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CODEBAR – Comparisons in Decentralised Bargaining

Country Report: Germany

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'Comparisons in decentralized bargaining: towards new relations between trade unions and works councils?' (CODEBAR). This project is co-financed by the European Commission, Agreement VS/2020/0111 (Improving expertise in the field of industrial relation). The Commission is not responsible for the author's view in this report, nor for any use that may be made of the information it contains.

Table of contents

1 Executive Summary

The German system of industrial relations rests on two core institutional pillars: branch-level pay regulation through negotiation between trade unions and employers' associations on the one hand and statutory workplace codetermination – together with codetermination on the supervisory boards of corporations – on the other. As a result of this institutional diversity, and the coexistence and interplay of these two levels of action and regulation, German industrial relations arrangements have been characterised as a 'dual system' (Müller-Jentsch, 1986). In Germany, 'collective bargaining' in the formal sense is a term that has been reserved for negotiations between either employers' associations or individual employers and trade unions and is subject to a legal framework created by statute law and court rulings; workplace bargaining by statutory works councils, subject to a separate legal framework, is regarded as institutionally and conceptually distinct, albeit with increasingly blurred lines as a result of the decentralisation processes discussed here.

This report focuses on recent trends in, and associated debates on, the decentralisation of collective bargaining in Germany. Based on company case studies in the metalworking and retail sectors, we demonstrate that decentralisation has become a central feature of the German dual system in recent years. Overall, we identify three forms of decentralisation: (1) decentralisation through the erosion of the dual system's institutional foundations and the gradual shrinkage of its scope; (2) decentralisation *within* the collective bargaining system through a shift in the locus of collective bargaining from the multi-employer level to the enterprise and establishment levels; and (3) decentralisation through the transfer of regulatory competences from the actors at industry level (that is, trade unions and employer associations) to the actors at establishment (workplace) level (works councils and local managements) and from the collective agreement (*Tarifvertrag*) to the workplace agreement (*Betriebsvereinbarung*), which, although having some similarities, have a different legal foundation, status and regulatory effect. However, our analysis reveals considerable differences between the two branches considered in this study, the metalworking industry and retailing. While the decentralisation of collective bargaining in the German metalworking industry has been characterised by a complex interplay of uncontrolled (so-called 'wild') and organised decentralisation – with the latter entailing both a shift to the establishment as well as derogations from industry agreements – decentralisation in retailing has mainly been of the wild variety. In both sectors and across all these forms of decentralisation, the main driving force has been either individual employers or employers' associations. In the case of wild decentralisation, the process has been driven by employers either leaving employers' associations or adopting a special status created by these associations that allows for continuing membership but without the requirement to comply with collective agreements. Controlled decentralisation, either through moving the site of regulation to the establishment or via 'opening clauses' allowing derogation from industry-level agreements, also has its origins in employers' demands for greater regulatory flexibility.

Our case study evidence from the metalworking industry highlights the fact that works councils play a central role in both processes of organised decentralisation. The shift in the locus of regulation to the workplace (*Verbetrieblichung*) via opening clauses in industry agreements requires works councils to address new topics and take on new responsibilities, confronting their members with an obligation to negotiate, regulate and oversee areas devolved to them by

the actors within the established system of collective bargaining. In the case of the decentralisation via scope for derogation from industry agreements, trade unions, conversely, become the most important actor in bargaining at establishment or company level since they check any applications by companies that wish to derogate from industry standards, set up and lead bargaining committees and negotiate with management, and organise membership participation and recruitment. Works councils are far from secondary in this process, however, as they need to coordinate with the relevant trade union and help organise negotiations and employee involvement. This draws them into the role of being a collective bargaining actor centred on, and by virtue of, their close collaboration with unions.

These developments call for new relationships between works councils and trade unions, and pose novel challenges for both actors. One of the main ways in which they have responded to these challenges is to engage in close (or closer) cooperation. This is a reciprocal relationship. In the case of derogations from industry agreements, trade unions need works councils as these represent the link both to workforces and management and are indispensable for monitoring how derogations are implemented at workplace level. Shifting the locus of regulation to the workplace cannot function without the existence of works councils that are able and willing to step in and implement the scope for local negotiation that unions have agreed at industry level. At the same time, works councils need trade unions, both to provide professional support when engaging in the new tasks devolved to them and back them up with organisational and bargaining power to enable them to negotiate fair derogation deals with management. Our study highlights that organised decentralisation calls for much closer cooperation between these two actors than has previously been customary.

2 Institutional framework of collective bargaining and employee representation in Germany

2.1 The dual system

The German system or model of industrial relations has long been discussed in international literature as an institutional core of German capitalism, albeit with different emphases. While some authors have focused on the crisis of the model, as diagnosed by Wolfgang Streeck in the early-1990s in the face of the challenges from lean production (Streeck, 1997) and again more recently in terms of the neoliberal assaults on it (Streeck, 2010), others have highlighted its exemplary character as an instance of a 'coordinated market economy' (Hall and Soskice, 2001) within the debate over 'Varieties of Capitalism'. Overall, in a comparative perspective, the model represents an instance of 'social partnership' between organised capital and labour (Silvia, 2013; Streeck and Hassel, 2010; Turner, 1997) anchored in two core institutional pillars: branch-level wage regulation by trade unions and employers' associations, on the one hand, and statutory workplace codetermination – together with codetermination on the supervisory boards of corporations – on the other. As a result of this institutional diversity, and the coexistence and interplay of these two levels of action and regulation, German industrial relations arrangements have been characterised as a 'dual system' (Müller-Jentsch, 1986). Collective bargaining in German industrial relations should therefore be seen as one element in a more comprehensive system of action and regulation, which also includes workplace and company-level codetermination. In this regard, Müller-Jentsch (1995) also speaks of two

arenas: the first, the arena of 'free collective bargaining' (*Tarifautonomie*); and the second, the arena of statutory workplace codetermination or '*Betriebsverfassung*'.

2.2 Collective bargaining and associations

Both arenas have a statutory basis in Germany and in that respect enjoy legal guarantees. In the case of *collective bargaining*, the basis is the Collective Bargaining Act (*Tarifvertragsgesetz*), which was passed in 1949 at the time of the birth of the Federal Republic, the constitution of which (the Basic Law) also provides for freedom of association. The Collective Bargaining Act is a short text consisting of only 13 paragraphs. According to the legal norms of the Act in the currently applicable version:

- collective agreements regulate the rights and obligations of the parties to collective agreements,
- collective agreements are concluded between trade unions and employers or their associations,
- the members of the parties to the collective agreement are bound by the collective agreement,
- the provisions of the collective agreement have the character of mandatory legal norms,
- deviations from these standards are only permissible if they are regulated in the collective agreement itself or if they are favourable to the employee,
- agreed norms continue to apply after the expiry of the collective agreement until a new collective agreement has been concluded, termed 'Nachwirkung' or 'continuing effect',
- in the event of conflicts between collective agreements concluded with different trade unions in one company, the legal standards of the collective agreement of the trade union with the largest number of members in the enterprise shall apply,
- collective agreements can be declared generally binding ('extended') by the Federal Ministry of Labour and Social Affairs, and thus extended to non-signatory parties, at the request of both parties and subject to the approval of a collective bargaining commission, composed of three representatives of each of the two umbrella (i.e. national) organisations of employers and employees (with a majority needed for approval), provided this is deemed to be in the public interest, defined as either where an industry-level agreement has acquired predominant significance in setting employment conditions in its area of application or where, as a result of a recent amendment, establishing agreed standards would counter the risk of wider economic harm.

According to the Collective Bargaining Act, the negotiating parties – trade unions and employers' associations or individual employers – set employment conditions that have legally binding effect without external influence by the state. This is why in Germany the collective agreement system is also referred to as 'collective bargaining *autonomy*' or alternatively 'free collective bargaining'. The most important role of the state in this system is to enforce the legal framework and apply the regulations on the extension of collective agreements. This traditional role of the state was expanded in 2015 with the introduction of a statutory minimum wage, the level of which is determined by a minimum wage commission that includes members nominated by the nationally-recognised trade unions and employer associations.

