



## NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference:  
VS/2018/0046 Improving expertise in the field of industrial relations



COUNTRY REPORT: GERMANY

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## Abstract

This report presents and analyses the legal and societal context related to the rise of new forms of employment in Germany, focusing on changes in regulation from 2007 to the present and on the consequences for social partners and industrial relations. The study is based on desk research using policy documents and media articles, national statistics, as well as eleven semi-structured interviews with representatives of the social partners, policy makers and experts held during 2018.

We find that the type of challenges for the regulation of flexible and new forms of employment depends on the type of social partner, with unions pleading for containment while employers stress their continuing importance. The biggest challenge related to the regulation of work via platforms appears to be the complexity of the issue as the related forms of work differ considerably. Themes in regulation and its goals during the last 10 years include: fighting abuses of certain employment forms such as temp agency work and service contracts (including the incidence of bogus self-employment); improving wage levels for low wages and on-call contracts and ensuring equal pay for temp agency workers; improving social security coverage for those in marginal work; finding ways for self-employed to pay affordable contributions to social security; and, creating bridges into standard employment contracts. Social partner initiatives include employers' pleas for little extra regulation of flexible employment forms as possible and for loosening existing regulation. On the other hand, trade unions' activities have been lobbying policy-makers for the reduction of precarious work and for the regulation of protection for vulnerable solo-self-employed; reaching out to those in flexible employment as new members; various collective agreements have been concluded for stronger rights and better pay and working conditions.

The implications of the growth of flexible and new forms of employment for German industrial relations have been mostly visible for trade unions, who need to (and are adapting to) changing profiles of workers as potential members and to the needs of workers in new forms of employment, e.g. by organizing efforts directed at 'precarious workers', (solo-) self-employed, and more recently, crowd- and gigworkers and continuing campaigns for 'good work'. Employers, at the same time, are continuing to promote the advantages of flexible forms of employment for the necessities of firms and based on the needs of certain groups among the working population. There seem to be no noticeable new actors in German industrial relations linked to flexible and new employment forms.

## 1. Introduction and background

This report presents and analyses the legal and societal context related to the rise of new forms of employment in Germany. The study is based on desk research, policy documents and media articles, national statistics, as well as eleven semi-structured interviews with representatives of the social partners, policy makers and experts held in the course of 2018.

This introductory section covers some of the topic's key aspects, setting the scene for a more in-depth investigation in the subsequent chapters. Chapter 2 focuses on the *current legal context* regarding new forms of employment including relevant case law and important recent regulatory changes between 2007 and the end of 2019. It addresses Germany's approach to those forms of flexible employment seen as (most) problematic, including the issue of dependent or bogus self-employment and the regulation of gig work and crowdwork jobs. Chapter 3 then gives an *overview of initiatives and activities by German social partners* that matter for the regulation of new forms of employment, next to characterizing the roles employers and trade union organization play in this regard. It also addresses the question of whether new actors related to new forms of employment emerged in German industrial relations. Finally, this chapter outlines policy-makers' views on past regulation and future regulatory options. Chapter 4 then analyses *how the development of new forms of employment since 2007 may be related to legislative changes* that occurred in the same period. The question here is whether changes in the levels of new forms of employment can be at all explained by changes in legislation or other regulative changes.

The reader should note that this report, for reasons of time and space, does not look into the consequences of EU legislative developments for Germany and the incidence of flexible (and new) forms of employment. Regulation at the EU level will be covered in a separate report attached to the NEWEFIN project. For the same reason, the report cannot focus on the role of (intra-EU or other) migration on the issues discussed here.<sup>1</sup>

The *conclusion* returns to five aspects of the subject matter, namely: 1) challenges for the labour market and regulation of new forms of employment as perceived by various stakeholders, 2) the ways in which, on the one hand, legislative action, and, on the other, social partners' initiatives tried to affect perceived changes of the labour market, especially the growth of new and flexible employment forms, 3) the ways in which industrial relations actors, especially trade unions, have adapted to different membership profiles and workers' needs, and, finally, 4) to what extent regulatory

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<sup>1</sup> This disclaimer is inspired by a personal communication with R. Empen (DGB), 17.05.19.

efforts and social partner initiatives can be said to have achieved their envisaged goals.

### **Reasons for the existence of new forms of employment and the timing of their rise**

In Germany, since the late 1980s a combination of many developments that were gradually changing the structure of paid work has been present, affecting both the demand and the supply side of labour. Factors of importance here include: the rise of services and associated jobs in the changing economy; the increase of female labour market participation; the flexibilization of production processes and services together with firms changing human resources strategies; the privatization of large parts of the public sector; and rising cost pressure in an ever more globalized form of market competition. While this list is long, the relative importance of these macro-trends is difficult to establish.<sup>2</sup> Scholars who have looked systematically at the drivers behind changing working patterns argue that shifts towards services and increased female employment are not satisfactory explanations in themselves. Instead, they see the interplay between institutional changes and behavior of both employers and individuals as the main factor behind the growth of flexible employment forms. As for employer behavior, they see greater institutional incentives in favour of non-standard employment (in the form of cost advantages and less legal barriers) and this combines with greater pressures on firms to enhance flexibility and reduce costs. As for unemployed individuals, forms of flexible employment may offer opportunities to re-enter the labour markets, although working flexibly may not be their first choice.<sup>3</sup>

Yet in Germany, the notable rise of new and flexible forms of employment since the 2000s is often associated with the introduction of the Hartz labour market reforms by the coalition government of Social Democrats and the Greens. Then, several measures were enacted to de-regulate the relatively static labour market, aiming to bring down the persistently high unemployment at the end of the 1990s, and had important effects on the country's labour market. The reforms contained many different elements. Employment services and related activities became fundamentally restructured, unemployment benefit duration for the elderly was lowered, and all welfare recipients considered able to work were included in activation schemes. The latter changes led to a significant reduction of long-term unemployment benefits and stricter monitoring activities for the unemployed. Most relevant for this study, already existing (but strictly regulated) flexible forms of employment such as fixed-term contracts, tempo-

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<sup>2</sup> G. Bäcker & J. Schmitz, Expertise für die Kommission „Arbeit der Zukunft“ Atypische Beschäftigung in Deutschland, ein aktueller Überblick. Hans Böckler Stiftung (2016), 4.

<sup>3</sup> A. Arlt, M Dietz & U. Walwei, *Winds of change: Work arrangements in Germany* (2009), <https://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper23b.pdf> (accessed 21 Feb. 2019)

rary agency work, and marginal employment were made more attractive. For instance, it promoted temporary agency work and new employment forms such as 'mini-jobs' and start-ups ('Ich-AG', later substituted by a financial incentive to become self-employed). Overall, and especially by economists, the reforms are seen as successful in addressing the German labor supply problem by (among other things) improving incentives for job search, abolishing ineffective policy instruments such as job creation schemes, and enforcing requirements for the unemployed to prove ongoing job search efforts. Hence, an accelerated matching between unemployed workers and job vacancies was observed.

In addition, labour market participation rates were substantially increased between 2000-2016, notably by taking away monetary incentives for early retirement. This occurred across the board, but especially with workers aged 55-64 years (by nearly 30%), women (by 10%) and low-skilled workers (by 5%). Schneider and Rinne stress that the abolition of early retirement options took away an important flexibility instrument for firms, which used to utilize early retirement (partly financed indirectly via unemployment insurance) to circumvent strict employment protection legislation for older workers. As a result, firms (as well as workers who often consented to early retirement) were confronted with strict employment protection legislation, and it was therefore essential that possibilities for using alternative flexibility instruments, such as temporary agency work, fixed-term contracts, and marginal employment were readily available.<sup>4</sup>

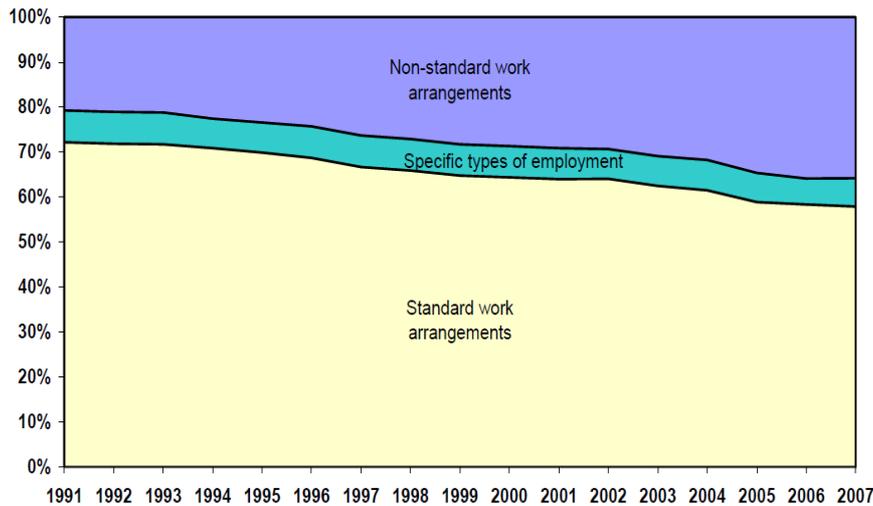
As for the timing of the rise of flexible forms of work, a 2008 report examines changing patterns of employment showed that non-standard forms of employment had gained importance even before the often-cited Hartz reforms. As displayed in Figure 1, the share of standard work (defined as permanently employed with at least 31 hours per week and employers) decreased from 72 per cent in 1991 to 58 per cent in 2007, while non-standard work increased about 15 percentage points to 35 per cent. Despite these shifts, in 2007, standard work or employment could still be considered 'normal' considering the labor market as a whole.<sup>5</sup>

Figure 1. Share of Work Arrangements in Germany 1991-2007

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<sup>4</sup> U. Rinne & H. Schneider, *The labor market in Germany 2000–2016 (July 2017)*, IZA World of Labor, <https://wol.iza.org/uploads/articles/379/pdfs/the-labor-market-in-germany.pdf> (accessed 21 Feb. 2019)

<sup>5</sup> Arlt, Dietz & Walwei, *supra* n.2.



Adding a longer-term perspective, Eichhorst et al (2016) report that the overall share of standard employment (defined as full-time and open-ended contracts) has declined 5 percentage points during the period 1992 to 2014 (from 45% to 40% in 2014), while being fairly stable at 40% since the mid-1990s. More remarkable, they find a strong decline in the share of the inactive population of 8 percentage points (from 26% in 1992 to 18% in 2014), while the rate of unemployment, however, has stayed relatively constant between 6% and 8%. Relatedly, there has been a concomitant large increase in the importance of flexible forms of employment such as part-time work, fixed-term activities, temporary work and marginal employment).<sup>6</sup> Importantly, as Schneider and Rinne argue, flexible forms of employment were mostly created in addition to permanent full-time jobs that are subject to social security contributions. Therefore, the share of people in standard employment (see below for differences with flexible forms of employment) has not only been fairly stable since the early 2000s, it even increased in absolute numbers. Simultaneously, the decline in the inactive population over the last 20 years is due to the increase in the share of people holding other flexible jobs.<sup>7</sup>

### **Trends regarding labour market flexibility and prevalent forms of flexible and new employment**

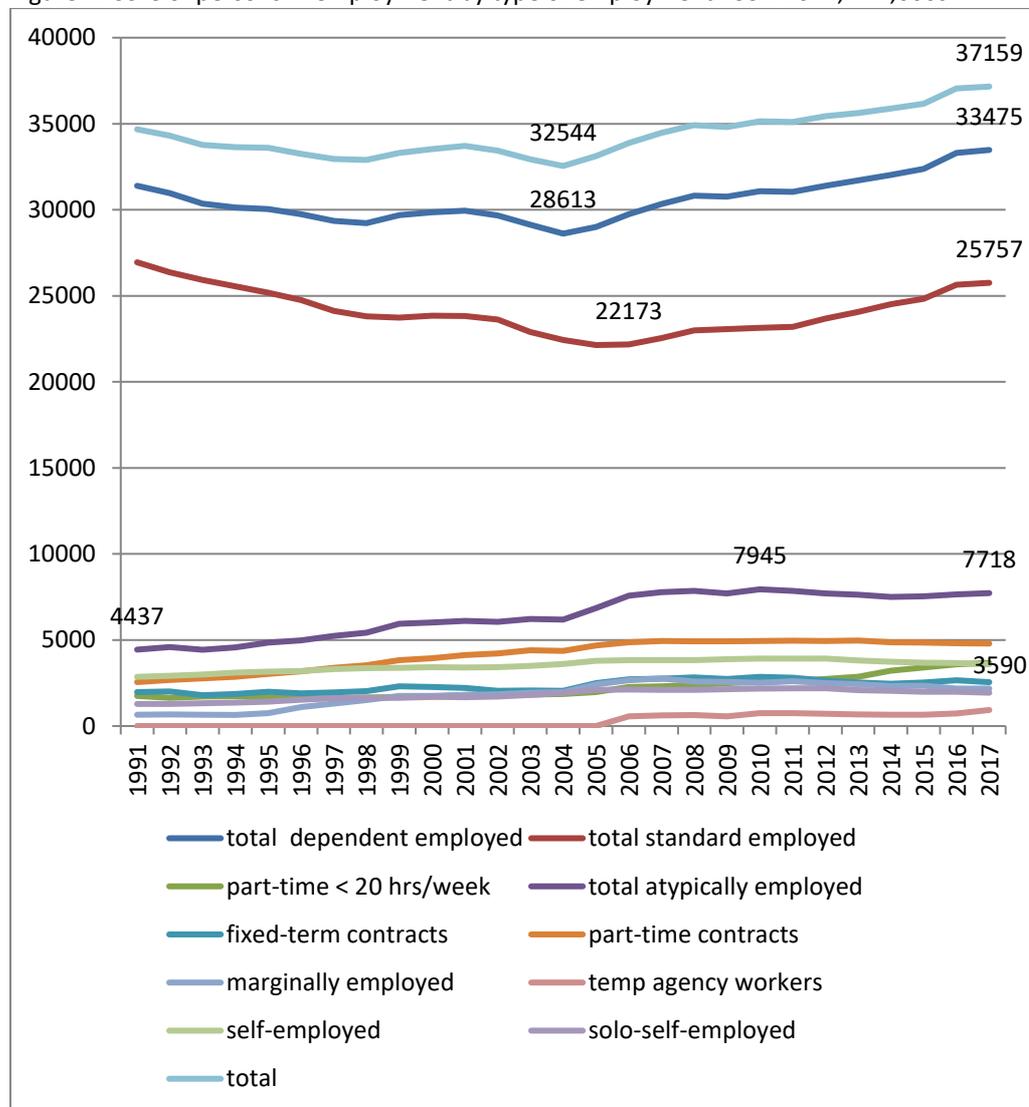
In Germany, different ways of counting employment categories exist, therefore, data sources often consist of overlapping categories (e.g. part-time and fixed-term work) which makes an exact mapping of the extent of flexible (by official sources usually referred to as ‘atypical’ employment) somewhat difficult. The following graphs are

<sup>6</sup> W. Eichhorst, H. Hinte, U. Rinne & V. Tobsch, *How Big is the Gig? Assessing the Preliminary Evidence on the Effects of Digitalization on the Labor Market*. IZA Policy Paper No. 117 (2016).

