Reconsidering the Notion of ‘Employer’ in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundaries of the Legal Entity?

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I. Introduction

In his book ‘The fissured workplace’, the author *David Weil* makes the case that large corporations in the US have shed their role as direct employers of the people responsible for their products, in favour of outsourcing work to small companies that often compete fiercely with one another resulting in an erosion of terms and conditions of work. This paper will discuss to what extent such fissurization also has been taking place in Germany and what the responses of the legislator and the courts are.

II. Employee and employer: Basic information and recent developments

1. The notion of ‘employee’

a) Basic elements

In Germany, no statutory definition of the term ‘contract of employment’ (*Arbeitsvertrag*) exists. It is basically undisputed, however, that a contract of employment is a sub-category of the so-called ‘service contract’ (*Dienstvertrag*).[1] A ‘service contract’, as legally defined in section 611(1) of the Civil Code (*Bürgerliches Gesetzbuch*), is a contract on the basis of which ‘a person is obliged to perform work [sub-ordinated or not] in exchange for remuneration owed to him by another person.’ What makes a contract of employment a specific case, is the fact that there is personal subordination (*persönliche Abhängigkeit*) between the service provider and the other party to the contract in the sense that an employee in the performance of his or her duties is directed by another person, the employer. According to the Federal Labour Court it is this very personal dependence that formed ‘one of the essential reasons for the development and strengthening of labour law.’[2]

[1] Critical, however, *Greiner*, Erfolgsbezogene Vergütungen im Arbeitsverhältnis – oder: der Arbeitsvertrag als spezieller Werkvertrag?, in: Recht der Arbeit 2015, p. 218 pointing to the fact that agreements on performance-related remuneration may render contracts of employments rather specific cases of so-called ‘contracts to produce a work’ within the meaning of section 631(1) of the Civil Code.
[2] Federal Labour Court of 15.03.1978 – 5 AZR 819/76, explicitly referring to the labour law scholar *Alfred Hueck*.

In 'measuring' whether a person is sufficiently subordinated to justify the relationship with another person to be qualified as an employment relationship, the Federal Labour Court employs the co-called 'typological method.' This means that an 'evaluating general assessment' (*wertende Gesamtbetrachtung*) forms the basis of legally qualifying the contract: the courts in deciding individual cases, take a 'holistic view' on whether a person qualifies as an 'employee.'[3] What is required when determining personal subordination varies from one case to the other. When determining the legal nature of a contract, the courts in any event apply the principle of 'primacy of facts'. The courts ask, in other words, what the 'true nature' of the contract is, irrespective of its 'labelling' by the parties.[4] In the view of the Federal Labour Court, it would harm the basic idea of employment law as an instrument of protecting employees from the (regularly economically more powerful) employer, if the latter could set aside this protection by simply using contractual language that points into the direction of, for instance, a 'free service contract' (*freier Dienstvertrag*), that is a 'service contract' not leading to subordination. The only thing that matters therefore is the 'real content' of the contract to be derived from its practical implementation.[5] It is worth noting from the start that the principle of 'primacy of facts' not only applies to determining whether there is an employment relationship between two parties. The principle also applies if the courts examine the question whether employees of a subcontractor who work on the premises of an entrepreneur are vicarious agents of that subcontractor or temporary agency workers. To put it into the words of the Federal Labour Court: 'Legal qualification of a contract as a contract to temporarily assign workers (…) is dependent on its real business content. If practical implementation of the contracts differs from the contractual language, the former will prevail (…)'.[6]

b) Recent developments

For quite a while, trade unions, in particular, claim that employers in Germany have increasingly been making use of 'ordinary civil law contracts' in order to avoid the application of labour law.[7] On an abstract level, it is relatively easy to identify a contract of employment, since these contracts are characterised by subordination or control. If there is a lack of that, the contract is a so-called 'free service contract'. At first sight, it is even easier to differentiate between a contract of employment and a so-called contract to produce a work (*Werkvertrag*), since (only) the latter is 'result-oriented'. According to the legal definition in section 631(1) of the Civil Code, 'by a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the

[3] Federal Labour Court of 23.04.1980 – 5 AZR 426/794.
[4] See, for instance, Federal Labour Court of 19.11.1997 – 5 AZR 653/96.
[5] Federal Labour Court of 19.11.1997 – 5 AZR 653/96.
[6] Federal Labour Court of 27.01.1993 – 7 AZR 476/92.
[7] According to a survey of the metal workers' union IG Metall, 70 p.c. of all companies surveyed use civil law contracts; see also *Bonin/Zierahn*, Machbarkeitsstudie zur Erfassung der Verbreitung und Problemlagen der Nutzung von Werkverträgen (Bundesministerium für Arbeit und Soziales), Mannheim, 2012. The use of 'ordinary civil law contracts' may also have been prompted by recent restrictions of temporary agency work as the result of some legislative reforms and court decisions; see *Hamann/Rudnik*: Scheinwerkvertrag mit Überlassungserlaubnis – Ein probates Mittel zur Vermeidung illegaler Arbeitnehmerüberlassung?, in: Neue Zeitschrift für Arbeitsrecht 2015, p. 449. However, some authors are hesitant in acknowledging an increased use of civil law contracts; see, in particular, *Henssler*, Überregulierung statt Rechtssicherheit – der Referentenentwurf des BMAS zur Reglementierung von Leiharbeit und Werkverträgen, in: Recht der Arbeit 2016, p. 18.

agreed remuneration'.[8] A closer look reveals, however, that the differentiation issue is a tricky one.[9] The reasons for this are two-fold: First, almost every duty to provide a service can, at least in theory, be 'translated' into a duty to provide a work (within the meaning of section 631(1) of the Civil Code). Second, the parties to the contract can considerably diminish the need for establishing control by fixing the tasks of the provider of a service in much detail in the contract itself.[10] Apart from that, there are practical problems when having to demonstrate that one person is subordinated to another in the course of his or her contractual performance. Specific problems arise in this regard if a line has to be drawn between temporary agency work on the one hand and a civil law contract concluded between two companies with the obligations of the debtor being fulfilled by his or her staff:[11] If work is performed in a given establishment by workers employed by another company, it will often be doubtful whether these workers are mere auxiliary persons of that company in fulfilling its contractual duties, or temporary agency workers assigned to the company running the establishment.

The problem of differentiation between employment contracts and ordinary civil law contracts forms the subject of a fierce debate among legal scholars.[12] The courts have been struggling with the issue, too.[13] In November 2015, the competent Ministry put forward a Draft Act that aims to prevent a possible misuse of contracts to produce a work by employers. For the first time, indicators would have been introduced into statutory labour law to be used by the courts when determining the existence of an employment relationship.[14] According to the draft it points to an employment relationship if: a person (a) is not allowed to decide on his or her working time, the owed services or his or her workplace; (b) a person predominantly renders his or her services at the premises of others; (c) regularly uses the resources of third parties for rendering owed services; (d) renders his or her services together with others who are deployed or charged by a another party; (e) works exclusively or predominantly for another party; (f) does not own an operational organisation to render the owed services; (g) renders his or her services without these services aiming at manufacturing or reaching a specific work product or a specific work result; (h) does not guarantee the result of his work. However, in January 2016, the

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[8] Section 631(2) adds that the 'subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service'.

