

# Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives in Germany

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## A. Introduction: The Two-Tier System of German Labour Law

As opposed to many other countries, Germany has a two-tier-system of workers representation. The interests of workers are represented on the one hand by trade unions and on the other hand by works councils. Trade unions represent the interests of their members mainly by stipulating collective bargaining agreements. Works councils are established on the shop-floor level on the basis of elections. They represent all workers who belong to a certain establishment. Though works councils can enter into collective agreements which essentially have the same effect as collective bargaining agreements (concluded by trade unions and individual employers or employers' associations), the legislator has ensured that works councils cannot easily enter the area of bargaining about wages or other working conditions (D. II. 1.).

Representation of workers' interests by works councils and trade unions must be separated from each other for a couple of reasons: The mandate of a trade union is established by a contract, for it is dependant on an employee joining a trade union. The mandate of the works council is based on the law which makes provision for the election of works councils. The mandate of a trade union essentially comes to an end as soon as an employee leaves the association. The works council on the other hand has a mandate as long as there is an employment relationship between the employee and the employer. The main instrument of representing workers' interests by trade unions is the conclusion of collective bargaining agreements, with the freedom to strike being the major tool of bringing about such agreements. The major instrument of representing workers' interests by works councils is the conclusion of works agreements. Where no agreement can be reached, compulsory arbitration may be available. According to section 74 subsection 2 sentence 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), works councils are expressly prevented from entering into strike action<sup>1</sup>.

Admittedly, in spite of the institutional separation between trade unions and works councils there are in practice close links and interrelationships. These are partly reflected by legal provisions: According to section 2 subsection 3 BetrVG, the duties of the trade unions and the employers' associations, in particular the safeguarding of interests of its members, are not affected by the works constitution. And according to section 74 subsection 3 BetrVG, employees who undertake duties pursuant to the Act may not be restricted with regard to their trade union activities in the establishment. Finally, according to section 75 subsection 1 BetrVG, the employer and the works council ensure, that all persons working in the establishment are treated in accordance with the principles of justice and fairness, in particular

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<sup>1</sup> See for an overview *Zwanziger*, *Collective Labor Law in a Changing Environment: Aspects of the German Experience*, *Comparative Labor Law & Policy Journal* 2006, p. 303.

that no persons are discriminated against due to union activities.

Apart from that, trade unions in practice exert an immense influence on the composition of the works councils. Around two thirds of works council members belong to a trade union. However, neither must a works council member necessarily belong to a trade union, nor is it imperative that a trade union nominates him. According to section 14 subsection 3 BetrVG not only the trade unions represented in the establishment, but also all employees eligible to vote are allowed to make nominations for the works councils' election.

In practice works council members feel often "safer" when belonging to a trade union and having trade union backing. This, however, is not to say that the relationship between works councils and trade unions is completely without tensions. Works councils are often nearer to what is going on at the individual establishment. As a consequence, they are often prepared to consent to agreements with employers – so-called shop floor-related pacts for labour (*Betriebliche Bündnisse für Arbeit*) – that deviate from provisions laid down in collective bargaining agreement. As will be seen later, however, the room for such pacts for labour is restricted (D. III.).

## **B. The Role of Trade Unions in Collective Bargaining: Some Factual Observations**

Before having a closer look at the German law on collective bargaining some empirical observations should be made. The most important factual development in this regard might be that in the last decades trade unions in Germany as well as in many other countries have experienced severe membership losses and reductions in union density. German unification offered trade unions a one-time chance to expand what indeed they did at the time. But very soon the trend reversed with the DGB unions losing almost 800,000 members in 1992 and another 500,000 members in 1993. Membership in eastern Germany has continued to fall since. By the end of 1998, the last year for which disaggregate union statistics are available, the DGB unions had only 1.8 million members in eastern Germany, a loss of 56 per cent since 1991. Membership problems were aggravated by the fact that in the same period almost 1.2 million members turned their back on the DGB unions in western Germany. The percentage of union members among German employees in the year 2000 were 25.4% in the West (1992: 28.7%) and 18.5% in the East (1992: 39.7%). Among blue collar workers the relevant percentages are 31.6% (1992: 37.6%) and 22.2% (1992: 37.8%). For white collar workers the percentages are 18.5% (1992: 20.2%) and 15.1% (1992: 40.7%) according to a recent study <sup>2</sup>.

The overwhelming majority of trade unions in Germany are organized on an industry basis (so-called principle of industrial organization, *Industrieverbandsprinzip*). This means that their function is to represent the interests not of particular occupations but of the employees working in a given industry or branch of activity. By way of illustration, the metal workers' union (*IG Metall*), which is the largest individual union, is not a union of manual metalworkers alone but an industrial union whose membership also includes all other employees working in the metal industry.

This principle of industrial organization is enshrined in the standing rules of the German Federation of Trade Unions (*Deutscher Gewerkschaftsbund*, DGB). It has the advantage of concentrating the system of bargaining to a very considerable extent, since it counteracts excessive overlap in the bargaining jurisdiction of different unions and conflicts between collective bargaining agreements which may result from this.

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<sup>2</sup> See *Schnabel/Wagner*, Trade Union Membership in Eastern and Western Germany: Convergence or Divergence?, IZA Discussion Paper No. 707, 2003; see for more recent information also *Addison/Schnabel/Wagner*, The (Parlous) State of German Unions, IZA Discussion Paper No. 2000, 2006.

## **C. The Law of Collective Bargaining Agreements and its Rigidities**

Wages and other elements for working conditions are to a wide extent fixed by collective bargaining agreements in Germany. The legal basis of collective bargaining is – on a constitutional level – Art. 9 of the Basic Law (*Grundgesetz*, GG), the German constitution, and – on the statutory level – by the Collective Bargaining Agreements Act (*Tarifvertragsgesetz*, TVG).

### **I. Freedom of association (Art 9 section 3 GG)**

Art. 9 section 3 GG contains the fundamental right of freedom of association.

#### **1. The essential content of the freedom of association**

According to this provision, the “right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation.” When applied literally, the wording of Art. 9 section 3 GG guarantees the fundamental right to every individual who intends to form an association within this sense. The Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) has however transcended the wording by ruling that the association itself can also be subject to the fundamental right. For this reason, the right is commonly referred to as a twofold fundamental right (*Doppelgrundrecht*), which comprises both the individual and the collective freedom of association. The bearer of the former right is the individual employer and the individual employee. The bearer of the latter right is the so-called coalition (employers’ association or trade union) itself<sup>3</sup>.