<sup>7</sup> Rinne & Schneider, *supra* n.3.

based on figures by the Federal Statistics Office and on the WSI-HBS on atypical employment to give an impression of the scope of flexible forms of employment and their prevalence. When referring to 'atypical' employment, this should be seen as equivalent to flexible forms of employment. Figure 2 and 3 display the development of employment in a larger time frame than the period of analysis in this report, from 1991 until 2017. Figure 2 shows the development of atypical work in relation to other forms of work, including self-employment. While the lines in the upper part show the development of overall categories, the purple line further below represents a continuous upward trend of atypical employment, which after an absolute peak in 2010, has remained at a high level until 2017.

Figure 2. Core of persons in employment by type of employment 1991-2017, in 1,000s

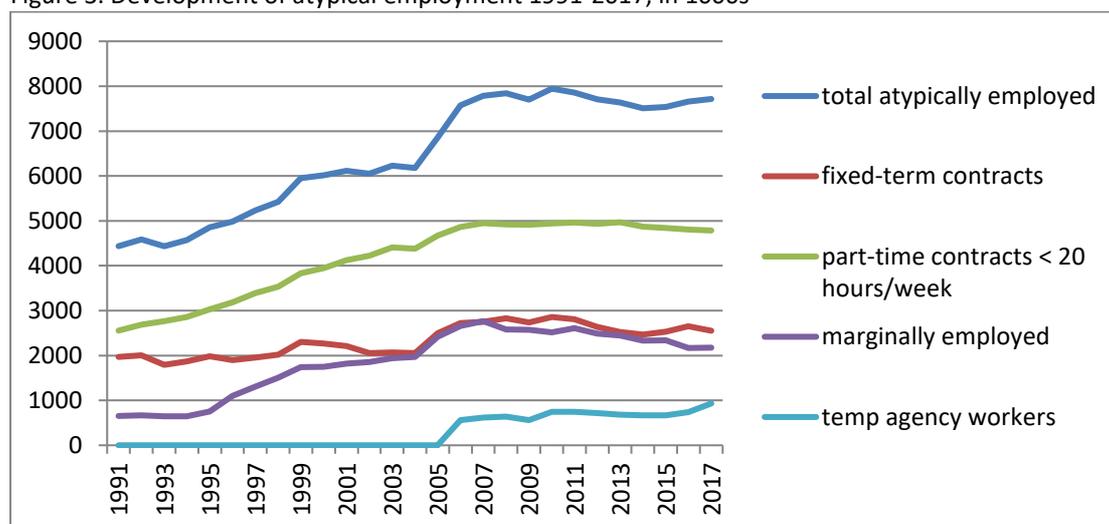


Source: Federal Statistics Office, Microcensus.

Figure 3 zooms in on the total numbers of various forms of atypical work in order to identify those that are prevalent in the German context. It shows that all specific forms

have, at least slightly, increased over time, but without changing its ranking in terms of absolute numbers, with part-time work highest and followed by fixed-term, marginal, and temp agency work. Since the introduction of the 2003 Hartz labour market reforms that enabled an increase of flexible forms of employment. Atypical work increased most between 2003 and 2010, peaking in that year at just under 8 million. Looking at data from 2017, it still amounted to about 7,7 million persons. Note that these numbers do not contain part-time contracts with more than 20 hours/week, while other ways of looking at atypical employment would include all part-time contracts as they deviate from standard, fulltime employment.

Figure 3. Development of atypical employment 1991-2017, in 1000s



Source: Federal Statistics Office, Microcensus

Calculating the share of atypical employment out of all employment, WSI-HBS data reports a peak in 2016, when it stood at 39,6% of all dependent employment (excluding civil servants and self-employed), corresponding to 14,473 million persons. This percentage was composed of 23% part-time workers (including those working more than 20 hours but less than fulltime), 2,6% temp agency workers and 14,1% marginal workers (including those working for marginal wages in mini-jobs or those working for very short periods).<sup>8</sup> Data on 2017 from an internal DGB (Deutscher Gewerkschaftsbund) document comparing normal and atypical employment even refers to a figure of 20,1 million in atypical employment next to 22,6 million working in standard employment. Among the atypically employed, there were 8,8 million part-time workers (fully covered by social security contributions), 5 million marginal/part-time workers, 3,2 million workers on fixed-term contracts, 2 million solo-self-employed and 1,1 million temp agency workers.<sup>9</sup>

<sup>8</sup> WSI-Hans Böckler-Stiftung, *Atypische Beschäftigung: Neuer Höchststand*, [https://www.boeckler.de/108863\\_108907.htm#](https://www.boeckler.de/108863_108907.htm#) (accessed 24 Jan. 2019)

<sup>9</sup> DGB, *EPSR – Prekäre Beschäftigung in Deutschland*, internal document received by respondent (15 June 2018).

In official German statistics, self-employment appears as a category apart from atypical employment. Numbers have been rising slowly over time and stood at 9,6 % in 2017 (of all employed persons). More than half of these were solo-self-employed, which amounts to 5.2% of the total German working population. The phenomenon of dependent or bogus (solo)self-employment is fed by factors such as including fraudulent employers who have incentives to save on labour costs by hiring cheaper (solo)self-employed persons rather than offering employment contracts that entail social security contributions and other costs. As for their extent, a 2018 report estimates their number in the main occupation to be in the range between 235,000 and 436,000 (0,7 % to 1,3 % of the working population).

Another form of employment that does not show at all in official employment statistics concerns workers hired by firms through service contracts. This group is seen by trade unions as being increasingly problematic because of crowding out effects of other personnel, especially temp agency work visible already for instance in the meat processing sector. A research report commissioned by BMAS (2017) reports on the results of a 2016 survey among firms and works councils seeking information on the spread, use and possible problems relating to service contracting. More than 90% of firms report to use service contracting, with almost 90 % outsourcing at least one core process via service contracts.<sup>10</sup> IG Metall stated in 2018 that service contracts are very widespread in their sector. Based on a repeated survey of works council members, the share of firms that outsource tasks to service contractors has risen from about 60 percent in 2015 to nearly 80 per cent in 2018. In addition, 12 per cent of firms have been substituting permanent staff in this fashion between 2015 and 2018 (compared to 5 per cent reported in a survey in 2012).<sup>11</sup>

As for the extent of platform work and crowdwork (and the characteristics of platform users), a number of small-scale studies exist, based on surveys that aim to be as representative as possible. The first German Crowdwork monitor (September 2018, based on a sample of nearly 375,000 internet users), estimates the share of active crowdworkers' in the population over age 18 to be up to 4.8 %. About 70 % of these, i.e. 3.4 % of Germans say that they earn 'an income' through this type of work, while up to another 3 % report that they could imagine participating in crowdwork in the

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<sup>10</sup>M. Arntz et al. Verbreitung, Nutzung und moegliche Probleme von Werkvertraegen. BMAS Forschungsbericht Nr. 496 (Nov 2017), [https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb496-verbreitung-nutzung-moegliche-probleme-von-werkvertraegen.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb496-verbreitung-nutzung-moegliche-probleme-von-werkvertraegen.pdf?__blob=publicationFile&v=2) (accessed 6 Feb. 2019)

<sup>11</sup> IGM, 05.10.2018. Immer mehr Missbrauch von Leiharbeit und Fremdvergabe. <https://www.igmetall.de/immer-mehr-missbrauch-von-leiharbeit-und-werkvertraegen-30027.htm>; IGM 01.09.2015, IG Metall wendet sich gegen Werkverträge, <http://www.bw.igm.de/wir/presse/meldung.html?id=72287> (accessed 6 Feb. 2019)

future.<sup>12</sup> An updated second version of the monitor (February 2019) reports a slightly lower share of active crowdworkers, that is up to 4% of respondents who currently engage in such activities; if excluding those without remuneration, the share decreases to 2.6%.<sup>13</sup>

Germany also figured in the 2017 EU COLLEEM survey (2018), which tried to gauge service provision via platforms by respondents in 14 EU countries.<sup>14</sup> Their less conservative results estimate that an average of 10% of the German adult population has ever used online platforms for some type of labour services. However, less than 8% do this with some frequency, and less than 6% spend a significant amount of time on it (at least 10 hours/week) or earn a significant amount of income (at least 25% of the total). Main platform workers (those who earn 50% or more of their income via platforms and/or work via platforms more than 20 hours a week) account for about 2% of the adult population on average. Countries differ significantly, with UK having the highest incidence of platform work, followed by countries with high relative values like Germany, the Netherlands, Spain, Portugal and Italy. Finally, the smaller-scale FEPS study of seven European countries including Germany estimates that between 1.6% and 5.1% of the population in these countries derive more than half of their income from crowdwork. As table 1 shows, Germany takes in a middle position after Italy, Switzerland, Sweden and the UK, but comes second in terms of absolute numbers behind Italy.<sup>15</sup>

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<sup>12</sup>O. Serfling, *Crowdworking Monitor No. 1*. Discussion papers in Behavioural Sciences and Economics 4 (Rhine-Waal University of Applied Sciences, September 2018), at 2.

<sup>13</sup>O. Serfling, *Crowdworking Monitor No. 2*. Discussion papers in Behavioural Sciences and Economics 5 (Rhine-Waal University of Applied Sciences, February 2019), at 1.

<sup>14</sup>A. Pesole, M.C. Urzì Brancati, E. Fernández-Macías, F. Biagi, & I. González Vázquez, *Platform Workers in Europe – Evidence from the COLLEEM survey*, (Publications Office of the European Union, Luxembourg, 2018). The survey asked whether the respondents had ever gained income from different online sources, among which there are two corresponding to labour service platforms, i.e. those 1) "providing services via online platforms, where you and the client are matched digitally, payment is conducted digitally via the platform and the work is location-independent, web-based" and, 2) "providing services via online platforms, where you and the client are matched digitally, and the payment is conducted digitally via the platform, but work is performed on-location".

<sup>15</sup>FEPS-Uni Europa-Uni Hertfordshire, *Work in the European Gig Economy*, <http://www.uni-europa.org/wp-content/uploads/2017/11/europeagigeconomy-longversionpdf.pdf> (accessed 8 March 2018)

Table 1. People earning at least 50% of personal income from crowd work

Austria	2.3%	130,000
Switzerland	3.5%	210,000
Germany	2.5%	1,450,000
Italy	5.1%	2,190,000
Netherlands	1.6%	200,000
Sweden	2.7%	170,000
UK	2.7%	1,330,000

Source: FEPS study 2017.

### **Differences between standard employment and flexible employment**

Bäcker and Schmitz point out that a core element of the German debate on atypical employment is the question what constitutes ‘standard employment’. In a normative sense, they list a number of criteria including 1) a dependent employment relationship, 2) with a full-time character, 3) open-ended, 4) offering a regular and living wage, 5) offering social security protection and 6) a direct activity in the firm one concluded the contract with.<sup>16</sup>

Based on those criteria, other flexible or atypical working arrangements differ from that ideal, e.g. a limited amount of hours worked, for part-time workers usually a fixed number of hours below fulltime; an employment contract for a fixed period of time (fixed-term workers); in a different kind of employment relationship (temp agency workers employed by an agency and dispatched to a company for a certain period of time working next to permanent and other company staff); and finally, marginal workers working for short periods and/or minimum or low wages earning marginal incomes. Temp agency workers are covered by separate collective agreements; or in terms of limitations of the wage earned (marginal workers: mini-jobs being subject to an earnings ceiling, up to which no social security contribution and taxes are due; others working at the minimum wage or just above that level). Finally, there is the category of crowd workers or gig workers, i.e. individuals who work for a platform, often a free-lance position in the form of (sometimes very short-term) engagements such as an agreed gig (often a physical task) or a task done on-line or in a digital form. Platforms differ widely in the way they give orders or require certain ways of working, making them employer-like to varying extents.

### **Recent political and societal debates on new forms of employment and recent legislation**

Following the more rapid growth of new forms of employment in the first half of the 2000s, after the onset of the financial-economic crisis, a debate about the negative effects on the labour market ensued in the public and the mainstream media. That debate criticized the rising extent of ‘precarious’ jobs and was first launched by unions

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<sup>16</sup>Bäcker & Schmitz, supra n.1, at 3.

with later support of the Social Democratic Party (SPD) during their second 'grand coalition' with the Christian Democratic parties CDU and CSU). It was followed by a discourse supported by the left political spectrum towards government re-regulation of labour markets in order to limit what was seen by many as excessive precariousness.<sup>17</sup> As Bosch (2018) in his account of the making of the minimum wage describes it, a coalition of trade unions and SPD politicians succeeded in combining their forces to construct a new narrative whose main theme was the fight against precarious employment and social inequality. This created the link that had hitherto been missing between the service unions' demand for a statutory minimum wage and the manufacturing unions' drive for a re-regulation of temporary agency work."<sup>18</sup> The subsequent and third 'grand coalition' government (2013-2017) succeeded to introduce for the first time a general minimum wage to counter the growth of extremely low-paid jobs and, later on, enacted legislation in an attempt to re-regulate temp agency work and service contracts, effective by April 2017. The spring 2018 coalition agreement included more initiatives by the current CDU/CSU and SPD government, including: a curb on unlimited chains of fixed-term contracts, the introduction of a right of part-time workers to return to fulltime employment (already proposed as a bill to parliament in June 2018), and the regulation of fixed-term contracts without special motivation (*sachgrundlos*). There is also a debate about the deregulation of working time (regulated in the Working Time Act) in the light of digitalization, as employers in particular would like to see a flexibilization of the current legislation.

### **Reactions of the social partners**

As for employers, their interest organisations tend to embrace flexible forms of employment, as they contribute to the internal flexibility of employers and, from their perspective, they bring (sometimes alleged) certain benefits (in terms of flexible and reduced working hours) for those working flexibly and their personal employment needs. Different types of 'employers' such as platforms may however create a challenge to employer associations in the long run as they are not bound by collective agreements. Trade unions, quite on the contrary, have consistently highlighted the disadvantages of new forms of employment, both from the point of view of individuals who cannot attain standard employment and from a general view on the labour market in its totality. Accordingly, employers met past reforms proposals with skepticism and lobbying efforts to weaken regulation (e.g. the minimum wage was assumed to destroy jobs), while unions voiced demands that went further in terms of regulation

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<sup>17</sup>See also R. Bispinck, R. & T. Schulten, T. *Trade Union Responses to Precarious Employment in Germany* (WSI Diskussionspapier, 178, 2011). Düsseldorf: WSI-Hans-Böckler-Stiftung. <http://nbn-resolving.de/urn:nbn:de:0168-ssoar-309237>; U. Walwei, *From deregulation to re-regulation: trend reversal in German labour market institutions and its possible implications*, IAB Discussion paper (10/2015).