The characteristic structure of branch-level – or, within industry boundaries, regional – collective agreements in Germany was established during the 1950s and 1960s (see also Müller-Jensch, 2007). The most important prerequisite for this was the emergence in the post-war period of trade unions and employers' associations as industry-based associations. On the *trade union side*, attempts were made to enforce the principle of industrial unionism, in which one trade union would represent all employees in an industry regardless of political or religious affiliations or employee status (blue-collar or white-collar). Although such industrial unions were established, what 'industrial' meant varied from case to case. For example, large unions, such as ÖTV (public sector and transport), HBV (retail, banking and insurance) or IG Metall (the very complex metalworking and electrical sector) were obliged to co-exist with several unions with much smaller organisational domains, such as the leatherworkers' union or the gardening and forestry union. Up until the 1990s, there were 16 industrial unions affiliated to the German Trade Union Federation (DGB), the main national umbrella organisation.

There were four exceptions to the industry unionism principle. The DAG union represented white-collar employees across all industries and was independent of the DGB: it eventually merged with other DGB unions in 2001 to form the large service sector union ver.di. The DBB union represents established civil servants who have no right to strike and whose pay and conditions are set by administrative decree; this is a wider group than administrative civil servants and has included other employees in the public sector (such as teachers). The CGB (Christian Trade Union Federation) was established as an umbrella organisation for a total of 16 religiously oriented sectoral trade unions. CGB-affiliated unions trail far behind the DGB trade unions in terms of membership and significance in these sectors; about 80 per cent of trade union members are organised in the DGB trade unions, and collective agreements are concluded almost exclusively by the DGB (in recent years many CGB-affiliated trade unions have lost their status as being competent to negotiate collective agreements, a matter determined by the courts applying a set of broad established principles). More recently, a number of occupational trade unions have either been formed or reasserted their independence, such as those representing train drivers, airline pilots and hospital doctors. These have successfully negotiated collective agreements since the 2000s and consequently compete with DGB unions in their respective spheres.

In addition to these developments, DGB-affiliated unions have also passed through major changes since the 1990s as a result of mergers, leading to a fall in the number of individual unions in the DGB from 16 to only eight currently. Some individual unions have developed into multi-sectoral unions whose organisational domains no longer coincide with narrower sectoral boundaries. For example, to take the three largest individual unions, ver.di now represents the entire private and public service sector – with overlaps with other unions in the energy sector or in industrial logistics; IG Metall represents the wood and plastics industry as well as clothing and textiles in addition to the metalworking and electrical industries; and the IG BCE union with its traditional domains in the chemical and pharmaceutical industry now represents in addition to this, mining, glass, paper and energy industries.

At first glance, the structure of *employers' associations* is more complex as these embrace three forms of association: employers' associations in the narrow sense, organised within the umbrella organisation of the BDA (Confederation of German Employers' Associations); trade associations, which represent companies' economic and sectoral interests and are organised in the BDI (Federation of German Industries); and chambers of industry and commerce, which

represent employers' regional interests, play an important role in vocational training and regional economic promotion, and membership of which, in contrast to the other two, is mandatory for companies.

Of these, only those employers' associations in the BDA represent specifically labour market interests and conclude collective agreements on behalf of their members. In all, the BDA includes 48 industry associations, which are organised at national level and group the regional associations in their respective branches, some of which are constituted at state (*Land)* level and in some cases represent smaller geographical areas; in addition, there are 14 state-level employer associations that represent all employers' organisations within their respective states. In total, there are more than 400 sectoral employers' associations with regionally-limited organisational domains: these negotiate collective agreements with the relevant trade unions either directly or through their federal umbrella organisations. The organisational domains of employers' associations are much more closely aligned with industry boundaries than those of the industrial trade unions. In addition to these private employers' associations, there are organisations representing public employers at the three levels of government in Germany: at national level, the federal government directly concludes collective agreements for federal government employees; the federal states (the *Länder*) are organised in the TdL (Collective Bargaining Community of the Federal States) – with the exception of the federal state of Hesse – and this jointly represent the states as employers in negotiations with the employee side; and the VKA (Federation of Municipal Employers) serves as the umbrella organisation for municipal employers' associations in the 16 federal states.

Despite the changes in organisational domains within the trade unions, the industry principle of *collective agreements* still prevails. The major trade unions now each conclude collective agreements for different branches with different employers' associations. In some cases, as in the chemical industry or banking, this is done directly at *industry level*, but in others – such as the metalworking industry and retail – agreements are negotiated at *regional* level, with differences, of varying degrees, between regional agreements in the same industry. For most sectors, three basic forms of collective agreement can be distinguished: (1) Wage and salary or pay agreements (*Lohn-, Gehalts- und Entgelttarifverträge*) specify pay levels and reflect negotiated pay settlements over different periods of time, usually one to two years; (2) Pay framework agreements (sing. *Lohn- und Gehaltsrahmentarifvertrag*) set out pay grades and bands, and specify grading criteria and job evaluation methods; finally, (3) framework agreements (sing. *Manteltarifvertrag*) stipulate basic terms and conditions, such as the duration and organisation of working hours together with holiday entitlements, regulations on overtime, and wage supplements for overtime and shift working among other matters. Pay framework agreements and framework agreements are renegotiated far less frequently than pay agreements; in some sectors, pay framework agreements have barely changed since the 1970s (which in these cases, admittedly, might also suggest a lack of capacity to modernise them). Two important trends have shaped these latter two types of collective agreements in recent decades: the shortening and flexibilisation of collectively agreed working hours in framework collective agreements and the creation of single status pay structures embracing both blue- and white-collar employees).

In addition to these three basic types of agreement, a wide range of other collective agreements have emerged covering – depending on the sector – issues such as adjustments to changing

workforce composition ('demography'), skills and training, job security, mobile (home) working, and the regulation of temporary employment. In addition to industry-level collective agreements, agreements can also be negotiated at company level between the relevant trade union and individual employers. Such agreements differ to varying degrees from industry agreements. For example, they may contain their own pay systems or specify different provisions on pay or working hours. Traditionally, trade unions have been able to negotiate company-level agreements that have improved on the prevailing industry agreement in economically strong and large companies, such as Volkswagen. In some cases, company agreements can provide for identical terms to the relevant industry agreement but have been negotiated directly with a trade union as the employer in question has not wanted to join the employers' association. However, company agreements can also provide for poorer terms and conditions, a phenomenon that has continued for some time. Trade unions have tried to limit this development as much as possible in order not to give companies an incentive to withdraw from the industry agreement. As a consequence, any such agreement negotiated with a DGB union will include an obligation to move to adopt the standards specified in industry agreements after a certain period of time (so-called 'recognition agreements'[1], *Anerkennungstarifverträge*). Company agreements of this kind can be a first step towards bringing a company that was previously not covered by a collective agreement at all into the scope of industry bargaining.

2.3 Codetermination and works councils

Under the German dual system, the arena of free collective bargaining is complemented by the arena of *codetermination*. While collective bargaining focuses on supra-company actors and regulations, codetermination refers to the representation of interests and the regulation of working conditions at the workplace (formally 'establishment', *Betrieb*). Collective agreements regulate the conditions under which labour-power is sold; workplace agreements determine how it is applied (Müller-Jentsch, 1986). Codetermination exists in two forms: at workplace level by works councils; and at company level through the membership of employee representatives on the supervisory boards of joint stock companies. The latter system is regulated by the 1976 Codetermination Act for corporations with more than 2,000 employees. The law stipulates that there must be an equal number of shareholder ('capital') and employee representatives, with the latter made up of elected members of works councils and external representatives from the relevant trade union but with a majority of works councillors. Supervisory boards are chaired by a representative of the shareholder side, and the chair can exercise a second, and casting, vote in the event of a tie. In addition, since 1951 there has been codetermination in the coal and steel industry, which provides for greater scope for the employee side as there is no double voting right for the supervisory board chair; moreover, employee representatives have the right to propose nominees for the appointment of a member of the company management board, the 'Labour Relations Director' (*Arbeitsdirektor*). Finally, the so-called One-Third Participation Act (*Drittelbeteilingungsgesetz*) regulates codetermination in companies with between 500 and 2,000 employees; in these firms, employee representatives are assigned only one-third of the seats on the supervisory board.