The wording of Art. 9 section 3 GG is too narrow in yet another aspect. The protection offered by the constitution by far exceeds the sole freedom of forming an association. It extends to a range of further activities, such as the freedom of joining an association as well as the freedom of engagement in an association. With regard to employers’ associations and trade unions the most eminent part of the constitutional guarantee is the right to engage in collective bargaining and to conclude collective bargaining agreements without interference by the state. This is called the autonomy to bargain collectively (*Tarifautonomie*)<sup>4</sup>.

Another important feature of the freedom of association merits some observations. The freedom of association is not exclusively directed against the State, when preventing it, for example, from restricting an employee to engage in trade union activities. A third person is also an eligible addressee of the freedom of association. This (direct) effect of the fundamental right on third parties follows from Art. 9 section 3 sentence GG, which explicitly states that agreements which “restrict or seek to impair” the fundamental right of freedom of association “shall be void” and “measures directed to this end” shall be unlawful.

#### **2. Coalitions as bearers of the right of freedom of association**

##### **a) Coalitions within the meaning of Art. 9 section 3 GG**

The freedom of association as guaranteed by Art. 9 section 1 GG is, according to the predominant view, nothing more than a special manifestation of the general freedom of organisation, as protected by Art. 9 section 1 GG. Therefore, a coalition must first of all

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<sup>3</sup> See, for instance, Federal Constitutional Court (*Bundesverfassungsgericht*) of 26.6.1991, Decisions of the Federal Constitutional Court 84, 212.

<sup>4</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 18.11.1954, Decisions of the Federal Constitutional Court 4, 96.

qualify as an organisation under Art. 9 section 1 GG. A legal definition of how to classify an organisation in this sense is provided for by section 2 subsection 1 of the Law of Organisations (*Vereinsgesetz*, VereinsG). It may not be selfexplanatory why a definition of a constitutional term is contained within a lower ranking legal provision. It is, however, generally accepted that in creating section 2 subsection 1 VereinsG the legislator has given the constitutional term of 'organisation' a concretisation in a constitutionally permissible manner.

According to section 2 subsection 1 VereinsG, existence of a legally recognised organisation, therefore also of an association, is conditional on three requirements: (1) The association must be entered into deliberately and be governed by the rules of civil law; (2) the association must be intended on a permanent basis, (3) it must be a association of corporate nature, with the prospect of forming a joint will.

The condition of deliberateness follows directly from the fact that an organisation in the sense of Art. 9 section 1 GG is formed by way of individuals exercising their fundamental freedom of forming such organisation. This outrules public-law organisations from the list of possible associations, for the reason that they can be subject to a statutory mandatory membership (as for example in the case of Chambers of Industry and Trade). The suggestion that associations shall be undisturbed from State influences is expressed in the condition that organisations need to be governed by civil law. Such independence would not be safeguarded in the case of public-law associations, because they depend on recognition by way of a public law act and, besides, are subject to state control up to a certain extent.

Secondly, the organisation must be intended for a permanent period of time. This requirement must be understood against the background of the associations' far reaching entitlement to industrial action in order to pursue their aims. For the reason that industrial action as *per definitionem* inflicts damage on the opposite site (and possibly as well on uninvolved third parties), there is a need to ensure access to certain liability assets for the damaged party. This access would not be secured if entirely unstable associations would qualify as associations. Apart from that, it must be noted that according to German constitutional interpretation, the right to enter into industrial action is strictly limited to associations and not extended to any other mergers of employers or employees. Above all, so-called 'wild strikes' are prohibited. This ban would be of hypothetical nature, if a spontaneous merger of employees would qualify as an association purely on merit of the fact that it constitutes a merger with a (temporarily) shared objective.

Final requirement is the existence of a corporative nature of the organisation, and the prospect of forming a joint will. Corporative nature is to be understood in the sense that the organisation is independent of the joining or leaving of members and furthermore employs an integrated company structure, i.e. a structure which allows for bodies capable of representing the members. This requirement, too, arises from the coalition's need to prove a certain element of stability.

#### **b) Further requirements**

Coalitions must be associations within the meaning of Art. 9 section 1 GG. But they must meet certain additional requirements originating from the specific purpose of associations operating in the area of industrial relations.

##### **aa) Independence from the opposing side**

In order to qualify as a coalition within the meaning of Art. 9 section 3 GG, an association must possess the so-called independence from the opposing side (*Gegnerunabhängigkeit*)<sup>5</sup>.

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<sup>5</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 18.11.1954, Decisions of the Federal Constitutional Court 4, 96.

The rationale of this requirement is that only independent trade unions can be true representatives of workers' interests. In history so-called "yellow trade unions" existed that were mere puppets of employers. Today employers are far from being able to exert such influence. As far as workers co-determination on board level<sup>6</sup> and the collaboration of trade unions and employers within the framework of institutions jointly established by them is concerned, it is acknowledged, that this does not lead to trade unions being dependant on the employers either.

#### **bb) Independence from third parties**

Finally, in order to qualify as a coalition within the meaning of Art. 9 section 3 GG, an association must be neutral in the sense that it must not be dependent from either the state or the church or political parties.

### **II. The capacity of coalitions to bargain collectively according to section 1 subsection 1 TVG**

A coalition which intends to conclude collective bargaining agreements must fulfil a couple of further requirements. The rationale for the legislator to limit access to the conclusion of collective bargaining agreements lies in the vast regulatory powers granted to the bargaining parties. Not only are they entitled to enter into agreements which are directly binding for those parties subject to a collective bargaining agreement. Collective bargaining agreements also play a strong influential role, for the reason that employment contracts between parties, which are not subject to collective bargaining agreements, are commonly modelled along the lines of the relevant collective bargaining agreement. Against this background it becomes apparent why collective bargaining capacity is conditional on compliance with a number of pre-conditions of an objective nature, the meeting of which safeguards that the freedom to conclude collective bargaining agreements is transferred into "safe hands".

#### **1. Democratic organisation**

Some assume that existence of a democratic form of organisation is the first pre-condition for an organisation in order to qualify as an association<sup>7</sup>. At the very least, collective bargaining capacity should, however, be inextricably linked to a democratic form of organisation. It would be unacceptable if associations are granted permission to exercise legislative power over their members, without being sufficiently democratically legitimated. A democratic legitimacy in this sense requires that the members are given the opportunity to (indirectly) change the process of intra-association opinion building by way of elections which are held in accordance with democratic principles. The requirement of a sufficient form of democratic organisation has another, quasi horizontal dimension. This follows from the necessity that members must be generally entitled to equal co-decision and voting rights. If members of an employers' association are granted voting rights of varying power, that may, however, be justified by their different economical weight. A form of organisation can in any way only be classified as sufficiently democratic if it ensures satisfactory protection for minorities. Therefore, the elements of a democratic form of organisation are: (1) democratic election procedures, (2) generally equal co-decision and voting rights, and (3) protection of minorities.

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<sup>6</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 1.3.1979, *Neue Juristische Wochenschrift* (NJW) 1979, 593.

