Collective Bargaining in Germany and its Interaction with State Legislation and Individual Employment Contracts

Matteo Fornasier

I. Introduction: Sources of German labour law

What makes employment law an intriguing – and, at times, daunting – subject for both practitioners and scholars is the plurality of legal sources. For a civil lawyer, the vast amount of legal instruments in the field of labour law is quite unusual. To date, the legislature in Germany has adopted neither a labour code nor even an employment contract act.[1] This is rather surprising, considering that England, a common law jurisdiction, has codified large parts of its individual employment law in the Employment Rights Act 1996 and most of its collective labour law in the Trade Union and Labour Relations (Consolidation) Act 1992. German labour law, on the other hand, consists of a patch-

[1] In the past there have been repeated calls for the legislature to codify employment contract law. Moreover, experts and scholars have elaborated drafts for such a codification; see, for a recent proposal, *Martin Henssler/Ulrich Preis*, Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG), Neue Zeitschrift für Arbeitsrecht (NZA) Beilage 2007 Heft 21, 6–32.

work of different laws and provisions, which essentially comprise a few scattered articles of the Constitution (*Grundgesetz – GG*),[2] a handful of provisions laid down in the chapter on service contracts of the Civil Code (*Bürgerliches Gesetzbuch – BGB*)[3] and a large number of separate statutes dealing with different aspects of individual as well as collective employment law. The *Erfurter Kommentar*,[4] probably the commentary on German labour law most widely used in practice, covers nearly 50 different statutory instruments.

Another important legal source besides statutory law is the case law of the labour tribunals and, in particular, the Federal Labour Court (*Bundesarbeitsgericht – BAG*). Unlike in other fields of German private law, the role of the courts is not confined to interpreting the law – it also involves, to a considerable degree, active law making. The reason is that the legislature has refrained from regulating certain politically sensitive issues such as the right to strike and other forms of industrial action, leaving it to the courts to develop rules on these issues.

In addition to the various legal sources at the level of domestic law, there is an increasing number of European and international instruments affecting employment relationships. The European legislature has enacted several directives designed to provide minimum standards of protection for employees throughout Europe.[5] Moreover, the EU economic freedoms as well as the fundamental rights guaranteed under EU primary law and under the European Convention on Human Rights (ECHR) have a significant impact on national labour law.[6]

The present paper focuses on a legal source outside the realm of state-law: collective bargaining. It sheds some light on the mechanisms of collective bargaining provided for by German law and how these mechanisms interact with other legal sources, namely state legislation, on the one hand, and the

---

[2] See e.g. Article 9 (freedom of association), Article 12 (occupational freedom), Article 20(1) *GG* (providing that the Federal Republic of Germany is a democratic and *social* federal state).

[3] See §§ 612a, 613a, 619a, 622, 623 *BGB*.

[4] *Rudi Müller-Gloge/Ulrich Preis/Ingrid Schmidt* (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed. 2015.

[5] See on EU legislation in the field of employment law and its impact on German law e.g. *Joachim Oppertshäuser*, Arbeitsrecht, in Martin Gebauer (ed.), Zivilrecht unter europäischem Einfluss, 2nd ed. 2010, 879–990; *Karl Riesenhuber*, Europäisches Arbeitsrecht, 2009; *Daniela Schrader*, Arbeitsrecht, in Katja Langenbucher (ed.), Europäisches Wirtschafts- und Privatrecht, 3rd ed. 2013, 410–446.

[6] See, on the impact of the Charter of Fundamental Rights of the European Union and the ECHR on employment law, *Matteo Fornasier*, Die Wirkung der europäischen Grundrechte im Arbeitsverhältnis, in Clemens Latzel/Christian Picker (eds.), Neue Arbeitswelt, 2014, 25–53; *Abbo Junker*, Europäische Grund- und Menschenrechte und das deutsche Arbeitsrecht (unter besonderer Berücksichtigung der kollektiven Koalitionsfreiheit), Zeitschrift für Arbeitsrecht (ZfA) 44 (2013), 91–136.

individual employment contract, on the other. The second part of the contribution highlights some current trends in the German system of collective bargaining and points out how the relationship between collective bargaining and state legislation is in the process of changing.

II. Foundations of the German system of collective bargaining

1. Legal sources regulating the terms of employment and the two mechanisms of collective bargaining

Under German law, the terms of employment are regulated by three different legal sources: (1) statutory law and other sources of state law such as constitutional law as well as judicial case law; (2) collective agreements; and (3) the individual contract of employment. In this regard, the situation is essentially the same as in most other legal systems. What is special about the German model, however, is that there are two different types of collective agreements: the *Tarifvertrag* and the *Betriebsvereinbarung*. In English legal terminology, the term 'collective agreement' is often used exclusively for the *Tarifvertrag*, whereas the *Betriebsvereinbarung* is generally referred to as 'company agreement'[7] or 'works agreement'.[8] Yet it is important to note that, contrary to what the English terminology may suggest, both the *Tarifvertrag* and the *Betriebsvereinbarung* rest on collective bargaining and, thus, represent collective agreements. Although the two types of agreements share certain elements, they also display a number of important differences that will be highlighted in the following sections.

a) Tarifvertrag

The *Tarifvertrag* rests on the traditional model of collective bargaining that is also common to other European legal systems. According to § 2(1) of the German Collective Bargaining Act (*Tarifvertragsgesetz – TVG*), the *Tarifvertrag* may be only concluded by trade unions, on the one hand, and employers' organisations or single employers on the other. The agreements are entered into either at sectoral level with an employers' organisation or at company level with the management of an individual firm. The territorial scope of sectoral-level collective agreements varies and is generally stipulated by the

[7] *Ulrich Runggaldier*, Company Agreement, in Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann (eds.), Max Planck Encyclopedia of European Private Law, 2012, 277–281.