[1] The term 'recognition agreement' in this sense does not refer to the instance that a company recognises the trade union as a negotiating partner, but that it recognises the collective bargaining agreements.

In practice, *works council codetermination* under the Works Constitution Act (WCA), the first version of which dates from 1952 and has been amended several times since then (1976; 1989; 2001) is more important and more relevant for determining employment conditions than board-level representation. The Works Constitution Act regulates the structures and participation rights of works councils, which are elected by all employees at a workplace. They are therefore formally independent of the trade unions. Specifically, the WCA, which takes up 130 paragraphs, sets out the following requirements for works council codetermination:

- Works councils can be elected in all establishments with more than five employees. The establishment of a works council is voluntary and at the initiative of the employees. Works councils have a duty to maintain 'industrial peace': they may not call for industrial action such as strikes and are obliged to act in the both best interests of the workforce and the establishment.
- The number of elected works councillors in a company depends on the number of employees and is staggered, starting with one (up to 20 employees), three (up to 50 employees), five (up to 100 employees) and so on, with the ratio of works councillors per employee decreasing with workforce size. From 200 employees, one works councillor must be released from work but only for attending to works council duties, with further releases in steps of 500 employees and, from 2,000 employees onwards, of 1,000 employees.
- Workplace codetermination is a multi-level system. If there are several works councils in a company, a central works council must be set up to which the individual works councils can delegate up to three representatives. If a company has several subsidiaries in Germany, the central works councils of these companies can set up a group works council, provided there is a majority in favour, and send two representatives to it. In addition, codetermination structures may be adapted to company structures by collective agreement (that is, with the involvement of a trade union).
- Works councils have rights of information, consultation and codetermination. Information rights focus on economic decisions that might be prejudicial to the interests of the workforce. In enterprises with more than 100 employees, an Economic Committee must also be formed; this must be informed comprehensively and in good time about all economic matters. Consultation rights exist, for example, in matters relating to changes in the organisation of the workplace and the planning of new working methods and processes. Works councils can also introduce initiatives, which employers must consider and discuss, to safeguard existing facilities and employment. Finally, codetermination rights (governed primarily by the famous Section 87 of the WCA) can be exercised by works councils on a range of issues: these include determining payment methods and performance-related pay; regulating the organisation of working hours and the introduction of overtime work; the introduction of technical equipment to monitor performance or behaviour; principles of suggestion schemes; implementing short-time work; and personnel matters such as selection guidelines for recruitment, redeployment and dismissals.

Works councils and management can negotiate *workplace agreements* (*Betriebsvereinbarungen*) on these and other issues.[2] The relationship between workplace agreements and collective agreements, the two central levels and instruments of labour

[2] Those agreements can also by concluded at the group level (signed by the group works council) or the company level (signed by the company works council).

regulation in the German dual system, is regulated by statute law. In addition to the stipulations of the Collective Bargaining Act, the WCA specifies (in Section 77.3) that collective agreements have *primacy*. That is, pay or other working conditions that are actually or customarily regulated by collective agreements may not be determined by a workplace agreement unless the collective agreement expressly permits the conclusion of supplementary workplace agreements.

However, free collective bargaining and workplace codetermination not only constitute two levels of labour regulation but also involve different actors in the representation of interests. While the relationship between the actors on the employer side is constituted by the direct relationship between employers' associations and their members, employee interests are represented through two institutional actors, trade unions and works councils, which have no formal connection. As the elected representatives of all employees (except certain senior managers), works councils are formally independent of trade unions, a situation that was an explicit objective of the Christian Democrat government that introduced the WCA in the early-1950s. Trade unions, on the other hand, are answerable only to their members in the workplace. For their part, trade unions have only a limited legal anchoring in the workplace, which is one reason why they have often moved to set up workplace trade union representatives' bodies in large companies ('shop stewards'), elected only by trade union members and designed to function as counter-organisations to works councils. Unlike works councils, however, these have no legal independent codetermination rights. In practice, close interaction has usually developed between works councils and workplace trade union representatives, with shop stewards serving as a means of communication for works councils and also on occasions even acting as elected members.

One key prerequisite for this development was the fact that trade unions came to dominate the organisation of works councils. Since the 1960s, a steady 70 per cent to 80 per cent of works councillors have been trade union members; in turn, works councillors have been integrated into the local administrative offices of the trade unions and play an important role in collective bargaining committees, especially in large companies.

In addition, an intensive division of labour has developed between trade unions and works councils. Trade unions have taken on the tasks of providing training for works council members and supplying expert advice as well as organising support when needed. They also provide organisational power to works councils as a strongly-unionised workforce will bolster the works councils' hand in negotiations with management. Finally, by concluding collective agreements, they relieve works councils of the burden of having to negotiate on contentious issues, such as pay increases or the length of working hours, for which they are ill-equipped given that they lack the right to strike.

Conversely, works councils have a legal duty to monitor compliance with the provisions of labour law and the implementation of collective agreements at the workplace. Their focus is on specific problems concerning employment conditions at the workplace that cannot be dealt with in the broader provisions of industry-level collective agreements. They can also support the mobilisation of workers for strike action during collective bargaining, provided they do not directly call a strike themselves. Finally, they undertake union recruitment at the workplace, an especially important task in workplaces where unions have not established their own representation in the form of shop stewards.

For this reason, Schmidt and Trinczek (1999) have argued for a 'structural asymmetry' between works councils and trade unions. Since works councils control the 'lifeline' that sustains trade unions, they argued, they could exist without trade unions if needed; trade unions could not exist without the works councils, however. On the other hand, given the training and support services provided to works councils by trade unions, as well as their capacity to offer organisational power, trade unions evidently play an important role in the establishment and activities of works councils (on this Artus and Röhrer, 2019; Behrens and Dribbusch, 2020). In this respect, the hypothesis of a structural asymmetry is perhaps no longer sustainable. Both actors would appear to depend on each other in a much more reciprocal way.

