National Report Germany

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Draft legislation

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General legal framework

Question a)

What are the main rules on termination of a contract at the initiative of the employer?

The German Constitution guarantees everybody contracting and cancelling agreements with everybody („personal autonomy in closing a contract“, Art. 2 I GG[1]). For the employers also a „entrepreneurial freedom“ arises from Art. 12 GG. This basic right contains the freedom to choose a career for the employees, too. But particularly in the scope of labour law there is awesome plurality of restrictions. An example is the restriction of dismissals by

- the Employment Protection Act (KSchG),
- the Works Constitution Act (BetrVG),
- the Civil Code (BGB),
- the Maternity Protection Law,
- the Social Security Code No. 9 (SGB) and
- the Law of Parental Money and Leave.

There are several formal and procedural rules (e.g. written form, receipt, official hearing) used for dismissals. Another important part is the reason for dismissal. Depending on this reason there are different rules on dismissals.

Dismissals are divided into „contractual notice of dismissal“ and „extraordinary dismissal”. Causes can be e.g. theft at work, insult to superiors, etc. They allow a dismissal without a notice period (“dismissal for cause”, § 626 BGB). But this kind of notice is strictly restricted on the other hand.

Other situations can allow a contractual notice of dismissal, e.g.

- reasons being up to the employee's person (disease, permanent disability),
- reasons caused by the employee’s behaviour (multiple unexcused absence, deliberate low performance) or
- economic reasons (reorganisation).

In the following explanation we'll only have a look at the last one, the economic reasons.

The main rules the employer has to respect in this case are:

- § 102 BetrVG — official hearing of the works council — (cf. question 1)
- § 622 BGB — notice period — (cf. question 2)

1 GG (Grundgesetz) = German Constitution Law

• § 623 BGB	written form	(cf. question 2)
• § 1 II KSchG	social justification	(cf. question 2)
• § 1 II KSchG	social selection	(cf. question 2)
• § 17 KSchG	obligation to notify	(cf. question 3b)
• § 629 BGB	release for job-seeking	(cf. question 5a)
• § 109 GewO	job reference	(cf. question 5a)
• § 1a KSchG	right of termination pay	(cf. question 5a)
• §§ 111 et sqq. BetrVG	"social plan" by the works council	(cf. question 1, 4c) and 4e)

Question b)

What is the personal scope of these rules?

1. applicability of the Employment Protection Act (KSchG)

The Employment Protection Act is applicable in the private sector as well as in the public sector and also with some modification in aeronautical and seafaring companies (§ 23 I KSchG). It is only applicable for contractual notices of dismissal (§ 13 KSchG).

a) personal scope

The KSchG is applicable for contractual notices of dismissal by the employer. The main precondition is that the employee is in an uninterrupted labour contract for at least six months in the same business or company (§ 1 KSchG). During the first six months there is a probation period and the KSchG isn't applicable.
The KSchG is not applicable for civil servants and such workers which aren't in an employer-employee relationship. These are especially freelancers, working with contracts of work and labour or service contracts. Also the legal body's representatives (CEOs, directors, etc.) and partnerships are not involved in the scope (§ 14 I KSchG).

b) substantive scope

The KSchG is only applicable in businesses with more than ten employees. Employees working in part-time are proportionately included in this number. Therefore it is enough if ten employees work in full-time and one employee works in part-time, a quarter times per week. So you count 10.25 employees and the KSchG is applicable. Trainees, CEOs or company owners are not included in this number. Till the end of 2003 more than five (e.g. 5.25) employees were enough for the applicability. If there are more than five employees in a company and all of them have been in labour contracts since 2003, these employees are protected by the scope to date.

2. protection outside the KSchG

However, there is a protection outside the KSchG, too. It was derived by constitutional court's jurisdiction and provides a modicum of social consideration by the employer. The employee is protected due to the Civil Code's sweeping clauses (§ 138 BGB, § 242 BGB) from arbitrarily dismissals by the employer. Additionally the normal rules like written form, receipt, official hearing are applied.

3. special protection

Among the KSchG there are some special rules protecting specific groups:

- severely handicapped person (§ 85 SGB IX)
- pregnant women inclusive up to four month postnatal (§ 9 MuSchG)
- parents in parental leave (§ 18 BEEG)
- employee representatives, e.g. members of the works council, trainees and young employees' representatives (§ 15 KSchG)
- trainees after probation period (§ 22 BBiG)
- members of Parliament (GG)

Some of these rules only limit the contractual notice of dismissal (e.g. § 22 II BBiG), other the dismissal for cause (e.g. § 9 MuSchG), too. But no one forbids the dismissals for cause absolutely, because that would be a violation of the employer's entrepreneurial freedom (Art. 12 GG). In case of severely handicapped person, the dismissal is restricted due to an official hearing of the appropriate authority (§§ 85, 91 I SGB IX).

Question c)

Is there additional protection provided through collective bargaining/agreements?

The German Collective Bargaining Agreements Act (=TVG) permits negotiating terms for termination. These terms apply directly and binding, but they are binding only parties, bound by the agreement (§ 4 I 1, § 3 I TVG). For all employees not bound by the agreement, you will often find clauses in their individual contracts which refer to the collective agreement. So the negotiated terms are also applicable for employees who aren't members of trade unions.

It is not allowed to reduce the protection provided by law in a collective agreement. The protection by law is „unilaterally binding law“, so you can change it by individual contract, collective agreement or works council agreement, but only for the benefit of the employees.

For example:

> The collective agreement's parties can negotiate that employees, older than 55 years and more than ten years of seniority, can't be given notice.

A special rule is written down in § 622 IV Civil Code: collective agreement's parties can modify notice periods for the benefit and also against the employees. This includes modifications of the end of period day and the calculation method.
We'll show some more information about periods under the 2nd question.

The works council can modify the employment protection as well. *For example:*

> The employer can regive a relinquishment of dismissals for two years if the works council accepts labour conditions adjustment.

In many cases a mighty employment protection is negotiated in collective agreements, so there's no space left for works council agreements (§ 77 III BetrVG).