[8] *Bernd Waas*, Employee Representation at the Enterprise in Germany, in Roger Blanpain (ed.), Systems of Employee Representation at the Enterprise, 2012, 71 (84).

collective bargaining parties. Thus, it may extend to the whole of Germany or be limited to certain regions.

The right to negotiate and conclude a *Tarifvertrag*, although not expressly mentioned by the German Constitution,[9] has been recognised by the German Constitutional Court as an integral part of the freedom of association guaranteed under Article 9 of the *Grundgesetz*.[10] Hence, the freedom of professional organisations to determine working conditions through the mechanism of the *Tarifvertrag* has the status of a constitutional right.

According to § 3(1) *TVG*, the provisions in a *Tarifvertrag* that regulate the terms and conditions of employment are only binding on employers and employees who are members of the signatory organisations. Where an employer concludes a *Tarifvertrag* on his own behalf (and not through a professional organisation), the agreement is binding on the individual employer and on the members of the signatory union. The rule of § 3(1) *TVG* marks an important difference from the model of '*erga omnes* effect' followed by other legal systems such as Austria or France. In the latter countries, if an employer is bound by a collective agreement, the agreement is applicable vis-à-vis all of his employees, whether or not they are members of the signatory union.[11] In practice, however, the differences between the German model and the systems following the model of '*erga omnes* effect' turn out to be smaller than one might, at first blush, think. The reason is that, in Germany, most employers bound by a collective agreement observe the terms of the agreement, on a voluntary basis, also vis-à-vis employees who are not union members.

Finally, § 4(1) *TVG* provides that the content of the *Tarifvertrag* regulating the terms of employment has a "direct and mandatory effect". In essence, this means that the provisions of the collective agreement are directly applicable to the individual employment relationship in a way similar to statutory provisions. In other words, the *Tarifvertrag* gives rise to rights and duties in the individual employment relationship *ipso iure*. Therefore, unlike for instance in England, the collective agreement does not need to be incorporated into the individual employment contract in order to become effective. Incorporation clauses are only used where one or both parties to the individual employment

[9] The situation is different with regard to fundamental rights at EU level. Here, the Charter of Fundamental Rights of the European Union expressly recognises, in its Article 28, a right of collective bargaining and action.

[10] See e.g. *Bundesverfassungsgericht* (BVerfG) 24.4.1996 – 1 BvR 712/86 – BVerfGE 94, 268 = NZA 1996, 1157.

[11] See § 12(1) of the Austrian *Arbeitsverfassungsgesetz*; for France, see *Martin Henssler*, Collective Bargaining Agreements, in Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann (eds.), Max Planck Encyclopedia of European Private Law, 2012, 233 (237). See, in general, for an overview of different models adopted in Europe *Sudabeh Kamanabrou* (ed.), Erga-omnes-Wirkung von Tarifverträgen, 2011, 121–385.

relationship are not members of the signatory organisations but nonetheless want to adhere to the collective agreement voluntarily.

b) Betriebsvereinbarung

The *Betriebsvereinbarung*, on the other hand, is a collective agreement at plant or company level. It is not covered by the Collective Bargaining Act but falls under the legal framework of employee participation and has its legal basis in § 77 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG)*. Unlike the *Tarifvertrag*, the *Betriebsvereinbarung* is not negotiated and signed by a trade union. The signatory on the employee side is the works council (*Betriebsrat*), which is a representative body at plant level elected by the employees regardless of whether or not they are union members. On the employer's side, the agreement is concluded only by the individual employer. By allowing for the conclusion of bilateral agreements with the employer, the German framework of employee representation confers more extensive participatory rights on works councils in comparison to other legal systems that frequently only grant a right to information and consultation to employee representatives.[12]

Where a company with multiple establishments has more than one works council at plant level, it is possible, on the basis of § 47 *BetrVG*, to install a joint works council at company level (*Gesamtbetriebsrat*) which deals with employment-related issues that concern the whole company or several establishments. Likewise, in a group of companies, § 54 *BetrVG* permits the establishment of a works council representing all workers of the group (*Konzernbetriebsrat*). Moreover, § 3 *BetrVG* provides that in companies, and in groups of companies with a more complex structure, the collective bargaining parties may set up, on the basis of a *Tarifvertrag*, joint works councils for particular business divisions. The works councils at company and group level as well as the works councils established on the basis of a *Tarifvertrag* may all enter into *Betriebsvereinbarungen* with the employer.

According to § 77(4) *BetrVG*, the *Betriebsvereinbarung* has a "direct and mandatory effect". Thus, to describe the legal effect of the *Betriebsvereinbarung*, the legislature has used the same terms as in § 4(1) *TVG* with regard to the *Tarifvertrag*.[13] However, unlike the *Tarifvertrag*, the *Betriebsvereinbarung* covers all workers employed in the respective plant, irrespective of whether or not they are unionised. Again, the reason is that the works council is, in principle, independent from trade unions[14] and is elected to represent the whole workforce.

---

[12] See, for a comparative overview, *Runggaldier* (fn. 7) 278 et seq.

[13] See supra II 1 a).

[14] It should be noted, however, that in practice trade unions and works councils interact in different ways. According to § 2(1) *BetrVG*, the employer and the works council are

Another important difference between the *Betriebsvereinbarung* and the *Tarifvertrag* lies in the fact that the right to conclude the former type of collective agreement is not protected as a specific constitutional right. As will be shown below, the lack of a constitutional guarantee has significant implications for the status of the *Betriebsvereinbarung* within the hierarchy of legal sources and, in particular, on the relationship between *Betriebsvereinbarung* and *Tarifvertrag*.