3 Trends and debates on decentralisation in German collective bargaining

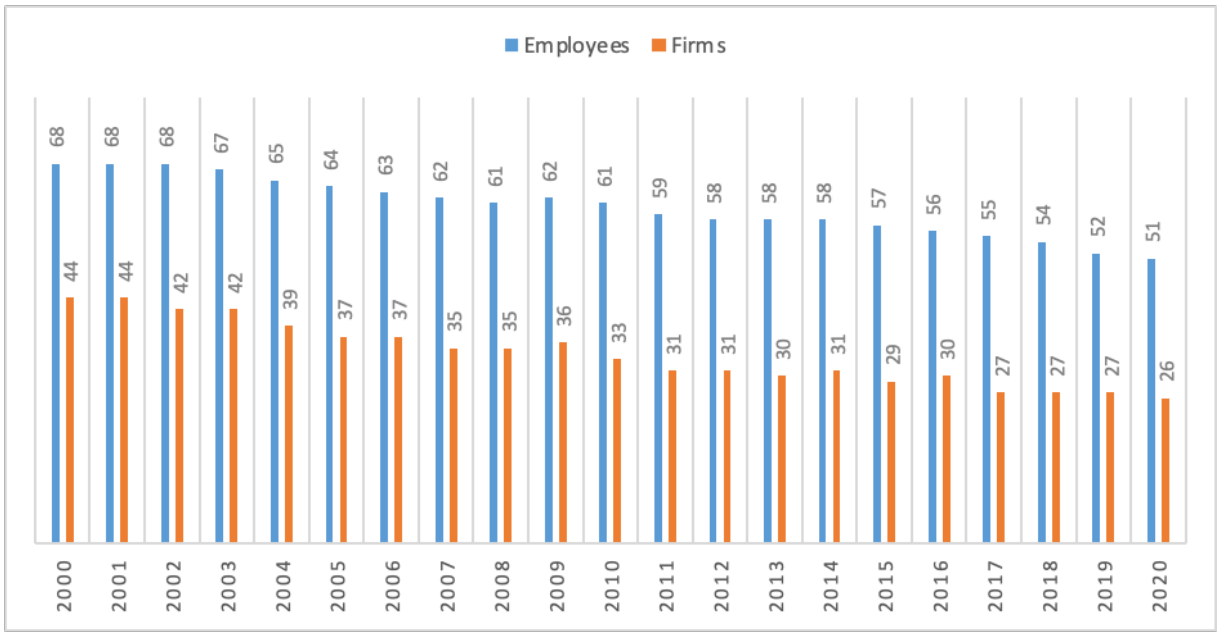
3.1 Erosion of collective bargaining and the dual system (uncontrolled decentralisation)

Decentralisation has been one of the central features of the German dual system of industrial relations, with its two pillars of free collective bargaining and workplace codetermination. This has taken three forms: firstly, decentralisation through the erosion of its institutional foundations and the gradual shrinkage of its scope; secondly, decentralisation within the collective bargaining system through the shift of the locus of collective bargaining regulation from the multi-employer level to the enterprise and workplace levels; and finally, decentralisation through the transfer of regulatory competences from the actors at industry level (that is, trade unions and employer associations) to the actors at establishment (workplace) level (works and staff councils and local managements) and from the collective agreement (*Tarifvertrag*) to the workplace agreement (*Betriebsvereinbarung*) with their differing legal status and regulatory effect, as noted above.

Of these three developments, the main current threat to the German model is that of decentralisation via the erosion of the dual system. The most important indicator of this is the *decline in collective bargaining coverage* and the increase in the proportion of companies and employees whose working conditions are no longer regulated by collective agreements (Figure 1). The decline in collective bargaining coverage is driven by two processes: that of firms that leave employers' associations (or opt for an 'agreement free' status within them, see below); and that of firms that never join associations in the first place.

Figure 1: Collective bargaining coverage in Germany, 2000-2020

(in per cent of employees and firms)



Source: IAB-Establishment Panel 2000-2020, author's illustration

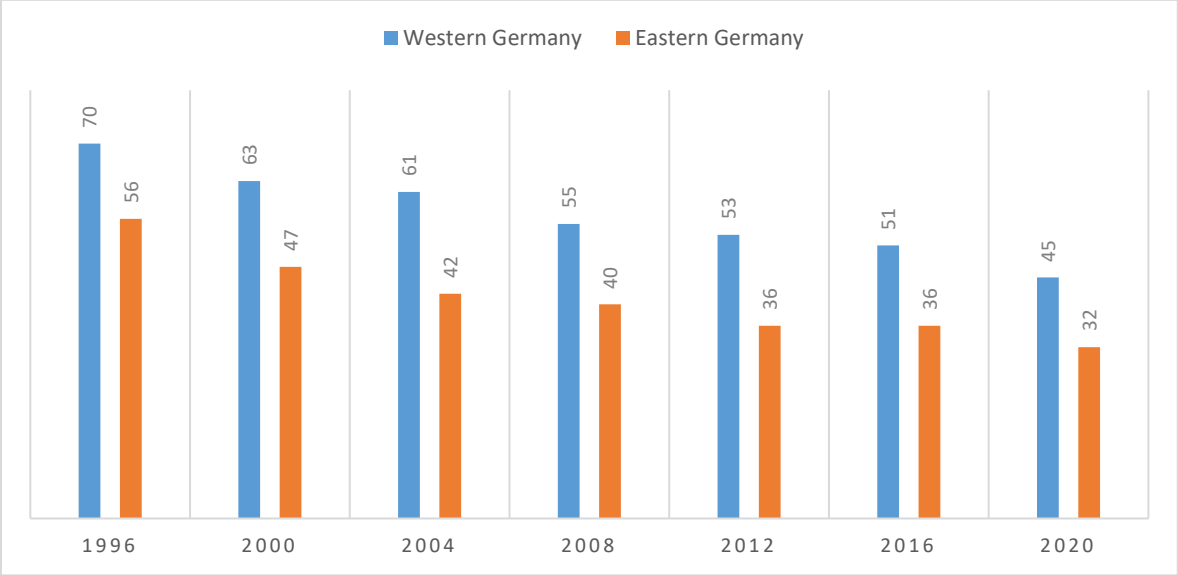
Over the first two decades of the century, collective bargaining coverage as measured by employees fell by 17 percentage points, with just only around one half of employees still covered by a collective agreement by 2020, including both industry-level and company-level agreements. Only 26 per cent of workplaces are now within the scope of a collective agreement, with a marked difference by establishment size. In 2020, 84 per cent of West German (and 72 per cent of East German) establishments with more than 500 employees were covered by collective agreement; by contrast, for workplaces with 10-49 employees, the coverage rate was just 36 per cent in West Germany and 26 per cent in the East.[3]

Coverage specifically by industry-level collective bargaining is even lower: by 2020 only 45 per cent of employees in the West and 32 per cent in the East were within the scope of an industry agreement (Figure 2). The decline since 2000 was 17 percentage points for West Germany and 13 percentage points for East Germany. Given that this decline is almost identical to the drop in overall collective bargaining coverage shown in Figure 1, it would be reasonable to conclude that the share of company-level collective agreements has remained more or less constant over this period: in that respect, there has been no discernible shift from industry to company-level collective bargaining.

[3] 'East Germany' refers to the territory of the former German Democratic Republic that acceded to the Federal Republic ('West Germany') in 1990. The term now refers to the five federal states (*Länder*) that constitute this area and is still widely used to differentiate these two broad geographical zones.

Figure 2: Industry collective bargaining coverage in West and East Germany, 1996-2020

(in per cent of employees)

