



NEW EMPLOYMENT FORMS AND CHALLENGES TO INDUSTRIAL RELATIONS – NEWEFIN

Policy brief Germany

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Introduction

This brief policy paper proceeds in three steps. It revisits the structure of the Germany country report (section 1), it summarises its findings (section 2) and it proposes a number of recommendations based on the shortcomings of the current legal framework on flexible and new forms of employment, on possible reforms through new legislation and on concerns by trade unions and labour lawyers (section 3). The paper ends with some reflections on the prospects for change given the recent Covid-19 pandemic, which has tightened its grip on Germany as it has in many of the other European Union countries.

1. Overview

The country report presents and analyses the legal and societal context related to the rise of new forms of employment in Germany. Its contents are 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.

The introductory section covers key aspects of the topic and sets the scene for a more in-depth investigation in subsequent chapters. Chapter 2 focuses on the *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 crowd work jobs. Chapter 3 gives an *overview of initiatives and activities by German social partners* that matter for the regulation of new forms of employment, as well as characterising the roles employers and trade union organisations play in this regard. It also addresses the question of whether new actors related to new forms of employment have emerged in German industrial relations. Finally, it outlines policy-makers' views on past regulation and future regulatory options. Chapter 4 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 explained at all by changes in legislation or other regulative changes. The analysis, 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 is covered in a separate report forming part of the NEWEFIN project. For the same reason, the report excludes the role of (intra-EU or other) migration on flexible and new forms of employment.

The *conclusion* returns to five aspects of the subject matter, namely 1) the 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 have tried to affect perceived changes of the labour market, especially the growth of new and flexible employment forms, 3) to what extent regulatory efforts and social partner initiatives can be said to have achieved their envisaged goals, and 4) the ways in which industrial relations actors, especially trade unions, have adapted to different membership profiles and the needs of workers.

2. Summary of findings

Concerning *challenges for the regulation of flexible and new forms of employment*, the exploration of stakeholder perspectives showed that they clearly 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 include 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 of Social Democrats and Christian Democrats, who tend to favour different policies, is in place. A common challenge recognised by both coalition partners 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. There is a lot of variation in crowd work and gig work, which means 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 (topics that unions and, to some extent, the Ministry of Social Affairs and Employment would like to see regulated). In addition, despite considerable efforts to gather more 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.

Next, the report sought to reveal *how regulation has tried to affect flexible and new forms of employment*. Here, a number of goals can be discerned across regulatory efforts in the past 10 years: countering abuses of certain employment forms such as temporary 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 temporary 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 the self-employed to pay affordable contributions to social security (e.g. lowering health

insurance contributions), which is an ongoing endeavour. An additional goal of regulation may be to create bridges from flexible to standard employment contracts, which can be seen 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 reasonable grounds. As mentioned in the paragraph on challenges for regulation, platform work has not yet been regulated, and, judging from the 2018 coalition agreement, it has not gained priority on the agenda of the government in the ongoing parliamentary period (until 2021).

A related question is *how social partners' initiatives, as well as legal regulation, have tried to affect flexible and new forms of employment*. The report found that employers are pleading for as little new regulation of flexible employment as possible, and for loosening existing regulation such as the Working Hours 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 are also trying to reach out to those in flexible employment forms to win them over 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 temporary 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 at the firm level, works councils are often involved in agreements that include favourable rules to employees, including those in flexible employment.

In addition, the report assessed *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*. Here, the effects of selected regulatory efforts, i.e. the statutory minimum wage and the reform of the Temporary 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 temporary agency workers, on-call workers, fixed-term workers and those part-time workers who are entitled to return to full-time work. However, more in-depth research is needed in order to find out about the outcomes for each of these forms of employment. Based on the data used for the report on consequences of changes in legal regulation, one cannot speak of remarkable successes. However, social partner initiatives, as complements to legal regulation, have certainly produced positive outcomes for flexible workers, especially through collective agreements that seek to improve their situation in various ways. While measuring the 'success' of such initiatives could not be done in the context of the report, the existence of these collective agreements can be seen as an achievement in its own right.

Next, the report considered *the implications of the growth of flexible and new forms of employment for German industrial relations*. How have traditional industrial relations actors, and trade unions in particular, been adapting to the changing profile 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 unionisation rate and organisational strength. While the latter is the general rule, there are 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, they have launched efforts to organise '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, i.e. crowd- and gig-workers, as evidenced by initiatives by unions like 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 the decrease in 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 in 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, the report has not found any *visible 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 platform economy or those representing groups such as the (solo) self-employed are showing aspirations to the status of social partner.