Finally, it should be noted that, under the framework of employee representation, the employer and the employee representatives are required to interact in a spirit of mutual trust and cooperation.[15] One important aspect of this duty is that, according to § 74(2) *BetrVG*, no collective measures may be taken. Therefore, the works council may not call a strike in order to force the management of the company to conclude or to comply with a particular *Betriebsvereinbarung*.

2. *Hierarchy of legal sources*

In legal systems based on multiple legal sources, the question always arises as to which instrument takes precedence in the event of a conflict.

In German employment law, there is a clear hierarchy between the different legal sources: statutory law is placed on top, the individual contract of employment at the bottom, while collective bargaining occupies an intermediary position. It follows from this hierarchical order that, as a general rule, employment rights provided for by statutory law cannot be excluded in collective agreements or in the individual employment contract. Likewise, the individual contract may not deviate from the terms of a collective agreement. However, the lower-ranking instrument trumps the higher-ranking one to the extent that it provides for employment terms that are more favourable to the employee.[16] In other words, the collective bargaining parties and the parties of the individual contract may depart from statutory law to the benefit of the employee; the same is true for the relationship between collective bargaining and individual contracting.

---

required to cooperate with the trade unions represented in the company for the good of all workers and the company. Pursuant to § 31 *BetrVG*, union representatives may take part, under certain conditions, in the meetings of the works council. Moreover, members of the works council are often members of a trade union. For the new forms of cooperation between works councils and trade unions resulting from the process of decentralisation of collective bargaining, see infra III 3 a.

[15] See § 2(1) *BetrVG*.

[16] This rule is laid down in § 4(3) *TVG* with regard to the relationship between collective agreements (*Tarifverträge*) and the individual contract of employment. According to the Federal Labour Court, the provision expresses a general principle that applies also in relation other sources of employment law, see *BAG (GS)* 16.9.1986 – GS 1/82 – NZA 1987, 168.

The relationship between the two mechanisms of collective bargaining – that is, *Tarifvertrag* and *Betriebsvereinbarung* – is more complex. As already mentioned, only collective bargaining through trade unions is guaranteed as a constitutional right, while the agreements concluded by works councils do not enjoy a similar degree of protection.[17] The reason for the privileged status of trade unions is that they are voluntary associations which workers are free to join or not to join. Hence, trade unions derive their mandate to negotiate the terms of employment directly from their members. The works council, by contrast, is a mechanism provided for by the legislature. Thus, the regulatory powers of the works council, though legitimised through elections, are conferred upon by the state and not by individual employees. Moreover, by virtue of their organisational structure and independence, trade unions are generally believed to have stronger bargaining power vis-à-vis the employer than works councils and thus to be in a better position to defend the interests of employees effectively. Against this background, the mechanisms of employee representation provided for in the *BetrVG* are devised so as not to intrude into the prerogative of the parties to the *Tarifvertrag* and to avoid any rivalry between trade unions and works councils.[18] In particular, a *Betriebsvereinbarung* may not interfere with the arrangements made by the social partners on the basis of a *Tarifvertrag*. According to § 77(3) *BetrVG*, a *Betriebsvereinbarung* may not deal with terms of employment that are regulated in a *Tarifvertrag* for the relevant industrial sector. As a result of this rule, a *Tarifvertrag* takes precedence over a *Betriebsvereinbarung* even in the event that the latter is more favourable to employees. Moreover, the works council and the employer are precluded from entering into a company agreement also where the conflicting *Tarifvertrag* is not binding on the employer (for instance, on the grounds that the latter is not a member of the professional organisation that concluded the *Tarifvertrag*). Finally, § 77(3) *BetrVG* provides that even in the absence of a conflicting *Tarifvertrag*, a company agreement is deemed void if it covers matters that, in the industry in question, are *usually* regulated by the social partners in a *Tarifvertrag*.

---

[17] Supra II 1 b).

[18] See in general on the relationship between the frameworks of (union-based) collective bargaining and employee representation *Thomas Dieterich*, Tarif- und Betriebsautonomie – ein Spannungsverhältnis, Festschrift für Reinhard Richardi, 2007, 117–125; *Rüdiger Krause*, Gewerkschaften und Betriebsräte zwischen Kooperation und Konfrontation, Recht der Arbeit (RdA) 2009, 129–142; *Eduard Picker*, Tarifautonomie – Betriebsautonomie – Privatautonomie, NZA 2002, 761 (769); *Waas* (fn. 8) 88–89.

III. Current trends and developments

Like elsewhere in the world, globalisation has had a considerable impact on the labour market in Germany, posing new challenges to businesses, workers, and regulators. Firms move or threaten to move their activities abroad where labour costs are lower. Another common scenario is that companies from low wage countries post workers to provide services in Germany, for example in the construction industry, underbidding local companies that employ domestic workers.

Against this background, the agenda of the social partners has changed. Trade unions, in particular, have realized that it is no longer possible to pursue a 'one-fits-all' strategy for the whole industry or for entire branches of the industry. Rather, they have to take into account the economic situation and particular needs of individual employers. In many cases, securing jobs instead of improving working conditions has become the top priority for trade unions. This more flexible approach, however, has alienated many workers from the unions. The degree of unionisation has decreased and, consequently, the position of trade unions has been further weakened.[19]

In the light of these developments, the legislature faces a difficult double task: on the one hand, it is called upon to accommodate the desire of the social partners for more flexibility. On the other hand, it has to solve the problems arising from the fact that social partners today play a less important role in determining the terms and conditions of employment.