[9] See for a more detailed discussion *Waas*, Werkvertrag, freier Dienstvertrag und Arbeitsvertrag: Abgrenzung und Identifikation im deutschen Recht und in ausländischen Rechtsordnungen, 2012: http://www.boeckler.de/pdf_fof/S-2011-477-3-1.pdf.

[10] If the content of the service is fixed in detail in the contract between the parties and thus no instructions are needed to substantiate it, then no employment contract may exist; see Federal Labour Court of 30.10.1991 - 7 ABR 19/91, highly critical *Preis*, in: Erfurter Kommentar zum Arbeitsrecht, 16th ed., 2016, § 611 BGB note 52.

[11] See *Hamann*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed., 2010, § 1 AÜG notes 107 et seqq.; *Waas*, in: Thüsing (ed), Arbeitnehmerüberlassungsgesetz, 3rd ed., 2012, notes 59 et seqq.

[12] See, for instance, *Brors/Schüren*, Neue gesetzliche Rahmenbedingungen für den Fremdpersonaleinsatz, in: Neue Zeitschrift für Arbeitsrecht, 2014, p. 569; *Deinert*, Kernbelegschaften – Randbelegschaften – Fremdbelegschaften, in: Recht der Arbeit 2014, p. 65.

[13] See, for instance, Federal Labour Court of 18.01.2012− 7 AZR 723/10 (temporary agency work and contract of service); Federal Labour Court of 15.04.2014 – 3 AZR 395/11 (temporary agency work and contract of service/contract to produce a work); Federal Labour Court of 25.09.2013 – 10 AZR 282/12 (employment contract and contract to produce a work).

[14] In social security law, many years ago, a presumption (section 7(4) of Social Code IV) was introduced by the legislator based on similar indicators to be quickly abolished amid protests, however.

Ministry withdrew its Draft amid protests from business, in particular.[15] Instead of fixing indicators, the present Draft does no more than repeat the general definition of a contract of employment as developed by the Courts. A consensus on this Draft was reached within the ruling Coalition government in May.

2. Notion of 'employer'

a) Basic elements

While German legal doctrine is rich with regard to the notion of 'employee', the legal concept of 'employer' has been somewhat neglected. As is the case with the term 'employee', there is no statutory definition of the term 'employer'. The courts derive the content of the term indirectly from the term 'employee', stressing that the legal concept of employment law is basically devised from the perspective of the employee.[16] According to the Federal Labour Court, 'an employer is a person who employs at least one employee.'[17] Every (natural or legal person) can qualify as an employer. On the other hand, a group of companies as such cannot be the employer since it lacks the quality of a legal entity.[18]

Employees often have more than one employer. This is certainly true in Germany, since so-called 'minijobs' whereby the employee earns no more than € 450 per month are widespread.[19] These situations do not pose major problems as different employment relationships can easily exist 'in parallel'. A case in point is employment with one employer and (lawful) secondary employment with another, the latter often taking the form of a minijob. As opposed to this situation, there are cases where a true 'multi-employer' set-up exists in the sense that one employee with regard to his or her single employment relationship faces more than one employer.[20] In that case, there will often be joint and several liability[21] as well as joint and several creditorship on the part of employers.[22] In this context, the question can arise, for instance, who enjoys the right to direct the employee. If the parties to the contract did not clearly assign this power to one single person, then every

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[15] Critical too, for instance, *Baeck/Winzer/Kramer*, Neuere Entwicklungen im Arbeitsrecht, in: Neue Zeitschrift für Gesellschaftsrecht 2016, p. 20; *Schüren/Fasholz*: Inhouse-Outsourcing und der Diskussionsentwurf zum AÜG – Ein Diskussionsbeitrag, in: Neue Zeitschrift für Arbeitsrecht 2015, p. 1473 (the latter with specific regard to the position of temporary agency workers); *Henssler*, Überregulierung statt Rechtssicherheit – der Referentenentwurf des BMAS zur Reglementierung von Leiharbeit und Werkverträgen, in: Recht der Arbeit 2016, p. 18.

[16] Federal Labour Court of 21.011999 – 2 AZR 648/97.

[17] Federal Labour Court of 21.01.1999 – 2 AZR 648/9; see also Federal Labour Court of 09.09.1982 – 2 AZR 253/80, stating that 'employer is the other party to the employment relationship, thus he who can demand work from the employee under the employment contract (…)'.

[18] See *Richardi*, in Richardi al. (ed.), Münchener Handbuch zum Arbeitsrecht, vol. 1, 3rd ed., 2009, § 23 note 1.

[19] The system of mini-jobs was developed to allow companies to hire staff without heavy social insurance obligations, making it easier for part-time workers to take on another side job.

[20] It should be noted that there is no such 'multi-employer'-set-up if a person is employed by a partnership under civil (*Gesellschaft bürgerlichen Rechts*), since such partnership is regarded by the courts as enjoying a limited legal capacity; see Federal Civil Court of 29.01.2001 – II ZR 331/00.

[21] See section 427 of the Civil Code: 'If more than one person jointly binds himself by a contract to render divisible performance then, in case of doubt, they are liable as joint and several debtors'.

[22] See section 428 of the Civil Code: 'If more than one person is entitled to demand performance in such a way that each may demand the entire performance but the obligor is only obliged to effect the performance once (joint and several creditors), the obligor may at his discretion effect performance to each of the obligees. This also applies if one of the obligees has already sued for performance'.

employer is presumed to be able to make use of it. The employee then complies with his or her obligation to work by following the instructions of this particular person.[23]

b) Recent developments

The notion of 'employer' has always been dependent on the notion of 'employee'. This being the case, uncertainties as to the qualification as 'employee' necessarily impact on whether the partner to the contract qualifies as employer. Recently, the notion of 'employer' became further blurred, because of developments that could be referred to as fissurization of the workplace. These developments will now be discussed in more detail.

III. Current situation of fissurization

1. Groups of companies

'Fissurization' of the workplace has taken different forms in Germany. A relatively old phenomenon is employment of workers within a group of companies. The legal problems that come with such employment have recently become even more accentuated since companies have increasingly been using so-called 'matrix structures'. In a matrix, certain corporate functions are concentrated at one group company, while they are reduced or even completely abolished in other group companies. Moreover, there is a group-wide breakdown by function and production areas. As a result, reporting lines and the rights to issue functional instructions are assigned due to economic realities overriding classic business structures as well as contractual arrangements.[24] But then again, the right to issue instructions other than functional ones remains largely with the contractual employer. This includes, for instance, granting of holiday and giving warnings or notice. In other words, the power to direct, which for its part is the defining element of an employment relationship, is split (between the contractual employer and the functional employer).