<sup>18</sup>G. Bosch, *The making of the German minimum wage: a case study of institutional change*, *Industrial Relations Journal* 49 19, 33 (2018) at 31.

than the actual compromises reached during the legislative process, a pattern confirmed by social partner respondents.

### **Initiatives of social partners in reaction to new forms of employment**

Both social partners are actively communicating their positions, most prominently on their organizational websites. Employer associations advertise the advantages of 'flexible' forms of employment, such as the umbrella organization BDA does on their website, using fact sheets that clarify misunderstandings and delivering relevant facts from their viewpoint and they are actively representing their interests in that respects vis-à-vis political actors. Trade unions, similarly, have been running various long-term campaigns, e.g. DGB (*Gute Arbeit*), IG Metall (e.g. campaigns aimed at temp agency work and service contracting) and Ver.di (*Gute Arbeit*), which play a crucial role in their information and political lobby strategies. In addition, they encourage company agreements in sectors that lack coverage by collective agreements in order to ensure beneficial measures for flexible workers amongst company staff.

## **2. Germany's legal framework for new forms of employment (in corporation with Hugo-Sinzheimer Institut f. Arbeitsrecht, Frankfurt)**

This sketch of the applicable legal framework to new forms of employment starts out with the different bases or categories of employment found in Germany. It then goes on to describe relevant changes since about 2007 across the spectrum of labour law, including case law and legislative changes. Finally, it offers an overview of which parts of labour law and social security regulations apply (or do not apply) to the different forms of flexible and other forms of employment.

### **2.1 Different bases on which work can be performed**

#### **2.1.1 Common labour contract according to § 611a German Civil Code**

For many years, Germany has not known a statutory definition of 'employee'. Rather, the employee status was defined with a typology developed through case law on the basis of one particular paragraph in the German Civil Code, § 611 (specifying the employment contract as a modification of the service contract). The core element of this typology had been dependent work, i.e. a relationship of personal dependency, which usually depends on the degree of direction provided by the employer and the integration of the organisation of the employer.

Since 2017, the definition of the labour contract has been regulated in § 611a BGB. That paragraph specifies that 'through a contract of employment, an employee will be obliged to work in the service of another person, observing the instructions issue by that person and being in a position of personal dependence'. Instructions may affect content, mode of work performance, time or location of work activity. The obligation to obey these instructions is there is the person is not 'essentially free to arrange those professional activities at his or her own discretion and decide when to perform the work'. Importantly, the determination of the contract of employment depends on an overall assessment of all relevant facts. The latter can be seen as recodification of the former case law of the Federal Labour Court (Bundesarbeitsgericht, BAG) since content-wise, there were no far reaching material changes and new forms of employment are not directly affected.<sup>19</sup> The change is that there is now a positive definition in the law while before it was entirely based jurisprudence. Importantly, if the status of employee applies, an individual enjoys full protection by the labour law *acquis*. Further-

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<sup>19</sup> B. Waas, *The Concept of 'Employee': The Position in Germany*, in *Restatement of Labour Law in Europe Vol 1: the concept of employee* (B. Waas and G. Heerma van Voss eds, Hart Publishing, 2017) at 251.

more, an employment relationship is supposed to follow from an employment contract as a form of contractual agreement, with only few exceptions when that relationship is established without an employment contract.<sup>20</sup>

### 2.2.2 Variations of the common labour contract regarding flexible forms of work

Part-time work (including marginal work) is regulated by the 2001 Part-Time Work and Fixed-Term Employment Contracts Law (*Teilzeit- und Befristungsgesetz*), which implements a corresponding EU directive. In addition, some relevant rules are contained in Part IV of the Code of Social Law (*Sozialgesetzbuch, SGB IV*). For instance, the definition of marginal employment (*geringfügige Beschäftigung*) can be found here (§ 8 SGB IV). Here, the earnings threshold has been raised somewhat (from 400 Euro originally to 450 Euro from 2013 onwards). In this form of employment, workers are not included in the usual social security insurance schemes for sickness, long-term care and unemployment<sup>21</sup> and the employer pays a reduced fixed amount for social security contributions and deducts reduced tax rate. Workers are only included in the occupational accident insurance and, since 2013, in the statutory pension scheme. A report for the EU Commission (2018) stated that one fifth of dependent employed hold a mini-job. Among the 7.6 million mini-jobbers, 4.9 million, i.e. nearly 65%, only hold a mini-job; the remaining ones have it next to another job.<sup>22</sup> Most of those in marginal employment are women and they usually have very low pension entitlements. In addition, Germany knows another - increasingly seen as problematic - form of employment, on-call work or work on demand (*Arbeit auf Abruf*). This employed form is somewhat regulated in § 12 of Part-Time Work and Fixed-Term Employment Contracts Law. However, this seems not sufficient to prevent abuse of workers on the part of employers as reported in the media (see also the later section on 'recent changes').<sup>23</sup>

Second, we turn to **fixed-term contracts**, which are equally regulated by the Part-Time Work and Fixed-Term Employment Contracts Law. Based on this legislation (emanating from the earlier EU directive 1999/70/EC which sought to regulate fixed-term contracts across the European Union) there are two possibilities to establish a fixed term contract: one on the basis of a reasonable ground (§ 14 I TzBfG, *Sachgrundbefristung*), and another without a reasonable ground (§ 14 II TzBfG, *sachgrundlose Befristung*).

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<sup>20</sup> Ibid., at 254. These expectations include: first, vocational trainees serving on a works council, and, second, temporary agency workers employed by an agency that lacks state permission to operate.

<sup>21</sup> N. Duell, *Case study – gaps in access to social protection for mini-jobs in Germany* (Luxembourg: Publications Office of the European Union, 2018). <https://publications.europa.eu/en/publication-detail/-/publication/48d21683-4445-11e8-a9f4-01aa75ed71a1/language-en> (accessed 10 Jan. 2019)

<sup>22</sup> Frankfurter Allgemeine Zeitung, *Der Beschäftigungsmotor Zeitarbeit stottert*, 31.08.2018, <http://plus.faz.net/faz-plus/wirtschaft/2018-08-31/392fd49e0cd07d533f63ead1f742db11?GEPC=s9> (accessed 5 Feb. 2019)

<sup>23</sup> *Bei Anruf Arbeit*, Die Zeit, 30.03.2017, <https://www.zeit.de/2017/13/arbeitszeitmodell-arbeit-auf-abruf-lohn-post-h-und-m> (accessed 24 Jan. 2019)

Especially the latter form, fixed-term contracts without a reasonable ground, has been criticized by a broad coalition of trade unions and political parties advocating workers' rights which led to a political debate on possible new restrictions (see below). Most new labour contracts of young people are based on this variant.

### 2.2.3 Temporary Agency Work

In German law, there is a “triangular relationship” connecting the temporary work agency, the agency worker and the user company. Agency workers (employees) are hired by the temporary work agency (the employers) and are assigned to user companies (clients of temporary work agencies). During the job assignment, user companies are authorized to determine the tasks and duties of agency workers which implies discontinuities between the workplace relationship and employment relationship.<sup>24</sup> Hiring agency workers was until the late 1990s for firms in transitional need of workers. The amount of temporary agency work has been rising considerably following the deregulation contained in the 2003 Hartz legislation. Then, among other things, a special prohibition on fixed-term contracts with agency workers was abolished; the prohibition of re-engagement of former agency workers disappeared; and there was no longer a maximum period of performance in the user enterprise.<sup>25</sup>

In the labour law literature, authors point out two major shortcomings in the regulation of temporary agency work after 2003. First, there is a lack of definition of what is considered ‘temporary’ in the context of supplying workers to an end user. Second, there is plenty of room to derogate through collective agreements to the disadvantage of employees from the equal treatment principle as contained in the Act on Temporary Agency Work.<sup>26</sup>

As a consequence, there have been quite many “dumping” collective agreements during the 2000s. More specifically, these concerned agreements with employer-dominated (‘yellow’) unions which derogated from the equal treatment principle to the disadvantage of workers, putting considerable strain on those agreements that did establish decent terms and working conditions.<sup>27</sup> However, there has been counteraction by the social partners, especially in the metal sector (see the paragraph on *common social partner initiatives* in section 3). Moreover, in 2010, there was jurisprudence in favour of those covered by dumping collective agreement. Then, the Federal

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<sup>24</sup>A. Spermann, *How Does Temporary Agency Work Impact German Agency Workers?* IZA Policy Paper No. 70 (October 2013), at 3.

<sup>25</sup>O. Deinert, *Equal Treatment as a Problem: Germany and Agency Work*, in Core and contingent work in the European Union: a comparative analysis 26, 27 (E. Ales, O. Deinert & J. Kenner eds. Hart Publishing 2017).

<sup>26</sup>T. Klebe & J. Heuschmid, *Collective Regulation of Contingent Work: From Traditional Forms of Contingent Work to Crowdwork – A German perspective*, 186-187 in Ales, Deinert & Kenner, *supra* n.23.

<sup>27</sup>*Ibid.*, at 187.

Labour Court indirectly annulled dumping collective agreements concluded by the collective Christian unions Temp Agency Work and PSA (CZGP), establishing the obligation for temp agencies to pay the difference to equal-pay salary and social security contributions.<sup>28</sup>

Temp agency workers have been subject to substitution through workers hired on the basis of **service contracting** (*Werkverträge*). A service contract can be defined as contract for services in which a contractor has a duty to produce something and is responsible for the result. The phenomenon is quite heterogeneous although it may be categorized into three main types of contract: 1) a contract for the provision of sporadic services, 2) service-contracting with solo-self-employed persons, and, 3) service contracts with other companies as subcontractors, mostly in the context of outsourcing operations or services. The second form is considered problematic as it could result in bogus self-employment and is quite common in the context of one new form of employment, being crowdwork. The third type of contracting is used a lot in the German car industry, where industrial service providers have been used and driven by companies' dumping strategies.<sup>29</sup>

Service contracting is a relatively recent and increasingly widespread form of precarious work with the character of 'dumping' in the sense that employers avoid expensive branch collective agreements for temp agency workers, and choose for cheaper service branch agreements instead (this practice also leads to problems between unions, e.g. IG Metall and Ver.di). Usually, service workers are not bound to high-level special sector collective agreements. If there are collective agreements that are applicable, these tend to be collective agreements of the service sector with lower standards.

#### **2.2.4 Employee-like persons**

Moving onto a different category of workers, Germany knows an intermediate category including those who are neither ordinary employees nor 'ordinary' self-employed workers, called 'employee-like persons'. Those belonging to this category are not personally dependent or subordinated, as employees, but are 'economically dependent' only.<sup>30</sup>

There is no statutory definition so far, but several laws refer to the employee-like status, such as the Collective Bargaining Act (*Tarifvertragsgesetz*, § 12 a TVG) and the Labour Court Law (*Arbeitsgerichtsgesetz*, ArbGG).<sup>31</sup> For this specific status, the main

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<sup>28</sup>J. Heuschmid, IV. *Typischer Inhalt von Tarifvertragsnormen*, Rn. 813 in *Tarifvertragsgesetz* (W. Daeubler ed. Nomos Kommentar, 2016); BAG decision 14.12.2010 – 1 ABR 19/10.

<sup>29</sup>Klebe and Heuschmid, *supra* n.24, at 192-193.

<sup>30</sup>Waas, *supra* n. 17, at p. 273.

<sup>31</sup>Klebe and Heuschmid, *supra* no. 24, at 199.

criteria to ascertain it are: a) economic dependency and, b) a need for social protection similar to ordinary employees. Furthermore, employee-like persons perform work personally without the aid of subordinate employees; and work is either performed for one person mainly or where the worker relies on a single entity, for more than half of his/her income. In fact the Federal Labour Court has considered the need for social protection to exist if a person needs to dispose of his/her working power in order to secure his/her existence (similarly to the need of an employee)<sup>32</sup>. Because of the perceived need of specific legal protection, some selected specific labour law provisions applying to this group are the right to annual leave, prevention of discrimination and the access to labour courts. However, they do not enjoy dismissal protection or protection in case of transfer of an undertaking.<sup>33</sup>

Some provisions in the field of social law also are applicable to employee-like persons. These include § 2 no.9 in the Code of Social Law (Part VI) on state pension schemes, and § 2 II Code of Social Law (Part VII) on the statutory accident insurance scheme.

*Homeworkers* concern a subcategory of employee-like persons, and are regulated in a special law, the Homeworkers Law (*Heimarbeitsgesetz*, HAG) that dates back to the early years of industrialisation.<sup>34</sup> A home worker "works in a work place of his choosing (own home or business premises of their choosing), alone or with family members (...) for profitmaking purposes (...), but surrenders the use of the work results to the directly or indirectly contracting entrepreneur". This category is economically dependent, but generally more autonomous than employees due to the lack of or only minimal subservience to instructions in the performance of their tasks and as such can determine their working hours on their own. The requirement to exclusively personally render the services does not apply to them, in contrast to employees.<sup>35</sup>

Many provisions of labour law are not applicable to homeworkers. However, there are some important exceptions, which concern the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), the Statutory Sick Pay Act (EFZG), the Parental Leave Act (BEEG) and the Paid Leave Act (BUrIG). Notably, and in contrast to the 'ordinary' employee-like worker, homeworkers are included in the vast majority of social security schemes (§ 12 II SGB IV). Recently, there has been notable case law that applying the Homeworkers Law. In 2016, the Federal Labour Court has given an extensive interpretation of the homeworker status<sup>36</sup>. The court considered that a data engineer was

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<sup>32</sup>BAG (Federal Labour Court) of 2 October 1990-4 AZR 106/90 and of 21 December 2010-10 AZB 14/10.

<sup>33</sup>Waas, supra n.17, at 274.

<sup>34</sup>Klebe and Heuschmid, supra no. 24, at 200.

<sup>35</sup>B. Waas, *Crowdwork in Germany*, in *Crowdwork - A Comparative Law Perspective* (Waas, Liebman, Lyubarsky & Kezuka eds., HSI Schriftenreihe, Vol 22: 2017), 142-186.

<sup>36</sup> BAG (Federal Labour Court), 14.06.2016, 9 AZR 305/15.

fitting the criteria of a homemaker and was entitled some protection under labour law, e.g. rights to holiday leave.