<sup>7</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*), of 15.11.1963, 9.7.1968 and 25.11.1986, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 14, 25 and 36.

When the courts apply a relatively generous approach with respect to this requirement – which is in fact the case – this needs to be attributed to the courts’ reluctance to interfere with the (constitutionally protected) autonomy of associations. Arguably the most important problem in this context concerns the question whether members of a trade union are entitled to play a role in the initiation of industrial action by way of the so called ‘*Urabstimmung*’ (ballot), or if the trade unions’ autonomy with regard to their statutes includes the right to abolish the necessity for such ballot.

## 2. Social power and effectiveness

Regardless of this, it is generally accepted that trade unions are required to adopt a certain extent of capability to perform and to enforce their objectives. This is commonly referred to as the trade unions’ social power<sup>8</sup>. This means, again, that trade unions must be capable of exerting pressure and re-pressure on the opposite side in order to encourage it to conclude a collective bargaining agreement. Whether a certain union is deemed to possess such social power can only be determined on a case to case basis. Possible factors can be, e.g., the number of members, the existence of a satisfactorily permanent structure of organisation, and sufficient financial funds.

## 3. Willingness to enter into collective bargaining

According to jurisdiction, the collective bargaining capacity furthermore depends on collective bargaining willingness (*Tarifwilligkeit*)<sup>9</sup>. This means that the statutes of an association claiming collective bargaining capacity need to demonstrate the will to enter into such agreements. Section 2 subsection 3 TVG explicitly demands this willingness to conclude collective bargaining agreements in the case of the so called ‘*Spitzenorganisationen*’ (head organisations). The requirement is equally necessary for all other associations. The rationale behind the requirement of collective bargaining willingness is, again, to be found in considerations concerning democratic legitimation. The members of an association should be enabled to foresee in the moment of joining, whether or not they will be subject to the association’s legislation regarding collective bargaining agreements.

## 4. Recognition of the collective bargaining system

Finally, according to the Federal Employment Court (*Bundesarbeitsgericht*, BAG), an association claiming collective bargaining capacity is under a duty to recognize the existing collective bargaining system<sup>10</sup>. Parts of the academic literature request moreover the acknowledgement of the State’s right of settlement and industrial action. Some voices even require the association seeking eligibility to acknowledge the current legal and economical order, or, at the very least, the constitutional order. It is in fact a greatly convincing approach to tie the right of participation in the collective bargaining process to the condition that the ‘rules of the game’ are being recognized. Some academics have, however, also voiced criticisms. Those views can be credited in so far as that it would be inappropriate to overstrain this requirement.

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<sup>8</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 16.11.1982, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 32.

<sup>9</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 10.9.1985, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 34.

<sup>10</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 10.9.1985 and 25.11.1986, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 34 and 36.

### **III. Collective bargaining capacity of the single employer**

According to section 2 subsection 1 TVG collective bargaining capacity is transferred not only to trade unions and employers' unions but also to the single employer. This provision does however not aim at improving the status of the employer as such. The underlying principle is rather to be found in the endeavour to ensure availability of potential collective bargaining partners, should no association exist on the side of the employer. In other words: Employers must not be relieved from their responsibility to conclude collective bargaining agreements by way of refusal to form employers' associations. This also means that employers can not simply opt out from their collective bargaining capacity. On the basis that collective bargaining capacity has not been transferred to employers in their own interest, they are consequently not entitled to eschew from this duty.

The collective bargaining capacity of the single employer does continue to exist even if the employer joins an association. The chance to 'get hold' of an employer by way of concluding an association agreement (between the employers' association and the trade union), does not fully eliminate any interest a trade union may have in the conclusion of a company agreement (between the employer and the trade union). The continuation of the employers collective bargaining capability does however raise difficult questions in its consequences, should a company agreement between trade union and employer be concluded (C. V.).

### **IV. No easy way out: The binding nature of collective bargaining agreements**

According to section 4 subsection 1 sentence 1 TVG the legal provisions contained in a collective bargaining agreement that regulate the content, commencement or termination of employment relationships shall apply directly and with mandatory effect as between both parties bound by the agreement (so-called *Tarifgebundenheit*) who fall within the area of application of the agreement. Arrangements which depart from provisions in collective bargaining agreements are, according to section 4 subsection 3 sentence 1 TVG, permissible only if they are authorized by the collective bargaining agreement or the departure is to the employees' advantage.

The question who is bound to a collective bargaining agreement is answered in section 3 subsection 1 TVG. According to this provision, members of the parties to a collective bargaining agreement and the employer who is himself a party thereto is bound by the agreement. The latter alternative refers to an employer who himself concludes a collective bargaining agreement (so-called *Haus- or Firmentarifvertrag*). If an employer concludes such agreement he, being party to the agreement, is (self-evidently) bound to it. Company agreements in this sense, however, are relatively rare. The most collective bargaining agreements by far are concluded in Germany on the level of a branch and therefore exceed the boundaries of the individual company. With regard to these so-called association-level collective bargaining agreements (*Verbandstarifverträge*) section 3 subsection 1 TVG makes it clear that employers and employees are bound to them if, but only if, they belong to the employers' association or trade union, respectively that has concluded the relevant agreement. It must be noted that an employer and an employee in their employment contract may make provision for a reference to an existing (or future) collective bargaining agreement. In this case the provisions of the collective bargaining agreement are clearly of relevance for the content of the employment relationship. The effect of these provisions on the contract, however, is one of incorporation into the individual agreement and the basis of them having this effect is the contract and not the collective bargaining agreement as such. It can therefore not be said that in this case the employer and the employee are bound to the collective bargaining agreement in the sense that they are subjected to the power of employers'

associations and trade unions to regulate in the area of industrial relations by concluding collective bargaining agreements. Consequently, in the case of a mere contractual reference to collective bargaining agreements, the provisions of such agreements lack mandatory effect.

In principle, employers and employees are bound to a collective bargaining agreement only if they belong to the relevant association. There are, however, two major exceptions to this rule. The first relates to provisions of collective bargaining agreements that do not aim at a single employment relationship but at the establishment as such. According to section 3 subsection 2 TVG, the legal provisions set forth in a collective bargaining agreement that regulate matters relating to the operation of the establishment and legal aspects of the works' constitution are applicable to all establishments where the employers are bound by the collective bargaining agreement. With regard to certain provisions the effectiveness of collective bargaining agreements, in other words, is not dependant on the employee being a member of the relevant trade union.