In a nutshell, we can see that the process of globalisation and the strong exposure of firms to cross-border competition have left their imprint on the German system of collective bargaining.[20] On closer inspection, one can observe three major developments that are currently changing the foundations of collective labour law, namely (1) flexibilisation; (2) decentralisation; and (3) Europeanisation. The following sections will highlight each of these three developments in turn.

1. Flexibilisation

The process of flexibilisation concerns the relationship between statutory law and collective bargaining. Traditionally, the general goal of statutory law has

[19] In 1991, the trade unions that formed part of the *Deutscher Gewerkschaftsbund* (Confederation of German Trade Unions), the principal umbrella organisation of trade unions in Germany, had more than 11 million members. By 2013, the number of members had dropped to 6 million (see: <http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen>).

[20] See, on the impact of globalisation on the German system of collective bargaining from a comparative perspective, *Thorsten Schulten*, Das deutsche Tarifvertragssystem im europäischen Vergleich, in Reinhard Bispinck/Thorsten Schulten (eds.), Zukunft der Tarifautonomie – 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick, 2010, 193–204.

been to afford a non-excludable minimum standard of protection to employees. Collective bargaining, on the other hand, is generally meant to improve the position of employees and achieve employment terms more favourable than those required by statutory law. In recent times, however, a new regulatory pattern has emerged. In order to satisfy the need for more flexibility in employment relations, the legislature has implemented a number of statutory rules from which collective bargaining parties are allowed to depart also to the *detriment* of employees.

a) Advantages of flexibilisation: the case of working time regulation

At first sight, the new regulatory approach appears to be superior to the traditional model of strict mandatory regulation as it widens the scope of collective bargaining and enhances the autonomy of social partners. Considering that statutory employment rules have a broad scope of application and cover all kinds of professions and industrial branches, it seems reasonable, in principle, to allow for some flexibility by permitting social partners to modify those rules where appropriate. Generally, the collective bargaining parties are better informed than state regulators about the particular needs and interests in a given branch of industry. Moreover, in firms faced with economic difficulties, restricting certain statutory rights may be an effective transitional measure to avoid layoffs or the winding up of the entire company.

The provisions of the Working Time Act (*Arbeitszeitgesetz – ArbZG)* provide an example of statutory law from which collective bargaining parties can derogate to the detriment of employees. § 3 of that act, which is based on the European Working Time Directive 2003/88/EC,[21] stipulates that, as a general rule, the daily working hours may not exceed 8 hours. Under the same provision, the parties to the individual employment contract may agree to extend the working hours to a maximum of 10 hours per day provided that the average working time, calculated on the basis of a period of 6 months, does not exceed 8 hours per day. While these requirements may be appropriate and allow for sufficient flexibility in most branches of industry, they may prove too rigid for particular branches and professions. This may be the case, for instance, for emergency workers such as firemen or paramedics who, for the most part of their working shift, are merely in attendance without performing active work. To respond to the needs of such professions, § 7 *ArbZG* permits collective bargaining parties to derogate from the precepts of § 3 and to extend the working time, subject to certain conditions, beyond the limits imposed by that provision.

[21] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9.

The risks for employees arising from the derogable character of the provisions on maximum working hours seem to be rather limited especially for two reasons. First, § 7 *ArbZG* allows the extension of the daily working time only subject to strict requirements which are designed to protect employees against health hazards resulting from the prolonged working hours (thus, the average working time per week may not exceed 48 hours; furthermore, if the daily working time is extended to more than 12 hours, the employee must be guaranteed an uninterrupted rest period of at least 11 hours immediately subsequent to the completion of the working shift). The second argument rests on a more general consideration. At the collective level, employers and employees have usually equal bargaining power and, thus, negotiate the terms of employment on an equal footing. Against this background, one may assume that trade unions will be only willing to accept derogations from statutory provisions to the detriment of employees if the employer offers some form of compensation. Thus, there appears to be no risk of unfair bargains or, even worse, of exploitation of workers.

b) Risks of flexibilisation: the case of temporary agency work

The latter assumption, however, does not always prove correct in practice. Frequently, the system of collective bargaining fails to produce fair outcomes and, as a consequence, employees are deprived of their statutory protection rights without obtaining proper compensation in return.[22] The rules on temporary agency work provide an illustrative example. Under the German Temporary Agency Work Act (*Arbeitnehmerüberlassungsgesetz – AÜG*), temporary agency workers assigned to a particular undertaking – the 'user undertaking' – are entitled to the same pay as the regular staff employed in that undertaking. However, according to the *AÜG*, the temporary-work agency may exclude the right to equal pay on the basis of a collective agreement and stipulate that the temporary agency worker is paid a wage lower than that earned by the employees working in the user undertaking. The *AÜG* makes clear that a collective agreement departing from the principle of equal pay is also applicable vis-à-vis temporary agency workers who are not members of the signatory union provided that the collective agreement is incorporated into the individual contract of employment. From a practical point of view, the latter aspect plays a crucial role, as the level of unionisation is very low among temporary agency workers. What happens in practice is that temporary-work agencies conclude collective agreements with some minor trade unions that represent

[22] See, for a critique of the possibility of derogating from statutory law to the detriment of employees on the basis of collective agreements, *Rudolf Buschmann*, Abbau des gesetzlichen Arbeitnehmerschutzes durch kollektives Arbeitsrecht?, in Festschrift für Reinhard Richardi, 2007, 93–116; *Monika Schlachter/Melanie Klauk*, Tarifdispositivität – eine zeitgemäße Regelung?, Arbeit und Recht (AuR) 2010, 354–362.

just a small percentage of temporary agency workers, fixing wages in derogation from the principle of equal pay. Those collective agreements are incorporated, on the basis of standard contractual terms, also into individual employment contracts with temporary agency workers who are not members of the signatory unions. Thus, virtually all temporary agency workers are exempted from the principle of equal pay[23] and earn significantly less in comparison to non-temporary workers.[24] As a result, what the legislature intended to be the general rule – the principle of equal pay – almost never applies. This marks an important difference from the rules on maximum working hours mentioned above. In the latter context, the collective bargaining parties generally derogate from statutory provisions only in exceptional cases to meet specific requirements of a particular industry.