Termination of the contract based on economic grounds:

<u>Question 1:</u> Social Actors

Which actors are involved with the termination of a contract at the initiative of employer based on economic grounds? What are their functions (trade unions, works council, governmental authorities)?

1. parties to a contract

The right of dismissing occupies only the parties to a contract. Is one party underage and thus just limited contractually capable (§§ 106 ff. BGB), the underage person is only able to dismiss or to be dismissed by a proxy (§ 107 BGB).

2. works council

Is there a works council in the company, where an employee should be dismissed, the works council has to be heard before the dismissal takes place (§ 102 I BetrVG). In Germany there is just the possibility to have a works council if the company has five or more employees, who are entitled to vote, and where three of them are eligible for election (§ 1 I 1 BetrVG). It's up to the employees whether they have a works council; if they don´t elect one, there is no one. The employer is obliged to advise the works council about the dismissals. He has to execute an official hearing of the works council about the planned dismissals. A notice without an official hearing is legally void.

The works council is also able to contradict to the planned dismissal (§ 102 III BetrVG), if

- there are compunction about the social selection,
- the dismissal violates the law and the rules of § 95 BetrVG, for instance the works council doesn't agree with a displacement, redeployment or the hiring of employees,
- the employee, who should be dismissed, is able to work on another place in the same company,
- the employee is able to continue his work in the same company after an occupational redeployment or a further training,
- the contract can be modified and the employee agrees to that.

The veto of the works council is uninfluential to the dismissal. The employee is still bound to file a suit. Just the right of ongoing work is a result of the veto (§ 102 V BetrVG).

Is there, in case of an enforced redundancy, also an alteration of the establishment the employer is not just bound to hear the works council, he is also bound to take legal advice of the works council, § 111 BetrVG (for alteration of the establishment, cf. question no. 4 e).

In addition to that the employer and the works council are able to arrange that each dismissal needs to be accepted by the works council and if the parties still have different opinions about a dismissal, they will ask an arbitration committee. The arbitration committee consists of the

same number of people, who were elected by the employer and the works council, and also one judicial person, § 76 I 1 BetrVG.

3. trade unions and works councils

Trade unions and works councils are able to arrange collective agreements for the employees and the employers which abridge the possibility of dismissals. Special possibilities, which have priority previous to a dismissal, like e.g. short-time work, reduction of overtimes, reduction of temporary work or pay cut can be agreed (cf. General legal framework question c).

Above all they are also able to arrange in collective agreements and works council agreements according to § 95 BetrVG how the social criteria (§ 1 III 1 KSchG) - job tenure, age, obligation to support and severe disability - have to be considered in relation to each other (§ 1 IV KSchG). These agreements have prevalence to all employees of the company; otherwise the effect would be avoided. The agreements act like solidary rules and will assure structural unity, § 3 II, § 4 I 2 TVG.

The possibility to arrange agreements is not compulsive, but in a company with more than 500 employees, the works council can demand those agreements, § 95 II BetrVG. Does the employer use selection guidelines for the dismissals, which are not rubberstamped by the works council according to § 95 I BetrVG, the dismissals are legally void. This happens by breach of the co-determination right of the works council.

Furthermore the trade unions have the possibility to call out on a strike for a “social plan”. This strike gives the trade unions the influence on the investment management and the location of the company. By that way economical drawbacks can be compensated or alleviated. The social plans are generally made by the employer and the works council of the company (§§ 111, 112 BetrVG), but the BetrVG doesn't restrict the authority of the parties of collective agreements. Typical contents of a social plan like “right of compensation” are also negotiated adjustable topics. If the employer is not prepared to arrange a collective agreement, it is allowed to strike for it. The scale of the strike is subjected to the trade union which is guaranteed in Art. 9 III GG. Because of the integrity of the freedom of collective bargaining a judicial control is not possible.

4. public authorities

Public authorities can also be involved in dismissals. A mass dismissal commits the employer to contact and advise the Federal Employment Agency, § 17 KSchG (cf. question 3 b). Does a company change in operations and the parties are discordant because of something, they can call (in terms of § 111 BetrVG) the board of the Federal Employment Agency to help arranging a balance of interests and/or a social plan (cf. question 4 e).

<u>Question 2:</u> Procedural requirements

What are the main procedural requirements in case of dismissal (individual/collective) and what are their aims?

1. general rules

In case of an enforced redundancy you begin with the general rules for dismissals. For example the dismissal must be written down with the employer's genuine signature or an authorised signature and it must reach the employee. Normally the employers have to keep a notice period, defined in the Civil Code (§ 622). But often this period is expanded by collective agreements.

The regular notice period (defined by law) is four weeks by 15th day or the end of the month. Depending on duration of employment this notice period grows up.

duration of employment	**notice period**
2 years	1 month by the end of the month
5 years	2 months by the end of the month
8 years	3 months by the end of the month
10 years	4 months by the end of the month
12 years	5 months by the end of the month
15 years	6 months by the end of the month
20 years	7 months by the end of the month

According to the law only the duration of employment after reaching 25th year of one's life is counted (§ 622 II 2 BGB). But this rule is an age discrimination, so courts mustn't use this rule any more. The Federal Labour Court confirmed this judgement of the European Court of Justice.

The aim of this notice period is to prevent the parties from suddenly ending of their liabilities.

2. rules provided by the KSchG

The main condition by the KSchG is that the dismissal is socially justified. One reason for such a justification are economic requirements (§ 1 II KSchG).

At first you have to find such economic reasons. Economic reasons are on hand, if a basis for employment is stopped by a contractor decision. The reason for this decision can be an in-company or an external cause. But the cause must exist at the date of termination. A preventive termination for future causes is not allowed.

The second condition is that these economic reasons must be urgent. This means, that it mustn't exist a milder way (like notification of a change) for executing the contractor decision. The dismissal must be the „last resort“.

If you meet these conditions and you've got a range of employees for terminating, the employer has to choose by social criteria. These criteria will be shown in the following text.

The aim of this rule is to keep the entrepreneurial freedom provided by the Constitution. This strictly conditions shall secure the job where possible and prevent the employees from disposal by the employer.

<u>Question 3:</u> The economic reason for the dismissal

Question 3a)

How this "economic" reason is described, what should be understood by "economic" reason? For instance, could transnational relocation be considered as an "economic" reason?