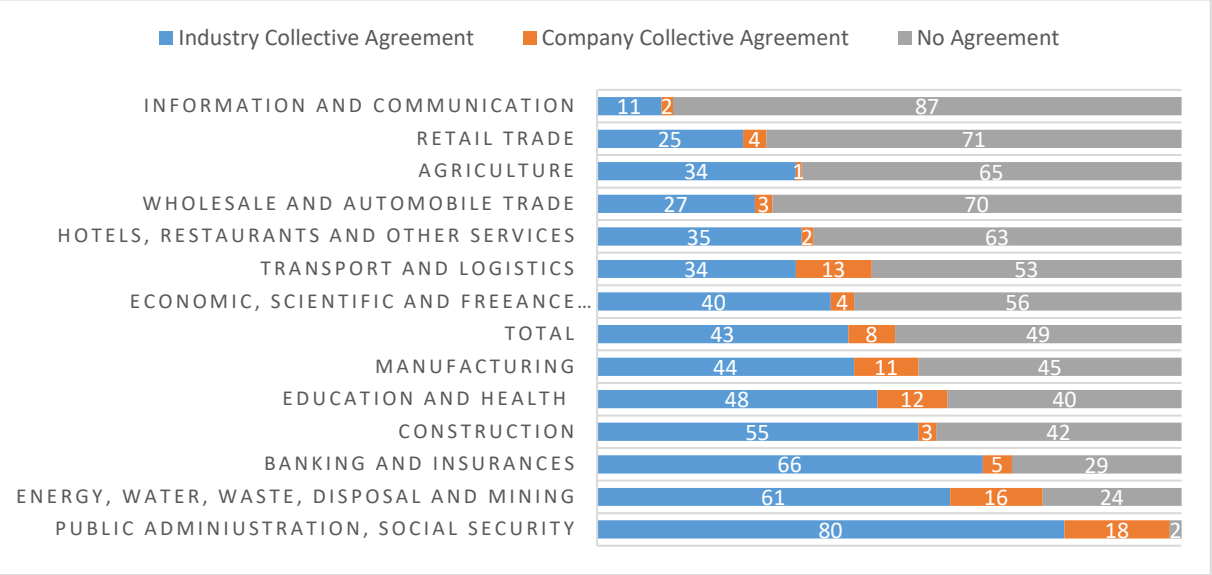


Source: IAB Establishment Panel; Ellguth and Kohaut, 2021, authors' illustration

Collective bargaining coverage (by employees) varies widely as between sectors, ranging in 2020 from 98 per cent in the public sector to 13 per cent in the information and communication sector (Figure 3). The important manufacturing sector is just above the average, while most private services branches, such as retail and wholesale trade or the hospitality sector, but also transport and logistics, are well below the average. Two important exceptions to this are the banking and insurance sector, where 71 per cent of the workforce is covered by collective bargaining, and the education and health sector with 60 per cent. While in some sectors industry agreements continue to be a key determinant of employment terms and conditions beyond the immediate scope of signatory employers, in others this effect has been virtually extinguished due to the decline in the use of statutory extension processes. For example, the effective coverage rate in retailing was still virtually 100 per cent up until 1999 as a result of industry agreements being declared generally binding: by 2020, it had fallen to 27 per cent.

Figure 3: Collective bargaining coverage by branch, 2020

(in per cent of employees)

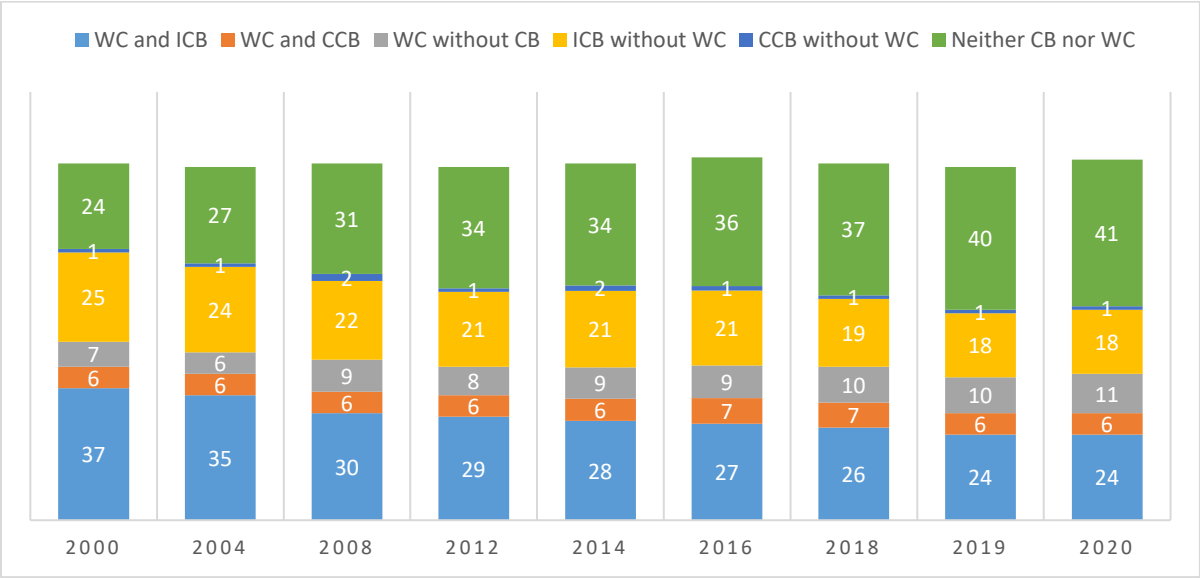


Source: IAB-Establishment Panel; Ellguth and Kohaut, 2021; author's illustration.

Codetermination through works councils as the second pillar of the dual system has also been subject to erosion. Between 2000 and 2020, the proportion of establishments with works councils fell from 12 per cent in both East and West Germany to 8 per cent in the West and 9 per cent in the East; over the same period, the proportion of employees with works councils fell from 50 per cent in West Germany (and 41 per cent in East Germany) to 40 per cent in the West and 36 per cent in the East (Ellguth and Kohaut, 2021). The decline in the prevalence of works councils was particularly pronounced in medium-sized establishments with between 200 and 500 employees (see also Ellguth and Trinczeck, 2016); by contrast, prevalence remained at a consistently high level of 90 per cent (of employees) and 85 per cent (of establishments) in large establishments with more than 500 employees (Ellguth and Kohaut, 2021). In this sense, works councils are increasingly becoming an institution characteristic of and confined to large-scale businesses. The decline in the incidence of works councils is attributable to two main factors: on the one hand, the structural shift in company size towards smaller firms; and on the other, changes in the actors – with trade unions, which are a key support for works councils, becoming weaker and managements becoming less willing to engage with codetermination arrangements, especially in owner-manager firms, up to and including a resort to union busting (Artus and Röhrer, 2019; Ellguth and Trinczek, 2016; Behrens and Dribbusch, 2020).

The combined effect of the contraction in collective bargaining coverage and the declining incidence of works councils has culminated in the shrinkage of what might be called the 'core zone' of the German dual system. Only 30 per cent of employees are now covered by both a works council and a collective agreement, a decline of 13 percentage points compared to 2000 (Figure 4). The proportion of employees with either a works council or collective bargaining coverage (but not both) has also fallen over this period, by 3 percentage points. In contrast, the proportion of employees outside the scope of collective bargaining and not represented by a works council has risen sharply since 2020 – by 17 percentage points to 41 per cent.

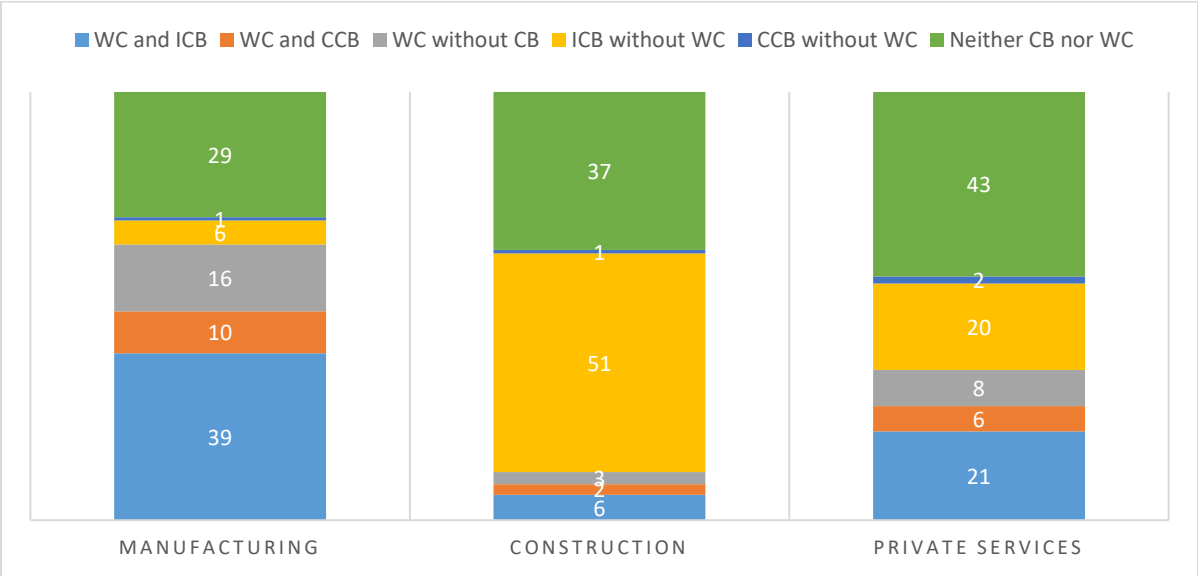
Figure 4: Share of employees with works councils (WC), industry collective bargaining (IC), company collective bargaining (CCB) and collective bargaining (CC) in the private sector 2000-2020



