

# Labor Law in Europe

Manfred LÖWISCH \*

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## I. General Principles

### 1. Sources of Law

The European Community's labor law in the first place is the **law of its different**

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\* Direktor des Instituts für Wirtschaftsrecht, Arbeitsrecht, Sozialversicherungsrecht der Universität Freiburg i. Br.

**Member States.** Only as an exception (this is the case for France), it is unified in a Code of Labor Law. For the most part (as is the case in Germany), it is contained in several single statutes.

As in Japan, the Member States of the European Community are bound to comply with the agreements of the **International Labor Organization** which they have ratified. These agreements do not have direct effect on the domestic laws of the Member States. They only oblige the single states to pay regard to these agreements and to incorporate them into their national law. They are controlled by special bodies of the International Labor Organization.

Furthermore, there are commitments to the **European Convention on Human Rights** and the **European Social Charter**, both issued by the Council of Europe. Also democratic European states that are not members of the European Union form part of the Council of Europe.

But mostly, labor law in Europe is marked by **European Community law**.

The original version of the **Treaty establishing the European Economic Community** dated from March 25<sup>th</sup>, 1957, already included several provisions of importance for the labor law, namely about the free movement of workers (Art. 48 et seq. EEC), the harmonisation of the Member States' social security and cooperation in social issues (Art. 117 et seq., 120 et seq. EEC) as well as on equal pay for men and women (Art. 119 EEC).

The **Single European Act** signed on February 28<sup>th</sup>, 1986, added Articles 118a and 118b to the EC Treaty. Article 118a declared the harmonisation and improvement of the legislation on occupational health and safety as an aim of the Community. The article also authorized the Council to enact directives on minimum requirements in this field. Article 118b obliged the Commission to endeavour to "develop the dialogue between the social partners at European level, which could, if the two sides consider it desirable, lead to relations based on agreement".

The **Treaty on the European Union** dating from February 7<sup>th</sup>, 1992, (**Maastricht**) did not contain any further provisions for labor law and social law. Still, a special protocol and agreement on social policy signed by all states (except Great Britain) members allowed legislation on uniform standards in labor law and social law, including union-wide collective agreements. Only the regulation of the actual gross pay, the freedom of association and the trade dispute law remained excluded.

In the meantime, these provisions about labor law and social law have been included in the new version of the EC Treaty revised by the **Amsterdam Treaty**. The relevant rules are now Articles 136 et seq. EC. Provisions for a coordinated employment strategy by the Member States and the European Union were added in Article 125 et seq. EC. The Community legislation on labor law and social law is now applicable in Great Britain as well.

Gradually, several **regulations and directives** have been issued based on the mentioned

provisions of the EC Treaty. The following are to be named among the regulations :

Regulation 1612/68 (EEC) regarding the free movement of workers, securing the right to take up employment within the Community, and Regulation 1408/71 (EEC) regarding the social security of migrant workers which regulates the affiliation to the national social security systems when taking up work in a different Member State.

Almost 30 directives pertain to significant fields of labor law. Emphasized are occupational health and safety, securing of an equal treatment for men and women, banning of discrimination, protection of workers in the event of the insolvency or transfer of a business, regulation of particular forms of employment such as part-time work, fixed-term contracts and agency employment, as well as recently the law on the employees' representation in a company. We will recur to some of these directives.

Gradually, **agreements between the European Social Partners** are emerging on the basis of Article 139 EC. According to this rule, the dialogue between social partners at Community level may lead to contractual relations including the conclusions of agreements. Such agreements are implemented in accordance with the proceedings and practice specific to management and labor and the Member States or at the joint request of the signatory parties by a Council decision on a proposal from the Commission (Art. 139(2)EC). The European social partners have already used these possibilities several times. Thus the Directives on Parental Leave, Part-Time Work and Fixed-Term Work are based on framework agreements concluded by the UNICE (Union of Industrial and Employer's Confederations of Europe), the CEEP (European Centre of Enterprises with Public Participation) and the ETUC (European Trade Union Confederation).