Matrix organisations offer a couple of advantages. Among them are shorter lines of communication, more flexibility for management, more focused leadership (with less burden on the top of management) and priority of substance-specific competence without regard for hierarchical levels. There are also drawbacks. This is particularly true from the point of employees, as they may often find themselves in a position of being responsible towards a company that is not their employer.

2. Contracting-out

As has already been said, there are claims that companies recently have been making increasing use of 'ordinary' civil law contracts instead of contracts of employment. Civil law contracts are mostly used in the context of sub-contracting. Such sub-contracting can take the form of a contract concluded between the parties and involving only these parties. Such situation then leads to the question whether the contract, on the basis of the

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[23] See *Lange*, Mehrfacharbeitsverhältnisse – Nicht nur Fabelwesen, in: Neue Zeitschrift für Arbeitsrecht, 2012, p. 1121 (1122).

[24] This, for instance, can lead to problems when it comes to a possible transfer of undertakings as it will often be difficult to determine whether a certain worker belongs to the entity that is being transferred; see *Mückl*, Betriebsübergang und Matrix-Struktur – Welche Arbeitnehmer sind erfasst?, in: Der Betrieb 2015, p. 2695.

application of the principle of 'primacy of facts', qualifies as a contract of employment. It seems that quite a few employers entered into such contracts with former employees[25] – a problem often referred to as 'new self-employment' (*neue Selbständigkeit*) in Germany.[26] More often sub-contracting will take the form of one company concluding a business contract with another company with the obligations of that company actually being performed by its employees. If a company outsources some (subsidiary) facilities to another, the issue arises whether the courts will acknowledge the existence of a business contract. As the principle of 'primacy of facts' also applies in these situations, the 'real nature' of the contract must be determined. The question is this: Is the contract in question a business contract, whose obligations are fulfilled by vicarious agents, or is it 'in reality' a contract that obliges the other company to provide employees? If the latter is true, the workers qualify as agency workers temporarily assigned to another company.

The first type of contracting-out may be motivated by an attempt of employers to escape the application of the rules of labour law. Considerations of tax and social security may also play a role. The second type of contracting-out will often be the result of 'genuine business considerations', for instance, an effort to focus on the particular strength in one field and to make the most of the strengths of other companies in areas that do not form part of the core business. However, labour law considerations may also be relevant, since contracting-out does offer an opportunity to escape duties arising from the position of 'employer'. Moreover, contracting-out offers the prospect of getting better conditions with regard to collective agreements. A case in point is contract logistics: In the more recent past, companies, for instance in the car industry, have increasingly moved work to logistic providers. At the same time, these companies are often not limited to providing mere logistics services anymore, but have extended their offerings to plant preassembly and subsequent 'plug-in status delivery'. The cost advantages involved are huge as, for instance, the minimum hourly wage in the metal and electronics industry (within the competence of the industry-sector-wide trade union *IG Metall*) is above 14 Euros, while the medium hourly wage in the logistics industry (in the realm of the service-sector trade union *VERDI*) is above 12 Euros. From this point of view it must be noted that the two trade unions recently entered into a cooperation agreement setting out criteria for demarcation. According to this agreement, in the future IG Metall will, for instance, be competent if at least 75 p.c. of the activities of a logistic provider aim at an end customer that falls into the original organisational area of this trade union.[27]

3. Supply-chains

Supply chains are a common feature of modern economies. Improving work conditions in global supply chains, in particular, has become one of the most important challenges in both national and international labour law.[28] These supply chains are permanently in flux. For instance, car manufacturers who in the past used to dominate the

[25] According to Federal Labour Court of 13.03.2008 – 2 AZR 1037/06, the entrepreneurial decision to outsource certain tasks that were formerly performed by employees can form the basis of a lawful redundancy.

[26] For instance, in many slaughterhouses one would find high numbers of so-called 'stand-alone self-employed persons' (*Soloselbständige*) instead of employees.

[27] See: https://www.igmetall.de/kontraktlogistik-18244.htm.

[28] See, for instance, the G7 efforts in addressing the root causes in global supply chains by creating the multi-donor 'Vision Zero Fund' for action in producing countries.

suppliers of components, face the prospect of being forced into collaborating with the likes of Google and Apple in the future.[29] There are undoubtedly many reasons for the wide use of supply-chains. Even if it is not (primarily) motivated by labour law considerations, problems do arise in this regard, as for instance there is concern that employees' rights may be diminished by 'spreading' tasks over a long chain of different companies.

4. Franchising

In Germany, franchising is widespread.[30] There are two major forms to be distinguished: subordination franchise on the one hand and cooperative franchise on the other. The latter is a relationship of partnership and cooperation. The former is characterised by a relationship of subordination between franchisor and franchisee. In that case, the franchise basically is an instrument within the marketing strategy of the franchisor.[31] The distinction between the two forms is often rather a matter of degree. In practice, subordination franchise seems to be the main form in Germany in any event.[32]

IV. Responses by the legislator and the courts

1. Groups of companies

Specific problems arise if an employee is employed by a company that belongs to a group of companies. What constitutes a 'group of companies' (*Konzern*) is defined in the Stock Corporation Act (*Aktiengesetz*).[33] This company law term also applies in labour law. The starting point of the legal assessment is the recognition that the group as such is not

[29] See *Weisser/Färber*: Rechtliche Rahmenbedingungen bei Connected Car – Überblick über die Rechtsprobleme der automobilen Zukunft, in: MultiMedia und Recht 2015, p. 506.

[30] Though Commission Regulation (EEC) No 4087/88 of 30.11.1988 on the application of cartel law to categories of franchise agreements is not in force anymore, its definition of a 'franchise' is still widely regarded as useful. According to Article 1(3) lit. a) '"franchise" means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users'. According to Article 1(3) lit. b) '"franchise agreement" means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to: the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport, the communication by the franchisor to the franchisee of know-how, the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement'.

[31] See, for instance *Martinek/Habermeier*, in: Martinek/Semler/Habermeier/Flohr, Vertriebsrecht (ed.), 3rd ed., 2010, § 26 note 21.

[32] *Graf von Westphalen*, in: Westphalen (ed.), Vertragsrecht und AGB-Klauselwerke, 2015, Teil 'Klauselwerke' note 4.