### 2.2.5 (Solo) Self-employed

Finally, Germany knows the category of self-employed persons, although a formal legal definition does not exist. Therefore, the difference between self-employment as independent work and dependent employment has been established by case law and derives from the legal definition for dependent employment (codified in the Civil Code in § 611a since 2016 as previously described): someone is an employee if that worker is dependent on the employers' instructions in terms of (i) place, (ii) time and (iii) content of work, (iv) is incorporated into the organisational structure of the employer, and (v) uses the production equipment of the employer.<sup>37</sup> The proportion of self-employed out of all employed persons has been relatively constant since the late 1990s, moving around 10 and 11%. However, among these, the sub-group of solo-self-employed has seen a considerable increase in the early 2000s, exceeding the group of self-employed with personnel between 2002-2005 and peaking in 2012 at more than 2,4 million persons (compared to about 1,8 million of other self-employed).<sup>38</sup> Self-employment is characterized by substantially restricted access to social security protection (see Table 3 below) and, importantly, no protection by provisions of labour law. However, the application of some common laws is possible, for example consumer protection law (e.g. § 305ff BGB).<sup>39</sup>

Relatedly, what does German law specify about dependent (or bogus) self-employment? Currently, no regulation in labour law refers to this 'form' of employment, except for the recent regulation in § 611a of the German Civil Code clarifying when an *employment contract* exists. If there is no labour contract although the conditions for one are in place, possibly dependent self-employment is at hand. On the other hand, regulations *do exist* in the social security field (which, however, merely serve to define social security obligation rather than affecting employee status). In Section 7(1), Code of Social Law IV, a definition of employment is given: 'Employment is subordinate work, in particular within the framework of an employment relationship'. Furthermore, two indicators of such employment are stipulated, a) it refers to a person who

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<sup>37</sup> W. Eichhorst et al, *Social Protection Rights of Economically Dependent Self-employed Workers*, study conducted for the European Parliament under contract IP/A/EMPL/FWC/2008-002/C1/SC8, IZA Research Report 54, 2013, at 38.

<sup>38</sup> M.F. Meier and B. Ivanov, *Selbstständige Erwerbstätigkeit in Deutschland*, BMAS Forschungsbericht no. 514, September 2018, [https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb514-selbststaendige-erwerbstaetigkeit-in-deutschland.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb514-selbststaendige-erwerbstaetigkeit-in-deutschland.pdf?__blob=publicationFile&v=1) (accessed 17. Jan. 2019).

<sup>39</sup>Klebe and Heuschmid, *supra* no. 24, at 201.

is subjected to the authority of another person to direct him or her, and b) it refers to a person who forms part of the business organisation of another person.<sup>40</sup>

There is a procedure to assess a person's status as employee in the context of social law in § 7a of Part 4 of the German Code of Social Law, aimed at establishing whether an employer has the duty to pay social security contributions for the person in question. Yet, as the social security administration in question (*Deutsche Rentenversicherung*) has to prove that someone who is self-employed should in fact be employed, few transfers are made owing to the difficulty in identifying these workers and their employers. As a result, most economically dependent self-employed are registered as self-employed and only obtain limited rights<sup>41</sup>. However, a self-employed person who would be given an employee status would only be levelled with employees for social security rights and not conferred other rights associated to labour law or collective agreements. As for the extent of bogus self-employment, a recent study by the German Institute of Employment Research, IAB, estimates their number (in the main occupation) to be somewhere between 235,000 (0,7 % of the working population) and 436,000 (ca. 1,3 %) depending on the estimation model used.<sup>42</sup> Finally, it should be noted that (solo)self-employed persons are assumed to make up a great deal of those employed in the platform economy,<sup>43</sup> especially given the basic attitude of platforms being simply intermediaries for workers on a free-lance basis with employment rights such as a minimum wage, dismissal protection and social security rights.<sup>44</sup>

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<sup>40</sup> Waas, *supra* n. 17, at 255.

<sup>41</sup> In practice, the social insurance administration (pension insurance) assesses the actual employment status by a number of criteria formally removed from the law in 2003. Accordingly, workers can be deemed as self-employed if they do not fulfil three of these: i) has not engaged employees who are liable to compulsory insurance deductions; (ii) has only one employer; (iii) executes the same type of task at regular intervals; (iv) does not fulfil the criteria of entrepreneurship that are based on personal and economic independence; or (v) provides services that are consistent with former dependent work within the same company. Eurofound, 'Self-employed Workers: Industrial Relations and Working Conditions'. <https://www.eurofound.europa.eu/publications/report/2009/self-employed-workers-industrial-relations-and-working-conditions> (accessed 13 March 2018).

<sup>42</sup> H. Dietrich and A. Patzina, *Bogus self-employment in Germany - also a question of definition*. <https://www.iab-forum.de/en/bogus-self-employment-in-germany-also-a-question-of-definition/> (accessed 4. Feb. 2019)

<sup>43</sup> Klebe and Heuschmid, *supra* n. 24, at 200.

<sup>44</sup> T. Klebe, *Arbeitsrecht 4.0. Faire Bedingungen fuer Plattformarbeit*, WISO Direkt 22/2017, Friedrich-Ebert-Stiftung, at 1.

### 2.3 Applicability of specific rules of labour law and social security coverage

While the previous sub-section on the different categories of employment has mentioned in passing what type of regulation applies to employment forms, the present one seeks to give a comprehensive overview. Generally speaking, German law makes a strict distinction regarding labour law and social security protection between dependent employees on the one hand, and self-employed persons on the other hand. The former are covered by both labour law and social security, while the latter ones are, generally speaking, not covered (although certain social security regulations may apply to some groups among the self-employed, see below).

Table 2. Applicability of labour law and social security regulation to non-standard forms of employment, employee-like and self-employed persons

	Part-time and fixed-term	Marginal part-time/mini-jobs	Temp agency workers	Employee-like persons	self-employed
Labour law	Yes	Yes	Yes	Partially	No
Social security	Yes (Per rato coverage for part-time)	Partially, special rules apply to mini-jobs	Yes	Yes (home-workers), partially for others	Responsible for risk coverage

Source: own compilation.

When systematically considering the differences in access to workers' rights and social security access across a continuum that includes employees, home workers, employee-like persons and self-employed, we see employees at one extreme, as they enjoying full access to general labour laws including anti-discrimination provisions and other individual employee rights, regulation of atypical forms of work, parental (leave) rights, collective labour legislation and minimum wage. As for social security regulations regarding unemployment, statutory health insurance, statutory pension insurance, injury, rehabilitation and rights for handicapped persons and long-term care. Moving on, there is a marked decrease in access to labour law and social rights for home workers and yet less access for 'general' employee-like persons, ending the continuum at the opposite extreme with self-employed to whom workers' rights do not apply at all.<sup>45</sup> In Germany, social security schemes were primarily designed for the protection of employees' social rights, not typically covering self-employed, while treating dependent self-employed as dependent employees if reclassified along the criteria for employment. However, reforms opened up most social security programs for voluntary participation of self-employed, enabling them (in theory) to reach a

<sup>45</sup> U. Preis, *Heimarbeit, Home-Office, Global-Office*. Soziales Recht 5, 2017, see in particular the table at 180.

somewhat comparable level of protection (with differences for craftsmen, retailers, farmers, artists and publicists and certain professions forming separate associations with their own schemes).

The subsequent tables offer more detailed information on (the extent of) social security coverage for different forms of employment. Table 3 compares different forms of dependent employment (including the standard full-time contract), showing a high extent of coverage for most employment forms except for mini-jobs, where the situation is more complex. Table 4 shows the coverage of different categories of self-employment persons, which varies considerably.<sup>46</sup> The situation is only the same for all categories regarding family benefits, health and long-term care: there exists a general obligation to be insured against sickness and care risks. However, protection against invalidity, old age and accidents at work is compulsory for some groups of self-employed, while others are able to join on a voluntary basis. The difference between the employed and self-employed is most striking for unemployment insurance, where no specific scheme exists and the self-employed cannot join regulated unemployment funds. Dependent self-employment also has not been defined in this respect, and thus always falls under the same rules as the regularly self-employed.<sup>47</sup>

In the light of the foregoing, we can identify the most problematic employment forms being:

- marginally employed (often in mini-jobs or at the minimum wage level or just above that), and amongst them, on-call contracts (considered as part of marginal and part-time employment)
- (Solo) self-employed (especially those persons gaining their income solely from working in the platform economy)

From a view on the degree of protection, these are most problematic due to limited social security coverage, e.g. for mini-jobbers, see table 3 on p.24; or for (solo)-self-employed, see table 4 on p.25; when compared to standard employment. The feared consequences are precariousness or poverty, either already during one's working-life or when reaching the pension age, which shifts the responsibility for these groups towards society and (future) taxpayers. The 2017 German ESPN report also identifies various general 'gaps and problems' regarding those in non-standard or atypical employment.

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<sup>46</sup> G. Bäcker, *ESPN Thematic report on access on social protection of people working as self-employed or on non-standard contracts: Germany* (2017), <https://ec.europa.eu/social/BlobServlet?docId=17724&langId=en> (accessed 31 May 2018), at 23-24.

<sup>47</sup> Eichhorst et al., *supra* n.35, at 48-49.

- lower incomes of non-standard workers (hourly wages, less hours worked per month) leading to lower social security cash benefits
- alleged gaps in occupational health and safety protection with (smaller) companies employing non-standard workers
- limited effect of dismissal protection and paid exemptions on fixed-term employees (including many temp agency workers)
- often low continuity of employment among non-standard workers leading to problems with eligibility for e.g. unemployment benefits
- less access to voluntary occupational pension schemes
- less frequent or no access to entitlements from collective agreements (due to low level of collective bargaining coverage of SME's and non-standard employees)<sup>48</sup>

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<sup>48</sup>Bäcker, *supra* n.44, at 18-19.

Table 3. Access to social protection: contractual employment (non-standard contracts)

	Full-time employee	Part-time employee	Fixed-term employee	Temp agency worker	Casual and seasonal workers	On-call workers	Zero-hour workers	Apprentices	Paid trainees	(Other) persons in vocational or professional training	Mini-jobbers
<b>Healthcare - cash benefits and benefits in kind</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	partial
<b>Sickness - cash benefits and benefits in kind</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Maternity/paternity - cash benefits and benefits in kind</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Old age pensions (preretirement benefits and pensions)</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	partial
<b>Survivors pensions and death grants</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	partial
<b>Unemployment benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	none
<b>Social assistance benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Long-term care benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Invalidity benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Accidents at work and occupational injuries benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full
<b>Family benefits</b>	Full	Full	Full	Full	Full	Full		Full	Full	Full	Full

Source: ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts, Germany (2017), at 24

Table 4. Access to Social Protection: Self-Employed

	On her/his own account	With employees (self-employed employer)	Dependent on single client	Dependent on contractual relationship with client	Liberal professions (e.g. doctor, notary, lawyer)
<b>Healthcare - cash benefits and benefits in kind</b>	Full	full	full	full	full
<b>Sickness - cash benefits and benefits in kind</b>	partial	partial	partial	partial	partial
<b>Maternity/paternity - cash benefits and benefits in kind</b>	partial	partial	partial	partial	partial
<b>Old age pensions (preretirement benefits and pensions)</b>	partial	partial	full	full	full
<b>Survivors pensions and death grants</b>	partial	partial	full	full	full
<b>Unemployment benefits</b>	none	none	none	none	none
<b>Social assistance benefits</b>	Full	full	full	full	full
<b>Long-term care benefits</b>	Full	Full	Full	Full	Full
<b>Invalidity benefits</b>	partial	partial	partial	partial	partial
<b>Accidents at work and occupational injuries benefits</b>	none	none	none	none	none
<b>Family benefits</b>	Full	full	full	full	full

Source: ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts, Germany (2017), at 23

## 2.4 Recent changes in labour law, legislative proposals and plans related to new forms of employment (2007-2019)

One of the most publicized German reforms regarding the labour market was the introduction of a general minimum wage by the Act on the Minimum Wage (*Mindestlohngesetz*) as of January 2015. The minimum hourly wage has been increased by way of ministerial decree, based on a biannual expert commission's proposal, to 9,19 Euro in 2019 and to 9,35 Euro in 2020.<sup>49</sup> Although the minimum wage does not apply to a particular form of non-standard employment generally, it may have particular effects for the earnings of those in marginal work (e.g. mini-jobbers) and those working for very short periods. Chapter 4 will return to the question of more general effects of the minimum wage.

Notably, the current German coalition of Christian Democrats and Social Democrats has launched several proposals on further regulation of atypical and new forms of employment in their 2018 coalition agreement. Regarding some particular forms of **part-time work**, the agreement envisions a number of changes. These concern, first, more restrictions for on-call contracts (*Arbeit auf Abruf*) that are aimed at increasing income security and increase predictability for workers. Concurrently with the reform of fixed-term part-timework, since January 2019, the percentage of on-call work has been limited to 20-25% of weekly hours (depending on whether a minimum of hours is agreed) and in contracts without specified hours, 20 hours is assumed. Finally, standards for the calculation of sickness pay and for statutory holiday pay are prescribed.<sup>50</sup> Second, since January 2019, there is a right for part-time workers to return to a full-time contract, or conversely, the right to work part-time for a maximum of five years (i.e. a 'fixed-term' part-time contract). The political compromise reached, however, includes important restrictions relating to company size of minimum of 45 employees and additional maximum (15%) for companies up to 200 employees.<sup>51</sup> Third, the coalition agreement pleaded for encouraging more midi-jobs, i.e. jobs with gross earnings for between 450 (the limit for mini-jobs) and 850 Euro.<sup>52</sup> Already decided as part of a greater statutory pension reform package, as of July 2019, the ceiling for midi-jobs has been increased from 850 to 1.300 Euro; and midi-jobbers are entitled to reduced social security (pension) contributions while earning full credits towards their statutory pension later.<sup>53</sup>

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<sup>49</sup>BMAS, *Mindestlohn steigt auf 9,19 Euro im Jahr 2019 und 9,35 Euro im Jahr 2020*,

<https://www.bmas.de/DE/Presse/Meldungen/2018/mindestlohn-steigt.html> (accessed 17 Jan. 2019)

<sup>50</sup>Handwerksblatt.de, Oktober 2018, *Arbeit auf Abruf wird beschränkt*, <https://www.handwerksblatt.de/15-unternehmensfuehrung-uebersicht/5005173-arbeit-auf-abruf-wird-beschaenkt.html> (accessed 17 Jan. 2019)

<sup>51</sup> BMAS, 23.11.18, *Brückenteilzeit ab 2019 möglich*, <https://www.bundesregierung.de/breg-de/aktuelles/brueckenteilzeit-ab-2019-moeglich-1140040> (accessed 17 Jan. 2019)

<sup>52</sup>CDU/CSU-SPD, *Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land. Koalitionsvertrag CDU/CSU-SPD*, 7.2.2018, para 2443.

<sup>53</sup> Deutsche Handwerkszeitung, *Mehr Ver.dienen im Midijob: Das gilt ab 2019*, <https://www.deutsche-handwerks-zeitung.de/midijob-Ver.dienen-aenderung-ab-2019/150/3093/376834> (accessed 7 Feb. 2019)

For **fixed-time contracts**, there is relevant jurisprudence. The Federal Labour Court, following a decision by the European Court of Justice (ECJ 26.1.2012 C 586/10) strengthened the checking procedure to be applied by labour courts in cases of abuse of sequences or chains of fixed-term contracts.<sup>54</sup> As for future regulation, in the coalition agreement the government announced plans to restrict contracts without proper reason (*sachgrundlose Befristungen*) through imposing a quota of 2,5 % of staff (for companies with more than 75 employees) as well as a reduction of the maximum period for which fixed-term contracts are permitted, from 24 to 18 months.<sup>55</sup> These limitations, intended to limit abuses of this type of fixed-term contract, were supposed to be submitted to parliament in the first half of 2019,<sup>56</sup> but have been subject to delay due to critique by the social partners, and especially by employers' associations.