Source: IAB-Establishment Panel; authors' illustration

This development can also be described as the emergence of different *worlds of industrial relations* (Schröder, 2016). On this categorisation, three worlds of industrial relations now exist in parallel and in competition: a 'first world' consisting of the dual system, in which both collective bargaining and codetermination are widespread as institutions and the actors of both levels interact; a 'second world' in which there is still a high incidence of either codetermination or collective bargaining but not both, with the consequence that works councils can no longer benefit from the presence of collective agreements and the implementation of such agreements can no longer be assured by works councils; and finally a 'third' or 'deregulated world' of industrial relations, in which neither of these two institutions, together with their regulations and actors, are present. Although these three worlds occur in almost every sector of German industrial relations, their incidence varies widely as between branches (Figure 5). While in the manufacturing sector, for example, the first world covers about 50 per cent of employees, the second world clearly dominates in the construction sector, while in the private services sector the third world accounts for the largest share. This raises the problem of negative spillover effects on collective bargaining coverage. The greater the size of the third world, the greater the pressure and incentives for companies in the other two worlds to outsource business areas to the third world or to move all their operations into it (Schröder, 2016).

Figure 5: Share of employees with works councils (WC), industry collective bargaining (IC), company collective bargaining (CCB) and collective bargaining (CC) by private sector branch, 2020



Source: IAB-Establishment Panel; Ellguth and Kohaut, 2021; authors' illustration

The decline in collective bargaining coverage is an expression of *uncontrolled decentralisation*. Its starting point is the decline in the level of company membership of *employers' associations* as it is only such membership that obliges companies to comply with industry collective agreements. One explanation for this lies in structural economic change; this includes both the continuing shift towards services, in which employers' associations are more weakly anchored, the outsourcing of activities by large companies to suppliers outside the scope of collective bargaining, and the emergence of new companies in fields often untouched by organised industrial relations, such as research and development, IT or communication technologies. In addition to the problem of attracting such new companies, there is also the problem of 'flight' from collective bargaining by companies, in particular small and medium-sized enterprises (SMEs), that were previously bound by their membership of an employers' association but hope to gain cost and flexibility advantages by fleeing collective bargaining coverage, often because of the strong cost pressures exerted on them from their position in value chains (Silvia, 2017).

Employers' associations have developed a solution to this problem, albeit one that creates a fresh set of problems for the collective bargaining system. This is the creation of new employers' associations (or new memberships statuses in existing employers' associations) that are free of the obligation to comply with collective agreements (so called 'opt-out' associations, in German *OT-Verbände, 'ohne-Tarifbindung', without collective bargaining coverage*). These opt-out associations serve two main purposes: to retain employers that are unhappy with the stipulations of the collective agreement and to recruit new companies that do not want to be covered by the collective agreement but are interested in the other services that employers' associations provide. This strategy can sustain the nominal membership strength of employers' organisations but does nothing to maintain collective bargaining coverage. Quite the contrary. Such opt-out associations legitimise employer withdrawal from collective bargaining. What was formerly seen as a breach of organisational etiquette and the undermining of a shared

employer orientation towards social partnership is now institutionalised as an entirely acceptable option (Haipeter, 2016).

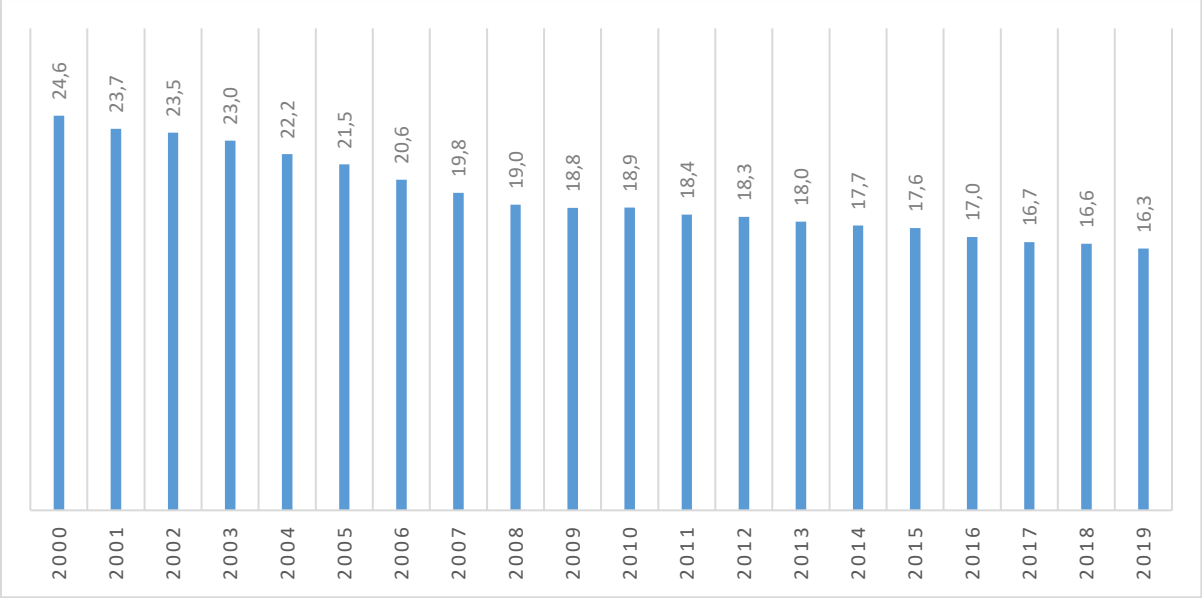
There is no comprehensive data on the spread of opt-out associations and membership. Behrens (2011; 2013) investigated the constitutions of more than 300 employers' associations that were in the public domain and found that 34 per cent had introduced such associations or forms of membership. The shares in manufacturing and services, at 41 and 46 per cent respectively, are significantly above the average. However, data on this are not published by the employers' associations. Only Gesamtmetall in the metalworking and electrical industry has published figures on the evolution of the regional opt-out associations in its organisational domain beginning in 2005 (see the following chapter on metalworking).

The employers' associations' strategy in this area has two aspects when looked at in terms of compliance with collective agreements. On the one hand, it can help recruit companies that would not otherwise have joined an association, with the prospect that they might later move to participate in the collective bargaining system. On the other hand, however, this strategy also creates incentives to leave the collective bargaining system and switch to an opt-out membership. On balance, it is more probable that it will weaken collective bargaining, especially as it is unclear whether newly-acquired opted-out employers will in fact make the switch into collective bargaining at a later date.

This development has also been encouraged by the declining organisational strength of *the trade unions*. Over the past two decades, union density in Germany has fallen from just under 25 per cent to only 16.3 per cent (2019) (Figure 6), with union density in DGB-affiliated unions at 15 per cent in 2016, below the 6 million member mark. Trade unions are underrepresented among low-skilled workers, younger workers, white-collar workers, and female workers (Hassel and Schröder, 2018).