The other exception relates to a so-called declaration of generally binding. According to section 5 subsection 1 TVG, on request by a party to a collective bargaining agreement, the Federal Minister for Labor Law and Social Affairs, acting in consultation with a committee consisting of representatives of the central organizations of the employers and representatives of the central organizations of the employees can declare the agreement generally binding if (1) the employers bound by the agreement employ not less than fifty percent of the employees coming within its area of application and (2) the declaration that the agreement is generally binding appears to be necessary for the public interest. According to section 4 subsection 4 TVG, if a collective bargaining agreement is declared generally binding, the legal provisions it contains also apply, within its area of application, to employers and employees not previously bound by the agreement.

Such extension of collective bargaining agreements are questionable from the viewpoint of constitutional law for the very reason that there are strong indications that the right to be left alone by collective bargaining agreements forms an indispensable part of the "negative" freedom of association. However, the Federal Constitutional Court in a ruling on section 5 TVG argued that this does not render the provision unconstitutional for a generally binding declaration requires among other things that such a declaration appears necessary in the public interest<sup>11</sup>.

An employer (or employee) who is, within the sense of section 3 subsection 1 TVG, bound to a collective bargaining agreement, remains to be bound to the agreement even if he leaves the coalition. This is a consequence of section 3 subsection 3 TVG. According to this provision a collective bargaining agreement continues to be binding until it expires or is terminated. Even if the agreement expires or is terminated, it has effects on employers who have left their organisation. According to section 4 subsection 5 TVG, upon the expiration (or termination) of a collective bargaining agreement, the legal provisions set forth therein continue to apply until they are replaced by another arrangement. This so-called *Nachwirkung* comes into play even if the individual employer does not belong to the employers' association any more<sup>12</sup>. One thing, however, has to be made clear. The combined effect of §§ 3 subsection 3, 5 subsection 5 TVG is only to hold the employer to existing collective bargaining agreements which upon their expiration only lose their mandatory effect. The effect of these provisions is *not* to subject the employer to the autonomy to bargain collectively even if he has

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<sup>11</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 14.6.1983, Decisions of the Federal Constitutional Court 64, 208.

<sup>12</sup> See Federal Labour Court (*Bundesarbeitsgericht*) of 14.2.1991, *Arbeitsrechtliche Praxis* (AP) TVG § 3, No. 10; Federal Labour Court (*Bundesarbeitsgericht*) of 17.5.2000, *Arbeitsrechtliche Praxis* (AP) TVG § 3 Verbandsaustritt, No. 8; Federal Labour Court (*Bundesarbeitsgericht*) of 7.11.2001, *Arbeitsrechtliche Praxis* (AP) TVG § 3 Verbandsaustritt, No. 11.



left his organisation. In other words: An employer who has left his employers' association is bound to existing collective bargaining agreements, but he is not bound to future agreements.

Apart from remaining bound to collective bargaining agreements by operation of sections 3 subsection 3, 4 subsection 5 TVG, it is not easy for employers to "escape" from such agreements by transferring or outsourcing certain activities either. According to section 613a subsection 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), in case of a business transfer, rights and obligations governed by rules contained in a collective bargaining agreement become part of the employment relationship between the transferee and the employee and cannot be modified to the employees' disadvantage within one year of the date of the transfer. The content of collective agreements, in other words, is transformed into individual contractual rights, unless the new employer is already bound by one collective agreement or another. This transformation is designed to ensure that employees enjoy the rights which derive from a collective bargaining agreement at least for a certain period of time. In order to achieve this, the provisions of collective agreements are transformed into provisions of the individual contract of employment by way of a legal fiction and at the same time declared mandatory for a period of one year, after which period the transferee is free to make use of the normal tools for varying the employment contract, the so-called dismissal with the option of altered conditions of employment (*Änderungskündigung*) being the most important of them. Only if the new employer is bound by another collective bargaining agreement, whether by having concluded such agreement individually or being subjected to an agreement by his employers' association, the provisions of the collective bargaining agreement may become part of the relationship.

#### **V. Decentralisation of collective bargaining: Company-level collective agreements as an alternative to association-level agreements**

As pointed out earlier, the power to conclude collective bargaining agreements is not restricted to employers' associations (and trade unions). The individual employer can as well enter into such agreements. According to section 2 subsection 1 TVG, possible parties to a collective bargaining agreement are not only trade unions and associations of employers but also individual employers.

Even if an individual employer is a member of an employers' association, he is technically entitled to conclude such an agreement. The question of whether or not employers are allowed to do so under the terms of their membership of an association and its internal rules has no bearing on the validity of the agreement.

From an employers' perspective the conclusion of separate company agreements is particularly desirable in cases where the general conditions agreed collectively with an association are not appropriate for them. The trade unions, on the other hand are normally reluctant to enter into such agreements because they fear that the spreading of company-level agreements could put holes in their association-level agreements and, as a consequence, undermine their overall bargaining power. This is why most collective bargaining agreements by far are concluded on an association-level in Germany.

If, however, an employer has found a trade union willing to enter into a company-level collective bargaining agreement, the provisions of such agreement take precedence over an association-level agreement the employer may, as a member to the employers' association, be equally bound to. This is a consequence of the rules which have been developed by the Federal Labour Court relating to so-called concurring collective bargaining agreements (*Tarifkonkurrenz*). One of the most important examples of such concurrence is indeed the existence of both an association-level and a company-level agreement, which an employer may have concluded while being a member of an employers' association (or after having left such association only recently). With regard to concurring collective bargaining agreements

the Federal Labour Court applies two legal principles. According to the so-called principle of unity (*Grundsatz der Tarifeinheit*), if there is a real conflict between the concurring collective agreements, this conflict must be resolved on the ground that an individual employment relationship cannot be governed by more than one collective bargaining agreement. According to the so-called principle of speciality (*Spezialitätsgrundsatz*), the conflict then has to be decided on the basis of which of the two collective agreements contains provisions closest to the situation of a given establishment. As a consequence of the application of the principle of speciality a company-level agreement takes precedence over an association-level agreement<sup>13</sup>.

It must again be noted, however, that decentralized bargaining by concluding company-level collective bargaining agreements is possible only, if the employer finds a trade union that is willing to enter into such agreement. Most activities and branches in Germany, however, are covered by a single trade union, the majority of unions forming part of the German Federation of Trade Unions (see B.: *Industrieverbandsprinzip*). This is why employers normally are dependant on the same trade unions as possible partners to a company-level agreement who have also participated in the conclusion of the association-level agreement.

In recent years, however, a couple of smaller trade unions have established themselves partly as the result of certain discontent among employees relating to the bargaining policy of the big trade unions. In some cases these little trade unions have offered themselves as partners of company-level agreements with the provisions of these agreements pushing aside the provisions of the concurring association-wide agreement. But this is not an easy route out of existing obligations arising from association-level agreements because these small trade unions may not qualify as coalitions being able to conclude collective bargaining agreements. As pointed out earlier an association requires a certain social power and effectiveness in order to qualify as a trade union being able to enter into collective bargaining agreements (C. II. 2.). By referring to the requirement of social power the courts in some decisions have ruled that one or the other association of employees lacks the power to conclude collective agreements<sup>14</sup>.