Turning to **temporary agency work**, recent changes to regulation occurred in April 2017, based on a reform of the German Act on Temporary Work (*Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze*, BGBl. I 258). The principal changes have been: the introduction of a maximum loan period of 18 months for temp agency workers; and the introduction of the equal pay principle which comes into place after a working period of nine months at the same company.<sup>57</sup> In August 2018, German media reported that numbers of temp agency workers had been declining moderately by 3,1% (851.000 as of June 2016) based on data of the Federal Employment Agency, possibly as a result of the deadlines introduced in 2017.<sup>58</sup> The same reform was also supposed to contain protective measures for workers under service contracts, but only does so in a minor way. By defining the concept of 'employee leasing' applying to temp agency work, the reform creates the 'fiction' of a labour contract with the user undertaking in cases of bogus temporary agency work. An evaluation of the reform is foreseen for 2020.

Regarding **platform workers and their employment status**, so far Germany knows no explicit regulation and platform workers are de facto considered to be self-employed. In 2019, there were at least two pending law suits that may lead to relevant case law in this area. One case, supported by the trade union NGG, revolves about the right to elect and establish a works council for riders of a platform (Foodora) in a delivery area where it has no 'city office'. The other case regards the status of a platform worker as employed vs (solo) self-employed. A person working for a platform (commissioning jobs checking for retail goods arrangements in shops) filed a law suit following his abrupt end of 'contracting', claiming that an employment

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<sup>54</sup> BAG (Federal Labour Court) 18.07.2012 – 7 AZR 443/09.

<sup>55</sup> CDU-CSU/SPD, supra n.50, para 2332, 2347.

<sup>56</sup> F. Specht, *Wirtschaft fordert Regulierungsstopp fuer befristete Jobs*, <https://www.handelsblatt.com/politik/deutschland/arbeitsmarkt-wirtschaft-fordert-regulierungsstopp> (accessed 21 March 2019)

<sup>57</sup> BMAS, Klare Regeln für Leiharbeit und Werkverträge, <https://www.bmas.de/DE/Presse/Pressemitteilungen/2016/pk-leiharbeit-werkvertraege.html> (accessed 12 Dec. 2018)

<sup>58</sup> FAZ, supra n. 20.

contract still exists.<sup>59</sup> Following the dismissal of the claim about employee status, a state labour court declined the plaintiff's appeal and the case has been transferred to the Federal Labour Court (BAG).<sup>60</sup>

Despite the lack of formal regulation, there is certainly a lot of discussion going on in policy circles and among labour law experts. The 2016 White Book by the Ministry of Work and Social Affairs (BMAS) contained some ideas on how to proceed with regulation in the future.<sup>61</sup> Then, as a starting point, the Ministry stated a lack of empirical evidence about the extent of the platform economy, and announced plans to collect better data about platform workers (see also section 3.4 about BMAS activities). Furthermore, if there were clear indications for a significant increase of platform workers, there should be legal action providing protection concepts for employee-like persons. Other points stated in the Whitebook relating to self-employed persons include: encouraging them to enter collective organisation in order to better enforce their interests, and including them into the state statutory pension scheme.<sup>62</sup> In this context, labour law scholars have also pleaded for a standard wage scheme for solo-self-employed persons.<sup>63</sup>

Addressing the phenomenon of the platform economy, the latest coalition agreement envisages a 'level playing field' on the basis of employee and consumer rights and the application of collective agreements in the context of new business models. As for more concrete steps, the coalition government plans to introduce an obligatory pension scheme for (solo) self-employed persons on an opt-out basis that was to be developed during 2019.<sup>64</sup> However, as of February 2020, the ministry still has not presented draft legislation. The delay may have to do with protracted discussions within the coalition government on another piece of legislation, the basic pension (*Grundrente*, a supplementary benefit for persons on small pensions with a minimum of contribution years).<sup>65</sup> In 2018, parliament already decided on a reduction of the minimum contribution for the statutory health insurance by 50% for (solo) self-employed persons.<sup>66</sup> The corresponding piece of legislation (*GKV Versichertenentlastungsgesetz*) went into effect in 2019 and should considerably reduce social security burdens for (solo)-self-employed persons.<sup>67</sup>

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<sup>59</sup> J. Heuschmid, *HSI Workshop Plattformunternehmen: Herausforderung an das Arbeitsrecht und soziale Sicherung, Beijing*, 16-18.11.18 (personal communication)

<sup>60</sup> LAG Muenchen (Munich state labour court), 4.12.19 - 8 Sa 146/19.

<sup>61</sup> BMAS, White Book Work 4.0. (2016). The White Book was the final product of an extensive dialogue process of the ministry with various stakeholders, called 'Work 4.0'.

<sup>62</sup> *Ibid.*, at 175-176.

<sup>63</sup> See for instance, F. Bayreuther, *Entwurf eines Gesetzes über Mindestentgeltbedingungen für Selbstständige ohne Arbeitnehmer (Solo-Selbstständige)* (2nd edition, Hugo Sinzheimer Institut Working paper Nr. 12, 2018).

<sup>64</sup> CDU/CSU-SPD, *supra* n. 50, paras 1947, 2324, 4290.

<sup>65</sup> Neues Deutschland, 08.01.20, Die naechste Rentenbaustelle, <https://www.neues-deutschland.de/artikel/1131151.altersvorsorge-die-naechste-rentenbaustelle.html> (accessed 27 Feb. 2020)

<sup>66</sup> *Ibid.*, *supra* n. 50, para 4767.

<sup>67</sup> BMG, *GKV-Versichertenentlastungsgesetz (GKV-VEG)*, <https://www.bundesgesundheitsministerium.de/versichertenentlastungsgesetz.html> (accessed 7 Feb. 2019)

### 3. Positions of the social partners on new forms of employment and their role in regulation

#### 3.1 Social partner positions and organizational initiatives

This section distinguishes between social partners' approaches towards traditional flexible forms of work, self-employment and the platform economy and crowd work before considering their roles, emergent new actors and the views of policy-makers.

##### **Positions on flexible forms of employment and future regulation**

Major *employers' associations* generally welcome the availability of new forms of employment, as far as non-standard employment is concerned. In their view, 'flexible employment forms' such as part-time work, temp agency work, marginal or fixed-term work have gained importance as 'modern instruments of personnel deployment' that contribute to the internal and external flexibility of employers, strengthening their competitiveness in an ever more globalized economy.<sup>68</sup> This view is echoed by respondents with employer association representatives and the German Economic Institute.

As for organizational activities, employers are actively communicating this position, most visibly on their websites. Employer associations as the Confederation of German Employers' Associations (BDA) advertise the advantages of 'flexible' forms of employment. More specifically, BDA publicizes thematic sheets that seek to clarify 'misunderstandings' and presenting arguments ('facts') about flexible employment forms that reflect their viewpoint, often backed by the presentation of statistical data. For instance, BDA counters the claim that such employment forms crowd out standard employment by arguing that for many, they open up new avenues into the labour market. In addition, instead of leading to 'precarious' career paths, they cater for a demand for flexibility by many female and male employees (Ibid).

The latter can be illustrated further with arguments about two employment forms that have been object of recent re-regulation (temp agency work) or are currently facing new proposals for regulation (fixed-term contracts without special purpose). Temp agency work is considered to be 'indispensable for the economy, industrial relations and the labour market' and 'especially for low-qualified and long-term unemployed an important stepping stone to work'<sup>69</sup>. Fixed-term contracts with special motivation ('sachgrundlos') are portrayed as 'a central element of a functioning and competitive German labour market, contributing to employment to a considerable extent', while 'offering jobseekers successful paths to labour market entry or – especially after long unemployment – re-entry'<sup>70</sup>. Finally, they are preferable for employers over fixed-term contracts *with special motivation* as the latter may involve legal insecurities regarding the formulation of the grounds of motivation. As mentioned by various respondents

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<sup>68</sup> BDA, *Argumente. Flexible Beschaeftigungsformen schaffen Arbeit*. <http://www.arbeitgeber.de> (accessed 5. June 2018).

<sup>69</sup> BDA, *Kompakt. Zeitarbeit*. <http://www.arbeitgeber.de> (accessed 5. June 2018).

<sup>70</sup> BDA, *Argumente. Sachgrundlose Befristungen sind unverzichtbar*. <http://www.arbeitgeber.de> (accessed 5 June 2018).

employers are actively pushing their interests regarding the regulation of flexible forms of employment in their contacts with political parties and ministerial policy-makers in the preparatory and parliamentary phases of new legislation. In addition, employers are voicing their arguments through news media, as most recently is the case with fixed-term contract regulation. For instance, Gesamtmetall, BDA and chemical sector employers BAVC were warning about the effects of limiting the use of these contracts with reference to the worsening economic situation in early 2019, which is said to necessitate more instead of less flexibility for employers.<sup>71</sup>

Employers reacted to past proposals for regulation with skepticism and staged lobbying efforts in order to restrain the extent of government regulation. This applied to the introduction of the minimum wage, which was assumed to destroy jobs, the reform of temp agency work regulation and others. Respondents also showed worries about future regulation, e.g. of fixed-term contracts, as the existing regulation on fixed-term contracts with a special motivation is viewed as being quite strict already and may lead to costly law suits. Equally, skeptical positions on the general introduction of a right to a fixed-term part-time contract (especially voiced by employers representing smaller firms, such as the German Confederation of Skilled Crafts (ZDH), have led to numerous restrictions using quotas.

*Trade unions*, on the other hand, generally highlight and warn about the numerous drawbacks of different new forms of employment. In contrast to employers, unions denote them not as 'flexible' but as 'atypical' or simply as 'precarious' work. For the German trade union confederation (DGB), precarious forms of employment compromise temp agency work and service contracts, solo-self-employment, fixed-term contracts, internships and other unprotected entry jobs, marginal employment (mini-jobs) and part-time work including marginal forms. In addition, low-wage employment (*Niedriglohnarbeit*) is considered as precarious.<sup>72</sup> The DGB (and its member unions) consider each of these employment forms to be problematic, calling for remedies in the future. In practice, this means working towards the guiding idea of 'good work', which DGB launched as a 'counterbalance to a long-drawn strategy of deregulation and flexibilization at the cost of working people'.<sup>73</sup> Moreover, they also stress the adverse effects of a future increase of labour market flexibility for the quality of jobs when viewed in their totality.

Research from the early 2010s on union responses to precarious employment suggested four main strategies to deal with this consequence of labour market flexibilization:

1) change of legislation to counter certain forms of precarious employment, 2) collective agreements to improve the condition of precarious workers and limit the use of these forms of employment, 3) organizing workers in precarious employment and giving them practical

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<sup>71</sup> Specht, *supra* nr. 54.

<sup>72</sup> DGB Bundesvorstand, *Prekäre Beschäftigung. Herausforderung fuer die Gewerkschaften. Diskurs* (2017) at 11.

<sup>73</sup> *Ibid.*, at 4.

support, and, 4) developing and promoting a vision of ‘good work’ as counter project against precarious forms of work.<sup>74</sup> Representatives from DGB, Ver.di and IG Metall indicate that all of these strategies have been continuing up to the present.

Unions are trying to get legislative changes, often to introduce minimum ceilings, limiting the use and abuse of flexible employment on the political agenda. They also provide input during legislative processes such as the reform of temp agency work regulation in 2017. Generally speaking, they often make demands in terms of legal regulation that go much further in terms of protection and rights than the political compromises that are struck by the governing political parties (often Christian Democrats and Social Democrats) during the legislative process.

Next to such lobbying activities, unions have negotiated various collective agreements that sought to improve wages and working conditions of flexible forms of employment. This development started with counter action to dumping collective agreements in the mid-2000s, especially in the metal sector. Rather recently, and following a IG Metall campaign focusing on employees’ working time sovereignty, the 2018 collective agreement for the metal sector provides workers with an option to decrease weekly working time to 28 hours for up to 2 years and other instruments to convert pay into free time. Although employees in specific sectors (e.g. metal, electrical and chemical industries) surely profit from favourable collective agreements, unions point to a more general problem of employer defection from collective bargaining (and how employer associations deal with it) as it contributes to decreasing collective agreement coverage of employees, including those in flexible employment forms.<sup>75</sup>

With regard to temp agency work, unions have been engaged in regulating through collective agreements. Here, they pursued two main strategies: to re-establish the equal pay principle (by agreeing supplements to the basic remuneration with employer associations of agencies and by concluding agreements with the hiring companies to ensure equal treatment in the user undertaking) and to contain the extent of agency work in user undertakings. As for the latter strategy, some collective agreements established maximum loan periods; others agreed quotas for the use of agency workers; and some took the route of strengthening the participation rights of works councils. For instance, IGM Metall concluded a collective agreement for temp agency workers (2012) that re-established the equal pay principle. In addition, agreements by works councils (in practice closely connected to unions) have fixed quotas for the use of agency workers in the shipbuilding and car industry, or, in metal working and electrical engineering, require the user undertaking to equal pay during the loan period (*Besservereinbarungen*). Also, local agreements (company collective agreements) are encouraged by unions in sectors that lack collective sectoral agreements in order to introduce beneficial measures for flexible workers amongst company staff.

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<sup>74</sup>Bispinck and Schulten, *supra* n.15.

<sup>75</sup>Personal communication by DGB representative, 17.05.19.

Equally, in the area of service contracting, unions have negotiated collective agreements, first on the company level (2013 agreement with a major shipbuilder), followed by an agreement by IG Metall in 2014 for workers of subcontractors in the steel sector. Such agreements dealt with working time, health and safety, housing and minimum hourly wages.

Equally, in this area agreements with works councils occurred in shipbuilding, car manufacturing, and steel companies.<sup>76</sup>

When it comes to union efforts to organize members among flexible workers, these are ongoing. However, union respondents acknowledge the difficulties (among mini-jobbers, service contractors, low-wage sectors), but also successes, especially among temp agency workers. Information provision takes place both in organisations (or through works council union representatives), but also digitally, as union websites (IG Metall, Ver.di, and other DGB unions) offer information about labour rights and a place to turn to for complaints, while trying to gain new members through these channels. Moreover, trade unions have been running various campaigns aimed at those in flexible and new employment forms as part of their overall communication strategy. For instance, IG Metall operated campaigns for equal pay for temp agency workers and service contractors, which has been re-launched in October 2018 to draw attention to the growing use of service contractors by companies, who allegedly replace temp agency workers (19). Finally, there is the ongoing DGB campaign for 'Good Work' (Gute Arbeit), which has influenced similar campaigns in its member unions (e.g. Ver.di) and has run annual representative surveys on the quality of work since 2007.<sup>77</sup> Next to the more traditional forms of flexible work, we turn to social partners' positions and initiatives regarding the group of the (solo) - self-employed together with those directed at platform workers.