What the example of temporary agency work illustrates is that the possibility of derogating from statutory law on the basis of collective agreements poses problems especially in industries where the level of unionisation is low. Here, trade unions generally lack the power to defend the interests of employees effectively and, hence, are more likely to accept collective agreements containing terms which are rather unfavourable to employees. The harm inflicted on employees would be limited if the collective agreements at issue were only binding, in accordance with the principle laid down in § 4(1) *TVG*,[25] on the few members of the signatory union. However, since the legislature generally permits the employer to incorporate the content of such agreements also into employment contracts with non-union members, the agreements become *de facto* universally applicable. As a result, a collective agreement formed by a trade union that represents only a small minority of workers ends up covering virtually the whole workforce in a particular industry – it may be doubted whether this is a legitimate outcome.[26]

Moreover, unlike in the case of collective agreements designed to afford to employees terms of employment more favourable than those required by law, employers have a genuine interest in negotiating with 'weak' unions as this

---

[23] According to *Raimund Waltermann*, Fehlentwicklung in der Leiharbeit, NZA 2010, 482 (485), approximately 95% of all temporary agency workers are exempted from the principle of equal pay.

[24] According to a study published in 2010, temporary workers earn around 20% less than their non-temporary counterparts, see *Elke Jahn*, Reassessing the Pay Gap for Temps in Germany, Journal of Economics and Statistics 230 (2010), 208–233 (the study takes into account that temporary agency workers are sometimes less skilled and less experienced than their counterparts in the user undertaking).

[25] See supra II 1 a).

[26] Also critical with regard to the possibility of incorporating collective agreements excluding statutory rights into employment contracts with non-union members, *Reinhard Richardi*, Verbandsmitgliedschaft und Tarifgeltung als Grundprinzip der Tarifautonomie, NZA 2013, 408 (410); *Waltermann* NZA 2010, 482 (485).

enables them to reduce the standard of protection for employees without having to make substantial concessions to employees. In fact, empowering social partners to exclude certain statutory rights favours the emergence of 'yellow' unions which act primarily in the interest of employers rather than of employees.[27] Thus, instead of enhancing flexibility to meet the demands of particular industrial branches to the mutual benefit of employers and employees, the new regulatory approach poses the risk of lowering, to the sole benefit of employers, the overall standard of protection afforded to employees.

In response to this threat, the courts have started to scrutinize closely whether the employee associations that sign collective agreements excluding statutory rights are sufficiently strong and independent to qualify as trade unions entitled to engage in collective bargaining. In particular, the Federal Labour Court has refined its case law according to which employee organisations concluding collective agreements on a regular basis are presumed to be sufficiently powerful to possess collective bargaining capacity.[28] According to the Court, the presumption does not hold where the collective agreements signed by the association in question derogate from statutory law to the detriment of employees.[29]

2. *Decentralisation*

The second major trend that can be observed in the German system of collective labour law is decentralisation. This aspect concerns the relationship between the different levels of collective bargaining. Generally speaking, we can see that collective bargaining is shifting more and more from sectoral level to company level.

a) Main aspects of decentralisation

The process of decentralisation is reflected in different developments. First, the number of collective agreements (*Tarifverträge*) concluded at company level has increased substantially over the last two decades. In 1990, roughly 2,500 firms in Germany were bound by a *Tarifvertrag* at company level.[30] By the year 2000, the number had risen to more than 6,000. In 2013, more than 10,000 companies were signatories of company-level collective agreements.

---

[27] See also *Raimund Waltermann*, Gesetzliche und tarifvertragliche Gestaltung im Niedriglohnsektor, NZA 2013, 1041 (1045): "Das Regelungsmuster des tarifdispositiven Gesetzesrechts […] begünstigt die Bildung schwacher Gewerkschaften, die zur Unterbietung gesetzliche Schutzes bereit sind".

[28] *BAG* 28.3.2006 – 1 ABR 58/04 – NZA 2006, 1112 Rn. 80 et seq.

[29] *BAG* 5.10.2010 – 1 ABR 88/09 – NZA 2011, 300 Rn. 41 et seq. See, on this development, *Richard Giesen*, Verschärfte Anforderungen an die Tariffähigkeit, in Richard Giesen/Abbo Junker/Volker Rieble (eds.), Neue Tarifrechtspolitik?, 2014, 139–168.

[30] See the figures in *Hans-Böckler-Stiftung* (ed.), WSI Tarifarchiv 2014 (2014).

These figures reflect the fact that collective agreements at sectoral level are increasingly facing resistance from small and medium-sized companies in particular. In fact, many firms drop out of their respective professional organisations altogether or remain members but without authorising the professional organisation to conclude collective agreements on their behalf.[31] The effect is the same either way: those firms are not bound by the sectoral level collective agreements signed by their associations.