Figure 6: Trade union density in Germany, 2000-2019

(number of net union members (i.e excluding those who are not in the labour force, unemployed and self-employed) as a proportion of the number of employees)



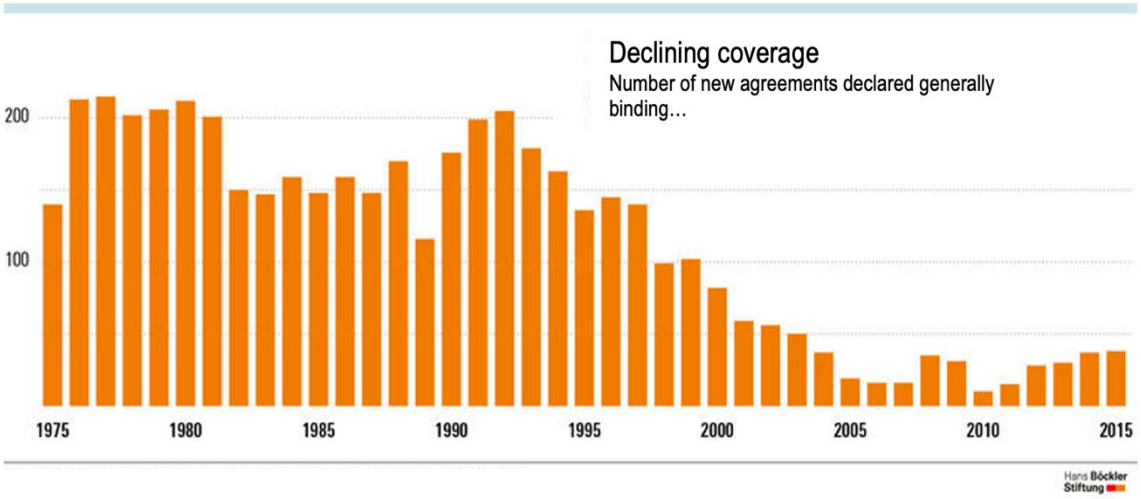
Source: OECD, author's illustration

Although the level of union density has no direct impact on the collective bargaining coverage, either of firms or employees, as this is determined solely by the organisational density of employers' associations, the decline in union organising power within companies – as well as the problem of recruiting members in new companies – creates the conditions for firms to be able to exit collective bargaining, or not enter it, as they do not have to fear union opposition. By contrast, unions at well-organised companies could respond with strikes or other forms of industrial action, possibly forcing the employer to conclude a company agreement that might be more costly than the relevant industry agreement, aside from the further costs inflicted by such a dispute.

Trade unions have responded to this development and – depending on the individual unions and their different approaches and resources – developed new strategies for building and sustaining their memberships (see Schröder and Hassel, 2018; Haipeter, 2019). These new membership policies usually rest on two pillars: union organising and new forms of member participation. Inspired by the campaigning initiatives mounted by ver.di against working conditions at drugstores and supermarkets, the metalworkers' union IG Metall, for example, has developed a systematic organising strategy, to be coordinated at regional level, that is intended to recruit new members, create trade union structures, establish works councils, and pursue collective bargaining coverage in companies or company areas where there is currently no or only a weak membership presence. The campaign is for a period of nine years and has a budget of some €170 million. Member participation plays an important role in this, both in terms of how workplace organising projects are conducted as well as the use of nationwide surveys to gauge member preferences (Haipeter, 2019; Hassel and Schröder, 2019).

The 'opt-out' status created by employers' associations has a further negative effect on collective bargaining coverage as it runs directly counter to the practice of declaring collective agreements generally binding through the statutory extension procedure. 'Opt-out' membership only makes sense if agreements are not generally binding; generally binding agreements covering all employments would not allow escape through acquiring opted-out status and would actually encourage membership as it would allow companies to influence associations' collective bargaining strategies, something only open to members. This is one of the main reasons why employers' associations have increasingly come to resist the use of extension procedures, evident in the low and declining prevalence of *generally binding collective agreements*. Although the option to do this is guaranteed in the Collective Bargaining Law, fewer and fewer collective agreements have been declared generally binding in recent years (Figure 7); in 2017, only 1.5 per cent of all industry agreements had been declared generally binding and only very few included provisions on pay (Schulten et al., 2019). In response, in 2014 the federal government amended the law to include a new definition of the criterion of 'public interest', one of the prerequisites for extending an agreement. This has not led to an expansion in the use of the procedure, however. As with many other European countries, such as the Netherlands, France or Spain, the decisive factor impeding the wider deployment of extension procedures is the negative stance adopted by the employers, in Germany on the committee that has to approve any applications. The commission is composed of three members from the recognised national associations of unions and employers (that is, currently the DGB and BDA) and approval requires a majority. Since the 1990s, the BDA has adopted a strategy of refusal and has rejected most applications, even those supported by the industry-level employer association.

Figure 7: New collective bargaining agreements declared generally binding, 1975-2015



Source: HBS (2018)

3.2 Organised decentralisation: from collective bargaining to codetermination

The organised decentralisation of labour regulation takes two forms in the German collective bargaining system: 'localisation' to the workplace (*Verbetrieblichung*) involving the shift of regulatory competences between the levels of the dual system from the actors at industry level to the actors at company level; and derogation, involving the shift of regulatory competences within the collective bargaining system from the industry level to the company or workplace level. This section briefly examines the phenomenon of localisation to the workplace which, in its original form, as outlined by Schmidt and Trinczek (1989) in the late-1980s, referred to what was then the novel delegation of authority over the organisation of working time from the industry-level negotiating parties to the company and workplace level. This was the result of the fact that when trade unions were successful in winning shorter working hours in the 1980s, the quid pro quo was the introduction of scope for hours to fluctuate in line with operational needs, subject to the agreed figure being met on average over an agreed reference period. In this respect, the dispute over the duration of weekly working times offered an opportunity for employers' associations to demand greater flexibility in the management of working hours: working time flexibility was employer-led from the start.

The industry agreements that set the framework for this specified that, subject to some limits, the practical configuration of these reference periods – the degree of flexibility – was to be agreed by the parties at company and workplace level, with no interference from the industry-level parties. The workplace parties were therefore free to decide whether and in what form flexible working time arrangements would be introduced. For example, they could determine whether individual working time accounts should be set up, what rules should apply for accumulating and withdrawing hours from this, the duration of any reference periods, and any upper limits on this.

What the consequences of this would be was contested from the outset. Schmidt and Trinczek (1989) themselves were sceptical, on the presumption that works councils would be overburdened by the requirement to negotiate with management on the new options. Other

assessments were more positive, seeing the new situation as an expression of the particular flexibility and adaptability of the German system of industrial relations and its foundation in the variable interplay between the two arenas of free collective bargaining and statutory workplace codetermination (Turner, 1998). In retrospect, neither view has been confirmed absolutely. Overall, in many instances working time flexibilisation has been successfully regulated at company level, mostly in the form of working time accounts, leading to a form of 'regulated flexibility' (Seifert, 2001). This is not fundamentally problematic either for the overall collective bargaining system or for works councils as actors; many works councils have learned to operate as capable actors in the regulation of flexible working time at the workplace (Haipeter, 2006).

There have, nonetheless, been problems in how this has operated in detail. For example, the formal agreed limits set for working time flexibility have often been exceeded at workplace level in the context of 'forced flexibilisation' (Herrmann et al., 1999). There are also indications that grey areas of working time organisation have grown up, such as overtime that is either unpaid or uncompensated for by time off, especially for white-collar employees (Haipeter and Lehndorff, 2004). And finally, as already mentioned, the trade unions have had to accept a serious loss of their hegemony over working time (Haipeter and Lehndorff, 2007). One response by IG Metall in the metalworking industry has been to regain its capacity to influence this by bringing working time organisation back into the scope of industry-level bargaining: agreements concluded on long-term working time accounts have represented a first step in this direction (Jentgens and Wagner, 2007).

A second line of development in the process of localised bargaining arose out of the company-based pacts on job security and the retention of operations that have spread since the mid-1990s. According to the WSI's 2003 survey of works councils, 23 per cent of all companies surveyed in the private sector had concluded such a pact (Massa-Wirth, 2007). The forerunner was the 1993 collective agreement on safeguarding jobs at Volkswagen, concluded during a period of acute corporate crisis and centred on the promise that the company would offer a time-limited no-redundancy guarantee in exchange for cuts in weekly working hours, but with reduced pay, and more working time flexibility. This type of exchange became the basis of agreements at many companies, although – unlike the regulation anchored in the company collective agreement at VW – these did not have the status of a collective agreement proper, but were concluded as workplace agreements despite regulating collectively-agreed issues such as working hours and pay.