3. Policy recommendations

Linked to the reports' contents on the current legal framework concerning flexible and new forms of employment, legislative reforms and future plans as well as the concerns voiced by social partners (mostly trade unions), this paper ends with a number of policy proposals for the regulation of certain forms of employment. The latter includes new legislative measures and the adaptation of existing labour law.

Therefore, the recommendations are first and foremost directed at policy-makers in the Ministry of Social Affairs and Employment and politicians of the coalition parties (rather than social partners who cannot achieve regulation of the points proposed with the instruments they have at their proposal)

Most recommendations are aimed at the situation of the solo self-employed and crowd workers (who are de facto self-employed for the time being); some are aimed at particularly vulnerable forms among the range of flexible employment forms: on-call work, certain fixed-term contracts and, in part, temporary agency work.

1) Introduce obligatory social insurance coverage for the solo self-employed

Obligatory social insurance for the solo-self-employed should be developed further since this group is among the most vulnerable forms of employment. Because of the economic risk of old-age poverty, this applies in particular to pension insurance. This issue has been on the government's policy agenda for some time now, but policy-makers have not yet achieved a political compromise on the exact form to be implemented through legislation.

2) Further develop the category of 'employee-like persons' or of the definition of 'employee', taking into account particular situations of economic dependency

According to labour lawyers, existing definitions of categories of employment are still falling short by not covering all possible employment situations. For instance, in order to have those solo self-employed operating in the market gain an 'employee-like' status, they should be classified as 'employee-like persons', or, in extreme cases of dependency, classified as employees.

3) Introduce a minimum remuneration for the solo self-employed

In parallel to the introduction of the statutory minimum wage for those in paid employment, a comparable measure for the solo self-employed could help to ensure some extent of income security and, in the long run, help to avoid old-age poverty. Similar to planned regulation in the Netherlands (still in the process of implementation) or in Poland, creating a minimum remuneration for the self-employed would be desirable despite a number of practical obstacles.

4) Update the Home Workers Act (HAG), especially widening its scope of application to crowd workers

As the discussion in the report has shown, the labour law community is putting forward legal solutions to the relative lack of regulation in the area of platform work. Adapting the Home Workers Act to include crowd workers is seen as a workable solution by many in the community.

5) Regulate rights of access by trade unions to digital platform companies, to increase possibilities for organising their 'employees'

As described in the report, trade unions are seeking ways to reach out to platform workers as potential members and to help them to strengthen their rights vis-à-vis platform companies. To achieve greater legal safety, regulation of trade union access to such workers by law (as in the US/Ireland) could be thought of, or, alternatively, achieved through case law.

6) Further restrict and/or abolish certain forms of flexible work

Trade unions (DGB) in particular have been lobbying for the abolition of those flexible forms of work that imply considerable income insecurity, including on-call work, which has been further regulated but not prohibited. In addition, the abolition of fixed-term contracts without a reasonable ground, also in line with the demands of the DGB, should be considered. As fixed-term contracts with a reasonable ground still allow considerable flexibility to employers that need to offer contracts for a limited time, they could serve as an alternative. In practice, due to the sensitivity of the issue for employers, plans for further legal restrictions on fixed-term contracts and chain constructions have been postponed for the time being.

7) Strengthen the claim for equal treatment for temporary agency workers

Such a proposal relates to the AUEG reform (2017), which, from the unions' point of view, did not go far enough in ensuring equal rights compared to firms' permanent staff. In addition, from the perspective of labour lawyers, German law still offers too many ways to avoid principles of equal treatment, which have not been addressed by the latest reform.

Final reflections

What are the prospects of implementing these recommendations? While it is usually hard to predict the chances of getting policy measures implemented, at the time of writing (late March 2020), predicting these chances is even harder due to the extraordinary circumstances being faced by German policy-makers, the economy and society at large. Since mid-March 2020, the Covid-19 pandemic has tightened its grip on European Union countries, including Germany. In order to alleviate the economic consequences of the pandemic, the German parliament adopted an economic aid package of unknown proportions (€123 billion) at the end of March, including financial assistance for businesses, self-employed persons and employees of ailing companies to enable short-time work. In the ongoing crisis decision-making, it is difficult to make predictions about whether policy proposals directed at flexible and new forms of employment will materialise quickly. For the moment, there is increased attention to those adversely affected by the near lock-down of the economy and restrictions for citizens. Whether this will translate into more attention for those in flexible employment, who tend to be hit first by the consequences of an economic downturn, remains to be seen. The same goes for whether the current crisis will speed up the implementation of plans already on the policy agenda (such as increased social security protection for solo self-employed persons). Although decision-making under crisis conditions tends to happen much faster than under ‘normal’ conditions, as evidenced by the rapid conclusion of crisis aid packages in Germany and surrounding countries, the items on the policy-making agenda are manifold.