[33] Section 18 of the Stock Corporation Act (*Aktiengesetz*) on 'Groups and Members of Groups' reads as follows: '(1) If a controlling and one or more controlled enterprises are subject to the common direction of the controlling enterprise, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group. If enterprises are parties to a control agreement (section 291) or if one enterprise has been integrated into the other (section 319), such enterprises shall be deemed to be subject to common management. A controlled enterprise and its controlling enterprise shall be presumed to constitute a group. (2) If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group'.

the employer. As has already been pointed out, an employer-position is generally considered out of the question, since the group as such has no legal personality and, accordingly, cannot be a party to a contract. However, the fact that the employer belongs to a group of companies and, consequently, that a contract of employment a group company is a party to, in one way or another relates to the group, will often influence its content. The best example of this are clauses often included in such contracts that allow the employer to either temporarily second the worker to another group company, or to temporarily send him or her to another group company, or to hire him or her out to such company. During such secondment, posting or hiring-out, the employment relationship with the hiring company remains fully valid. No (parallel or even exclusive) employment relationship with the other company is presumed to exist. Even so, a third party obviously becomes involved in the employment relationship. Accordingly, secondment, posting or hiring-out are only allowed, if there is a sound basis in the contract of employment. In principle, this is only the case, if either the worker was hired to perform his or her duties within the group from the outset, or if the employer has reserved the right to make the worker available for other group companies, or if the parties to the employment contract consented to amend the contract accordingly. And regardless of the contractual basis, the concrete decision of the employer to make the worker available for another company must meet the standards of good faith and is subject to judicial review.[34]

Another question is whether and to what extent the law takes a possible 'group dimension' of the employment relationship into account. A more detailed legal analysis shows that this is only partly the case. Take, for instance, application of the so-called employment law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*): As in many other jurisdictions, German law provides for an obligation of the employer not to discriminate workers without objective reason. The legal basis is the principle of equal treatment that has been developed by the courts and is generally considered to form customary law.[35] Originally, the Federal Labour Court assumed that such duty was limited to workers in a given undertaking. This was justified by the Court by pointing to a specific 'closeness' of workers belonging to a single establishment.[36] Later, the Court modified its position and held that employers had in principle to treat all employees in the company equally.[37] A 'group-related' obligation on the part of the employer, however, is in principle rejected by the Court. In support, the Court points to the fact that companies belonging to the same group form different legal entities and that the employment law principle of equal treatment serves only the purpose

[34] See section 315(1) of the Civil Code (*Bürgerliches Gesetzbuch*): '(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it'.

[35] In substance, it is closely related to the constitutional principle of equality as laid down in Article 3(1) of the Basic Law, the German Constitution. Art. 3(1) of the German Constitution (*Grundgesetz*): 'All persons shall be equal before the law'. As all other fundamental rights, except Art. 9(3) enshrining freedom of association, Art. 3(1) of the Constitution is not 'horizontally' applicable which means that it needs to be specifically 'implemented' in order to be applied to private law relationships like employment relationships; see, for instance, Federal Labour Court of 22.12.2009 - 3 AZR 136/08 (note 39): 'The employment law principle of equal treatment is the private law expression of the principle of equality as set forth in Art. 3(1) of the Constitution'.

[36] Federal Labour Court of 26.04.1966 – 1 AZR 242/65.

[37] Federal Labour Court of 17.11.1998 – 1 AZR 147/98, Federal Labour Court of 03.12.2008 – 5 AZR 74/08.

of ensuring equal treatment of workers by their joint employer.[38] Accordingly, a 'group-related' obligation of equal treatment can exist in exceptional cases only.[39]

As for dismissal protection, the position is similar. Under German law, a compulsory redundancy is inadmissible if the workers could be further-employed, either in the same establishment or in another which belongs to the same company. Section 1(2) of the Act on Dismissal Protection (*Kündigungsschutzgesetz*) expressly provides that the protection against dismissal is 'company-related', that is to say that it is not restricted to the establishment concerned. Alternative employment opportunities within the group, in contrast, are in principle irrelevant.[40] However, in exceptional cases it may be different. For instance, a 'group-related' obligation of further employment may exist if a company that belongs to the same group explicitly offers the opportunity of further employment or if an obligation to transfer the worker either directly arises from the contract of employment (or another agreement), or if the employer has made a promise to this effect.[41] In any event, it is required that the employer is in a position to ensure further employment with the other company. The decision, to offer further employment may in other words not be one solely for the other company to take.[42] Recently, the Federal Labour Court stressed again that 'an obligation of the employer to try to ensure further employment with another group company, before giving notice' does exist in 'exceptional cases' only. Moreover, the burden of proving that there is a possibility of further employment is essentially on the employee.[43]

As already mentioned, so-called matrix structures have been on the rise recently among groups of companies. Labour lawyers are still struggling with the problems posed by them.[44] While it is beyond doubt, that employers are free to establish these structures, there is dissent on how far the position of employees affected by these structures must be protected. Some authors, for instance, argue that the law in any event prevents the employer from transferring his or her power to direct without the consent of the employee.[45] Others are of the opinion that no change of 'ownership' of the power to direct is required as the other company could simply be authorised (*Ermächtigung*) by the

[38] Federal Labour Court of 20.08.1986 – 4 AZR 272/85.

[39] If, for instance, the mother company takes responsibility for granting certain benefits and instructs the group companies accordingly, then a 'group-wide' duty of equal treatment may apply; see *Preis*, in: Erfurter Kommentar zum Arbeitsrecht, 16th ed., 2016, § 611 BGB note 199. A 'piercing of the corporate veil' can take place if certain requirements are met; see, for instance, Federal Labour Court of 15.03.2011 −1 ABR 87/09. The Federal Labour Court in this regard follows the rules that have been developed by the Federal Civil Court; see *Müller-Glöge*, in: Münchener Kommentar zum BGB, 6th ed. 2012, § 611 BGB Vertragstypische Pflichten beim Dienstvertrag note 248.

[40] See Federal Labour Court of 23.11.2004 – 2 AZR 24/04: 'Dismissal protection, in principle, is related to the establishment and, as far as the possibility of further employment is concerned, to the company. (…). The possibility of further employment, in principle, is not related to groups of companies'.

[41] According to the Federal Labour Court an obligation to offer further employment with another company may also derived from past practice; see Federal Labour Court of 23.04.2008 – 2 AZR 1110/06.

[42] Federal Labour Court of 23.11.2004 – 2 AZR 24/04.

[43] If such employee refers to a relocation clause, it is in principle up to him/her to show at which company and at which workplace further employment would be possible; see Federal Labour Court of 24.05.2012 – 2 AZR 62/11.

[44] See, for instance, *Henssler*, 1. Deutscher Arbeitsrechtstag – Generalbericht, in: Neue Zeitschrift für Arbeitsrecht-Beilage (Supplement) 2014, p. 95.

