Collar Worker  
*Period of notice is calculated on the basis of salary and the length of service*  
Not over € 30,535 + 5 years | 3 months     |
|                  | For each + 5 more years | + 3 months |
|                  | Employee = 65 years old | 6 months    |
| Bulgaria         | Employment relationship for an indefinite time | 30 days |
|                  | Fixed-term employment relationship | 3 months (remaining term of contract must not be shorter) |
| Cyprus           | 26 weeks         | 1 week        |
|                  | 52 weeks         | 2 weeks       |
|                  | 104 weeks        | 4 weeks       |
|                  | 150 weeks        | 5 weeks       |
|                  | 208 weeks        | 6 weeks       |
|                  | 260 weeks        | 7 weeks       |
|                  | 312 + weeks      | 8 weeks       |
| Czech Republic   | No info          | Not less than 2 months |
| Denmark          | White collar workers Up to 6 months | 1 month     |
|                  | 6 months         | 3 months      |
|                  | 3 years          | 4 months      |
|                  | 6 years          | 5 months      |
|                  | 9 years          | 6 months      |
|                  | Blue collar workers  
Depending on the collective agreement in question.  
Usually: Up to 6 months | No notice period |
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<th>Notice Period</th>
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<tr>
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<td></td>
<td>2 + years</td>
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<td></td>
<td>15 years</td>
<td>6 months</td>
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<tr>
<td></td>
<td>20 + years</td>
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<td></td>
<td>15 – 20 years</td>
<td>5 months</td>
</tr>
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<td></td>
<td>20 + years</td>
<td>6 months</td>
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<td>Manual workers</td>
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<tr>
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<td></td>
<td>20 years</td>
<td>90 days</td>
</tr>
<tr>
<td>Iceland</td>
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<td>1 month</td>
</tr>
<tr>
<td></td>
<td>3 years</td>
<td>2 months</td>
</tr>
<tr>
<td></td>
<td>5 + years</td>
<td>3 months</td>
</tr>
<tr>
<td>Ireland</td>
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</tr>
<tr>
<td></td>
<td>2 years</td>
<td>2 weeks</td>
</tr>
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<td>4 weeks</td>
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<tr>
<td></td>
<td>10 years</td>
<td>6 weeks</td>
</tr>
<tr>
<td></td>
<td>15 + years</td>
<td>8 weeks</td>
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<tr>
<td>Italy</td>
<td>Article 2118 LC and collective agreements or custom or equity</td>
<td>variable</td>
</tr>
<tr>
<td>Latvia</td>
<td>Employment relationship for an indefinite time</td>
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<tr>
<td>Country</td>
<td>Years of Service</td>
<td>Notice Period</td>
</tr>
<tr>
<td>------------</td>
<td>------------------</td>
<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>Up to 1 year</td>
<td>1 month&lt;br&gt; 1 year&lt;br&gt; 9 + years</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Generally</td>
<td>2 months</td>
</tr>
<tr>
<td>Luxemburg</td>
<td>Up to 5 years</td>
<td>2 months&lt;br&gt; 4 months&lt;br&gt; 6 months</td>
</tr>
<tr>
<td>Malta</td>
<td>1-6 months</td>
<td>1 week&lt;br&gt; 2 weeks&lt;br&gt; 4 weeks&lt;br&gt; 8 weeks&lt;br&gt; An additional week for every subsequent year of service, up to a maximum of 12 weeks</td>
</tr>
<tr>
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<td>1 month&lt;br&gt; 2 months&lt;br&gt; 3 months&lt;br&gt; 4 months</td>
</tr>
<tr>
<td>Norway</td>
<td>Up to 5 years</td>
<td>1 month&lt;br&gt; 2 months&lt;br&gt; 3 months</td>
</tr>
<tr>
<td></td>
<td>10 + years</td>
<td>4 months&lt;br&gt; 5 months&lt;br&gt; 6 months</td>
</tr>
<tr>
<td></td>
<td>At least 10 years &amp; age 50 +</td>
<td>4 months&lt;br&gt; 5 months&lt;br&gt; 6 months</td>
</tr>
<tr>
<td></td>
<td>At least 10 years &amp; age 55 +</td>
<td></td>
</tr>
<tr>
<td></td>
<td>At least 10 years &amp; age 60 +</td>
<td></td>
</tr>
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<td>Poland</td>
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<td>Romania</td>
<td>Generally</td>
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</tr>
<tr>
<td>Slovakia</td>
<td>General</td>
<td>1 month&lt;br&gt; 2 months&lt;br&gt; 3 months</td>
</tr>
<tr>
<td></td>
<td>At least 1 year and less than 5 years&lt;br&gt; 5 years and longer</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>Up to 5 years of service</td>
<td>30 days&lt;br&gt; 45 days&lt;br&gt; 60 days&lt;br&gt; 120 days</td>
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<td>General</td>
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<tr>
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<td>Minimum of one month</td>
<td>2 months&lt;br&gt; 3 months&lt;br&gt; 4 months</td>
</tr>
<tr>
<td></td>
<td>At least two but less than four years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>At least four but less than six years</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Years of Service</td>
<td>Notice Period</td>
</tr>
<tr>
<td>------------------</td>
<td>-------------------------------------------------------</td>
<td>--------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>At least six but less than eight years</td>
<td>5 months</td>
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<td></td>
<td>At least eight but less than ten years</td>
<td>6 months</td>
</tr>
<tr>
<td></td>
<td>At least ten years</td>
<td></td>
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<tr>
<td>United Kingdom</td>
<td>1 month</td>
<td>1 week</td>
</tr>
<tr>
<td></td>
<td>2 years</td>
<td>At least 1 week for each year of continuous employment</td>
</tr>
<tr>
<td></td>
<td>12 + years</td>
<td>12 weeks</td>
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</table>
Annex 2  Data on temporary employment in 29 European countries