Another factor contributing to the decentralisation of the collective bargaining system is the use of 'opening clauses' in collective agreements at sectoral level.[32] Such clauses allow for adjustments of the respective *Tarifvertrag* at plant or company level through a *Betriebsvereinbarung*. This type of arrangement aims to strike a balance between the interests of trade unions (which usually strive for uniform working conditions in a particular branch of industry), and the interests of employers (who seek to achieve more flexible agreements tailored to their individual needs). The combination of collective bargaining at sectoral and company level has given rise to new forms of cooperation between trade unions and works councils, thus blurring the traditionally clear-cut divide between the two mechanisms of collective bargaining, namely the *Tarifvertrag* and the *Betriebsvereinbarung*.[33] Some economists have credited this decentralised model of collective bargaining with Germany's remarkable economic recovery during the last decade.[34] According to these analysts, the flexibility granted by the social partners at industry level to the individual firms and their works councils constituted the main cause for Germany's gains in competitiveness and for the significant reduction of unemployment. The far-reaching reforms of the social security system (the 'Hartz reforms') carried out by the Schröder Government in the early 2000s, on the other hand, are said to have played only a minor role.

---

[31] As has been mentioned (supra II 1 a)), collective agreements concluded by an employers' organisation are binding on all members of the organisation in accordance with § 4(1) *TVG*. However, in order to remain attractive for firms, many professional associations have introduced a new form of membership (generally referred to as *OT-Mitgliedschaft*), by which firms continue to be part of the organisation (and therefore pay their contributions) but are no longer bound by the sectoral-level collective agreements signed by the organisation. This practice has been approved, albeit subject to certain restrictions, by the Federal Labour Court, see *BAG* 18.7.2006 – 1 ABR 36/05 = NZA 2006, 1225.

[32] *Thomas Dieterich*, Zukunft der Tarifautonomie, in Bispinck/Schulten (fn. 20), 179 (181 et seq.); *Manfred Walser*, Stabilisierung des Verbandstarifvertrags: Widersprüchliche Impulse der Rechtsordnung?, WSI Mitteilungen 2013, 491 (494).

[33] See, on this aspect, *Dieterich* (fn. 18) 119 et seq.

[34] See e.g. *Christian Dustmann/Bernd Fitzenberger/Uta Schönberg/Alexandra Spitz–Oener*, From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy, Journal of Economic Perspectives 28 (2014), Issue 1, 167–88.

b) Impact on system of collective bargaining

The trend towards decentralisation in collective bargaining has a significant impact on industrial relations in general. First, it affects the way firms compete over employment conditions. Collective agreements at sectoral level are described as having effects similar to those produced by a cartel (*Kartellwirkung*).[35] Essentially, such agreements neutralise the impact of working conditions on competition since all firms bound by the collective agreement have to comply with the same terms of employment. Thus, they are precluded from employing workers on less favourable – and hence less expensive – terms with a view to gaining a competitive advantage in the relevant industry. Firms may only compete to offer working conditions more favourable than those provided for in the collective agreement – for instance, to attract high-skilled or particularly talented workers. By withdrawing from collective bargaining at sectoral level and negotiating the terms of employment at company level (where the bargaining power of unions is often weaker), firms are generally in a position to impose working conditions on employees that are less favourable than those provided for in the agreements at sectoral level. The resulting reduction of labour costs confers a competitive advantage on the firms in question. This, in turn, puts pressure on competitors to withdraw from collective bargaining at sectoral level as well. Thus, in sum, the process of decentralisation has the effect of harming companies that offer more favourable employment terms to their employees.

A second major effect of decentralisation relates to the coverage of collective bargaining. Over the last few decades, the coverage of collective bargaining has been decreasing constantly. In 1998, more than 75% of all employment relations in Western Germany were covered by a collective agreement (63% in Eastern Germany).[36] Since then, the percentage has dropped to no more than 60% in 2013 (48% in Eastern Germany). The process of decentralisation has contributed to this trend. As has been mentioned, the number of firms represented by employers' organisations and taking part in collective bargaining at sectoral level has sunk considerably over recent years. While some of the firms that opt out of sectoral level collective bargaining conclude collective agreements at company level, many other firms conclude no collective agreements at all. The reason is that, in practice, trade unions often lack the power to force a particular firm to conclude company-level collective agreements. This is especially true for smaller companies in which trade unions

[35] See, on the *Kartellwirkung* of collective agreements, *Franz Gamillscheg*, Kollektives Arbeitsrecht, vol. I, 1997, 498 et seq.

[36] *Hans-Böckler-Stiftung* (ed.), WSI Tarifarchiv 2014 (2014). The numbers comprise also employment relations with non-union members where the collective agreement applies on the basis of a voluntary incorporation clause.

are not represented.[37] In such circumstances, it is difficult for a trade union to organise collective action to exert pressure on the firm's management. Thus, in sum, it can be stated that the process of decentralisation has reduced the coverage not just of collective agreements at sectoral level, but also the coverage of collective bargaining in general, as it is more difficult for unions to represent and organise workers at company level.

c) Legislative responses

The general aim of collective bargaining is to overcome the inequality of bargaining power between the parties to the individual contract of employment and to enable employers and employees to negotiate the terms of employment autonomously and on an equal footing. In the absence of a collective agreement, there is a risk that the employer may abuse his superior bargaining power and dictate employment terms that are unfair to the employee.

In view of the declining coverage of collective bargaining, the legislature has recently taken action to afford better protection to employees who are not covered by a collective agreement. In July 2014, Parliament passed the Collective Bargaining Strengthening Act (*Tarifautonomiestärkungsgesetz*).[38] The act provides for two measures to guarantee better working conditions in the absence of a collective agreement. First, it introduces a statutory minimum wage, which is mandatory for all professions and industrial branches. As of 2015, employees are entitled to a minimum rate of pay of 8.50 Euro per working hour. The Government, acting in concert with an advisory committee composed of representatives of the social partners, may adjust the rate in order to keep it in line with inflation or other economic developments. The collective bargaining parties may not derogate from the statutory minimum wage to the detriment of employees.[39]

---

[37] According to *Stephan Seiwerth*, Stärkung der Tarifautonomie – Anregungen aus Europa?, Europäische Zeitschrift für Arbeitsrecht (EuZA) 2014, 450 (451), approximately 79% of the companies employing up to 40 workers are not bound by a collective agreement. Among the companies employing 1000 workers or more only 12% are not covered by a collective agreement.