[45] In this context, section 613 sentence 2 of the Civil Code is often referred to. This provision reads as follows: 'The party under a duty of service must in case of doubt render the services in person. The claim to services is, in case of doubt, not transferable'.

contractual employer to make use of it. In the past, the Federal Labour Court, in any event, imposed relatively low requirements for a transfer of the power to direct.[46] It is doubtful, however, whether that is still true. Practically speaking, it is recommendable for employers to address the issue by making explicit provision for a (partial) transfer to another company. Another question is whether and to what extent the 'functional employer' is bound by provisions of labour law. Again, the legal position is far from clear. It is argued, however, that the (functional) power to direct, if 'transferred' to another company, must come with according obligations so as to ensuring that the interests of the worker subjected to that power are taken into proper consideration when making use of it.[47]

Specific problems arise if workers are hired-out within a group of companies. In group settings section 1(2) no. 2 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*), the so-called 'intra-group exemption', is relevant. According to this provision, the Act basically does not apply to a hiring-out between group companies if the worker has not been taken into employment with the exclusive aim of later being hired-out. The Act does apply, on the other hand, if workers are hired by one group company whose exclusive business purpose is to act as a 'group temporary agency' (*reine Personalführungsgesellschaft*).[48] Whether and to what extent the Act is applicable in other group settings, is far from clear, however. This is all the more so since some authors argue that the 'intra-group exemption' as such does not conform with EU-law and should have been completely abolished when the German legislator implemented the underlying EU-Directive.[49]

2. Contracting-out

Whether or not certain tasks should be contracted-out, is for management to decide. The right to conclude business contracts with other companies is part of freedom of contract as well as part of freedom of entrepreneurship. As the German Constitution protects both,[50] the right to conclude business contracts with others can in principle not be limited.

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[46] Federal Labour Court of 10.03.1998 – 1 AZR 658/97.

[47] See, in particular, *Henssler*, 1. Deutscher Arbeitsrechtstag – Generalbericht, in: Neue Zeitschrift für Arbeitsrecht-Beilage (Supplement) 2014, p. 95 (101). Our discussion of matrix organisations is limited to questions of individual labour law. As regards matters belonging to the works constitution see, for instance, *Kort*, Matrix-Strukturen und Betriebsverfassungsrecht, in: Neue Zeitschrift für Arbeitsrecht 2013, p. 1318. It is subject to debate, in any event, whether and to what extent current rules can cope with an increasing decentralisation of management decisions within matrix organisations or otherwise; see, *Rieble*, Mitbestimmung in komplexen Betriebs- und Unternehmensstrukturen, in: Neue Zeitschrift für Arbeitsrecht-Beilage (Supplement) 2014, p. 28.

[48] See, for instance, *Wank*, in: Dieterich a.o., Erfurter Kommentar zum, Arbeitsrecht, 16th ed., 2016, § 1 AÜG notes 31, 34a and 57a.

[49] See, for instance, *Böhm*, Umsetzung der EU-Leiharbeitsrichtlinie – mit Fragezeichen?!, in: Der Betrieb 2011, p. 473; *Wank*, in: Dieterich a.o., Erfurter Kommentar zum, Arbeitsrecht, 16th ed., 2016, § 1 AÜG note 57 (with further references). See in this context also ECJ of 21.10.2010 – Case C-242/09 (Albron Catering BV) according to which in the event of a transfer within the meaning of Council Directive 2001/23/EC of 12 March 2001, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment'.

[50] Art. 2(1) and 12(2) of the Basic Law.

Without directly limiting this power, the legislator has responded to contracting-out in two ways: by fixing a secondary liability of contractors with regard to certain labour law obligations and by enlarging the rights of works councils. Secondary liability can arise on two occasions. First, such liability arises under the Act on Posting of Workers (*Arbeitnehmerentsendegesetz*) which permits the state to declare collective agreements generally binding. According to section 14 sentence 1 of the Act, an entrepreneur who commissioned another entrepreneur with the provision of work or services, is liable for payment of the minimum wage to employees by a contractor, a subcontractor or a lender commissioned by the contractor or a subcontractor as a guarantor.[51] The purpose of section 14 of the Act is to ensure that companies commissioned by an entrepreneur actually pay the minimum wage. The provision applies to all companies belonging to the entrepreneurial chain. This means that an entrepreneur is also liable for any subcontractor of his or her direct sub-contractor.[52] The Federal Constitutional Court has held that section 14 is in conformity with the Constitution even though liability does not depend on fault or negligence. Though section 14 of the Act impacts on freedom of entrepreneurship as ensrhined in Article 12 of the Basic Law, it conforms with the Constitution, since protection of workers is a legitimate aim, especially in light of Article 20 of the Constitution which contains the so-called social state-principle (*Sozialstaatsprinzip*)[53]. As from 01.01.2015, a general statutory minimum wage applies in Germany. Section 13 of the Act of the Minimum Wage Act (*Mindestlohngesetz*), by referring to section 14 of the Act on Posting of Workers, establishes the same secondary liability with regard to general minimum pay as that already existing with regard to minimum pay that is due under generally binding collective agreements. It was the explicit intention of the legislator to make sure that the same rules apply.[54] In both cases, entrepreneurs who depend on subcontractors are encouraged to adopt appropriate measures in order to reduce the risk of employees of contractors or subcontractors bringing claims against them. Apart from carefully selecting their contractor, entrepreneurs will try to ensure that if subcontractors are commissioned, these subcontractors will commit themselves to pay the minimum wage and, in case the subcontractor commissions further subcontractors, to include such obligation in their respective contracts as well.

The second response to contracting-out has been to enlarge the rights of works councils. In the very Draft Act that was already mentioned, the Federal Government included provisions amending the Works Constitution Act (*Betriebsverfassungsgesetz*) by adding information on the use of civil law contracts to the existing information rights of works councils. According to section 80(2) sentence 1 of the Works Constitution Act, the employer 'shall supply comprehensive information to the works council in good time to enable it to discharge its duties under this Act; such information shall also refer to the employment of persons who have not entered into a contract of employment with the

[51] See in this regard also *Yorens el al*., Study on the protection of workers' rights in subcontracting processes in the European Union, 2012, p. 47 and 52. Apart from that the Act imposes sanctions in cases of failing to grant minimum working conditions by either the principal contractor or subcontractor, even if this did not happen deliberately but negligently; see, in particular section 23 in conjunction with section 8 of the Act on Posting of Workers.
[52] See Federal Labour Court of 17.08.2011 − 5 AZR 490/10 (note 17).
[53] Federal Constitutional Court of 20.03.2007 – 1 BvR 1047/05; see also Federal Labour Court of 06.11.2002 – 5 AZR 617/01 (A). Moreover, it is in line with EU-law; see ECJ of 12.10.2004 – C-60/03 (Wolff & Müller GmbH & Co. KG / José Filipe Pereira Félix).
[54] See German Parliament Printing Matter 18/2010, p. 23.