Every economic reason causes a contractor decision. This decision effects a job loss and so consequently unavoidable a dismissal. An enforced redundancy, thus a dismissal caused by economic reasons, calls for leaving out a place of work.

A dismissal based on economic causes in terms of § 1 II KSchG can result from "in-company" and "external" reasons. In-company and external reasons cause an immediate economic redundancy if they directly correspond to the relevant work place. It is not important that a special work place ceased, but whether and in which scale a need of the employee dropped out. The decision of the company organisation has to be the reason why the work place does not longer exist. This is just accepted if the decision refers to a special work place. The decision to curtail costs is not enough.

1. in-company reasons

In-company reasons are given if the employer decided an organisation measure because of an economic or technical change, which effects the loss of the work place for some employees. This includes e.g.:

- rationalisation of workflow,
- closure of a company or of an operation department,
- increase of work,
- new regulation of the job specification for an existing work place,
- transmission of the work from employees to freelancers,
- reorganisation (e.g. shift work),
- modification or introduction of a new system and
- reduction or displacement of the fabrication.

The contractor decision of reorganisation can imply a master plan which includes the rearrangement of all work places and as well the reduction of work. In contrary to that, it is also possible to outsource special operations of the company. The entrepreneurial freedom includes the authority to decide how the work in the company is done and how many workers are employed. The assignment of the employer is to decide how much work has to be done by the employees and how many hours are necessary for that.

The dismissal itself is not a free contractor decision. It always has to consider the Employment Protection Act. Further it has to be targeted on ceasing the work place on a permanent basis because just then, the decision is "urgent". A temporary close-down generally doesn't justify an enforced redundancy; it only allows short-time work for a while. The

employer is obliged to prognose that the work place does not longer exist after the notice period.

A dismissal directed towards a replacement is also illegal. But this doesn't mean that the employer isn't in the position to decide, that the work will be done by freelancers or other parties in the future.

2. external reasons

The external reason does not only exist on special economic reasons but also on a thus motivated decision of the employer.
This includes e.g.:

- lack of orders,
- decline in sales,
- economic decline,
- change of the market structure,
- deficit of raw material,
- energy poverty,
- budget deficit or
- cutbacks and shortfall of financial background.

Solely if a permanent decline in sales results in a reduction of the amount of work, the employer is allowed to dismiss employees because of an “economic reason”. This is assumed if a concrete amount of turnover is related to a concrete number of employees. In contrary to that, it is illegal to dismiss employees just in a preventive way because of unsure orders in the future.

The transfer of operations at trans-border relocation is not an argument for a dismissal. That means that the employer is not able to justify the dismissal by a close-down, if a part of the company will be displaced across the border. This kind of relocation is judged as a normal transfer of operations in terms of § 613 a BGB. An exculpation of the dismissal because of urgent economic reasons is not possible.

Question 3b)

Based on this reason, can the dismissal be either, individual, plural or collective? In this case, is the meaning of the “economic reason” changing in any way? (less strict requirements, for instance).

A dismissal can refer to one or more employees of one office or operative. This is part of the constitutionally guaranteed contractor decision (Art. 2 I, 12 and 14 GG). The only barrier limit is the dismissal protection: The decision has to comply with the Employment Protection Act.

The decision to appoint somebody is generally a contractor decision, as well as the decision to dismiss 10 of 100 employees. Having said this, every dismissal is a result of a contractor decision. This applies in particular for enforced redundancies. Precondition for dismissals because of “economic reasons” is that the employer argues that the employees are no longer

necessary. A contractor decision, which is not concentrated on a special employee, generally seems to be in order. Differently if the contractor decision is concentrated on a special person who should be dismissed. In this case the employer has to argue a lot more and the disposal control is much stricter.

1. mass dismissals

Is the dismissal meant for several employees (the number of employees depends on the size of the company) in the space of 30 days, the employer is obliged to advise the Federal Employment Agency, § 17 KSchG.

Is it proposed to make such a mass-dismissal, the employer is also obliged to advise the works council about it in time. He has to inform it at that time he plans the dismissals for the first time – not later than two weeks before the notice to the Federal Employment Agency. He has to inform about:

- the reasons of the planned dismissals,
- the number and career of these employees,
- the number and career of the employees who work generally,
- the time when the dismissals should take place,
- the intended criteria for the choice of the employees and
- the intended criteria to calculate the compensation.

The works council has the possibility to advise the employer in order to avoid dismissals or to limit them. Moreover the employer is obliged to give the Federal Employment Agency a copy of the notice, he sent to the works council, which should include the details above.

Unconsidered are:

- extraordinary dismissals (§ 17 IV KSchG),
- terminations by the employees,
- terminations of the employment because of a contract or of time lapse and
- dismissals which are the result of an illegal collective action.

The advice is necessary, because now the Federal Employment Agency is able to know in time the high number of unemployed persons. The Federal Employment Agency can help the company to take the chance of some arrangements that will reduce the impact of dismissals. Teamwork of all parties is fundamental in this situation.

The notice to the Federal Employment Agency initiates a month-long blocking period for more dismissals. Other dismissals will come into effect after the blocked month passed by - unless the Federal Employment Agency accepts them. In particular cases the Federal Employment Agency is able to decide that further dismissals are not allowed before two months passed by (after the advice), § 18 II KSchG. A new notice is necessary if the dismissals are not realised in the space of 90 days after the advice that they will come to pass, § 18 IV KSchG.

Whether the employer can't employ the workers till the end of the blocked period, the Federal Employment Agency is able to admit short-time work, § 19 I KSchG. But the public authority has to consider the works council, § 87 I 3 BetrVG. In case of short-time work, the employer is allowed to curtail the payment of the employees adequately. The cutting of wages is after the end of the general notice period (§ 622 BGB) or the agreed end effective for the first time, § 19 II KSchG. The difference to the "normal" wages is generally paid by the Agency ("short-time work money") (cf. page 26).

The regulations about the mass dismissals apply accordingly for dismissals with the option of altered conditions of employment if the disacceptance of the employee results in a dismissal.