The report mainly deals with dismissal protection for employees with a contract for an indefinite term. For a good understanding of the standing of this dismissal legislation, it is important to have some idea about the number of fixed-term contracts compared to those with an indefinite term.

Two sources are available to provide these data. We present them in the two tables in this Annex. The data in Table 1 derive from the Labour Force Survey of Eurostat. For this survey, the following definition is used for temporary employment:

A job is considered temporary if the employer and employee agree that its end is determined by objective conditions such as a specific date, the completion of a task or the return of another employee who has been temporarily replaced (usually stated in a work contract of limited duration). Typical cases are: (a) persons with seasonal employment; (b) persons engaged by an agency or employment exchange and hired to a third party to perform a specific task (unless there is a written work contract of unlimited duration); (c) persons with specific training contracts.

In the data temporary employment is expressed as % of the total number of employees who are defined as:

Persons who work for a public or private employer and who receive compensation in the form of wages, salaries, fees, gratuities, payment by results or payment in kind; non-conscripted members of the armed forces are also included.

Table 1  Temporary work as % of total number of employees.

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<th>2002</th>
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<td>4,9</td>
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<tr>
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<td>14,8</td>
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<td>9,6</td>
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<td>8,1</td>
<td>8,4</td>
</tr>
</tbody>
</table>
Overall, the numbers demonstrate that temporary employment in the EU-27 increased with a curved line from 11.8% in 1999 to 14.6% in 2007, and 14% in 2010. The numbers also demonstrate that the percentage of temporary employment within the countries varies significantly. Most of the countries, however, have a percentage of temporary employment around 8 to 14, with some outliers at the bottom in Estonia, Lithuania and Romania (with 3.7%, 2.4% and 1%, respectively in 2010) and at the top in Poland, Portugal and Spain (with 27.3%, 23% and 24.9%, respectively, in 2010).

Furthermore, the numbers demonstrate that the developments within the countries also vary considerably. In most of the countries the number remained more or less the same, thus a slight increase (at most +2%) can be found in Austria, Czech Republic, Germany, Estonia, France, Luxembourg, Malta and Slovakia, whereas a slight decrease (at most -2%) can be found in Belgium, Bulgaria, Denmark, Greece, Latvia, Lithuania, Romania, Finland, Sweden and the United Kingdom. Some countries demonstrate a more significant increase, i.e., more than 2%, but less than 5%, including Cyprus, Iceland, Ireland, Italy, Hungary, and Portugal. There are four countries, the Netherlands, Norway, Poland and Slovenia that have an increase of over 5%. The most remarkable increase can be found in Poland, which had one of the lowest percentages in 1999 (4.6) and the highest in 2010 (27.3). In Norway, the increase is more than 5%, however, with a percentage of 8.4 of temporary employment it is still on the lower side of the median of 8 to 14%. This cannot be confirmed for the Netherlands and Slovenia, which both moved above that median to 18.5% and 17.3%, respectively.

Another remarkable development is evident in Spain, which demonstrates a significant decrease in temporary employment, from 32.9% in 1999 to 24.9% in 2010, however, as stated above, it is still way above the median and the EU average and remains in the top three.

### Data of OECD on temporary employment within several ELLN countries

Table 2 is based on the data of the OECD on temporary and permanent employment over the period 2000–2010. In contrast to Eurostat, the OECD presents the data in numbers of temporary employment, permanent employment and declared employment (which is the total amount of temporary and permanent employment). To make the data of the OECD
comparable with the data of Eurostat, the amount of temporary employment has been converted into a percentage of the declared amount of employment. Since the OECD data do not include statistics on all 30 countries included in this report, this is only done for a selection of countries. There are two main reasons for this. Firstly, to have a second source to support the tendencies we have found in the data of Eurostat. Although there are some insignificant differences in percentages, which could be the result of definitions used, both datasets overall demonstrate the same tendencies with mostly the same percentages of temporary employment over the last decade (2000–2010). Secondly, the data of the OECD are more clear in relating the number of temporary employment to the number of permanent employment. Since the percentage of temporary employment within the OECD database is generally the same as that of Eurostat, it is safe to assume that the percentage of temporary employment presented in Eurostat is also related to the total of employment based on either temporary or permanent employment. For as far as differences occur, this can be accounted to the fact that the OECD data is based on national definitions, while that of Eurostat is principally based on one single definition (see above).