### **Positions on (solo) self-employed and platform work/crowdwork**

In general, employer see further legal regulation of all forms of self-employment, including crowdwork, very critically, as it is feared to put limits to entrepreneurial flexibility. In particular, this concerns inclusion in social security systems, minimum standards especially on pay or forms of collective agreements.<sup>78</sup> However, there are differences between associations on the reach of future regulation. For instance, on the issue of improving social security coverage, the German Confederation of Skilled Crafts, ZDH (and some others) pleads for an pension obligatory insurance for self-employed (including crowdworkers) whether statutory or privately.

Employer respondents state that they see platform work and crowdwork activities primarily as a form of (solo-) self-employment. They see a need to first assess the extent of this growing group before proceeding with any regulatory efforts based on the assumption that all affected

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<sup>76</sup>See for more details on strategies of unions via collective agreements and works council agreements Klebe and Heuschmid, supra n.24, 187 et seq.

<sup>77</sup> Institut DGB-Index Gute Arbeit, <https://index-gute-arbeit.dgb.de/veroeffentlichungen/jahresreports> (accessed 8 Feb. 2019)

<sup>78</sup> S. Greef and W. Schroeder, *Plattformökonomie und Crowdworking: Eine Analyse der Strategien und Positionen zentraler Akteure*, BMAS Forschungsbericht nr. 500 (Universität Kassel, 2017), at 24.

persons are employees rather than self-employed (I Gesamtmetall). In general, further regulation of all forms of self-employment (including crowdwork) is seen very critically, as this would limit entrepreneurial flexibility. In particular, this concerns inclusion in social security systems, minimum standards especially on pay or forms of collective agreements.<sup>79</sup> Here, some associations like ZDH are exceptions. They point to adverse effects on free competition when supposedly solo-self-employed persons are offering services via platforms in the area of crafts and cleaning, competing at lower prices than small firms (e.g. by not charging the costs of social security contributions for employees). This comes with a plea for new regulation that would strike a balance between enabling entrepreneurship in the area of craftsmen and curbing unfair practices that damage self-employed with personnel. In addition they are interested in a new definition of the limit between self-employment and dependent self-employed as well as employees and temporary agency workers.<sup>80</sup>

*Trade unions* are generally in favour of improving the extent of social security protection of the self-employed, and especially of solo-self-employed. As one respondent from Ver.di put it, self-employed have often ‘not been thought of’ when it comes to legislation, and the regulation applicable to them resembles a patchwork. The DGB has formulated a whole catalogue of demands including the inclusion in the statutory pension and other social security systems, sharing social security contributions with clients, strengthening of co-determination in firms to include freelance and people working on service contracts and regulation that clearly distinguishes service contracts (often involved self-employed persons) from temp agency work.<sup>81</sup> Unions are in favour of legally determining criteria for dependent self-employment, as an attempt to do so (in the reform of the Temp Agency Work Act) was frustrated in 2017.

Regarding the unions’ approach towards platform work and crowdworkers, they tend to see a comprehensive need for regulation, including minimum standards, a clarification of employment status, co-determination, social security protection and data security. In interviews with union representatives, different approaches for regulation come to the fore, e.g. Ver.di’s ideas for taking a differentiated approach to different types of platform workers (e.g. cycle couriers versus crowdworkers performing digital tasks), versus a more pragmatic approach, pleading for a revision of the law covering home workers, taken by IG Metall. One Ver.di respondent refers to the ongoing academic discussion on regulation options, as evidenced by recent studies that propose national regulation on the earnings of solo-self-employed and crowdworkers to guarantee sufficient income levels, or, via another route, by proposing EU regulation on minimum earnings.<sup>82</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid., at 25.

<sup>81</sup> DGB, supra n.8.

<sup>82</sup> F. Bayreuther, *Sicherung einer fairen Vergütung und eines angemessenen sozialen Schutzes von (Solo-) Selbständigen, Crowdworkern und anderen Plattformbeschäftigten*, BMAS Forschungsbericht Nr. 508 (May 2018), [https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb508-sicherung-einer-fairen-verguetung-und-eines-angemessenen-sozialen-schutzes-von-solo-selbstaendigen.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/Forschungsberichte/fb508-sicherung-einer-fairen-verguetung-und-eines-angemessenen-sozialen-schutzes-von-solo-selbstaendigen.pdf?__blob=publicationFile&v=2) (accessed 27 June 2018); M. Risak, *Fair Working conditions for*

Unions generally try to reach out to the (solo-)self-employed as potential members and to support them by offering information about their rights in general as well as giving personalized advice. Here, the services union Ver.di occupies a special position with a membership of 30.000 self-employed. Ver.di also has made efforts to conclude specific collective agreements for certain groups of freelancers (employee-like persons), and agreements exist in the area of public TV and radio and daily newspapers. The same union offers information services for crowd workers in addition to those for self-employed and freelancers considered as employee-like persons. When it comes to reaching out to platform workers (in particular, platform work that is done online), the example of IG Metall is noteworthy, as it has launched various initiatives after a change of its statutes in 2015. These include, first, a website that offers platform ratings and workers reviews as well as information about legal status and workers' rights (in cooperation with unions in Sweden and Austria - [www.fairwork.org](http://www.fairwork.org)). Second, IG Metall collaborated with platforms to further develop the German Code of Conduct in cooperation with platforms to facilitate fair crowd work employment practices (see also section 3.3). Third and connected to the latter, in late 2017 a dispute settling mechanism (Ombuds Office) was created to help solve conflicts between platforms and crowd workers in case platforms are not sticking to the standards of the Code of Conduct.<sup>83</sup>

Next to these initiatives, there are examples of unions that have teamed up with platform workers who perform location-dependent activities (notably bike couriers riding for delivery platforms such as Deliveroo and Foodora). They have supported workers to show their grievances in public protests, e.g. FAU (*Freie Arbeiterinnen-und Arbeiter-Union*) (FAU), or have concluded local agreements on working conditions, e.g. the food and hospitality sector union NGG (*Nahrung-Genuss-Gaststaetten*).<sup>84</sup> FAU continues to campaign for the interest of German couriers in 2019 and joined an international campaign (#Deliverunion) of alternative unions to network across borders and to offer a platform for couriers to cooperate internationally and get informed about their rights.<sup>85</sup>

### 3.2 Different roles of the social partners and common initiatives

As the previous sub-section has shown, German employer associations and trade unions have been playing rather opposing roles (on the level of associations) given their differing and even antagonistic viewpoints on new forms of employment, surely when it comes to flexible employment forms that have been around for considerable time. This characterization extends to the discussion on how to regulate crowd work in the future. However, these observations do not imply that collaborative efforts do not exist as according to respondents they do. For instance, DGB reports a common initiative of unions and employers to integrate migrants (and

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*Platform Workers. Possible Regulatory Approaches at the EU level.* Friedrich-Ebert-Stiftung, <https://library.fes.de/pdf-files/id/ipa/14055.pdf> (accessed 3 May 2018)

<sup>83</sup> K.Lenaerts, Z. Kilhoffer & M. Akgüç, *Traditional and new forms of organisation and representation in the platform economy*, 12 (2) *Work Organisation, Labour & Globalisation*, 60,78 (2018), at 71,73.

<sup>84</sup> *Ibid.*, at 70.

<sup>85</sup> FAU, *Deliverunion*, <https://www.fau.org/kaempfe-und-kampagnen/deliverunion> (accessed 28 March 2019).

especially refugees) in the labour market more easily, supporting a change of legislation to facilitate working permits. Equally, based on union demands, voluntary agreements with employers to improve working conditions in the meat processing sector have been concluded. Giving an example from employers, the German Confederation of Skilled Crafts (ZDH) regularly meets with DGB to discuss topical issues of mutual interest. As of 2018, solo-self-employment, and their recent increase was their focal point, the aim being to arrive at common recommendation directed at policy-makers about how to design the planned obligation to take out pension insurance and financing of contributions.

At the same time, respondents pointed out that despite the awareness of social partners of their contribution to 'social partnership', social dialogue processes are not institutionalized in Germany (and not facilitated by statutory structures), as they are in the Netherlands, for instance. Beyond the interaction of social partners in the framework of collective negotiations, contacts are often dependent on personal network connections and the economic situation and/or potential for conflict on working conditions in specific sectors. These limitations, however, do not preclude joint initiatives on topics of common interest, aimed to provide policy advice or lobbying efforts for ministries or other political actors.

### **3.3 Emerging new actors in industrial relations: associations of gig economy workers/self-employed or lobbying groups**

Germany knows a variety of associations of self-employed. Some are of a more general nature (e.g. *Verband der Selbständigen und Gründer Deutschland e.V.*), others are specialized organizations representing certain professional groups, e.g. for designers, IT-specialists and others. The general associations also include a recently (2017) formed umbrella association (BAGSV), which consists of professional, sectoral and freelancer associations.<sup>86</sup> BAGSV seems to cooperate with traditional employer associations to lobby for the economic interests of their member associations. Next, as the only notable association of platforms, there is the German crowdworking association (*Deutscher Crowdsourcing Verband e.V.*), which pools knowledge on crowd-based business models and says to offer a 'representation of interest in relation to regulation initiatives' for its members and the entire crowdsourcing sector in Germany.<sup>87</sup> This association is significant in that its eight founding platforms drafted a Code of Conduct in 2017 "aimed at the promotion of a fair and trust-based collaboration between platforms and crowd workers".<sup>88</sup>

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<sup>86</sup> Bundesarbeitsgemeinschaft Selbstständigenverbände (BAGSV), <https://www.vgsd.de/bagsv2/> (accessed 9 March 2019)

<sup>87</sup> Deutscher Crowdsourcing Verband, *Ueber uns*, <https://www.crowdsourcingverband.de/ueber-uns/> (accessed 9 March 2019)

<sup>88</sup> Lenaerts, Kilhoffer & M. Akgüç, *supra* n. 77, at 73. The codes covers the following fields: lawfulness of task, clarification of the legal framework, fair pay, 'motivating and good work', respectful conduct, clear task definitions and appropriate time planning, freedom and flexibility, constructive feedback and open communication, rule-based process to reject completed work and request rework, data privacy and private sphere.

Respondents indicated that these organisations do not appear to lobby policy-makers on issues relating to better social security protection. Rather, to the contrary, they oppose further regulation to the detriment of their clients as this is seen as creating unnecessary (cost) pressures on their members, putting limits on entrepreneurship. In addition, they avoid alliance-building with trade unions in the interest of freelancers. Both trade unions and employer respondents indicate that they are not aware of any associations that aspire to attain the status of social partner and to participate in collective bargaining, nor do they see a change in this situation in the near nearby future. Therefore, we conclude that Germany there is so far no new emerging actors in industrial relations.

### **3.4 Policy-makers' views on past regulation and future options**

This sub-section summarizes views of respondents representing current government coalition parties Social Democrats (SPD) and Christian Democrats (CDU/CSU) before reporting on the Federal Governments views and in particular the activities of the Federal Ministry of Employment and Social Affairs (BMAS). Regarding needs for protection by labour law or social security of those flexible and new forms of employment (based on today's situation) we can discern different viewpoints on the general situation: In Germany, the character of the current basis of social security and labour law protection presumes the existence of employers and employees, both of which can be matched to each other in order to establish concrete rights, implying that all others lose out in terms of protection in either system (SPD). On the other hand, Christian Democrats recognize standard employment relationships as a goal that needs to be weighed against the needs of employers regarding flexibility (and flexible forms of employment).

Looking back at regulation, the more employee-friendly view points out the importance of the Work 4.0 dialogue process (2015-2017) and the ongoing development of regulatory solutions to problems identified (such as fixed-term part time contracts, regulation of on-call work), taking the self-employed into the focus of policy-making (obligatory coverage by some form of pension) and, within the greater digitalized labour markets debate, plans to reform opportunities for re-training for those in jobs likely to be affected by digitalization).

The more complex employer- and somewhat employee-friendly view of the Christian Democrats highlights the successes in fighting abuse of temp agency work since 2012, introduction of the minimum wage, the re-regulation of temp agency work in 2017 and the concurrent introduction of employee concept (to distinguish from self-employment) in the Civil Code.

#### **Views on future options for regulation**

For both coalition parties, **self-employment and social security** is an important topic on the political agenda, but they approach it in different ways. On the one hand, self-employed cannot profit from social security if not included in those systems (basic pension, statutory pension etc.); in addition, more protection for those working on service contracts is desired (SPD). On the other hand, it is seen as necessary to create better incentives for self-employed to take

out pension insurance, because the existing voluntary possibilities are not used enough. This is perceived as a large project in 2019, as several model options exist and the degree of obligation is seen as debated. However, as of early 2020, a workable compromise has not been forthcoming (see also section 2.4). Moreover, another project concerns the intention to regulate fixed-term contracts without proper reason, as agreed with much difficulty in the 2018 coalition agreement (CDU).

When it comes to **platform work**, the Social Democrat view is in favour of defining forms of employment and to regulate newly emerging structures, following proposals for regulation as circulated by various academics, while a “best approach” to be followed seems not yet evident. Their Christian Democrat counterparts judge the regulation of platform work as ‘very complicated’ and concerning freelancers, they stress that regulation should strike a balance between moderate regulation and securing newly created jobs. Furthermore, here the broader question lies on how to accommodate changes by digitalization on the labour market (training, reform of working time regulation, experiments on working time etc.).

### **Views on the role of social partners related to flexibilization and their efforts to regulate**

How do the main parties view the actions of the social partners? Here differences are less pronounced, reflecting probably the shared value of social partnership irrespective of party-political positions. The Social Democrats, traditionally closer to trade union positions, indicate the importance of social partners, emphasizing their proper responsibility to regulate through collective agreements. However, it is recognized that especially for non-standard workers, collective agreement regulation (and protection) differs largely across sectors (as union organization differs) and employer associations are said to enable membership without employers being bound by collective agreements.

The CDU view equally recognizes the contributions of the social partners, pointing to many initiatives and position papers coming from the social partners and highlights the high organization grade and favourable collective agreements in sectors like metal and chemicals. One sector singled out for recent regulatory legal action (2017) because of deplorable working conditions and circumstances, is meat processing. More future union action is expected to be directed at temp agency work, service contracting and the extension of rights via works councils.