The rules about the social selection (§ 1 KSchG) have to be considered. The employer has to explain and to verify how many comparable employees can be replaced without stopping or disturbing the operating procedure of the company. The social selection is confined to this number of employees.

2. named mass dismissals at a balance of interests (§ 1 V KSchG)

§ 1 V KSchG allows the employer, in case of an alteration of the establishment, to dismiss a little easier if an agreement of balancing the interests exists. Aim of this possibility is, in case of enforced redundancy, to create a more legal social selection for the employers. Are the employees, who should be dismissed, named at a balance of interests, it will be assumed that the dismissal is conditioned by urgent economic reasons, § 1 II KSchG. Beside that a register of names leads to a limited verification.

Question 3 c)

Is the employer obliged to justify the dismissal or to prove the economic situation and how?

1. no force for a statement of reasons at the written notice

The employer is not obliged to justify the dismissal. On demand of the employee the employer only has to tell him the reasons, which caused the social selection – but not the reasons for the dismissal itself (§ 1 III 1 KSchG). Only some special laws, which concern specific groups, include the obligation to justify the notice in the declaration of dismissal (e.g. § 9 III MuSchG for pregnant women). Also some collective agreements already contain a compulsion to state a reason in the written declaration of dismissal.

In either case the employer is obliged to check the economic situation before he dismisses employees.

2. the submission of the employer before the court / juridical verifiability

At court the employer is obliged to explain his decision to reduce the number of employees and how it will be organized, so that it is able to check the decision. If the decision of organisation moves closer to the decision to dismiss employees, all the more the employer is obliged to concrete that there is no more necessity of the relevant employees. The employer also has to substantiate how the decision of organisation effects the capabilities of the employees. He also has to give detailed information about how high the volume of change

because of the decision arose. It is especially essential if the job specification for works places change which were engaged by the same employees for many years. Does the employer just want to destroy the command structure, he is obliged to explain how the work will be done with fewer employees in the future. He has to prognose the development of the volume of work in the future. The qualified employees are not allowed to do dissimilar work which overlap voluntary service here and there.

Many of these redundancies fail at the labour court because of the free contractor decision. The labour court has to check, if the decision was made at the cancellation date and if the decision was really executed.

Does the employer engage new employees after a dismissal, it seems to be an indicate of an illegal replacement. A differently judgment will be made if the fresh engagements weren't conceivable.

The court also checks in a legal control, if the realisation of the contractor decision violates the law. It won't check if the decision is economical, but rather if the decision is unobjective, irrational or arbitrary. The lawful dismissal protection doesn't oblige the employer to make decisions of organisation only if they avoid shortfalls. It is adequate if he thinks the decision is not arbitrary. It is not the business of the court to dictate the employer how to organise the company. The organisation of the company is just the decision of the employer which is guaranteed by the Constitution. In order to the economic and social order, the employer bears the economic risk of the company.

According to § 1 IV KSchG it is possible to arrange the relation of the social criteria in a collective agreement (§ 95 BetrVG), works council agreement or in a principle of the Employee Representations Act (PersVG). Then the guidelines for the selection can only be checked for rough failures by the court. Does an effective agreement exist, the judicial control is just possible in a limited way.

The judicial control and its criteria doesn't change if external reasons like decline in sales, for instance, are the matter of the contractor decision. It is not to check if the organisation of the employer is the right one to adhere the company.

The violation control of the contractor decision doesn't want to advise him how to react or to tell him what to do. It just wants to avoid violating the possibility of dismissing. It's not abusive if the employer decides to give some of the company work to a freelancer or another party. It is abusing if the employer reduces the number of employees with the help of the contractor decision, although he doesn't rearrange the operational sequences.

The employer has to explain to the labour court the formation of the contractor decision as well as the practicability and the sustainability of the organisation measure with all essential information and data in detail. Many employers fail at this obligingness because of undervaluing these requirements:

> *example 1:* The general decision to reduce personnel costs, doesn't comply with the conditions.
> *example 2:* A decline in premium growth rate doesn't tell anything about the change of the amount of work and cannot justify an enforced redundancy.

example 3: Is the contractor decision connected to a change in the future, it is only possible to argue for the enforced redundancy if the operative circumstances are concrete enough.

<u>Question 4:</u> Social and economic interests

Question 4a)

Is one of the aims of the rules to consider all the parties' interests? For instance, is the employer obliged to examine alternatives to dismissal?

The employers may only dismiss if the economic requirements are urgent. The dismissal must be the back door ("last resort"). You have to check, if the dismissal is proportional. At first it must be generally used to execute the contractor decision. It must be required for it, too, so there mustn't be another way as a dismissal. At last, you have to contrast the dismissal with the company's impairment. In doing so, the employer has to accept minor changes of needed manpower. He has also to check if there is another solution to execute the employer's decision like short-time work or notification of a change. Only when all these solutions are not acceptable, the dismissal is allowed.

If there's a works council, it can check other solutions e.g. by expert advice. The employer has to pay for this advice. Sometimes the employer is grateful for this advice, too.

<u>Question 4b)</u>

Is there a duty of adaptation or reinstatement of the workers?

1. adaptation

Before a dismissal a re-education can be one solution (§ 1 II 3 KSchG). A re-education is only allowed at the same level. This says, that you can re-educate employees to e.g. work on another machine, but you can't re-educate an employee working on machine to be a supervisor. Additionally there must be a chance to employ someone after re-education. The costs of re-education must be economically reasonable for the employer.

2. ongoing work

The dismissal is also unlawful if there is a possibility for ongoing work. Three cases are taken as an example for this possibility in the KSchG (§ 1 II 2 no. 1b, 3)

- ongoing work at another job in the same company
- ongoing work at another job in another company of the group of companies
- ongoing work under new conditions of employment with the employee's consent.

Ongoing work within the whole corporate group is only possible if this is negotiated in a collective agreement.

Ongoing working in the same company is usually possible, due to the individual contract allows this. If the contract terms a big range for working, the employer has to look for

ongoing work in the whole range. When the ongoing work is beyond this range, you've got "new conditions" (like described by the third bullet).

One more possibility is ongoing work in another company of the group of companies like an affiliate. This is also possible, if there is no agreement in the individual contract.