Some of these rulings, it must be said, have met with resistance. Though it is justified to ensure that the freedom to conclude collective bargaining agreements is transferred into “safe hands” only, there is the downside that the system of collective bargaining is at peril of monopolisation. If conclusion of collective bargaining agreements is, for example, exclusive to certain trade unions, this, in turn, excludes other trade unions from the process and thus deprives them of the opportunity to commend themselves to potential members by negotiating specific collective bargaining regulations. But be it as it may, it must be noted in any event that the conclusion of entering into company-level agreements offers only a limited chance of decentralization

## **D. The Role of Works Councils: Which Room for Decentralized Bargaining?**

### **I. Works council and the employer as partners to so-called works agreements**

According to section 1 subsection 1 sentence 1 BetrVG, works councils are elected in establishments (on the shopfloor level) which regularly have at least five permanent employees eligible to vote, of whom three are eligible for election. Though election of works councils is mandatory, enforcement depends on employees or trade unions demanding an election. This is the reason why the majority of establishment, especially smaller establishments, are without a works council. In big companies, however, mostly works

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<sup>13</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 24.9.1975, *Arbeitsrechtliche Praxis* (AP) TVG § 4 Tarifkonkurrenz, No. 11; Federal Labour Court (*Bundesarbeitsgericht*) of 4.4.2001, *Arbeitsrechtliche Praxis* (AP) TVG § 4 Tarifkonkurrenz, No. 26.

<sup>14</sup> See *Löwisch/Rieble*, *Tarifvertragsgesetz*, 2<sup>nd</sup> ed., 2004, § 2, 35 ff. with further references.

councils exist. Therefore it is safe to say that roughly 50% of the total workforce in Germany is represented by works councils.

The works councils in Germany have vast powers ranging from information and consultation rights to co-determination rights. The latter form the strongest form of works council participation. Pursuant to section 87 subsection 1 BetrVG, the works council participates in the determination of a variety of social matters (including, for instance, demands to work overtime), to the extent that they are not already regulated by statute or collective bargaining agreements. Under section 87 BetrVG, the works council has a genuine co-determination right. This means that the employer cannot implement certain planned measures without the consent of the works council. In the event that the parties cannot reach an agreement, either may appeal to the conciliation board, which would then rule on the matter.

One of the instruments of co-determination by works councils is the conclusion of a so-called works agreement (*Betriebsvereinbarung*). In this regard section 77 subsection 1 sentence 1 BetrVG states: "Agreements between the works council and the employer, including those based on a decision of the conciliation board, shall be implemented by the employer unless otherwise agreed in an individual case". A works agreement is a special type of contract. It is concluded between the employer and the works council and contains general rules with regard to the working conditions of individual employees. According to section 77 subsection 4 sentence 1 BetrVG, works agreements have immediate and binding effect on the individual employment relationships in the same way as statutory law or collective bargaining agreements. All types of works councils (works councils, joint works councils, group works councils) are enabled to enter into these agreements. Depending on the type of the participating works council these agreements differ as to whether they apply to an individual undertaking, all undertakings of a company or even all undertakings of a group of companies.

As a rule works agreements contain clauses binding both on the employer and the works council. Furthermore, they contain normative clauses regulating the works conditions for the employees who belong to the undertaking. It is with regard to these clauses, that works agreements have immediate and binding effect. Accordingly, the content of the works agreement regulates the individual employee's employment relationship in the same way as a mandatory statutory law or collective bargaining agreements. The works agreement need not to be formally incorporated into the individual employment contracts. Apart from that the employer and the individual employee are not allowed to deviate from the works agreements to the disadvantage of the employee, unless the works council agrees thereto (§ 77 section 4 sentence 2 BetrVG).

## **II. The interrelationship between collective bargaining agreements and works agreements**

Works councils in Germany are made up exclusively of workers' representatives. Though there are close links between works councils and trade unions (A.), it must be reiterated that, according to the law, works councils are separated from the trade unions. For works councils and employers by law enjoy the right to enter into work agreements and for these agreements in principle have the same legal effect as a collective bargaining agreement, the question arises of the relationship between these two sources of agreements.

### **1. The principle: The prevention of works councils from collective bargaining**

An unrestricted power of works councils of entering into works agreements would end in a possible competition between works councils and trade unions and could put the bargaining structure in great danger. In order to prevent this, it is foreseen that works agreements that deal with remuneration or other working conditions are only legally admissible as long as the

same matter is not treated in a collective agreement. To be more precise, remuneration and other working conditions which are regulated or normally regulated by collective bargaining agreements may not be the subject of a works agreement. However, the parties to a collective agreement may expressly permit the conclusion of works agreements which supplement or specify their contract.

As a consequence of section 77 subsection 3 BetrVG, collective bargaining agreements in principle exclude conflicting works agreements. The purpose of the regulation is to protect the freedom to bargain collectively by making sure that the works councils do not compete with trade unions and, by doing so, become “quasi trade unions” that undermine the power of trade unions as the pre-eminent means of workers’ representation. It would be particularly dangerous if works councils would be seen by individual employees as being in a position of bargaining successfully for higher wages than those fixed by collective bargaining agreements. Apart from that, section 77 subsection 3 BetrVG aims at making the not-entering into an employers’ association or the leaving of such association less attractive. If the employer by either abstaining from an employers’ association or leaving an employers’ association cannot hope for achieving more favourable conditions, he will think twice about doing so. To sum it all up, the German legislator, by stating that competing works agreements are null and void tries to make the collective bargaining system more stable. And though it is debatable whether section 77 subsection 3 BetrVG must be regarded as a consequence of the autonomy to bargain collectively as fixed in the German constitution, it is widely acknowledged that this regulation reflects the importance of the freedom to bargain collectively.

If one takes a closer look at section 77 subsection 3 BetrVG, it becomes immediately clear that the power to conclude works agreements is severely restricted on the basis of this regulation. First, it must be noted that the application of section 77 subsection 3 BetrVG is not dependent on the employer being bound to the conflicting collective bargaining agreement (or such agreement being representative for a certain area or branch). Second, for section 77 subsection 3 BetrVG to apply it is sufficient that the collective bargaining agreement, upon expiration, continues to apply until being replaced by another arrangement. Finally, and perhaps most importantly, section 77 subsection 3 BetrVG states that for the restriction to apply it suffices that remuneration or other working conditions are “normally regulated” by collective bargaining agreements.