### **The Federal Ministry of Employment and Social Affairs and Federal Government**

Most of the recent regulatory changes by legislation discussed earlier in Section 2 and in the current section’s analysis of social partners’ views have been initiated by the Federal Ministry of Employment and Social Affairs (BMAS). This ministry is responsible for putting forward various legislative proposals envisaged by the current 2018 coalition agreement, some of which have already been adopted. In the period under study, since 2007, it has mostly been led by ministers from the Social Democratic Party (except for the period October 2009-December 2013, when Christian Democrat ministers were in place), who have tried, within (sometimes considerable) limitations posed by the Christian Democrats coalition partner, to push their

ideas on extending labour law and social protection to vulnerable groups including those in flexible employment. During 2015-2017, the Work 4.0 dialogue process was conducted under the auspices of Minister Nahles, resulting in the White Paper 4.0. Since then, a notable recent (mid-2018) ministry initiative - with origins in the Work 4.0 process - is the Policy Lab Digital, Work & Society ('Denkfabrik Digitale Arbeitsgesellschaft'). More specifically, the creation of this innovative unit within the Ministry was the result of an internal reflection process with regard to working methods, instruments, and organizational structures. Regarding working procedures and functions, the policy lab was designed as a mix of a classical think tank with a contemporary future lab.<sup>89</sup> Portraying itself as an "academically-oriented, interdisciplinary organizational unit" within the BMAS, it aims to "bring together expert analyses of trends and developments in strategically targeted forecasts for all processes relevant to labour and social policy", including "internal and external perspectives and promote the required networking in close cooperation with academia, those involved at a practical level and social partners".<sup>90</sup>

Regarding the phenomenon of cloud- and gigwork, as of the end of 2017, the federal government did not ascribe high priority to legal regulation, and, correspondingly, no concrete regulatory proposals have been forthcoming. Rather, and especially during 2013-2017, there has been intensive funding of research about the topic which is set to continue. Answers of the government to parliamentary inquiries show that it favoured a case-by-case check of employee status of self-employment and based on the latter, the application of social security, labour and minimum wage should be decided. As of the end of 2016, the government concluded that "in so far crowdworking predominantly includes marginal second jobs or a marginal phenomenon, the federal government does not see so far urgent need for action in terms of social policy".<sup>91</sup> This does not mean that there are no initiatives at all. For instance, in February 2019, BMAS and the food and hospitality sector trade union NGG presented a common policy paper that analyzes the working conditions of food delivery riders and sketches the challenges of the platform economy. This is to support their claim for fair working conditions and sufficient social protection for those working via platforms, independently of their status as employee or freelancer.<sup>92</sup> Moreover, within the larger project of obliging self-employed to get pension insurance, BMAS has reported to consider instruments to make platforms pay in part for pension contributions of self-employed cloudworkers in order to make those contributions more affordable for those on low incomes.<sup>93</sup> More generally, within BMAS, the Policy

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<sup>89</sup> Personal communication by BMAS source with the authors, 29.04.19

<sup>90</sup> BMAS, *Why has the Policy Lab Digital, Work & Society been established?* <https://www.denkfabrik-bmas.de/en/the-policy-lab/where-we-come-from>; *Work 4.0 Agenda of the BMAS*, <https://www.denkfabrik-bmas.de/en/the-policy-lab/work-40-agenda/> (all accessed 21 March 2019)

<sup>91</sup> Greef & Schroeder, *supra* n. 72, 60 et seq.

<sup>92</sup> BMAS, *Plattformvermittelte Arbeit gut gestalten*, <https://www.bmas.de/DE/Presse/Pressemitteilungen/2019/plattformvermittelte-arbeit-gut-gestalten.html> (accessed 15 March 2019).

<sup>93</sup> Der Spiegel, 26.07.19, *Bundesarbeitsministerium will Selbständige entlasten*, <https://www.spiegel.de/karriere/crowdworker-bundesarbeitsministerium-prueft-entlastungen-bei-altersvorsorge-a-1279138.html> (accessed 20 Aug. 2019)

Lab Digital, Work & Society (see previous paragraph), has continued to work on policy proposals for good work in the Platform Economy since 2018. As current Minister Hubertus Heil re-iterated on a recent national 'Digital Summit' with the focal point of digital platforms (October 2019), internal debate within the ministry was directed at how employee rights could be guaranteed for freelance crowd workers on those platforms, and how new policies could ensure that platforms contribute their share to their social security.<sup>94</sup>

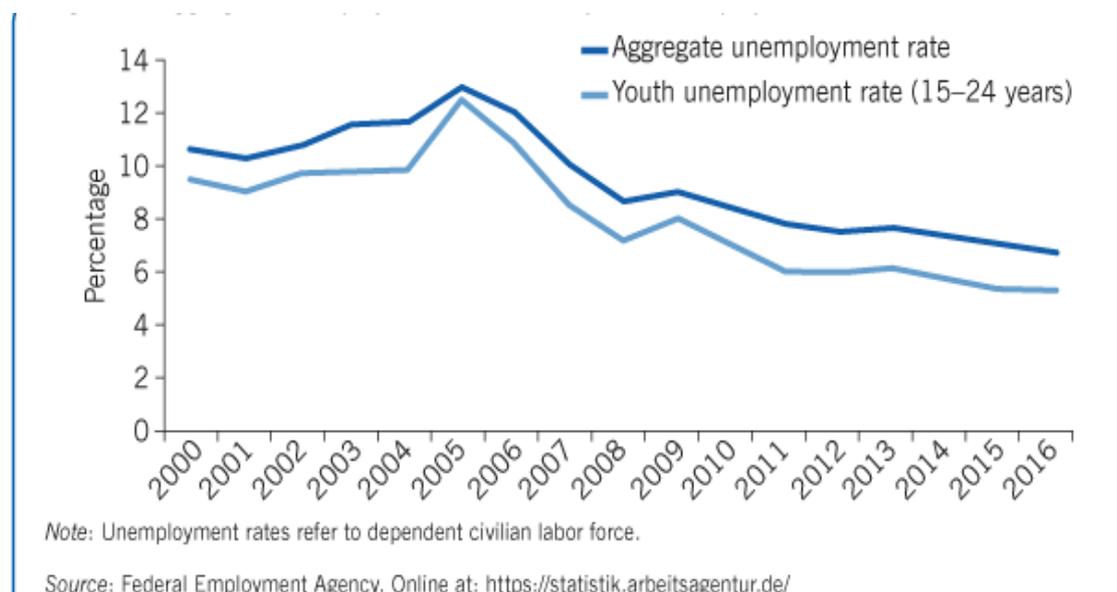
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<sup>94</sup> BMAS, Review of the 2019 Digital Summit: Speed Debating on Platforms, 04.11.19, <https://www.denkfabrik-bmas.de/en/topics/platform-economy/review-of-the-2019-digital-summit-speed-debating-on-platforms> (accessed 2 March 2020)

#### 4. Labour market effects of regulatory reforms

Having shown the long-term trend since the late 1990s in Section 1, this section returns to the study's focus on the period between 2007 and 2019. The overall question here is whether new regulatory efforts in this period have had effects on the numbers (and, possibly the quality) of flexible employment. Additionally, the state of the labour market as a whole needs to be taken into account, which has been quite robust even during the years of the financial and economic crisis that hit employment rates much more severely elsewhere in the EU. As the graph below shows, both aggregate and youth unemployment has been decreasing almost continuously since about 2006 (except for some rise between 2008-2010).<sup>95</sup>

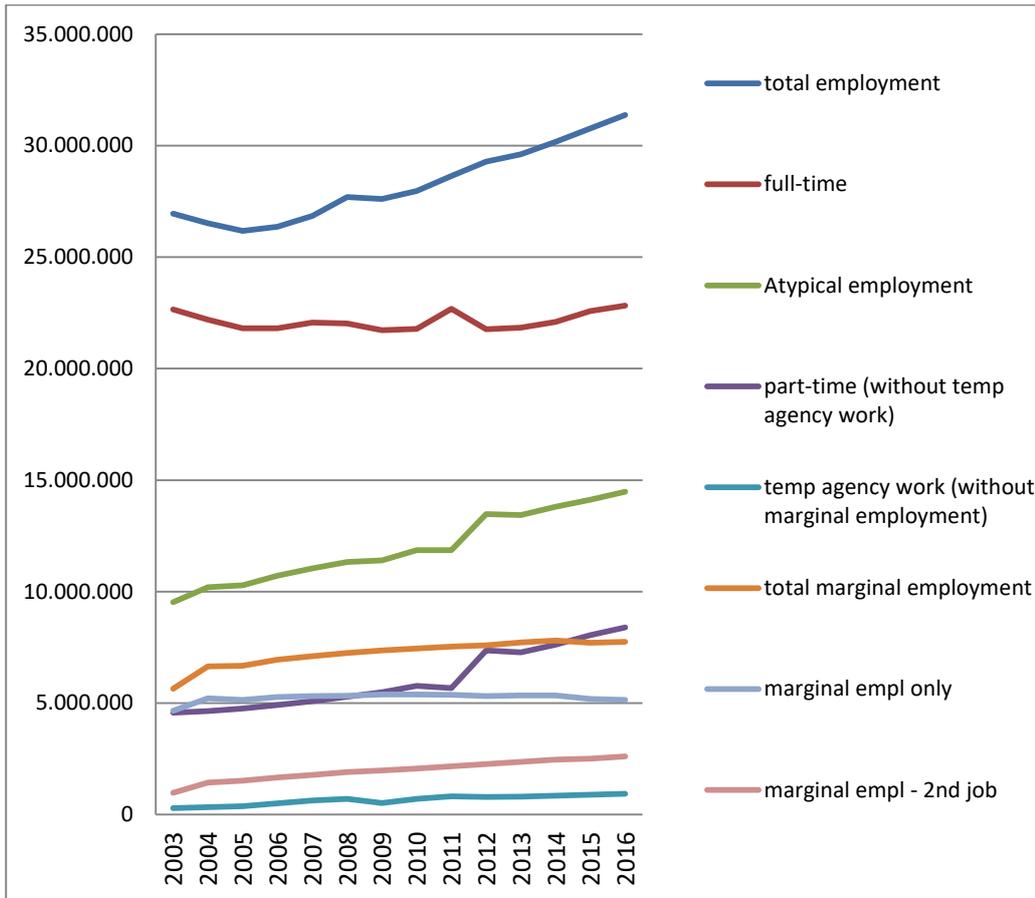
Figure 4. Development of unemployment rates 2000-2016



Let us consider how employment fared. Figure 5 indicates an overall upward trend in total employment after 2005 (excluding self-employed). Fulltime employment first declined and stagnated before rising again to a temporary peak in 2010, and decreasing to 2003 levels until 2016. Atypical employment (including temp agency work in the WSI data), in contrast, has continuously grown since the deregulating Hartz reforms in 2003. This overall growth is mostly due to a steep climb of part-time work from 4,8 to 8,4 million in 2016, and, on a lesser scale, a continuous rise of total marginal work from 5,5 to 7,7 million (only mini-jobs as a second job continued to grow throughout) and a slight increase of temp agency work over time.

Figure 5. Development of employment and atypical employment 2003-2016, totals

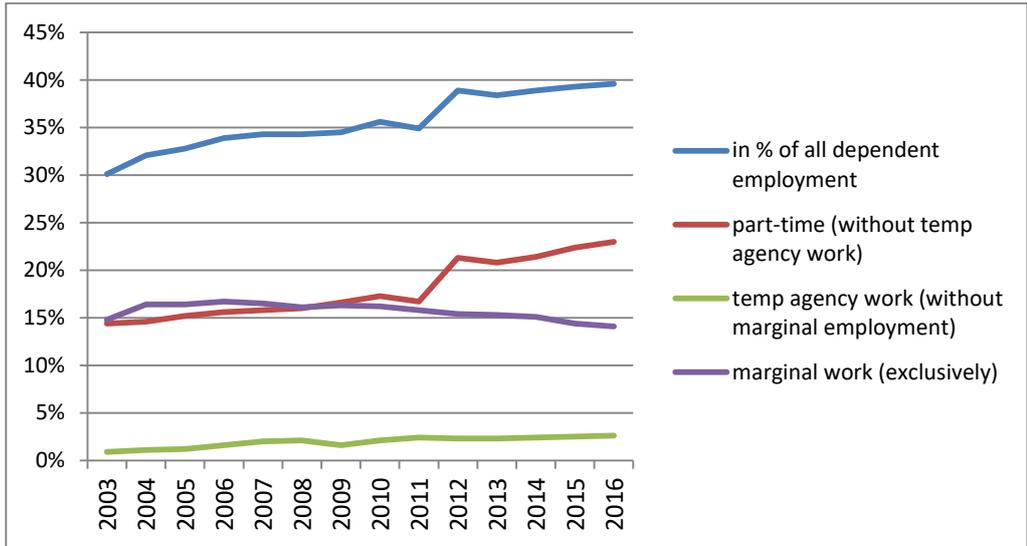
<sup>95</sup> Rinne & Schneider, *supra* n. 3.



Source: WSI-HBS Database Atypical Employment

Figure 6 displays the percentages of main forms of atypical work in relation to total (dependent) employment. In line with a favourable labour market and the expansion of dependent employment throughout the period 2007-2016, atypical work also increased, reaching nearly 40% of all employment in 2016. As for specific forms of work, 1) part-time contracts showed the largest rise, from 16,5 % to 23%, 2) marginal employment (exclusive) shows a constant downward trend since 2009 from more than 16% down to 14% in 2016, and 3) temp agency work increased to a (comparatively modest) percentage of the total relative to the other forms of 2,6%, compared to 2,0% in 2007.

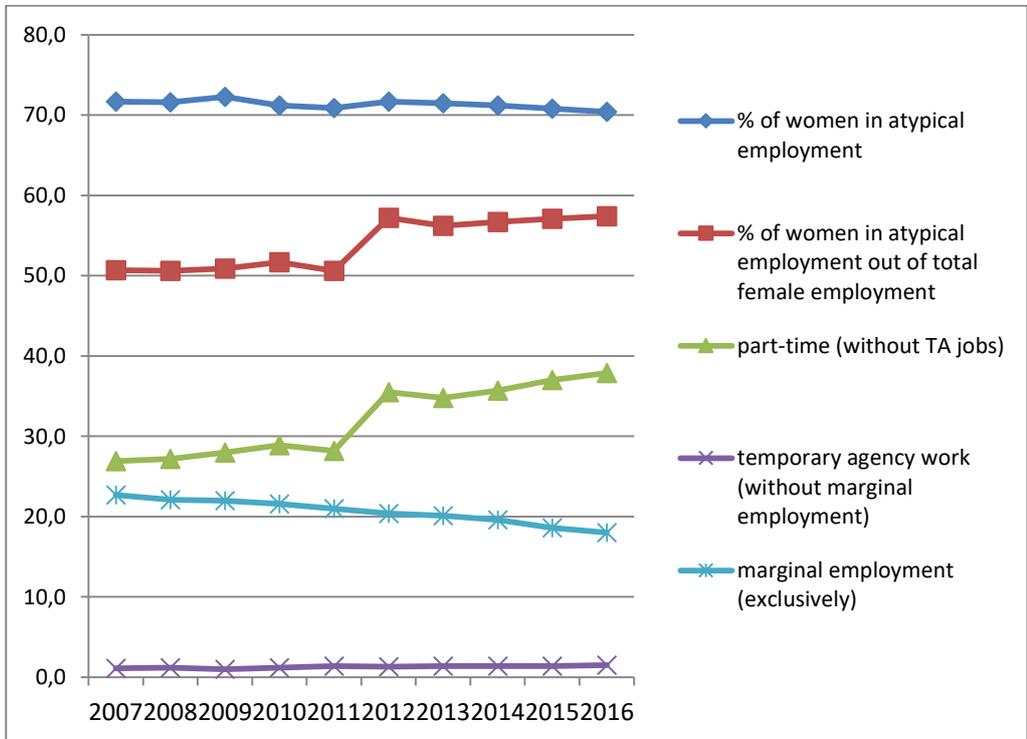
Figure 6. Percentage of specific forms of atypical employment 2003-2016



Source: WSI-HBS Database Atypical Employment

Next, figure 7 indicates that flexible forms of employment continue to be predominantly female: the share of females amounted to more than 70% in 2007, showing only a slight decrease until 2016. Out of all working women, nearly 60 % held non-standard jobs in 2016, an increase from 50% in 2007.