At last also ongoing work under new conditions of employment is allowed. This new conditions can be e.g. payment or working hours. But the employee has to consent this new conditions. Otherwise it deals with a "dismissal with the option of altered conditions of employment".

3. reinstatement

If conditions change between the dismissal and the end of the notice period (e.g. receiving new orders for the company), the former dismissal is lawful, but the employee has a right of reinstatement. The reinstatement requires that the same workplace or at least a similar job is free. The employer doesn't have to create a new one.

The reason for this right of reinstatement is that the employer's decision is just a forecasting and you can't accuse the employer of this misjudgement.

Question 4c)

Is there a priority list for dismissals ("last-in first-out" or "social selection", for instance)?

1. social selection

In case of dismissals on economic grounds you have to do a social selection. If you scarcely respect social aspects by a social selection your dismissal is unlawful. The social selection is divided in three parts:

- At the beginning you have to look for comparable groups. The main criterion is the replaceability among each other. But this replaceability is reduced to only one level. It is not allowed to replace an employee with another employee from another (higher) level. Otherwise senior employees like supervisors could always be relocated to lower levels, so junior employees would be disadvantaged.

- In the second step you can except particular employees from this comparable group. This is lawful if this employees' ongoing work is necessary because of economic requirements. Reasons can be expert knowledge, special qualifications or keeping a balanced personnel structure (§ 1 III 2 KSchG). But this exception mustn't be used to abuse the social selection.

- At last you have to do a social selection from this comparable group. There are exclusively four criteria given by law:

  seniority
  age
  obligation to support

employee's severe disability

The age and the seniority as criteria for the selection were criticized in the past. The seniority is also depending on the employee's age and this could be an unlawful age discrimination violating European law. The European Court of Justice told that there is discrimination, of course. But it is justified, because looking for a new job is more reasonable for younger people as for older one.

But by respecting the employees' age there is the risk of ageing of the personnel structure by dismissing younger employees. To prevent this risk, the employer can first group by age and then select in this groups using the above-named social criteria. This selection is justified.

2. involving works council and trade union

Employers can be in an agreement with the works council respectively trade union about the social selection (cf. § 95 BetrVG). In this case the selection can be checked for rough failures by the court (§ 1 IV KSchG). Such an agreement offers security for the employer. But it is not allowed to violate the above-named criteria given by law.

In practice sometimes the employer and the trade union or works council negotiate such criteria in an agreement with a points matrix. The labour court accepts this matrix, because the agreement's parties know best the company's situation. But also with this matrix you have to respect the social criteria given by law.

Example:

obligation to support husband or wife	8 points
obligation to support children	4 points per child
Seniority	1 point per year (up to ten years)
seniority (for 11th year and more) (counted only up to the age of 55 years / max. 70 points)	2 points
age (max. 55 points)	1 point per year

3. legal action against incorrect social selection

The jurisdiction of the Federal Labour Court concerning the following situation changed: The employer dismissed several employees, but not a comparable employee who is socially less worth being protected. In the past every dismissed employee could complain this default (so-called „domino-theory“). Now the employee can only complain the incorrect social selection successfully if it was causal for his dismissal. When his termination also would have taken place at an exact social selection, the dismissal is also lawful when the social selection is incorrect (Federal Labour Court 9.11.2006 - 2 AZR 812/05).

Question 4d)

Is the employer allowed to hire new employees once the dismissals have taken place?

Generally it's a part of the entrepreneurial freedom to hire new employees at a later date. In practice company's sectors are closed with the view to hire cheap personnel later. These personnel usually isn't subjected to the employer's managerial authority, so they aren't employees in terms of the KSchG.

Dismissing an employee and hiring a new (e.g. younger or cheaper) one is an unlawful exchange of employees.

Question 4e)

What are the guarantees for the employees prior to dismissals taking place (money, right for training, guarantee for replacement, etc.) and how are they implemented: social plan, (collective) negotiations?

1. alternatives to dismissals

As already told, the dismissal must be the “ultima-ratio” respectively the “last resort”. There mustn't be any alternatives like re-education or re-training (cf. question 4b).

The KSchG regulates to test prior if you can keep on employing anybody at an alternative position. Usually this is justified due to the employer's managerial authority, so the works council participation isn't necessary. If the employee wants to complain about this alternative, the works council has to disagree (§ 1 II 2 no. 1b KSchG). The Federal Labour Court told, that this clause is only a repetition of the last-resort-principle. That's why you mustn't wait for the works council's disagree, but you always have to check the solution of ongoing work.

To agree a partial wage reduction (e.g. by short-time work) with employer and employee is one more solution to fight a dismissal of.

Another alternative is an agreement to terminate a contract. As opposed to a dismissal you can negotiate money compensation in this contract.

In some industries you'll find dismissals combined with a guarantee of re-engagement (e.g. in the building industry).

2. balance of interests and social plan

In addition to the protection by the KSchG there is a regulation in the Works Constitution Act (BetrVG). First of all, this regulation requires a works council in the company and more than 20 employees entitled to vote. Then the termination must be a big disadvantage for a large part of the employees (§ 111 s. 1 BetrVG).

In this case the employer and the works council can negotiate a balance of interests. This agreement often rules details like deadlines or sequences. But this agreement doesn't bind the employer and the works council can't enforce the agreement's execution. But if the employer

breaks this agreement, every employee can bring an action for compensation. The employer has to make up for this damage caused by breaking the agreement up to twelve months.

Furthermore you've got the option to negotiate a social plan. This plan shall be a balance or reduction of the employees' financial problems. This can also be done by re-education, re-training or other compensation. Unlike the balance of interests the social plan is a binding agreement, so the employees can enforce their claims.

If the parties don't agree on a balance of interests or a social plan, they can go to the Federal Employment Agency's chairman (§ 112 II 1 BetrVG). If this intermediation also fails, they will go to an arbitration committee board. The Federal Employment Agency can be a member of this board, too. The parties' task is to show solutions for solving the controversy. If the parties still disagree, the board will dictate a binding social plan (not a balance).

Question 5: Consequences of dismissal based on economic grounds and receipt to the Court:

Question 5a)

What are the consequences of a lawful dismissal?