The **EC Treaty itself, but also the EC regulations** are **laws directly effective** in as far as they contain rules and bans. They are to be obeyed by the authorities and, if concerned, also by subjects of private law. For example, public authorities may not hinder the access of workers from other Member States to employment in Germany, and employers are prohibited to pay women a lower remuneration than men contrary to Article 141 EC. The violation of rules and bans in the EC Treaty and in regulations can be taken to the **Member States' courts** in the same way as a violation of domestic law. Furthermore, national courts may submit doubtful questions in the interpretation of the treaty and the regulations to the European Court of Justice (ECJ) for a preliminary ruling (Art. 234 EC).

The **directives of the European Community** are directed at the Member States as the partners of the EC Treaty and need to be implemented by the legislator. National labor law is increasingly marked by the integration of EC regulations : for example, recently in Germany the Part-time Employment and Employment of Limited Duration Act (Teilzeit- und Befristungsgesetz) from December 21<sup>st</sup>, 2000, served the purpose of incorporating the Part-Time Work Directive and the Fixed-Term Work Directive into domestic legislation.

According to Article 226 EC, the Commission may reprimand the **lacking or incorrect implementation of regulations** in the European Court of Justice and the latter may then

disapprove this failure. In accordance with Article 234 EC, the German courts may also take the matter before the ECJ in request of a ruling thereon. This has happened successfully several times with respect to the Equal Treatment Directive.

The commitment of the Member States to the objectives of the European Community (Art. 10, 249 EC) leads to the obligation of its courts to participate in the implementation of Community law as far as it is in their power. In practice, this results in the obligation to **interpret** law as **consistent with European law** as possible. This matters especially with respect to the directives. If incorporated into national law, a directive has to be interpreted as close as possible to its wording and purpose. The principle of an interpretation consistent with European law applies even when a directive has not been implemented in national law in time. For example, after the Directive on the Minimum Safety and Health Requirements for Work with Display Screen Equipment had not been put into German law in time, the German Federal Labor Court interpreted contrary to its former rulings the German Law of Occupational Health and Safety in a way that the works council was able to request the interruption of VDU (visual display unit)-work in order to have breaks.

On December 7<sup>th</sup>, 2000 the European Council proclaimed to the governments of the member states the **Charter of Fundamental Rights of the European Union**. The Charter contains several fundamental social rights, such as the freedom of association in Article 12 (1), the freedom to choose an occupation and the right to engage in work in Article 15, the principle of non-discrimination in Article 21, the worker's right to information and consultation within an undertaking in Article 27, the right of collective bargaining and action in Article 28 and the protection in the event of unjustified dismissal in Article 30, to name just a few. The charter is on a purely formal level not binding, but it includes conclusions which acknowledge rights already extensively stipulated elsewhere. Therefore, it has to be anticipated that the ECJ will increasingly adapt its ruling regarding fundamental rights to the Charter.

## 2. Basic Principles

Basis of the employment relationship in every Member State of the European Union is the **employment contract freely concluded under private law**. Accordingly, the general rules of the law of contract such as the rules on concluding contracts, the consequences of a breach of duty (compensation of damages, cancellation of the contract) and the implications of the exclusion of the primary obligation to render services (e.g. loss of consideration, compensation of damages) are applicable to the employment contract unless the labor law includes special rules.

In several states, among them Germany, particular rules apply in regard to the public service. Only a part of the members of the civil service acts on the basis of an employment contract concluded under private law. The remaining members are public

servants whose relationship to the employing state is ruled by public law and is regulated by particular public service laws.

Contrary to Japan, employment contracts are **terminable** as a basic principle in all Member States of the European Community. The employer has to observe a term of notice and be able to claim grounds for a dismissal, but may then terminate the employment contract. There is no lifelong employment.

However, there are exceptions from this rule just like there do exist atypical terminable employment relationships in Japan. For example, some German collective agreements provide that employment contracts of employees who have reached a certain age (usually 55 years) and have worked for the company for some time (usually 10 years) cannot be terminated anymore.

National law in the Member States is essentially limited to providing **minimum standards in the field of employee protection**. They stipulate working conditions the employment contract may not fall short of but may exceed. This regards occupational health and safety, which is as shown above mainly regulated by EC directives. Provisions on working time, vacation, protection against dismissal and the protection of particular groups of individuals such as the severely disabled, young workers and mothers also belong here.