Figure 7. Women in atypical and total employment, 2007-2016



Source: Atypical employment database WSI-HBS (2017), <https://www.boeckler.de/tools/atypischebeschaef-tigung/index.php#result>

In the following, we consider two recent reforms that affected some groups of flexible employees and the evidence on their effects. According to several social partner observers (from the trade unions), there have hardly been any effects in terms of the numbers of atypically employed.

### **Effects of the re-regulation of temp agency work (2017)**

Temp agency work has been regulated by collective agreements, for instance in metal sector (since 2012) and others. Apparently, this has not affected the numbers of temp agency workers, although it has brought some improvements in terms of pay and working conditions. As for the subsequent reform of legal regulation in 2017, respondents indicate that its timing may be too recent to have produced any effects. However, based on the June 2018 report of the Federal Employment Agency, a prominent German daily reported a decreasing trend of temp agency workers by 3,1 % (28.000) down to 851.000, following a reduction of the usual seasonal increase of temp agency workers during spring. This decrease is explicitly related to the April 2017 reform, which is supposed to have a deferred effect due to the periods attached to new regulations (equal pay of temp agency workers after 9 months of posting, restriction of posting period in one firm to a maximum of 18 months).<sup>96</sup> A review of the reform is still on the agenda; in any case, labour market experts expect that any effects of the new rules will be hard to detect. Looking at data on the average length of periods spent in hiring firms, only a small share of temp agency workers (12 %) would profit from the maximum restriction of the posting period, as the majority stays for a shorter period of time. Moreover, the equal pay rule creates incentives to replace agency workers by new ones after 9 months of posting, which may lead to shorter posting periods in the future. As a result, it is questionable whether this combination of measures will promote the transition of agency workers to the core staff of a hiring firm. Rather, firms may try to do without agency workers, making use of alternative forms of employment such as on-site service contracts.<sup>97</sup>

### **Effects of the introduction of the minimum wage (2015)**

Another important reform has been the introduction of the minimum wage. In contrast to the reform of temp agency work, there have already been studies to estimate the effects of the minimum wage introduction on the main forms of employment. To complement the data from the three figures shown above, table 5 adds the latest definite figures of employment in February 2018 (with estimates being extended until June 2018), showing that total dependent employment has continued to expand by nearly 4 million after 2017.<sup>98</sup>

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<sup>96</sup>FAZ, supra n. 20.

<sup>97</sup>F. Bauer et al. *Zu den Auswirkungen der Reformen von befristeter Beschäftigung und Zeitarbeit sowie möglichem Reformbedarf bei der Arbeitszeitregulierung*, IAB-Stellungnahme 13/2018, <http://doku.iab.de/stellungnahme/2018/sn1318.pdf> (accessed 23 Jan. 2019), at 9-11.

<sup>98</sup>IAB Arbeitsmarktspiegel in *BT-Ausschussdrucksache nr. 19(11)231 - Unterrichtung durch das Bundesministerium für Arbeit und Soziales*, (Deutscher Bundestag, December 2018).

Table 5. Employment as of February 2018 (not corrected for seasonal effects)

Employment covered by social security contributions 32.542.800 <i>(without vocational trainees: 31.059.220)</i>	Exclusively employees covered by social security contributions	29.815.140	Marginally employed 7.368.860
	Employees covered by social security contributions and marginal employment as 2nd job	2.727.660	
	Exclusively marginally Employed	4.641.200	
	Exclusively short-term employed	146.970	
	<b>Total (dependent) employment</b>	<b>37.330.960</b>	

Table 6 summarizes several effects of the minimum wage, mainly on marginal employment (in majority those holding mini-jobs). Also, there was a small positive effect of the minimum wage on overall employment subject to social security contributions. Most notably, in the month of its introduction, the category of marginally employed decreased by almost 2%, while it decreased overall by 6% within the following three years. The effect is deemed to come from reducing mini-jobbers' working hours indirectly through the rise of the minimum wage they are also entitled to, causing mini-jobs to be converted to other forms of employment, e.g. midi-jobs (with a higher earnings ceiling). At the same time, marginal jobs, in addition to other employment covered by social security have increased slightly.

Table 6. Effects of minimum wage introduction (Jan.2015) and trends after 2014, main categories of employed

	<i>Effects in January 2015</i>	<i>Change(s) 2014 – February 2018</i>
Exclusively employees paying social security contributions	+ 0,3 %	+ 8,7 % (+ 2,4 million)
Employees paying social security contributions plus marginal employment as 2nd job	-0,5 % ( <i>temporary</i> )	<i>positive trend (2013-2017: increases between 0.25-0.38%)</i>
Exclusively marginally employed	- 1,9 %	- 6 % ( <i>ca. 300.000 persons</i> )
Exclusively short-term employed	<i>none</i>	<i>seasonal changes</i>

Source: IAB Arbeitsmarktspiegel, own compilation.

While these data point to some improvements from the perspective of marginally employed, an overall large low-wage sector continues to exist in Germany. Kalina and Weinkopf conclude in their study of that sector (based on data up to and including 2016) that the overall share of low-wage work has remained at almost 23% since 2012. Since the introduction of the minimum wage in 2014, average hourly wages at the low end of the scale have risen clearly in 2015 and 2016. More specifically, the share of workers earning less than 8,50 €/hour has decreased considerably, while the share of those remaining below the higher low-wage threshold of just above 10 € stagnated in 2015. There are clear regional differences, however: in East Germany,

the share of low wages has decreased since 2013, while stagnating in West Germany and even rising in 2016. Therefore, Germany retains a very large low-wage sector compared to other EU countries.<sup>99</sup>

In sum, some labour market effects of reforms have been taken place - against the background of an overall expanding labour market in a favourable economic situation - at least until early to mid-2018. Surely the minimum wage has led to some reduction of marginal work (while not reducing the size of the low-wage sector) and efforts at temp agency work re-regulation may over time show some effects by reducing overall numbers of agency workers. Other notable trends, such as the continuing increase of part-time contracts cannot be related to changes in regulation. Whether the recent reforms relating to fixed-term part time and on-call work and the planned re-regulation of fixed-term work will have numerical effects remains to be seen.

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<sup>99</sup> T. Kalina & C. Weinkopf, *Niedriglohnbeschäftigung 2016 – beachtliche Lohnzuwächse im unteren Lohnsegment, aber weiterhin hoher Anteil von Beschäftigten mit Niedriglöhnen*. IAQ Report 06/18, Universität Duisburg-Essen (2018).

## 5. Conclusion

This section combines concluding thoughts on a number of issues that were central in this report, including: 1) challenges for the regulation of new forms of employment perceived by social partners and policy-makers; 2) goals of legislative action and social partners' initiatives in regulating labour market flexibilization, in particular flexible and new forms of employment; 3) to what extent efforts to regulate have been successful in terms of achieving their goals; and, finally, 4) how industrial relations actors, especially trade unions, have adapted to changing membership profiles and needs of workers in flexible and new forms of employment.

As for the first issue, our exploration of stakeholder perspectives (section 3) has shown that perceived challenges for the regulation of flexible and new forms of employment depend on the type of social partner. Unions tend to stress the containment of flexible forms of employment, and aim at converting them into standard employment. Moreover, they advocate better social security protection for the most precarious forms. Employers, however, are wary of further regulation that tightens already existing restrictions (including dismissal protection) for flexible forms of employment, whether by national or EU legislation. From the view of policy-makers, the main challenge in regulation is how to strike a balance between the different interests expressed by the social partners, which includes finding party-political compromises on the extent and the substance of new regulation. The latter is especially important as long as the current Grand Coalition government by Social Democrats and Christian Democrats, who tend to favour different policies, is in place. A common challenge recognized by both coalition parties is to achieve better protection of the self-employed from old-age poverty (and other risks) in the future. The biggest challenge related to the regulation of work via platforms appears to be the complexity of the issue. Crowd- and gigwork differ in character and there is hardly a one-size-fits all framework for regulating the employment status of all affected persons and for securing minimum pay, a minimum level of social protection and acceptable working conditions; as unions and, in part, the Ministry of Social Affairs and Employment would like to see. In addition, despite considerable efforts to gather data on the phenomenon of platform work, German policy-makers on the whole seem still not convinced that the size of the group affected justifies serious efforts at regulation.

The second issue is about to what ends regulation has sought to affect flexible and new forms of employment. Here, we can discern a number of goals across regulatory efforts in the past 10 years, including: fighting abuses of certain employment forms such as temp agency work and service contracts, including the incidence of bogus self-employment; improving wage levels for those on (very) low wages and on-call contracts, but also ensuring equal pay for temp agency workers compared to permanent staff of hiring firms; improving social security coverage for those in marginal work (in mini- and midi-jobs); and finding ways for self-employed to pay affordable contributions to social security (e.g. lowering health insurance contributions), which is an ongoing endeavour. A last goal of regulation may be creating bridges into standard employment contracts, which is visible in the recent introduction of the right to fixed-term

part-time and in the (still not implemented) plan to limit the use of fixed-term contracts without a proper reason. As mentioned in the paragraph on challenges to regulation above (first issue), platform work has not yet been regulated, and, judging from the current coalition agreement (2018), it has not gained priority on the agenda of the government in the ongoing parliamentary period (2017-2021).

A related question is how social partners' initiatives, next to legal regulation, have tried to affect flexible and new forms of employment. Section 3 has set out in more detail which strategies have been used by the various actors. Here, it appears that employers are pleading for as little new regulation of flexible employment as possible, and for loosening existing regulation such as the Working Time Act. Unions have been lobbying policy-makers to enable the reduction of precarious work and for the regulation of protection for the vulnerable solo-self-employed. They also try to reach out to those in flexible employment forms to win them as members. Moreover, at the initiative of unions, various collective agreements for stronger rights and better pay and working condition have been concluded, particularly for temp agency workers, but also in low-wage sectors to agree sectoral minimum wages (even before the introduction of the statutory minimum wage). Most recently, the collective agreement in the metal sector (2018) introduced the idea of working time sovereignty for employees on a larger scale. In addition to unions' sectoral initiatives, on the firm level, works councils are often involved in agreements that include favourable rules to employees including those in flexible employment.

The third issue is about assessing to what extent regulation and social partner initiatives have been successful in terms of improving protection by labour law and social security as well as working conditions (mostly in terms of pay) for those in flexible employment. As shown in section 4, the effects of selected regulatory efforts such as the statutory minimum wage and the reform of the Temp Agency Work Act on the numbers of flexible workers seem to have been limited. In terms of improved protection and working conditions, some groups have surely profited from re-regulation or are expected to profit in the near future, including temp agency workers, on-call workers, fixed-term workers, those part-time workers being entitled to return to full-time work. However, further in-depth research would be needed in order to find out about the outcomes for each form of employment. Based on the current exploration of changes in legal regulation, one cannot speak of remarkable successes. However, as complements to legal regulation, social partner initiatives have certainly produced positive outcomes for flexible workers, especially through of collective agreements that improve their situation in various ways. While 'success' is hard to measure here, the existence of these collective agreements can be seen as an achievement in its own right.

Fourth, there is the issue of what implications the growth of flexible and new forms of employment has had for German industrial relations. Here, the question is how traditional industrial relations actors, and trade unions in particular, have been adapting to the changing pro-

file of workers as potential members and to the needs of workers in new forms of employment. For German trade unions, the phenomenon of an increasing group of flexible workers is a challenge linked to the ongoing decrease in the unionization rate and organizational strength. The latter is a general observation, with exceptions such as IG Metall, which has been winning rather than losing members. Unions are very much aware of their shrinking membership base and the need to win new members among flexible workers, while knowing that these groups are harder (or nearly impossible) to reach out to. Nevertheless, there have been organizing efforts towards 'precarious workers', offering them advice and practical support in many different ways. These efforts also include the (solo-) self-employed, and more recently, those working via platforms (crowd- and gigworkers), as evidenced by initiatives by, for instance, Ver.di and IG Metall. On the other hand, on the employer side, employer defection from collective bargaining - and the ability of employers' associations to counter this development - has been noted as a problem, as it contributes to decreasing collective agreement coverage of employees. At the same time, trade union campaigns for 'good work' are being continued to underline the long-term goal of restricting the use of flexible forms of work, which, in their view, should be the exception rather than the rule. Employers, on the other hand, continue to promote the advantages of flexible forms of employment in the name of business-related needs, but also stress the needs of certain groups of individual workers, such as trainees, starters on the labour market, and women, particularly those also caring for children. One could argue this type of communication also constitutes a form of adaptation to the realities of the labour market; as well as a reaction to unions' campaigns against atypical and precarious work.

Finally, this study has not found any noticeable new actors in German industrial relations linked to flexible and new employment forms that have entered the system of traditional actors. Neither sectoral associations, associations connected to the platforms economy or those representing groups such as the (solo-) self-employed are showing aspirations to the status of social partner.

## **Appendix: Overview of respondents**

1. Gesamtmetall, 12.06.18 (2 representatives), Berlin.
2. Zentralverband des deutschen Handwerks (ZDH), 13.06.18 (2 representatives), Berlin.
3. Ver.di, 13.06.18 (official, Department of labour law), Berlin.
4. Social Democratic Party, parliamentary party official on employment and social affairs, 14.06.18, Berlin.
5. Ver.di, 14.06.18 (official, Department of Self-Employment), Berlin.
6. Deutscher Gewerkschaftsbund (DGB) (official, Department of Labour Market Policy, 15.06.18, Berlin.
7. IG Metall, 4.7.18, official, Department "Zielgruppenarbeit und Gleichstellung", Frankfurt.
8. Institut der Deutschen Wirtschaft (IW), 5.7.18, senior researcher Department of Tariff Policy and Labour Relations, Cologne.
9. IG Metall, 28.08.18, official Department "Kampagnen", Frankfurt.
10. Federal Ministry of Employment and Social Affairs (official, Department of Labour Relations and Denkfabrik Arbeit 4.0), Berlin (personal communication, various dates)
11. Christian Democratic Union, parliamentary party official on employment and social affairs, 06.12.18 (by phone, 6.12.18).