[38] Gesetz zur Stärkung der Tarifautonomie vom 11. August 2014, BGBl. 2014 I 1348.

[39] Critical, in this regard, are *Thomas Lobinger*, Stärkung oder Verstaatlichung der Tarifautonomie, Juristenzeitung (JZ) 2014, 810 (817) and *Christian Picker*, Niedriglohn und Mindestlohn, Recht der Arbeit (RdA) 2014, 25 (34), both taking the view that collective bargaining parties should be entitled to fix wages below the statutory minimum wage; see, for the opposite view, *Waltermann* NZA 2013, 1041 (1047), who points out the negative experiences made with collective agreements excluding statutory rights in the context of temporary agency work (see, on this matter, supra III 2 b)). However, it should be noted that, according to § 24 of the Minimum Wage Act (*Mindestlohngesetz – MiLoG*), existing collective agreements which have been declared universally applicable and which provide

The second regulatory measure adopted by the legislature in the *Tarifautonomiestärkungsgesetz* relates to the power of authorities to declare collective agreements universally applicable. The effect of such a declaration of universal application is that the collective agreement becomes binding on employers and employees falling within the personal and territorial scope of the agreement irrespective of whether or not they are members of the signatory organisations. In the new act, the power of the authorities to declare collective agreements universally applicable has been extended considerably.[40]

However, as commentators have rightly pointed out, the Collective Bargaining Strengthening Act might eventually have the effect of *weakening* collective bargaining.[41] The reason is that by guaranteeing a statutory minimum wage and by extending the rights and benefits provided in collective agreements also to non-union members, the legislature actually reduces the incentives for employees to join unions. Employees may in fact question the benefit of union membership if union members and non-union members enjoy the same level of protection. As a result, unions may face even more difficulty in organising employees.

d) Decentralisation of collective bargaining within companies

Finally, it should be mentioned that the trend towards decentralisation occurs also *within* companies. Up to the year 2010, the Federal Labour Court took the position that, for each category of employees in a given establishment, an employer could not be bound by more than one collective agreement.[42] It followed that different trade unions were precluded from competing with each other at company level to represent the same groups of employees. This case law had the effect of weakening the position of small trade unions that represent, exclusively, specific professional groups such as pilots, train con-

---

a minimum rate of pay below 8.50 Euro per working hour remain valid until 31 December 2017.

[40] Previously § 5 *TVG* stipulated that a collective agreement could be declared universally applicable on grounds of public interest provided that the employers bound by the agreement employed 50% or more of the workers falling under the personal scope the agreement. Under the new § 5 *TVG*, the 50% threshold has been abandoned. In addition, it is now easier to declare collective agreements universally applicable also under the framework of the Posting of Workers Act (*Arbeitnehmer-Entsendegesetz – AEntG*). Whereas § 4 *AEntG*, in its previous version, contained an exhaustive list of industries in which collective agreements could be declared universally applicable, the new § 4 *AEntG* now extends to any branch of industry.

[41] *Lobinger* JZ 2014, 810 (813); *Seiwerth* EuZA 2014, 450 (455); *Raimund Waltermann*, Stärkung der Tarifautonomie – Welche Wege könnte man gehen?, NZA 2014, 874 (877) („Anreize zur Stärkung der Tarifautonomie an sich enthält das Gesetz zur Stärkung der Tarifautonomie nicht").

[42] BAG 20.3.1991 – 4 AZR 455/90 – NZA 1991, 736.

ductors, doctors or other highly skilled workers. For those unions, it was generally difficult to conclude separate collective agreements for their members since the employment terms for the groups of employees they represented were also regulated in the collective agreements negotiated by the large trade unions that represent a variety of professions. According to the case law of the Federal Labour Court, the latter agreements would usually take precedence in the event of a conflict.

The situation changed in 2010, when the Federal Labour Court departed from its previous case law by ruling that a company can be bound by several collective agreements concluded with different trade unions that all represent the same groups of employees.[43] This new case law has unleashed fierce competition among trade unions. In particular, trade unions which represent employees that hold key positions in their relevant companies such as pilots, train conductors or security personnel at airports are now given the chance to conclude separate collective agreements that provide especially favourable terms for their members. Given the considerable impact of collective measures conducted by those groups of employees, the companies concerned are often forced to give in to the demands raised by the respective unions. The new case law of the Federal Labour Court faces strong criticism from employers and the traditional trade unions that represent different categories of workers. Moreover, there is a general fear that, as a result of the emergence of competition among trade unions, more collective disputes might arise, affecting not just the interests of the employers involved in the negotiations but the economy as a whole.

Against this background, the German legislature amended the *TVG* through the *Tarifeinheitsgesetz* in 2015. The new § 4a *TVG* essentially provides that among the trade unions represented in a given plant, only the one with the most members in the plant concerned may conclude a collective agreement with the management of the firm. One major goal of the new provision is to eliminate competition between unions at plant level. However, according to many commentators, the Government's proposal is incompatible with freedom of association and hence violates the constitution.[44] Soon after the new law entered into force, a number of trade unions filed a constitutional complaint against § 4a *TVG*, which at the moment is still pending.

---

[43] BAG 7.7.2010 – 4 AZR 549/08 – NZA 2010, 1068.