Rules on minimum wages exist in only a few countries, such as France and Italy. In general, the fixing of remuneration is left to collective agreements.

European Community law is marked by the principle of **non-discrimination**. Article 12 EC prohibits any discrimination on grounds of nationality. According to Article 13 EC, the European Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council availed itself of this competence in regard to labor law in particular and issued an **Anti-Discrimination Directive** in order to set up a general framework for the realization of equal treatment in employment and occupation. The directive has to be implemented until the end of 2003. Manifold changes in labor law will be necessary. Irrespective of these general anti-discrimination laws, Article 141 EC stipulates the **equal treatment of men and women in their professional life**, especially regarding equal pay. We will return to this matter later on.

The constitutions of the Member States in varying extent ensure to trade unions and employers the autonomous regulation of their members' working conditions (**right to free collective bargaining**). In Germany, this warranty is derived from the fundamental right of freedom of association (Art. 9(3) Basic Law (Grundgesetz)). Henceforth, as shown above also **Article 28 of the Charter of Fundamental Rights of the European Union** guarantees employers' and employees organizations the right to collective bargaining and collective action.

The realization of the concept of work councils is characteristic for German and Austrian law : the employees elect representatives in their companies. The employer has to inform the representatives about any important issue and they are involved in decisions concerning the employees. Furthermore, in these countries the employees delegate representatives to the enterprises' supervisory boards where they can co-determine the management of the enterprises.

In various forms, but with less intensity throughout, there exist consultation rights for employees' representatives in other Member States, too. In the meantime, the European Community itself has provided for corresponding legislation that will be talked about later on.

## II. European Employment Contract Law

### 1. Employer's Obligation to Inform When Concluding a Contract

The **EC Directive on the Proof of the Employment Contract** obliges the employer to document the key points of the employment contract and to hand over the corresponding document to the employee two months after the commencement of work at the latest. This obligation to inform and to document is interpreted extensively. For example, the ECJ ruled that an agreement obliging the employee to work overtime by mere order of the employer constitutes such a key point.

### 2. Protection Against Discrimination Within the Employment Relationship

#### a) Equal Pay for Men and Women

According to Article 141 EC, each Member State of the European Community has to ensure the application of the principle of equal pay for men and women for equal work or work of equal value. This rule has **direct effect** and also binds partners to collective bargaining, employees' representatives in companies and employers.

European law understands **remuneration** not only as the wage in itself but also as any other consideration attributable to the employer which the employee receives directly or indirectly in respect of his or her employment. Self-administrated company pension schemes in particular are subject to the principle of equal pay.

The European Court of Justice **applies** the principle of equal pay **strictly**. According to its ruling, the principle is violated if a group of employees, who receives lower benefits than a comparable group of employees, consists of significantly more women than men compared to the matched sample group. Thus, already before the Part-Time Work Directive came into effect, the ECJ objected to the lower wages of **part-time workers** : since the group of part-time workers consists of significantly more women than men, it constitutes, according to the ECJ's perspective, a discrimination against women if the wages of part-time workers regarded in reference to their working time are lower than

those of full-time workers. Several years ago, a plan by the Industrial Union of Metal Workers (IG Metall) publicizing a collectively bargained pension starting at age 60 failed largely due to reservations resulting from Article 141 EC : The IG Metall had intended this pension only for workers who had been part of an employment relationship for at least 35 years. This concerned significantly less women than men, though.

b) General Anti-Discrimination Law

The **Anti-Discrimination Directive** providing for a general framework for the realization of equal treatment in employment and occupation prohibits in Article 2 any indirect or direct discrimination in the employment relationship based on religion or belief, disability, age or sexual orientation.

The prohibition of discrimination based on **age** has a special meaning thereby. In the future, it will not be possible anymore to reject the hiring of workers on the ground that they have reached a certain age limit. Neither may the advertisement of a vacancy then tailor to a certain age anymore. On the other hand, in principle the preference of elder workers will not be possible anymore. For example this is true for provisions giving higher dismissal compensation to elder workers than younger employees. Collectively bargained prohibitions of dismissal or collective agreements to maintain wages for elder workers also represent an inequality according to the directive.