employer'. The Draft adds to this that the information provided must include information on the duration of the job, the place of work and its content. According to section 80(2) sentence 2 of the Works Constitution Act, the works council 'shall, if it so requests, be granted access at any time to any documentation it may require for the discharge of its duties; in this connection the works council committee or a committee set up in pursuance of section 28[55] shall be entitled to inspect the payroll showing the gross wages and salaries of the employees'. The Draft supplements this by adding a new sentence 3, according to which the works council has the right to examine the contracts on which the work of the employees of 'third companies' is based.[56] The purpose of this information right is to ensure that the works council can assess independently whether employment of staff 'in reality' is temporary agency work.[57] According to section 92(1) sentence 1 of the Works Constitution Act, the employer 'shall inform the works council comprehensively and in good time of matters relating to manpower planning including in particular present and future manpower needs and the resulting staffing and vocational training measures and supply the relevant documentation'. The Draft adds to this that 'staffing measures' encompass plans as to employ persons who are not in an employment relationship with the employer.[58]

The closest thing to what is the question of 'joint employers' under the National Labor Relations Act in the US might be whether more than one company can be regarded as 'owning' an establishment within the meaning of the Works Constitution Act. Section 1 of the Act indeed provides for the setting-up of works councils in establishments of several companies. According to section 1(1) sentence 1 of the Act, works councils shall be elected in all establishments that normally have five or more permanent employees. According to section 1(1) sentence 2 of the Act, the same shall apply to joint establishments of several companies. Section 1(2) holds a legal definition of a 'joint establishment'. A joint establishment of several companies is presumed to exist, in particular, 'if the companies employ the equipment and workers jointly in order to pursue their working objectives'.[59] This means that cooperation between different companies is not sufficient. What is required is joint operational management in the sense that essential employer functions in the area of human resources and social affairs are shared between two (or more) companies and concentrated in a common management team (which then constitutes a partner for the works council to deal with). The important question to ask is whether manpower is used across employers in the ordinary course of business.[60] In any event, however, joint operational management must derive from an explicit or tacit agreement between the companies.[61] Mere cooperation is not sufficient even if a control

[55] The works committee deals with the day-to-day business of the works council (section 27(2) sentence 1 of the Act). Apart from that, committees can be set up to deal with specific tasks (section 28(1) sentence 1 if the Act).

[56] The Draft does not add much in substance but rather enshrines in statutory law what has already been developped by the courts; see, in particular, Federal Labour Court of 31.01.1989 – 1 ABR 72/87.

[57] See *Karthaus/Klebe*: Betriebsratsrechte bei Werkverträgen, in: Neue Zeitschrift für Arbeitsrecht 2012, 417 (419).

[58] See in this regard also Federal Labour Court of 31.01.1989 – 1 ABR 72/87 (on section 92(2) of the Act): Works councils can sugggest the use of regular staff instead of employees of contractors.

[59] Section 1(2) no. 1 of the Act.

[60] Federal Labour Court of 13.02.2013 – 7 ABR 36/11 (note 28).

[61] See, for instance, Federal Labour Court of 20.02.2014 – 2 AZR 859/11.

agreement exists between the companies. The same applies if, in the case of just-in-time production, one company exerts external control over another.[62]

3. Supply-chains

So far, supply-chains, at least in terms of 'fissurization' of the workplace, have not come into the focus of the legislator. This, however, could possibly change in the future. For instance, the Federation of German Trade Unions (*DGB*) demands to ensure that companies will bear greater responsibility for work conditions at companies in global supply chains. In particular, there are demands to oblige companies to publicly report on supply chains and to involve trade union representatives, works councils and workers´ representatives in supervisory boards in this reporting.[63]

4. Franchising

With regard to labour law, it is often difficult to draw a line between a (subordination) franchise on the one hand and an employment relationship on the other. As the franchisee under a subordination franchise undertakes to promote sales according to guidelines and instructions of the franchisor, there is a need to distinguish this kind of subordination from the one that arises from an employment relationship.[64] According to the courts, there is regularly no employment relationship, in any event, if the franchisee has the right to fulfil his or her contractual obligations with the help of other persons and if the franchisee for factual reasons depends on the support provided by others.[65] However, German law acknowledges a category of workers, so-called 'semi-dependent workers' (*Arbeitnehmerähnliche*), in-between employees and self-employed persons. 'Semi-dependent workers' are persons who, though not being subordinated, are economically dependent on another person and, compared to employees, in equal need of legal protection.[66] There are cases were courts indeed have found that franchisees qualify as 'semi-dependent workers' in that sense.[67]

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[62] See *Richardi*, in: Richard (ed.), Betriebsverfassungsgesetz, 15th ed., 2016, § 1 note 67. Mere cooperation of employers in an establishment within the framework of a matrix organisation might not be sufficient either; see *Witschen*, Matrixorganisationen und Betriebsverfassung, in: Recht der Arbeit 2016, 38 (44).

[63] See *Pütz/Giertz/Thannisch*: Compliance aus gewerkschaftlicher Sicht, in: Corporate Compliance 2015, p. 19. This must be seen in the context of implementing Directive of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups into national law. See recital 7 of this Directive: '(…) As regards social and employee-related matters, the information provided in the statement may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities. (…)'. See also the Proposal for a Directive amending Directive 2013/34/EU of 12.04.2016, COM(2016) 198 final.

[64] See Federal Labour Court of 16.07.1997 – 5 AZB 29/96 according to which franchisees can perfectly qualify as employees.

[65] See, for instance, Federal Civil Court of 27.01.2000 – III ZB 67/99 and State Labour Court Düsseldorf of 27.08.2010 – 10 Sa 90/10; *Preis*, in Erfurter Kommentar, 16th ed., 2016, § 611 BGB note 30.

[66] A statutory definition can be found in section 12 a of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*). According to this provision, there is 'economic dependence' in that sense if a person

As the courts may consider whether a franchisee must be qualified as a 'semi-dependent worker' (or even an employee), there is at present (almost) no discussion on whether a franchisor may have to be qualified as the (co-) employer of persons employed by the franchisee. The reason for that might lie in the fact that, though the obligations arising for franchisees from agreement with franchisors may often be numerous as well as onerous,[68] they are rather not regarded as limiting the rights and powers which are derived from the legal position of 'employer'. While German law, at least at the moment, seems to be ill-prepared to treat franchisors as (co-) employers,[69] there is mounting political pressure. For instance, three Italian consumer organisations recently filed a complaint with the European Commission. Though they primarily allege McDonald's is abusing its franchises in Europe through restrictive contracts and property rental arrangements, they also blame the company for driving down wages for workers. Recently, these organisations received support for their complaint from the US labour union SEIU, which has already stirred up protests demanding higher wages for McDonald's workers.[70]

V. Evaluation and future prospects

As the notion of 'employee' has been extensively discussed, the notion of the 'employer' has so far attracted much less interest in Germany. Similarly, it is rarely asked whether and to what extent obligations that 'normally' would depend on being the 'contractual employer' could (partly and possibly cumulatively) be assigned to a mere 'functional employer'. And while the possibility of 'co-employership' is generally acknowledged, there is also a consensus that such 'co-employership' must, in principle, be based on being one of the parties to an employment contract.