The selection of countries is based on the most noteworthy tendencies found in the data of Eurostat, since it is desirable to further substantiate those findings. Austria is an exception to this; it is only the first country and used as a test case to determine whether the data for a country with average results also demonstrate average results in the OECD dataset. This appears to be the case.

Table 2  Data on temporary employment in select ELLN countries, period 2000-2010

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</tr>
</thead>
<tbody>
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<td>29.3</td>
<td>25.4</td>
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</table>


Notes

**Estonia:** it is remarkable that the data of the OECD show that while the total number of employees declined in 2009 and 2010, this applies in particular to permanent employment (533,67 in 2009 and 504,68 in 2010), since the number of temporary employees is rising considerably, from 13,64 in 2009 to 19,23 in 2010.

**Iceland:** the data demonstrate a significant drop in employment in 2002 (from 262,47 in 2001 to 162,94 in 2002). In 2003, there was a considerable increase in the total number of employees (227,11), and again in 2006. Both times the number of temporary employees increased considerably as well; 21,69 in 2003 and 33,06 in 2006. However, the overall data for Iceland demonstrates an increase in temporary employment over the course of time, it
swings remarkably within those two years. Also, the data from 2000–2005 differs significantly from that of Eurostat, while it is the same from 2006 onwards. **Ireland:** the increase in the percentage of temporary employment in 2009 and 2010 seems to not be the result of an increase in the use of temporary employment (145,37 in 2008; 133,67 in 2009; and 141,6 in 2010), instead, it is a result of the decrease in the use of permanent employment (1574,15 in 2008; 1435,07 in 2009; and 1373,82 in 2010) in those years.

**Netherlands:** the increase in the percentage of temporary employment is only significant in the years 2006 and 2007: from 1092,96 in 2005, increasing to 1190,3 in 2006 and 1319,04 in 2007. Contrary to this, the increases in the percentage of temporary employment from 2007 onwards appear to be the result of decreases in permanent employment in those years.

**Norway:** here, the dataset of the OECD demonstrates a significant difference compared to that of Eurostat for the years 2000–2002, while the data of the years 2003–2010 are exactly the same. In that sense, the data of the OECD seems to be more reliable, since it demonstrates a more consistent level of temporary employment over the last decade.

**Poland:** the dataset of the OECD lacks data on 2000, therefore, the extremely low figure of temporary employment shown by the dataset of Eurostat cannot be confirmed or contradicted. From 2001 onwards, the data is the same. Unlike the Netherlands, the increasing percentage of temporary employment is the result of an increase of this form of employment, since the number for permanent employment has remained more consistent over the course of time than that of temporary employment (see Table 3).

**Table 3** Amount of permanent and temporary employment in Poland x 1000.

<table>
<thead>
<tr>
<th>Poland</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
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<tr>
<td>Permanent employment</td>
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<td>18069,76</td>
<td>16749,74</td>
<td>15972,34</td>
<td>15633,84</td>
<td>15582,85</td>
<td>16028,9</td>
<td>16750,77</td>
<td>17790</td>
<td>18033,12</td>
<td>17930,21</td>
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<tr>
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<td>2424,01</td>
<td>3058,01</td>
<td>3836,07</td>
<td>4579,67</td>
<td>5378,00</td>
<td>6027,8</td>
<td>6580,20</td>
<td>6567</td>
<td>6487,00</td>
<td>6724,24</td>
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</table>


Both **Portugal** and **Slovenia**, demonstrate a consistently high percentage of temporary employment, indicating that this may be characteristic of their labour markets. Any changes in the percentages are also the result of increases and decreases of temporary employment rather than of permanent employment. In the light of the thematic report, it would be interesting to determine whether these two systems, as well as the **Dutch** system, show similarities with respect to probationary periods in order to draw a causal relationship between the use of temporary employment contracts and the probationary period.

**Spain:** demonstrates in the OECD data as well the highest percentage of temporary employment at the beginning of the previous decade (2000–2010). This begins to drop considerably from 2006 onwards, which is contributed to an actual decrease in temporary employment (4880,46 in 2008 and 3982,37 in 2009), which is not compensated by an equal increase (or decrease) in permanent employment (11.800,74 in 2008 and 11.698,3 in 2009). As such, with the most significant drop in 2009, this may indicate the vulnerability of temporary workers in times of economic and financial crisis.
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