However, Article 6 of the Directive gives Member States the competence to provide that differences of treatment on grounds of age shall not constitute discrimination if they aim at the protection of elder workers and are appropriate and necessary.

### 3. Employee's Rights in the Event of Restructuring or Closures of Companies

a) Transfer of Undertakings

In order to protect the employees in the event of a transfer of an undertaking, business or part of a business to another employer as a result of legal transfer or merger, the rights and duties derived from an existing employment relationship with the transferor **pass over to the transferee by operation of law** as provided in the Directive on the Transfer of Undertakings. The employees also gain protection against dismissals due to the transfer. In Germany, this directive has been implemented through § 613a BGB.

In the past, the **definition of a transfer of an undertaking** posed a substantial problem in the ruling of the European Court of Justice and of the German Federal Labor Court. The ECJ at first had ruled that already the takeover of one field of activities by a different enterprise represents a transfer of an undertaking. The Federal Labor Court in particular objected and the ECJ later corrected this ruling. The ECJ now requires the substantial part of the operating funds to be transferred as well. In return, it is then sufficient to take on the most important part of the staff so that the **transferee** cannot simply select from the staff who he wants to take on and who he does not.

The German Federal Labor Court has developed the principle that the employee may

**object** to the transfer of its employment relationship to the new business owner. This has been approved by the ECJ. Meanwhile, in Germany this right of objection has been integrated into § 613a BGB.

b) Mass Dismissals

The Collective Redundancies Directive obliges employers to **inform and consult the respective employees' representative** in case of dismissals of a large number of workers effected for one or more reasons not related to the individual workers concerned within a certain period of time. It is left to the Member States how to sanction this obligation to consult. German law has included corresponding provisions in §§ 17 et seq. of its Dismissal Protection Act (Kündigungsschutzgesetz) for a long time. Accordingly, in Germany it is assumed that information and dismissal are not effective until consultations have been held.

According to the directive, the **competent public authority has to be notified** of the mass dismissal. The obligation to notify is combined with a provision that the mass dismissals will not be effective until 30 days after arrival of the notification at the competent authority. In Germany, this would be the Employment Office.

c) Insolvency of the Employer

In case of an insolvency, the Insolvency Directive obliges the Member States to ensure the guarantee of payment of the employees' outstanding claims at least the last three months preceding the onset of the employer's insolvency. It is thereby left to the Member States to determine which institution is responsible for this guarantee. In Germany, the guarantee institution is the German Federal Labor Office (Bundesanstalt für Arbeit). It grants the employees insolvency guarantee payments coming from contributions imposed on the employers. In practice, the insolvency guarantee payment is often used for keeping up production in the time between filing for insolvency and insolvency proceedings in order to obtain a well-regulated liquidation.

#### 4. Particular Forms of Employment

a) Part-Time Work

The **Directive on Part-Time Work** implemented the framework agreement of the social partners on part-time work. Its focus is the **principle of non-discrimination**. Unless an unequal treatment is objectively justified, part-time workers may not be treated worse than comparable full-time workers in their employment just because they are employed part-time. The principle of pro-rata-temporis applies here regularly, meaning that the working conditions must be the same as for full-time workers proportional to the part-time workers' working hours. In Germany, this prohibition of discrimination has been implemented through § 4(1) Part-Time Employment and Employment of Limited Duration Act (Teilzeit- und Befristungsgesetz). Thus, there is no need to resort to the principle of equal pay for men and women concerning part-time work.

The Directive on Part-Time Work also appeals to the employers to take into consideration as far as possible applications of full-time workers for a **switch-over to a part-time employment**. Vice versa it also appeals to the employers to facilitate the switch-over from part-time to full-time positions. They shall also make an effort to provide in time information on part-time and full-time employments available in the company and to inform existing employees' representatives accordingly.