Against this background, it may be useful to distinguish two situations: First, the situation that the position of employer is split in the sense that another person than the contractual employer exerts the power to direct. This situation may lead to application of the rules on temporary agency work. Second, the situation that it in one way or another 'an employer behind the employer' exists. This latter situation is far less clear-cut than the former both in terms of requirements and in terms of legal consequences.

1. The 'functional employer' in the case of temporary agency work

Temporary agency work is regulated in the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*) which also implements Directive 2008/104/EC on temporary agency work.[71] Temporary agency work constitutes a trilateral relationship: First, there is a contract of employment between the temporary agency worker and the

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receives from a single other person on average more than half of his or her total income from his or her profession.

[67] See, for instance, State Labour Court Saarbruck of 11.04.2011 – 5 W 71/11.

[68] See *Graf von Westphalen*, in: Westphalen (ed.), Vertragsrecht und AGB-Klauselwerke, 2015, Teil 'Klauselwerke', note 10 who, however, mentions both the broad spectrum of rights and obligations and the fact that in terms of content they are subject to a dynamic development.

[69] See also State Labour Court Mecklenburg-Vorpommern of 30.09.2014 – 2 Sa 77/14 (employer position of franchisor considered but quickly discarded).

[70] Euroactiv.com: 'McDonald's most dedicated opponents find allies in Europe', 13.01.2016.

[71] Directive 2008/104/EC of the European Parliament and of the Council of 19.11.2008 on temporary agency work, Official Journal of the European Union of 05.12.2009, L 327/9.

temporary work agency. Second, there is a contract between the temporary work agency and the user-enterprise according to which the latter may make use of the manpower of the worker during an assignment. Third, there is a (non-contractual) legal relationship between the worker and the user-enterprise. A contract of employment exists only between the temporary work agency and the temporary worker. Only the temporary work agency is the employer. There is no double employment contract.[72] However, the contract of employment between the temporary work agency and the temporary agency worker will regularly form a so-called contract for the benefit of third parties (*Vertrag zugunsten Dritter*) within the meaning of section 328 of the Civil Code under which 'the third party acquires the right to demand the performance directly' (section 328(1) of the Civil Code).[73] While the relationship between the temporary agency worker and the user-enterprise is no employment relationship, it nevertheless forms a legal relationship that gives rise to secondary obligations, in particular, duties to care and to protect the worker (*Schutz- und Fürsorgepflichten*).[74] Though there is a fundamental agreement on the existence of these obligations, their legal basis is doubtful. Some authors claim that they are based on a quasi-contractual relationship, which essentially results from the fact that one party has intense possibilities of harming rights of others.[75] Other authors point to the contract between the temporary agency and the user-enterprise which they regard as a so-called contract with protective effect for third parties (*Vertrag mit Schutzwirkung für Dritte*).[76] In that case, workers would directly benefit from the contract concluded between the temporary agency and the user-enterprise in the sense of enjoying (contractual) claims. As regards the legal position of the user-enterprise, the employment contract between the temporary agency and the (temporary agency) worker is regarded by some authors as also constituting a contract with protective effect for third parties. In case of being harmed by the worker, the user-enterprise then also would have a claim based on contractual obligations to care and to protect.[77]

As far as health and safety is concerned, section 11(6) of the Act on Temporary Agency Work applies. According to this provision, activities of the temporary agency worker are subject to the rules of public health and safety law; and obligations arising from public health and safety law on the part of the user-enterprise are independent of obligations on the part of the temporary work agency. Section 11(6) must be seen in the light of the fact that the worker performs his or her duties as part of the work organisation

[72] In the past, legal doctrine was indeed of the view that there was such double employment relationship. This position is not in conformity with the current law anymore, however; see *Schüren*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed. 2010, Introduction note 107.
[73] See *Schüren*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed. 2010, Introduction note 312.
[74] *Schüren*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed. 2010, Introduction note 312 and note 117, in particular.
[75] See in general *Canaris*, Ansprüche wegen 'positiver Vertragsverletzung' und 'Schutzwirkung für Dritte' bei nichtigen Verträgen, Juristenzeitschrift 1965, p. 475.
[76] See *Markesinis/Unberath/Johnston*, The German Law of Contract – A Comparative Analysis, 2nd ed., 2006, p. 204 et seqq. There are basically three requirements that must be met: First, a particularly close relationship between the third party and the promisee (contractual creditor), second, the promisee must have some interest in protecting the third party/must be responsible for the third party 'for better or for worse', third, the promisor must be able to foresee that the third party would suffer damage in the event that the promisor performed his obligation badly.
[77] See *Schüren*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed. 2010, Introduction notes 113 et seqq., 130.

of the user-enterprise. There is consensus that section 11(6) is declaratory in nature as the provisions of public health and safety law, including the Act on Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz*), would apply to the user-enterprise anyway.[78]

The temporary agency is liable for social security contributions. This corresponds with its position as exclusive employer of the temporary worker. However, the user-enterprise has a subsidiary liability. According to section 28(2) sentence 1 of Social Code IV (*Sozialgesetzbuch IV*), user-enterprises shall be liable as absolute guarantor for contributions to sickness, care, pension and unemployment insurance as far as contributions are concerned that are due for times of assignment.[79]

Under certain circumstances, the law even provides for the user-enterprise becoming the (contractual) employer of the (temporary agency) worker. According to section 10(1) sentence 1 of the Act on Temporary Agency Work, if the temporary work agency lacks permission to hire-out workers and the employment contract with the worker accordingly is ineffective (section 9 no. 1 in conjunction with section 1 of the Act), an employment relationship between the worker and the user-enterprise is deemed to exist.[80] Section 10(1) sentence 1 primarily aims at protecting the worker. Indirectly, it also ensures alertness on the part of the user-enterprise which may not wish to land itself in a position where it becomes the employer of the temporary agency worker. It is worth noting, that according to the Draft Act that was mentioned above, employment contracts between the temporary agency and the worker will also be ineffective if, in the contract between the temporary agency and the user-enterprise, the existence of temporary agency work is not explicitly mentioned. As a result, companies will run the risk of becoming employers if they enter into bogus civil law contracts. In the past, if courts qualified a contract as a contract to assign workers, the companies could refer to a licence to hire-out workers that they kept in stock just in case.

As regards workers' codetermination, it should be noted that temporary agency workers even during their assignments belong to the establishment of the temporary work agency (section 14(1) of the Act on Temporary Agency Work). During assignments, however, they are also entitled to elect a works council at the user-enterprise if they have been working in the establishment for more than three months (section 7 sentence 2 of the Works Constitution Act).[81] In this context, it should also be mentioned that the Federal Labour Court recently abandoned its so-called 'two-components-doctrine' according to which affiliation of a worker with a given establishment required both existence of a contract with its owner and actual integration in the work organisation. According to the

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[78] See *Schüren*, in Schüren/Hamann (ed.), Arbeitnehmerüberlassungsgesetz, 4th ed. 2010, § 11 AÜG note 135.