[44] See e.g. *Wolfgang Ewer*, Aushöhlung von Grundrechten der Berufs- und Spartengewerkschaften – das Tarifeinheitsgesetz, Neue Juristische Wochenschrift (NJW) 2015, 2230–2235; *Reinhard Richardi*, Tarifeinheit als Placebo für ein Arbeitskampfverbot, NZA 2014, 1233 (1235 et seq.); *Bernd Rüthers*, Ein Gesetz gegen die Verfassung? – Die „Tarifeinheit" im Streit der Verbandsinteressen, Zeitschrift für Rechtspolitik (ZRP) 2015, 2 (4 et seq.).

3. *Europeanisation*

Finally, also the process of Europeanisation has a significant impact on the interaction between collective bargaining and state legislation. In fact, the harmonisation of employment law in the EU Member States through numerous directives has increased the importance of legislation as a legal source and has reduced the scope for collective bargaining. In those areas where EU law and the corresponding implementation acts adopted by national legislatures regulate certain terms of employment there remains usually little room for social partners to negotiate working conditions autonomously.[45]

However, one may argue that, for measures in the field of social policy (which also includes employment law), the Treaty on the Functioning of the European Union (TFEU) requires the involvement of the social partners in the legislative procedure. According to Art 154(2) TFEU, the Commission is required, before submitting proposals in the social policy field, to consult management and labour on the possible direction of action. Moreover, once a directive has been adopted, Art 153(3) TFEU stipulates that Member States may entrust management and labour, at their joint request, with the implementation of the directive. Finally, Art 155 TFEU provides for a social dialogue between management and labour at EU level, which "may lead to contractual relations, including agreements." Pursuant to Art 155(2) TFEU, such agreements may be implemented either in accordance with the procedures and practices specific to management and labour in the Member States or by a Council decision on a proposal from the Commission. In the latter case, the agreement is generally implemented on the basis of a directive that is then transposed by the Member States into domestic law.

Yet none of the aforementioned procedures confers a degree of regulatory autonomy on social partners comparable to that enjoyed by the collective bargaining parties at the national level. Under Art 154 TFEU, social partners are only consulted and do not actively participate in the legislative procedure. The involvement of social partners in the context of Art 153(3) is confined to the implementation of legislative acts: here, again, employers and employees lack the right to decide on the content of the measure in question. The social dialogue envisaged by Art 155 TFEU, on the other hand, empowers social partners at the European level to regulate employment-related issues autonomously. However, one major weakness of this mechanism lies in the fact that agreements between management and labour have no direct impact on individual relationships of employment. In particular, unlike the *Tarifvertrag* and the *Betriebsvereinbarung*,[46] such agreements are not capable of giving rise to

[45] It should be noted, however, that some directives contain 'opening clauses', permitting social partners to derogate from the content of the directive. This is true, for instance, for the Working Time Directive 2003/88 (fn. 21); see Article 18 of the Directive.

[46] See supra II 1 a) and b).

rights and duties for the parties to the individual contract of employment.[47] Thus, the social dialogue under Art 155 TFEU is a much less powerful regulatory tool in comparison to the instruments of collective bargaining at the national level.

These considerations show that what is still missing in the European internal market is an effective framework for cross-border collective bargaining. If such a framework were implemented, it would indeed be possible to harmonise the terms of employment in different Member States through collective bargaining.[48] In the absence of transnational mechanisms of collective labour law, the only way to harmonise the working conditions in Europe is through legislation.

IV. Summary

The German model of collective bargaining is currently undergoing significant change. On close inspection, one can discern three major developments:

Flexibilisation. While historically the primary aim of collective bargaining has been to afford to employees terms of employment above the minimum standard guaranteed by statutory law, the legislature has now empowered collective bargaining parties, in a variety of contexts, to derogate from statutory law also to the detriment of employees. This regulatory approach enables social partners to adjust the terms of employment to the needs of particular professions and industrial branches. However, as the example of the Temporary Agency Work Act has illustrated, the possibility of excluding workers' statutory rights on the basis of collective agreements poses problems in industries where the level of unionisation is low and unions therefore lack the power to defend the interests of employees effectively.

Decentralisation. Collective bargaining is shifting more and more from sectoral level to company level. Collective agreements at sectoral level frequently contain 'opening clauses' allowing for adjustments at company or plant

---

[47] See *Eberhard Eichenhofer*, in Rudolf Streinz, EUV/AEUV, Article 155 AEUV para. 2. See, on the other hand, *Reingard Zimmer*, Entwicklungsperspektiven transnationaler Kollektivverhandlungen in Europa – Schaffung eines rechtlichen Rahmens für transnationale Kollektivverträge in der Europäischen Union, EuZA 2013, 247 (256), who takes the view that Article 155 TFEU may provide a legal basis for collective agreements at EU level.

[48] In its Social Agenda 2005–2010, the European Commission raised the idea of creating an "optional European framework for transnational collective bargaining". The idea is also supported by numerous academics, see most prominently the 'Ales Report' (*Edoardo Ales/Samuel Engblom/Teun Jaspers et al.*, Transnational collective bargaining. Past, present and future. Final Report financed by and prepared for the use of the European Commission, 2006, 33–41). To date, however, the Commission has refrained from taking legislative action.

level through bilateral agreements between the works council and the management of the respective firm. At the same time, a growing number of companies withdraw from collective bargaining at sectoral level. While some of these firms (especially the larger ones) conclude collective agreements at company level, others refrain from signing collective agreements altogether. As a result, the coverage of collective bargaining diminishes. In response to this development, the legislature has adopted measures to improve the working conditions of employees who are not covered by a collective agreement.

Europeanisation. Finally, the harmonisation of employment law through EU legislation has the effect of increasing the importance of statutory law as a legal source and reducing the scope for collective bargaining. The reason is that EU law still lacks effective mechanisms for cross-border collective bargaining. As a consequence, harmonisation of working conditions in Europe can be only achieved by means of legislation.