The German legislator has built these appeals up into **legal obligations for the employer** : according to § 8 Part-Time Employment and Employment of Limited Duration Act (Teilzeit- und Befristungsgesetz), an employee who has been employed for over six months, is entitled to lower his contractually stipulated working hours unless internal operational objections exist. According to § 9 Part-Time Employment and Employment of Limited Duration Act, a part-time worker who has informed the employer of his wish to extend his contractually stipulated working hours has to be considered preferentially if a vacancy has to be filled unless there exist compelling operational objections. These rights are certainly made use of. Even though the law only came into force on January 1<sup>st</sup>, 2001, there are already a series of rulings by labor courts dealing with the question whether these rights have to be conceded in a particular case or whether the employer may deny the reduction or prolongation of working hours on operational grounds.

b) Fixed-Term Contracts

The **Directive on Fixed-Term Work** implemented the outline agreement of the social partners on fixed-term contracts. This directive includes the **principle of non-discrimination**, too : fixed-term workers may not be treated worse than comparable continuously employed workers only due to their fixed-term employment. In Germany, this principle of non-discrimination has been implemented through § 4(2) Part-Time Employment and Employment of Limited Duration Act (Teilzeit- und Befristungsgesetz). In particular, this provision stipulates that for working conditions which depend on seniority in service, the same periods of time are taken into account for fixed-term workers as for the continuously employed.

To avoid misuse through **consecutive fixed-term contracts** ("string of contracts"), the directive obliges the Member States to take one or several of three possible measures : They may either make the prolongation of such contracts subject to an objective reason or determine the allowable maximum overall duration of consecutive contracts or determine the allowable maximum number of prolongations of such contracts.

In Germany, the limitation of employment contracts has been regulated in §§ 14 **et seq. Part-Time Employment and Employment of Limited Duration Act (Teilzeit- und Befristungsgesetz)**. The directive has thereby been implemented in a way that a fixed-term contract either requires a objective reason (§ 14(1) of the above-mentioned act) or, if a objective reason does not exist, such a contract may be concluded for a duration of up to two years. Within this maximum duration, a maximum of three prolongations is permitted

(§ 14(2) of the Act).

c) Agency Employment

The proposal for a Directive on the Working Conditions of Temporary Workers also provides for non-discrimination : according to Article 5 of the proposal, temporary workers must receive during their posting at least as favorable treatment in terms of basic working and employment conditions as a comparable worker in the user enterprise. Specifically, this means that the remuneration for temporary workers has to be adjusted to the collective agreements in the user enterprise. This is problematic because there may exist very different collective agreements in the different user enterprises and this may thus complicate the reliable calculation of the temporary agency's staff expenditure. But the proposed directive will enable the Member States to diverge from the rule of equal working conditions if they also pay the temporary workers in the time between two postings. It will have to be proven whether this exception will be sufficient to solve the problems.

### III. European Law on the Protection of Employees at Work

#### 1. Health Protection and Safety at Work

The **Framework Directive on the Introduction of Improvements in the Health Protection and safety** at work is of central significance for the protection of employees at work in Europe. On the one hand, it contains rules in a general form for the equipment of the workplace and the work organization in the enterprise with the aim of avoiding accidents at work and preventing occupational health risks. Insofar, it has been supplemented by 15 single directives endeavouring to protect from specific work-related health and accident risks. On the other hand, the framework directive instructs the enterprises to sustain a certain **safety organization**. In particular, the employer has to appoint experts to deal with the organization of protective and preventive measures, provide for a service by company medical officers and involve employees' representatives in questions relating to safety and health protection at work.

In Germany, the framework directive has been implemented through two laws. The factual rules on health protection and safety at work are included in the **Occupational Health and Safety Act (Arbeitsschutzgesetz)**, the rules on the safety organization in the enterprise are included in the **Company Medical Officers, Safety Engineers and Other Experts on Safety at Work Act (Gesetz über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit)**. The details of the rules on the protection of employees at work as predetermined in the single directives also are concretized in particular provisions in Germany. The Directive on Minimum Safety and Health Requirements for Work with Display Screen Equipment approximately corresponds to the German Regulation on VDU-Work Places dating from December 4<sup>th</sup>, 1996 (BGBI I 1843).

## 2. Maternity Protection, Parental Leave, Protection of Young People at Work

### a) Maternity Protection, Parental Leave

First of all, the **Maternity Protection Directive prohibits** the occupation of pregnant employees with activities which represent a risk for the safety and health of the pregnant women. The directive also determines that pregnant women and mothers for a certain period of time after delivery may not be obliged to do night-time work.