#### **a) The importance of the scope of application of the collective bargaining agreement**

In order of section 77 subsection 3 BetrVG to apply, the employer must not, as a member of the relevant employers’ association be bound to the relevant collective bargaining agreement. It is only required that the employer falls within the scope of application of the collective bargaining agreement<sup>15</sup>. This means that if a collective bargaining agreement is in place, an employer is not allowed to enter into a competing works agreement if he fulfils the criteria fixed in the collective bargaining agreements according to which it is decided whether the agreement can be applied to him. In this case it is not of importance if the employer claims that he does not belong to the employers’ association that concluded the collective bargaining agreement.

#### **b) Is the subject matter typically governed by collective bargaining?**

The application of section 77 subsection 3 BetrVG is not even necessarily dependant on the existence of a collective bargaining agreement in the first place. It is sufficient that the

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<sup>15</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 5.3.1997, *Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 77 Tarifvorbehalt*, No. 10.

subject matter of the works agreements is normally (or typically) regulated by a collective bargaining agreement. This means that, though there may be no existing collective bargaining agreement, the power of entering into works agreements is restricted because the subject matter of these agreements is a typical playing field of the parties to collective agreements.

## **2. Exceptions to the principle of pre-eminence (false and true)**

Though section 77 subsection 3 BetrVG is relatively rigid with regard to conflicting works agreements it should be noted that in practice there exist quite a number of works agreements covering the area of remuneration or other working conditions<sup>16</sup>.

### **a) Illegal practices but no normative power of factual developments**

Most of these agreements, however, are (strictly speaking) illegal. Often, an employer who does not belong and did never belong to an employers' association is not fully aware of the fact that section 77 subsection 3 BetrVG already applies if a subject-matter is typically governed by collective bargaining. But relatively often employers and works councils, by entering into works agreements, may simply leave aside section 77 subsection 3 BetrVG, hoping that no one is interested in taking them to the court.

According to a survey conducted by the WSI, a trade union think tank, a majority of member companies of the employers' associations examined deviate from standards set by the industry-wide agreement<sup>17</sup>. The survey explicitly asked about those practices which are not permitted by the agreement. The authors found that even in the construction materials industry, the industry with the lowest percentage of incidences of 'unlawful decentralisation', 69% of member companies deviate from collectively agreed standards. In contrast to earlier studies on this issue, the survey found that the vast majority of deviations occur in the field of working time, while pay issues are much less important.

There are so many works agreements which are in conflict with collective bargaining agreement that some scholars have put forward the idea of a possible derogation of section 77 subsection 3 BetrVG on the basis of customary law. Though this certainly is taking it too far it still must be acknowledged that practice is to a wide extent not in line with the law. There are many experts which argue that the rigidities of the law are to blame with regard to this.

### **b) Works agreements within the area of co-determination proper**

Apart from that a word or two should be said about the relationship between section 77 subsection 3 of the Works Constitution Act on the one hand and section 87 BetrVG on the other hand. According to section 87 BetrVG the works council has a right of codetermination (so-called compulsory co-determination) on a couple of matters ranging from "questions of order in the undertaking and the conduct of the employees in the undertaking" (section 87 subsection 1 no. 1) to "principles regarding the performance of group work" (section 87 subsection 1 no. 13). In all the matters listed in section 87 subsection 1 BetrVG, if no agreement can be reached between the employer and the works council, a conciliation board renders a decision with the decision of the conciliation board replacing an agreement between the employer and the works council (§ 87 subsection 2). According to the Federal Labour Court section 87 subsection 1 BetrVG takes precedence over section 77 subsection 3 of the Act<sup>18</sup>. This means that, when it comes to the matters fixed in section 87 BetrVG, the validity

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<sup>16</sup> See *Kania*, § 77 Abs. 3 Betriebsverfassungsgesetz auf dem Rückzug – auch mit Hilfe der Verbände, Betriebs-Berater (BB) 2001, 1091.

<sup>17</sup> WSI Works Council Survey 1999/2000.

<sup>18</sup> So-called *Vorrangtheorie*; see Federal Labour Court (Bundesarbeitsgericht) of 3.12.1991 – GS 2/90, Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 87 Lohngestaltung, No. 51.

of a works agreement is determined by exclusively applying section 87 of the Act – the consequence being that employer and works council are prevented from entering into a works agreement, if but only if, there is a competing collective bargaining agreement in existence. Or to put it the other way round: As far as matters of co-determination within the meaning of section 87 BetrVG are concerned, it is not sufficient for the prevention of the conclusion of works agreements that the subject matter of these agreements is normally (or typically) governed by collective bargaining. From all this, however, it does not follow that there is a wide range of topics works councils and employers could regulate if the undertaking is not covered by an actual collective bargaining agreement. This is because the level of wages and salaries as well as the length of working hours are not subject to compulsory co-determination.

**c) The power to decide upon the area of application and the opportunity to escape collective bargaining**

There is another reason for section 77 subsection 3 BetrVG leaving a certain (limited) room for concluding works agreements after all. As already mentioned the application of section 77 subsection 3 BetrVG is dependant on the employer falling within the scope of application of the relevant collective bargaining agreement. For instance, a collective bargaining agreement which covers the area of the metal industry prevents employers from entering into works agreements if these employers belong to this branch. In recent years, however, trade unions and employers' associations, in fixing the area of application of their agreements, increasingly applied the sole criterion of the membership of the employer in the relevant employers' associations without having regard of the activity of the employer. The aim of this approach has been to ensure that all employment relationships between individual employees and the employer are governed by the collective bargaining agreement even if the main area of activity of the company has changed fundamentally. With regard to section 77 subsection 3 BetrVG there is, however, a drawback for an employer, who is not a member of the employers' association, does not fall within the scope of application of the collective bargaining agreement and, as a consequence, is not prevented from entering into a conflicting works agreement.

**d) Works agreements and the “naked membership”**

Another, increasingly important feature of the German collective bargaining system must be mentioned in this context: the so-called “membership without” (OT-Mitgliedschaft), which means membership without being bound to collective agreements. A couple of years ago many employers' associations started to offer a special ‘OT’ membership status, whereby companies are not covered by the industry-wide collective agreements concluded by the associations but still receive a full range of other membership services. This status was introduced as a response to a wide-spread opposition among some employers to some of the major provisions of industry-wide agreements. As a response many member companies have decided to change their status.

This development must be seen against the background of declining membership in employers' associations. Concerns have mostly been expressed with reference to the declining membership of *Gesammetall*, the pattern-setting employers' associations for the metalworking industry. Because reliable membership data of employers' associations is scarce, the future of German employers' associations has basically been associated with *Gesammetall's* situation. Until recently *Gesammetall* has continuously lost members since 1970, which is most striking when focusing on the percentage of companies within the metalworking industry which are members of the association. Membership in *Gesammetall* has decreased from 9595 (covering 3.26 million employees) in the year 1970 to 5697 (covering 2.02 million employees) in the year 2001 in the West and from 1192 (940.000) in

the year 1990 to 396 (80.000) in the year 2001 according to *Gesamtmetall* <sup>19</sup> .