1. **termination of the employment**

First of all the employment contract ends after the dismissal, more precisely it finishes at the end of the notice period. Since this moment the employee is no more obligated to work and he loses his right to receive the payment.

2. release for job-seeking

After a contractual notice of dismissal the employer has to allow the employee an adequate time for searching a job (§ 629 BGB). For this purpose the employer is obliged to exempt the employee from work and to continue the payment for that time.

3. holiday

Further the employer has to give the employee the possibility to take his remaining days of holiday. He can only pay the holiday instead of giving the free time if the holiday is not possible because of urgent economic reasons or because of a dismissal for cause.

4. return of the employment papers

The employer is obliged to give the employee his employment papers back. Even if he has requirements against the employee, he isn't allowed to retain the papers.

5. job reference

Besides that the employer has to give the employee a reference. Generally the job reference only has to include information about the character and the duration time of the employment (§ 109 I 2 GewO). But the employee can ask for additional information about the effort and

the behaviour at work (§ 109 I 3 GewO). This so-called “qualified reference” can't include information about the private behaviour of the employee. Further the employer has to formulate the job reference positive, so that the employees job-seeking is not complicated.

6. termination pay

Termination pays, for example arranged in collective agreements, purpose to compensate the loss of the job and the payment (Federal Labour Court 28.1.1986 – 3 AZR 312/84). They are not the standard. According to § 1 a KSchG the employee has the right to receive a termination pay at end of the notice period whether the employer terminated the employment because of urgent economic reasons according to § 1 II 1 KSchG. To get the compensation the employee isn't allowed to bring an action against the employer until the time period for bringing an action according to § 4 s. 1 KSchG runs out. Further this right requires that the declaration of dismissal includes the indication that he terminates the employment because of urgent economic reasons and that the employee has the right to achieve the termination pay after the time limit for bringing an action ends. Only then the employee has a legal right for compensation.

7. unemployment pay

After a lawful dismissal the employee has the right to achieve “unemployment pay I” in the amount of 60 % of the prior gross salary. This requires according to § 123 SGB III that the employee worked in the last two years before the unemployment at least 360 days. Only people, who worked in a liable for contributions employment, can get an unemployment pay. Unemployed public servants or freelancers don´t have the right to achieve unemployment pay. They only have the right to get “unemployment pay II”, which just saves the poverty level.

Question 5b)

When is the dismissal considered to be unlawful and what are the consequences?

1. unlawful dismissal

Dismissals are unlawful if they are socially unjustified (§ 1 KSchG). Socially unjustified is a dismissal when there are no reasons in the person, in the behaviour of the employee or when it isn't the consequence of urgent economic reasons. If one of several employees, who are all considered to be terminated, should be cancelled, the employer is obliged to make a social selection according to § 1 III 1 KSchG. Is the social selection incorrect, the dismissal of the false selected employee is independent of economic reasons void.
The termination is also void, if

- it is an illegal exchange notice,
- it is a dismissal because of the gender, race or something near it,
- it is a termination without a reason,
- the dismissal breaches a legal prohibition, § 134 BGB,
- violation of morality, § 138 BGB,
- disloyal dismissal, § 242 BGB,
- failure to comply with the written form, § 623 BGB,
- no receipt of the declaration to terminate the employment,

- missing requirements for procuration, §§ 164 ff. BGB,
- it is a dismissal because of a transfer of undertakings, § 613 a IV BGB,
- termination of a member of the works council or other persons according to § 15 KSchG or
- missing official hearing of the works council, § 102 BetrVG.

2. consequences

a) continuation of the employment

Does the court declare, that the dismissal is socially unjustified, it is void. The employment continues. Although the employee was not working after termination of the notice period, he will get his payment according to the rules of default in acceptance (§§ 615 s. 1, 293 ff. BGB).

b) liquidation of the labour contract through sentence of the court

It is possible that the court declares, that the employment didn't end because of the dismissal, but the continuation of the employment relationship is no more expected of the employee. Then the court cancels the contract at the request of the employee and convicts the employer to pay a compensation, § 9 I 1 KSchG.

c) allowance on the payment

When the employment continues after the courts sentence, the employee is obliged to charge to his payment, which the employer has to give him for the time after the illegal dismissal,

- what he earned with other work,
- what he could have earned when he didn't maliciously fail to work,
- what the social security, unemployment insurance, the security of the subsistence or the welfare in the meantime paid him (§ 11 KSchG).

d) new employment contract

It is possible that the court decided, the dismissal was illegal, so that the employment continues, but the employee has already a new job. Then he can declare towards the employer within a week after the courts sentence obtains legal force to deny the continuation of the employment (§ 12 KSchG).

e) extraordinary dismissal

The rules about the dismissal for cause aren't touched through the KSchG (§ 13 I 1 KSchG). At the request of the employee the court can cancel his contract and convict the employer to pay a compensation. This resumes the courts' declaration that the dismissal for cause was reasonless, but the continuation of the employment relationship is no more expected of the employee (§ 13 I 3 KSchG).

f) general right of ongoing work

Principally there is no general right of ongoing work after an unlawful dismissal. But the German Federal Labour Court allows two cases: There is a right of ongoing employment when the dismissal is evidently void or when the court of first instance declares the invalidity of the dismissal. But the right of ongoing employment expires if the court of second instance' decision disadvantages the employer.

g) right of ongoing work, § 102 V BetrVG

One more case is regulated by law. According to Art 102 V BetrVG there is a right of onging employment when the works council has contradicted a contractual notice of dismissal within the time limit correctly and the employee has brought an action against the dismissal. At the employee's request the employer has to keep him on at the same working conditions after termination of the notice period until the legally binding end of the legal dispute.

Question 5c)

Do the employees and the employee's representative body have receipt to a Court in case of termination at the initiative of the employer? Where does the burden of proof lie?

1. time period for bringing an action

Basically only the employee himself can bring an action at labour court, because it's a personal right. The employee can be represented by a lawyer or act himself. Members of a trade union can be represented by an agent of the trade union. Also employers can be represented by an agent of the employers' federation for example (cf. § 11 I 2 ArbGG). When the employee dies, his heirs can suit within the time limit or they can carry on his action.