The ECJ has supplemented these provisions insofar as it views the question whether a pregnancy exists as a violation against the Directive on Equal Treatment: it can thus happen that an employee is hired for a task she may not perform. The employer then has to transfer the employee to another workplace originally not intended for the pregnant worker if the employer wants to avoid having to pay the wage without service rendered for the whole duration of the pregnancy.

The Maternity Protection Directive also provides for a **maternity leave** of at least 14 continuous weeks. However, it is basically left to the Member States how this leave is allocated before and after confinement.

Finally, the Maternity Protection Directive provides for a **prohibition of dismissal** during the period from the beginning of the pregnancy to the end of the maternity leave. Dismissals are only permissible in exceptional cases and if the reason for dismissal is unconnected to the pregnancy. Such a dismissal requires the consent of the competent authority.

The **Parental Leave Directive** implementing a corresponding framework agreement by the social partners grants working men and women the right to an unpaid parental leave of at least **three months** on the grounds of the birth or adoption of a child.

This directive was incorporated into German law by the Federal Child-raising Allowances Act (Bundesarziehungsgeldgesetz). Accordingly, parents are entitled to **three years** of parental leave, whereby with the employer's consent a share of twelve months may be transferred to some time until the completion of the eighth year. During parental leave a child-raising allowance is granted whereby parents can choose: they may either draw a monthly allowance of 460 € confined to the first year of the child's life or of 307 € for the first **and** second year of life. The allowance is reduced or inapplicable for parents with a higher income.

### b) Protection of Young People at Work

The **Directive on the Protection of Young People at Work** bans child labor and prohibits the employment of adolescent workers for certain work. It also provides for a restriction of working time for adolescents to eight hours daily and 40 hours weekly. Night work is generally prohibited.

## 3. Regulation of Working Time

For the protection of workers, the **Working Time Directive** regulates the maximum

daily working time, rest periods, night work, shift work and work rhythm. It also provides for a minimum paid annual vacation of four weeks.

#### IV. Collective Labor Law

##### 1. Collective Bargaining Law and Trade Dispute Law

According to the principle of free collective bargaining (see I 2), in the Member States of the European Community the working conditions and the remuneration in particular are largely regulated **by collective agreements**.

On the European level, collective agreements between employers' associations and trade unions until now only exist in the form of the mentioned framework agreements between the social partners. They are implemented in a legally binding way through the enactment of directives. European law does not offer any further basis for **European collective agreements**.

In fact Article 137(6)EC explicitly excludes a competence of the European Community regarding remuneration, freedom of association, the right to strike and the right of lockout. Parallel collective agreements with uniform working conditions concluded in single Member States of the European Community are the only conceivable possibility.

It is doubtful how long this restrictive position towards European collective bargaining agreements can still be upheld. It cannot be ignored that the increasing coalescence of the European national economies is accompanied by a want for equal competitive conditions on the employment market. However, these require the possibility of uniform collective agreements.

##### 2. European Works Councils

The purpose of the **Directive on the Establishment of a European Works Council** is the **cross-border information and consultation** of employees in Community-scale undertakings and groups of undertakings. This aim may be achieved either through the institution of a European Works Council or through the establishment of a information and consultation procedure. The conclusion of **agreements** are **preferred** therein. Only in the case that an agreement cannot be concluded, a European Works Council is to be established by law.

The **scope** of this directive extends to Community-scale undertakings and groups of undertakings that employ at least 1.000 workers in the Member States and at least 150 employees in each of at least two Member States. It does not matter whether the undertaking has its headquarters or the group of undertakings its main office in a member state. In case there is no central management, the undertaking or the group of undertakings has to designate a representative for the purpose of the law's application. In the absence of such a representative, the law of the state where the greatest number of employees is employed will be applied. According to a study by the European Trade

Union Institute, in 1998 the directive applied to 1.205 undertakings and groups of undertakings, 318 thereof in Germany. 317 undertakings and groups of undertakings had their domicile in Non-Member States, 207 thereof in the USA, 59 in Switzerland and 35 in Japan.

Central management and the negotiating body have three years to conclude an agreement on the establishment of a European Works Council or a procedure for information and consultation. If they are unable to do so within this period of time, the failure of the negotiations can be declared and subsequently a European Works Council is to be established in compliance with the directive.