Traditionally, coverage by an industry-wide collective agreement comes with membership of the employers' association which is party to the agreement. This, however, is no longer true for a large number of employers' associations. In the late 1980s, the Association of Employers in the Wood and Plastics Processing Industry of Rhineland-Palatinate (*Verband der holz- und kunststoffverarbeitenden Industrie Rheinland-Pfalz eV*) was the first of a number of associations to introduce a special membership status, known as 'Ohne Tarifvertrag' (OT) status. This status provides companies with the full range of services of the association (such as legal assistance or political lobbying) but relieves them of the duty to comply with the standards set by the industry-wide collective agreement. Some companies took advantage of this special OT status and later negotiated company-level agreements, often with the support of their employers' association. Most 'OT' members, however, have simply refrained from collective bargaining altogether.

Two different versions of 'non-coverage membership' of an employers' association can be observed. In the first version, companies remain members of the original employers' association but switch to a separate membership status which is included in the association's constitution. In the second version, a second 'non-coverage association' is created and companies are invited to transfer from the regular association into this new organisation. As a result of this development, being a member of an employers' association is no longer identical with being covered by an industry-wide collective agreement<sup>20</sup>.

The take-up of 'OT' membership varies widely between industries as well as individual associations. However, the take-up of this option is in any event closely related to companies' size. According to recent findings 'OT' status is mostly used by medium-sized and large companies. The reason for this is that managers in these companies fear that they would be an easy target for unions' 'strike power' if they left an association. As long as they are a member of an 'OT' association, however, they could quickly retransfer into regular membership and thus find a safe haven from union strike threats. Smaller 'Mittelstand' companies, by contrast, are less exposed to union power, and union membership in these companies is usually far below the industrial average, but management largely depends on the basic membership services provided by the employers' association. While these companies tend to remain members of the association, they often practice what is known as 'unlawful decentralisation', ie they more or less openly contravene collective agreements.

### **III. The so-called pacts for labour**

§ 4 subsection 3 TVG states: "Arrangements which depart from the foregoing [the provisions of the Act on the legal effects of collective bargaining provisions] shall be permissible only if they are authorized by the collective bargaining agreement or the departure is to the employees' disadvantage". In these words the legislator has enshrined the so-called favourability principle (*Günstigkeitsprinzip*). The problem, however, is to determine, when a provision contained in a works agreement can be regarded as being more favourable than a provision of a collective bargaining agreement.

One of the most contested areas of application of the principle of favourability is the assessment of favourability in connection with exchanging poorer conditions for job security. Many legal scholars in Germany are of the opinion that in the case of an economic crisis of an enterprise, it must be assumed to be more favourable for an employee to receive less wages provided that this deviation from the collective agreement is met with the assurance that jobs

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<sup>19</sup> WSI Works Council Survey 1999/2000.

<sup>20</sup> See *Schaub*, *Arbeitsrechts-Handbuch*, 11<sup>th</sup> ed., 2005, § 199, 8.

will be secured<sup>21</sup>.

### 1. The so-called Burda-case

This approach, however, was clearly rejected in the so-called Burda-case. In 1996, Burda management and works council concluded a company arrangement which contained the following provisions: a four-hour extension of working time from the collectively agreed 35-hour week to a 39 hour-week. The first two additional hours are unpaid while the second two hours are paid, but without overtime bonuses; a reduction in collectively agreed bonuses for night work, Sunday and holiday work, overtime etc; a job guarantee lasting until 31 December 2000.

Since section 77 subsection 3 BetrVG forbids the conclusion of works agreements on topics which are normally regulated by collective agreements, Burda management and the works council adopted instead a “company arrangement” (*betriebliche Regelungsabrede*) which is not automatically legally binding but creates only rights and obligations between the parties to the agreement. In order to substitute for the missing normative effect the company asked all employees to accept the new working conditions through a change to their individual employment contracts. More than 95% of the workforce proved to be ready to accept these inferior working conditions in exchange for job security.

This approach at the time of the conclusion of the agreement seemed to offer a relatively safe way for employers who wanted to escape their obligations arising from collective bargaining agreement: First, the choice of agreements with a mere obligatory effect seemingly ensured that the principle of pre-eminence of collective bargaining agreement according to section 77 subsection 3 of the Works Constitution did not apply. Secondly, and even more importantly the consent of the workers concerned led the employers who made use of pacts for labour to believe that a conventional wisdom was applicable to their arrangements according to which there is only a judge if there is a plaintiff in the first place. When taken to the court by the trade union it became clear, however, that the approach failed.

### 2. The ruling of the Federal Labour Court

#### a) A contested interpretation of the favourability principle

The Federal Labour Court in its ruling<sup>22</sup> argued that it is only possible to compare terms of employment of a specific type, i.e., different salary components or working hours. According to the court, the comparison of provisions must be based on objective criteria (“group comparison”, *Sachgruppenvergleich*). The criterion applied in the comparison is the individual interest of the employee concerned, using however an objective-hypothetical approach from a comparative perspective. From the perspective of the court, it is not possible to make an overall comparison. For instance, an increase in the working hours could not be compensated for by a job guarantee. According to the courts this would result in a comparison of “apples and pears”. Furthermore, it is not legally possible to deviate from collective bargaining agreements to the disadvantage of the employees by individual agreements with the employee. The consent of the employee is regarded as irrelevant.

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<sup>21</sup> See for further reading *Höland/Reim/Brecht*, Association-Level Agreements and Favourability Principle – Summary of an empirical and legal study of the application of association-level agreements at the establishment level, ZERP-Diskussionspapier 2/2000.

<sup>22</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 20.4.1999, *Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 87 Unterlassungsanspruch*, No. 3.



### **b) The recognition of a direct claim of trade unions**

What is more, the Federal Labour Court expressly acknowledged the right of trade unions to bring court cases against employers who are bound to a collective bargaining agreement and which they accuse of operating a company arrangement that contravenes a collective agreement in force<sup>23</sup>. According to the view taken by the court, trade unions have the right to ask that employers cease an unlawful company arrangement in order to safeguard the unions' constitutional right to freedom of association. Up to the decision of the Federal Labour Court, it was widely argued that only the individual employee, and not a trade union, has the right to bring court cases against company arrangements alleged to contravene collective agreements. According to this view, the unions have no statutory right to effectively enforce the provisions of a collective bargaining agreement for an individual employee. The special protection for union members which comes with collective bargaining agreements as minimum terms of work must in principle be enforced by each individual employee. The union itself is not entitled to demand the application of collective bargaining agreements on behalf of its members, i.e., the individual employees. Therefore, the unions were not regarded as being entitled to force an employer to apply a collective bargaining agreement. According to this view the only possible claim of a trade union was the right of the trade union towards the employers' association to carry out the contract (so-called *Durchführungspflicht*): The parties to a collective agreement are not only prevented from violating contractual obligations; they are also bound to take all necessary steps to ensure that the contract is applied by their members in a proper way. For instance, they have to inform their members about the content of collective agreements and must use all reasonable means in the case that members do not respect the contractual duties which arise from the collective agreement. A direct claim against an individual employer, however, was not acknowledged.