[79] According to section 150(3) Social Code VII in conjunction with section 28e(2) Social Code IV, the same applies with regard to accident insurance. Similarly, there is a liability for income tax purposes under section 42 d(86) of the Income Tax Act (*Einkommensteuergesetz*).

[80] Application of section 10(1) sentence 1 is restricted to cases of lacking permission to hire-out. Other violations of the law are not within the scope of this provision. If the temporary work agency, for instance, hires-out a worker permanently, though assignments according to section 1(1) sentence 2 must be 'temporary', there is no legal fiction of an employment relationship between the worker and the user-enterprise as long as the temporary work agency is in possession of a permission; see Federal Labour Court of 10.12.2013 – 9 AZR 51/13. The Court, explicitly, states (under note 34) that substitution of one employer by another would also be problematic from the point of view of constitutional law (freedom of occupation of the temporary agency worker).

[81] On the other hand, according to section 14(2) sentence 1 of the Act on Temporary Agency Work, they cannot be elected.

Court, 'unlimited application (of this doctrine) would not lead to reasonable results if staff is deployed on other companies'.[82]

2. 'Indirect employment relationship' or 'the employer behind the employer'

A fairly old institution of German law is the so-called 'indirect employment relationship' (*mittelbares Arbeitsverhältnis*).[83] According to the courts, such relationship exists if an employee is employed by another person (often called the 'intermediate master' or *Zwischenmeister*) who for his part is an employee of a third party (the entrepreneur) whereby the work is performed directly for the entrepreneur who is fully aware of this.[84] Assuming such 'indirect employment relationship' aims at establishing subsidiary liability of the entrepreneur with regard to payment of wages, in particular. The rationale is that an entrepreneur must be liable if he or she directly benefits from the work performed. According to the courts, the 'indirect employment relationship' forms an 'unwritten principle of law'.[85] It is clear that this legal institution is close to the principle of good faith.[86] On one occasion the Federal Labour Court, for instance, held that it amounted to an 'abuse of the legal form of indirect employment and a circumvention of laws and collective agreements' if an employer instructed his maintenance men to hire cleaning ladies in their own name, though on account of him, instead of offering them direct employment. According to the court, that was the case in any event if the intermediaries were not allowed to reach their own business decisions and could not make a profit either.[87]

The Federal Labour Court has made it clear on various occasions that an 'indirect employment relationship' in that sense only can occur if the intermediary himself is an employee. According to the court, persons employed by an 'independent entrepreneur' do not need 'additional protection' (by providing them with a subsidiary debtor). Moreover, only if the intermediary himself is a mere employee, he is regularly lacking the resources needed to bear the risks that come with the status of employer.[88]

In legal literature, the position of the Federal Labour Court has been criticised by some authors. There have even been demands to abandon this supposed institution of law altogether.[89] Irrespective of whether the 'indirect employment relationship' had an added value in the past, it may serve a legitimate purpose in the future, however. It seems that this could be the case in particular, if the courts would not require anymore that the

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[82] Federal Labour Court of 05.12.2012 – 7 ABR 48/11.
[83] The practical importance so far has been limited; see *Preis*, in: Erfurter Kommentar zum Arbeitsrecht, 16th ed., 2016, § 611 BGB note 172.
[84] This is the definition provided by Federal Labour Court of 09.04.1957 – 3 AZR 435/54.
[85] Federal Labour Court of 09.04.1957 – 3 AZR 435/54.
[86] See section 242 of the Civil Code: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration'. The principle of good faith also prevents employers from cooperating in a collusive manner; see, for instance, Federal Labour Court of 24.06.2015 – 7 AZR 452/13 on such collusion aiming at escaping the application of legal provisions that limit the right of employers to fix the terms of employment contracts. See also Federal Labour Court of 23.09.2014 – 9 AZR 1025/12: If in the context of temporary agency work, the temporary work agency and the user-enterprise abuse their freedom of contract in order to escape the limits that apply to the fixing of the term of a contract of employment, such abuse leads to the fixing of the term being ineffective, while it does not lead to an employment relationship with the user-enterprise.
[87] Federal Labour Court of 20.07.1982 – 3 AZR 446/80.
[88] Federal Labour Court of 09.04.1957 – 3 AZR 435/54.
[89] See, in particular, *Waas*, Das sogenannte mittelbare Arbeitsverhältnis, in: Recht der Arbeit 1993, p. 153.

intermediary must be an employee. Moreover, the courts could consider putting more emphasis on the aspect that actively encouraging involvement of third parties, if motivated by the wish of entrepreneurs to escape labour law obligations, should be tackled by establishing (at least) subsidiary liability of these persons in their capacity as 'indirect employers'. If further developed by the courts in that sense, fissurization of the workplace could bring a breeze of fresh air to a legal institution that was presumed by some as being almost dead.

VI. Conclusion

Fissurization of the workplace is a global phenomenon.[90] Germany is no exception. Though German law may already hold some of the answers, the problems involved will have to be further addressed by the legislator as well as the courts.

[90] See also *Weil*, Afterword: Learning from a fissured world – reflections on international essays regarding *the fissured workplace*, in: Comparative Labor Law & Policy Journal 2015, p. 209 (209).

Summary:

1. Differentiation between contracts of employment and 'ordinary civil law contracts' has become a major issue as there are claims that employers increasingly take advantage of the latter in order to evade labour law.
2. While the notion of 'employee' has been fleshed-out by the courts and legal theory, there is little discussion of the notion of 'employer'.
3. Courts and academics have been struggling for quite a while with employment in so-called 'matrix-structures' of groups of companies that are characterized by the employer functions being split between companies belonging to the same group.
4. Contracting-out is widespread. Mostly, it takes the form of work subcontracted to other companies in which case there may often be temporary agency work in disguise.
5. Supply-chains and franchising are widespread as well.
6. In principle, labour law aims at individual establishments or companies. In a few cases, however, the law takes into account that a company is part of a group.
7. The legislator responded to contracting-out by establishing secondary liability of contractors with regard to certain labour law obligations and, more recently, by enlarging the rights of works councils (along the lines of jurisprudence).
8. Labour law problems that arise in the context of supply-chains and franchising so far received little attention.
9. The 'functional employer' (as opposed to the 'contractual employer') is acknowledged to a certain extent in the law on temporary agency work, which could provide a basis for further developing the law in this regard.
10. The legal institution of 'indirect employment' aims at what be called the 'shadow employer' (or 'the employer behind the employer'). The courts could possibly further develop it in order to cope with the problems posed by fissurization.