The employee has to file a suit within three weeks after the receipt of the dismissal, § 4 KSchG. If the employee doesn't bring an action at court within the time limit, the dismissal is regarded as valid from the beginning and there is no possibility to do something against the termination, § 7 KSchG. As an exception the employer can apply for a later allowance of the action according to § 5 I KSchG. The allowance requires that the employer couldn't bring the action at court on time, although he acted with adequate care. For example, when he was several weeks in foreign countries. The employee has to apply for the later allowance and to justify it within two weeks after the reason, why he couldn't go to law within the time limit, ends. At the same time he has to bring the action at court. After six month and three weeks an action is finally impossible (cf. § 5 III 2 KSchG). The reason for the time limit is the legal security. Both – employer and employee – have to know the legal situation at a definite time. The 3 weeks-time limit applies for nearly every reason of invalidity – not only if the dismissal is socially unjustified. So the employer has to suit within three weeks if he complains that the employer didn't hear the works council before he dismissed the employee. Further the time limit applies for all employees – even when the KSchG is not applicable (personal and substantive scope). But there is no time limit for an action in the following situations: the employer complains that the dismissal didn't happen in the written form according to § 623 BGB or that he never received a dismissal. These exceptions are regulated in § 4 s. 1 KSchG: „three weeks after **receipt** of the **written** dismissal“.

2. burden of proof

First of all the employee has the burden of proof for the personal requirements of the employment protection. So he has to evince that the KSchG is applicable. This requires that he proves that he is in an uninterrupted employment contract for at least six months in the same business or company. The burden of producing evidence is simplified; it's enough when the employee only submits it.

The employer has to explain and prove that he made a valid employer's decision before he dismissed the employer, e.g. that he decided a change in the business, § 111 BetrVG. During the trial the employer has to explain how, for example, the reduction in production has an effect on the amount of work and how this causes the loss of a job (causation). This means that the employer has the burden of proof for the facts of his justification for the dismissal, § 1 II 4 KSchG. The employer also has to explain, in which amount the tasks, which the employer did so far, are dropped. He has to explain his prognosis concerning the amount of work.

Because of the graded burden of proof (§ 138 II ZPO) now the employee has to respond. He especially has to prove that the social selection was obviously faulty, § 1 III 3 KSchG. Further he is obliged to explain and to prove that the internal measure was obviously not objective, irrational or random. Then the employer has to react again.

Concerning the fact that there is no possibility of an ongoing work the burden of producing evidence and the burden of proof are graded. At first the employer has to say that there is no ongoing work possible for the employee. Then it's the employees turn to explain how an alternative employment is possible. It's enough to declare the type of work. On principle he doesn't have to specify a concrete workplace. Now the employer is obliged to respond in detail why this employment isn't possible anymore.

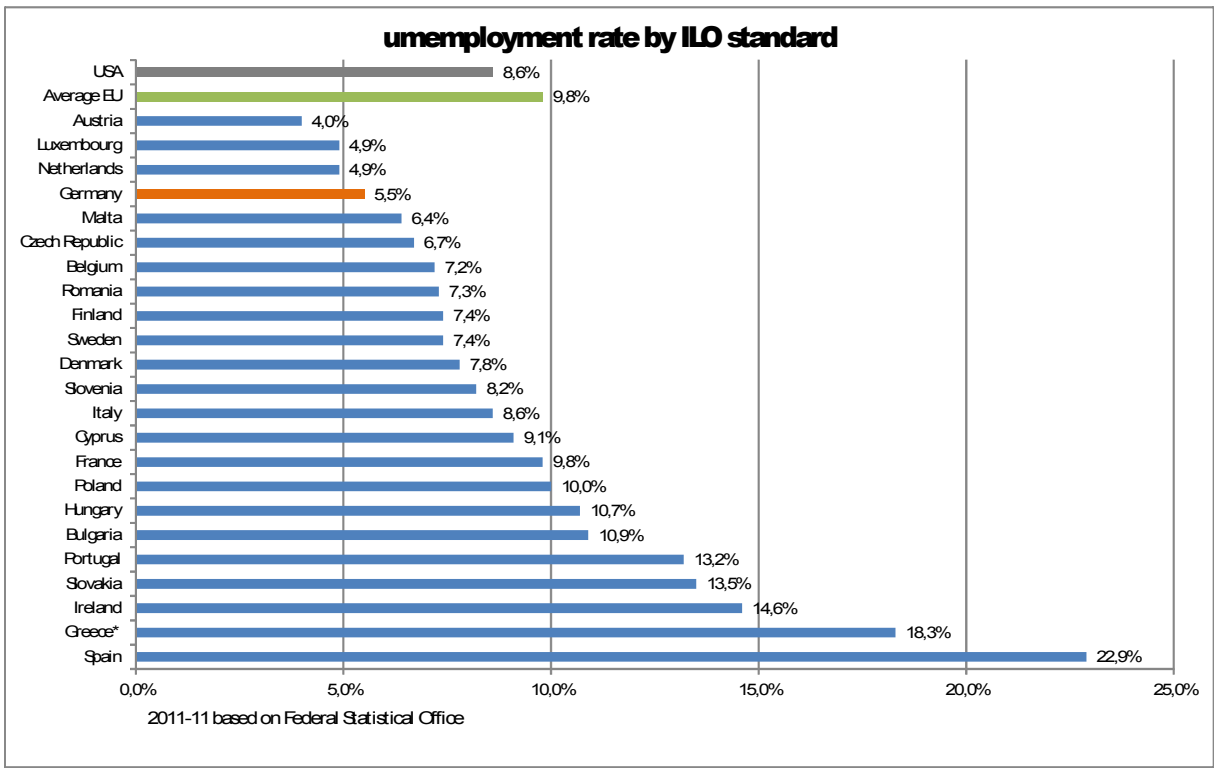
Question 6: Draft legislation

Are there any law changes projected or new draft legislation on dismissal based on economic grounds? If that is the case, which are the main objectives and new rules?

The economic crises, which started 2008, didn't cause a lot of relevant changes in the labour law, especially not in the employment protection legislation. The reason for this is probably that in Germany there's an extensive protection through the Employment Protection Law since 1951. In addition to this the consequences of the economic crises on the labour market were all in all very small.