It was exactly this relatively weak position of the unions with regard of the enforceability of collective bargaining that resulted in the described "pacts for jobs" between employer and works council and individual employees. The BAG, however, in its Burda-ruling took a different view and acknowledged a union's right to take legal action when it suspects employers who are legally bound to a collective bargaining agreement of violation of the agreement, in order to defend the unions' constitutional right to "freedom of association".

In order to have a claim towards an individual employer, the collective bargaining agreement, according to the Federal Labour Court, must be in force and binding on the employer. It is, however, not necessary that a formal works agreement be reached. Informal agreements are regarded as being sufficient to give a right to the trade union. If such agreement is reached it may even be sufficient that a collective bargaining agreement is not actually, but only usually, in force.

### **c) More than a technical problem: Protection of members vs. effective enforcement of collective agreements**

There is, however, a severe problem, that arises in this context. According to the Federal Labour Court, the content of the claim of a trade union is to a certain extent dependant on the intention of the employer. The employer may try to establish less favourable working conditions for all employees regardless of them being members of a trade union or not. In this case, the bid which is intended as one act generally applicable to all employees is regarded as completely illegal. If, on the other hand, the employer has no principal objection to members of the trade union not accepting an offer of less favourable working conditions, the claim that lies with the trade union can only be successful if it aims at preventing the employer from

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<sup>23</sup> See K. Schmidt, Die normative Tarifgeltung am Beispiel des allgemeinen koalitionsrechtlichen Unterlassungsanspruchs, *Recht der Arbeit (RdA)* 2004, 152.

actually including union members in the offer.

The employer, however, is normally not aware of its employees' membership in a union. Against this background the question had to be decided, whether or not a trade union is under an obligation to give the names of members being employed in the particular undertaking. In 2003 this question was answered by the Federal Labour Court in the affirmative<sup>24</sup>. According to the court, an employer who is ordered to apply the collective bargaining agreement to the employment relationship of the union members is not aware of who in his workforce is a union member and therefore to whom the collective bargaining agreement must be applied. In the view of the Federal Labour Court, it is therefore up to the complaining union to identify the respective employees.

This ruling in all likelihood will hamper the effort of trade unions that want to take individual employers to the court. In many cases unions may abstain from taking legal action because they are not prepared to disclose the names of their members. Up to now it was completely out of the question that a union would explicitly state the names of its members in a certain company. It was standard practice instead that a union tried to keep the identity of its members secret. Even if it were legally required to prove that some of its members were working in a certain establishment, other ways were found to prevent the unions from disclosing the identity of their members. In such a case, the unions would, for instance, by informing a notary, who was under a duty to maintain confidentiality, of the identity of the members. Against this background it is highly questionable whether the unions will pursue court rulings that would force employers to apply collective bargaining agreements if that would require revealing the identity of its members. From an employers' perspective, the new ruling therefore gives rise to the hope that unions will refrain from fighting "pacts for jobs" in the future.

## E. Conclusions and Future Perspectives

Collective bargaining in Germany is under severe strains. Many employers have already left their employers' associations. Many have converted their (full) existing membership into a membership according to which they are not longer subject to collective bargaining agreement. Increasingly agreements between employers and works councils are concluded which are contrary to collective bargaining agreements and therefore illegal.

To a certain extent trade unions have reacted to this development by expressly permitting the conclusion of (supplementary) works agreements. In this respect some trade unions have proved to be more "liberal" than others depending on their long-term strategy. The future will show which stance (loosening up or staying put) is more successful.

Many employers have gone to the limits of the existing system: by closely examining whether a collective bargaining agreement leaves room to manoeuvre or by concluding so-called pacts for work and at the same time ensuring that the competent representatives of the relevant trade union give their tacit consent, which is not binding but can prove to be convenient nevertheless. If an employer, after having left his employers' association and after termination of the collective bargaining agreement that existed at the time of his withdrawal, gets the consent of the individual employees there is no way for a trade union to interfere. Finally, an employer, who is bound to a collective agreement and may even still be a member of an employers' association, may succeed in stipulating a company-level agreement. The chances of this, however, are slim for trade unions normally do not lend a hand if there are not very good reasons for this.

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<sup>24</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 19.3.2003, *Arbeitsrechtliche Praxis* (AP) BetrVG 1972 § 87 Unterlassungsanspruch, No. 11.

Against the background various legislative proposals were put forward which aim at “softening” the existing system. For instance, the Christian Democrats and the Liberals introduced legislation that proposed to amend section 4 subsection 3 TVG, the rule concerning the principle of favourability (*Günstigkeitsprinzip*). According to these proposals, job security was to be regarded as a factor when evaluating if a term of employment was more favourable to the employee compared to the terms of a collective bargaining agreement. Both parties tried to involve the work force and the works council in the procedure. Under the Liberals’ proposal, an agreement was regarded as to the advantage of the employee if a protection against dismissal by reason of redundancy or business reorganization was provided and either the works council agreed, or 75% of employees who got the same offer accepted. Under the proposal put forward by the Christian-Democrats the works council and two-thirds of the workforce had to agree to the proposal. In addition, the agreement of less favourable working conditions could only be agreed for the period during which the bargaining agreement in question was in effect.

After the general election, that was held in 2005 and resulted in the formation of a “grand coalition” (between Christian Democrats and Social Democrats) it is highly unlikely that such proposals will make it into the statute book. The agreement that forms the legal foundation of the “grand coalition” contains language which is extremely vague: Both parties expressly recognise the autonomy to bargain collectively. They express their appreciation for “pacts for labour within the framework of collective bargaining” as a means of securing employment too. Apart from that the willingness is announced to hold talks on this issue with the representatives of trade unions and employers’ associations. All this does not sound radical.

For the time being decentralization will remain in the hands of the partners to collective bargaining<sup>25</sup>. As mentioned earlier some unions have displayed more flexibility, others less. The legislator might step in only if they utterly fail.

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<sup>25</sup> See *Lessner*, Chancen dezentraler Tarifpolitik – Herausforderungen für die gewerkschaftliche Willensbildung, *Recht der Arbeit (RdA)* 2005, 285.