The power of such a **statutory European Works Council** is regulated in detail. Most importantly the works council has to be informed and consulted once a year on the development and perspectives of Community-scale activities of the undertakings and groups of undertakings. There is also an obligation to inform and consult the works council in exceptional circumstances, particularly in the event of relocations, the closure of establishments, undertakings or important parts thereof and collective redundancies.

### **3. Involvement in the Organs of the European Company (Societas Europaea)**

The **Directive Supplementing the Statute for a European Company with Regard to the Involvement of Employees** aims at ensuring that the creation of a European Company does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of a European Company. This provision refers in particular to the German law on limited liability companies which provides for a participation of employees' representatives in the board of directors.

According to the directive, a procedure of information and consultation with a particular negotiating body consisting of employees' representatives is to be initiated upon creation of a European Company. The body and the participating companies shall reach an agreement about the co-determination of employees. Takes the European Company its domicile in a state with co-determination, this level is to be upheld.

To what extent European Companies will actually be created is still unknown. There are no noteworthy experiences yet.

### **4. General Framework for Informing and Consulting Employees**

The **Directive Establishing a General Framework for Informing and Consulting Employees** in the European Community stipulates that the employer has to inform and consult his employees of circumstances which do not have cross-border relevance, too. It obliges the Member States to provide for the information and consultation of employees on economical issues (economical situation, employment situation, employment structure, development of employment, important changes of work organization) in undertakings with a minimum of 50 employees in one Member State or establishments with a minimum

of 20 employees in one Member State.

The directive was passed in March 2002. It has to be implemented within three years. Every undertaking active in the European Community will then have to have some form of employees' representatives.

## V. International Labor Law (Conflict of Laws)

### 1. Applicable Substantive Law

As far as labor law systematically belongs to the law of contractual obligations, the general principles on international private law in itself apply to the collision of two national legal systems in Europe, too. Primarily, the law chosen by the two parties of the employment contract is relevant (Article 3 European Convention on the Law Applicable to Contractual Obligations). Only in the absence of a choice of law a legal rule applies: according to Article 6(2) of the convention the employment contract then is to be governed by the law of the state in which the employee habitually carries out his work unless it appears from the circumstances as a whole that the employment contract is more closely connected with another state.

However, the choice of law is restricted in order to protect the employees. According to Article 6(1) of the convention, it shall not have the result of depriving the employee of the protection afforded to him by the **mandatory** rules of the law which would be applicable under Article 6(2) of the convention in the absence of a choice.

In as much as labor law, like particularly the law on the protection of employees at work, belongs to the **public law**, according to Article 7 of the convention, mandatory national law even applies when the employment relationship in itself has closer connections to another state.

According to Article 3 of the **Directive Concerning the Posting of Workers** (implemented in Germany through § 7(1) Posting of Workers Act (Arbeitnehmerentsendegesetz)), national provisions not only of the mandatory public law on minimum paid annual vacation, the remuneration of pregnant women or women who have recently given birth and on the minimum rates of pay, including overtime rates, also apply to workers carrying out work in that state but employed by an undertaking based in a different state. Whether the employer has its headquarters in another Member State does not matter, because according to Article 1(4) of the Directive Concerning the Posting of Workers, undertakings established in a Non-Member State must not be given more favorable treatment than undertakings established in a member state. For example, a Japanese worker carrying out work in a German branch will be entitled to the minimum vacation of 24 working days according to the German Federal Vacation Act (Bundesurlaubsgesetz) although Japanese employment contract law applies.

## 2. Court of Jurisdiction

Article 19 of the Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters stipulates that an employee may sue his employer **either in the courts of the Member State where the employer is domiciled or in another Member State in the courts for the place where the employee carries out his work.** If the employer is not domiciled in a Member State but has a branch, agency or other establishment in a Member State, he will be deemed to be domiciled in that Member State (Article 18<sup>(2)</sup>EC Regulation No. 44/2001).

According to Article 20(1)EC Regulation No. 44/2001, an employer may bring proceedings only in the courts of the Member State where the employee is domiciled. According to Article 20(2), this rule does not affect the right to bring a counter claim. Whether the employee is domiciled at the place where he carries out his work depends on if the workplace is merely the focus of the performance of work or also the focus of his living.