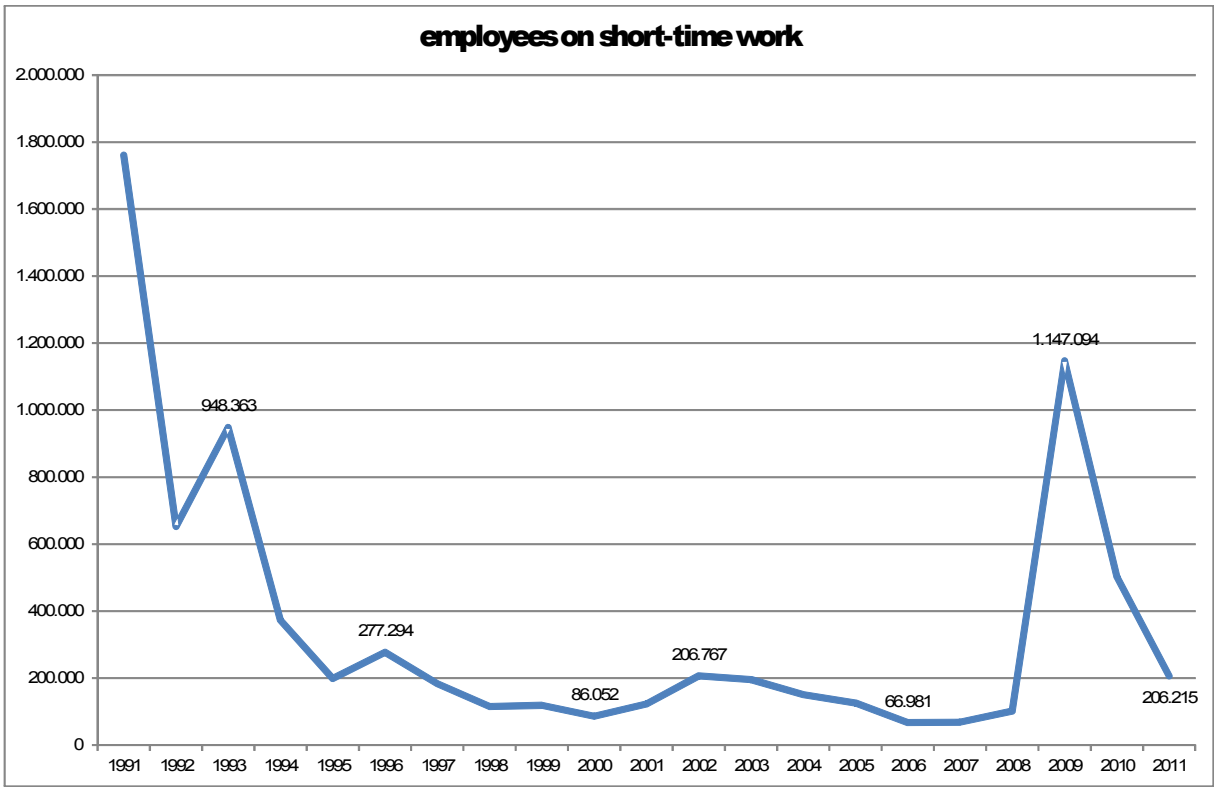
So the unemployment rate (by ILO standard) was 5,5%[2] at the end of 2011. In comparison to other European countries it's very small.

[2]http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Presse/abisz/ILO-Arbeitsmarktstatistik,templateId=renderPrint.psml.



During the hardest time of the economic crises many companies made a draft on the possibility of short-time work.

Short-time work means the temporary reduction of the regular working time in the company because of significant stoppage. The concerned employees work less or they work not at all if the company changed to short-time work. They can get money from the unemployment insurance, the so-called short-time work money, to balance the loss of payment at least partly. Especially in big concerns the working time was limited 2008/2009. So in this time averagely 1,14 million employees worked on short-time work. Because of the time limit and the different reactions to the situation the number of short-time workers was reduced on averagely 150.000 at the end of 2011.



Altogether Germany reached such a small unemployment rate at the end of 2011 as since 20 years.

A big reduction of the unemployment was since the year 2004. During the 15th legislative period under the Federal Chancellor Gerhard Schröder an elemental reform took place, the so-called „Agenda 2010“. This reform concluded different changes in the social law and the labour law and should improve the situation on the labour market.
Especially the KSchG was modified. The aim of the changes was to improve the situation of the employers, so that they are motivated to hire new employees.

- The social selection should become safer for the employers. In the future it was exactly ruled what they have to consider for the social selection: seniority, age, obligation to support and severe disability (§ 1 III 1 KSchG). Besides special qualified employees aren't to involve in the social selection (§ 1 III 2 KSchG).

- In case of a termination based on economic reasons the employee can get a compensation. This requires that he doesn't bring an action to the court. Further the declaration of dismissal has to include the indication that the employer terminates the employment because of urgent economic reasons. He also has to indicate that the employee has the right to achieve the termination pay after the period for bringing an action at court ends. The amount of compensation is regulated by law, too (½ monthly pay for each year of employment) (§ 1a KSchG).

- For the action against the employer concerning the dismissal there was already a time limit of three weeks before the reform. If the employee complained other aspects out of the KSchG, for example the missing official hearing of the works council, the time limit wasn't applicable. Since the reform the time period of three weeks applies independent of the reason – even when the KSchG isn't applicable (§ 4 KSchG).

- Small companies (5 or less than five employees) were so far excluded from the KSchG. The reform changed the limit, so that the KSchG is only applicable if the company has more than 10 employees. Part-time workers are included proportionately. For existing employment relationships, which already got the employment protection, it continues (§ 23 I KSchG).

- Limitations were only allowed with an objective reason or without a reason at the longest for two years. This changed for entrepreneurs: They can limit employment contracts without a reason in the first four years of their self-employment (§ 14 II 2a Part-Time Work and Fixed-Term Employment Contracts Law).

- When the employer and the works council arrange a balance of interests with a list of names, the compulsory redundancy is only restricted checkable (§ 1 V KSchG).