In contrast to working time flexibility, company employment pacts have been a demand raised by the trade unions that have sought to create instruments to safeguard employment in times of crisis or restructuring. In some sectors, such as the metalworking industry, these have figured in industry-level collective bargaining, with industry-level agreements concluded since the mid-1990s in which the workplace-level parties were given scope to reduce the working week to 30 hours, with corresponding reductions in pay, provided that companies promised to safeguard employment for the duration of the agreements. Such 'employment pacts' take into account agreed wage and salary levels such that any reductions in pay are proportionate to the cut in working hours to ensure that hourly pay remains consistent with agreed minima.

However, different forms of employment alliances have developed. According to a classification suggested by Rehder (2003), employment pacts can be distinguished depending on whether the thrust of the agreement is to reduce wages, to increase productivity or to

redistribute labour, and whether they primarily specify job security or investment commitments as quid pro quos. The extent of any concessions made by employees is naturally greatest in those agreements that specify wage reductions – in these instances, the loss of any remuneration paid at company level in excess of industry minima (Rehder, 2003).

There have been no comparative developments in the form of organised decentralisation in the area of pay. The allocation of employees to agreed pay scales and the addition of company-level pay on top of agreed minima have always been subject to regulation by workplace-level actors and the negotiating parties at industry level have not delegated other regulatory powers. One exception to this has been collectively-agreed one-off payments which have featured in some bargaining rounds in some sectors, with scope for them to be paid, postponed or even suspended by workplace agreement. However, these have remained exceptions and been limited in volume.

3.3 Organised decentralisation within the collective bargaining system

The *decentralisation of collective bargaining* as the second and, in terms of its repercussions on industry collective bargaining, the more important form of coordinated decentralisation compared to workplace localisation, took place in Germany in the 1990s and the first decade of the 2000s. The demand for decentralisation of sectoral collective agreements arose during the economic crisis of 1992 and 1993, which marked the deepest post-war slump in Germany and was associated with a sharp and large-scale rise in unemployment. In addition, there were growing problems with the transformation of enterprises in East Germany in line with the exigencies of the market economy. All this combined triggered a major change in politics and the media, and also on the part of employers' associations, in how social and economic problems were perceived and what values should guide policy: in particular, it prompted a public debate about the system of collective bargaining and whether and how it should be reformed. This was crystallised in the debate over Germany's standing as an industrial and business location (*Standortdebatte*). This was centred on the challenges posed by globalisation and its associated cost competition, in which companies were not only vulnerable because of high pay levels, given Germany's status as a 'high wage economy', but also because of the additional labour costs incurred as result of the social security system being financed not out of general taxation but via contributions levied on pay and paid equally by employees and employers. The intensity of the criticism of the established institutions and practices of collective bargaining was unprecedented in the history of the Federal Republic. Collective agreements were increasingly depicted as a rigid 'corset' clamping down on companies' freedom of manoeuvre.

A radical critique of the sectoral collective agreement developed within some political parties, the media and employers' associations. Bispinck and Schulten (1999) summarised this in the five demands for changing the legal foundations of the German industrial relations systems that were directed at government and the policy world more broadly: these were, the introduction of general opening clauses (*Öffnungsklauseln*) in industry-level agreements to permit derogations by company-level actors; the amendment of Section 77.3 of the Works Constitution Act to allow workplace actors to conclude collective agreements proper (*Tarifverträge);* the abolition of generally-binding agreements, effectively freeing companies outside the scope of collective bargaining from having to apply industry-level terms and conditions; the elimination of the 'continuing effect' provisions under the Collective Agreements Act, allowing the

standards set by agreements to lapse entirely on expiry; and finally a reinterpretation of the 'favourability principle' to allow terms and conditions to be lowered if this enabled jobs to be preserved.

Although these demands were never fully implemented in this form, they helped legitimise the behaviour of companies that either left employers' associations – and thus withdrew from coverage by collective agreements – or circumvented collectively-agreed provisions informally. This took place, for example, in instances of workplace jobs pacts, where collectively agreed rules were undercut in breach not only of the stipulations of collective agreements but also in violation of the Works Constitution Act. One notable case of this was the Vismann company in the metalworking industry, where the jobs pact provided for an extension of working hours without additional pay and was regarded as a new form of 'wildcat cooperation' between management and works councils (Bispinck and Schulten, 1999).

The response of the collective bargaining parties, especially in manufacturing, was to develop controlled forms of decentralisation by introducing 'opening clauses' allowing for derogations from agreed standards. How this was undertaken varied considerably between two of the major branches of manufacturing, the chemical industry and the metalworking industry, each of which is characterised by a different balance between the poles of 'social partnership' and industrial conflict. In the chemical industry, the opening of collective agreements was supported by both the employers' associations and trade unions as one facet of the modernisation of social partnership that had been initiated with agreements on opening clauses, beginning with the option to extend working hours, as early as in 1994. This proactive approach to the issue was mainly due to the fact that both sides were strongly committed to social partnership in the industry and were eager to ensure that industry-level agreements remained attractive.

This was made public in a jointly announced 'social partner agreement' in 2004 in which the parties pledged themselves to 'pragmatic social partnership' and an 'agreed approach to flexibilisation'. According to the parties, the objectives of this policy were to safeguard employment and improve competitiveness as well as develop innovations in collective bargaining that could serve as a model for the modernisation of collective agreements needed to ensure they were 'fit for the future'. At the same time, the social partner agreement was expressly directed against the proposal to amend existing legislation to allow the negotiation of workplace agreements on these issues, as had been put forward in 2004 and 2005, particularly by the then opposition parties, the Christian Democrat CDU and Liberal FDP. These proposals would have permitted the parties at workplace level to conclude agreements setting standards below those in industry-level agreements, provided that a certain majority of employees affected were in favour. In contrast to this, the social partners in the chemical industry emphasised that derogation agreements had to be negotiated at branch level and that any such deviations had to be approved by both the trade union and the employers' association, requiring the industry-level parties to keep in touch with their respective grassroots and thus ensure their members' loyalty and their own legitimacy.

The process was quite different in the metalworking industry. Here, a protracted conflict developed over opening clauses allowing derogations that was only ended when the then Red-Green federal government threatened to introduce such an option by amending the law. While IG Metall, at least during the early phase when such provisions were being considered, was entirely opposed to such derogations and only agreed to them under strong external pressure,

the employers' associations in the sector – or at least some of them – argued for more extensive scope for derogations than the 'corridor' arrangements agreed in the chemical industry allowed.

How this debate developed can be seen in several statements from the national metal trades employers confederation, Gesamtmetall. On the issue of deviations from industry agreements, Gesamtmetall argued for a more nuanced approach to reforming the legal framework, advocating, for example, a change in the favourability principle under Section 4.3 of the Collective Bargaining Act to allow employees to individually and contractually agree to work below agreed standards in exchange for job security if this appeared more favourable to them. In contrast Gesamtmetall rejected any amendment to Section 77.3 of the Works Constitution Act to allow workplace parties to conclude collective agreements proper, arguing that this would upgrade these parties to the status of fully-fledged collective bargaining actors and, as a consequence, would require them to be granted the full panoply of collective bargaining instruments, including the right to strike (see on this 'Der moderne Flächentarifvertrag' at www.gesamtmetall.de). This was seen as a threat to the ordering and 'peace-keeping' role of collective agreements.

Although an opening clause to allow deviations from the industry agreement was introduced in the metalworking industry in 1993 in the form of a 'hardship provision', this remained confined to East Germany, where the employers' associations had unilaterally terminated the previous collective agreement that had provided for a progressive alignment of wage and working time standards between East and West Germany. And although provisions on wage deviation, the so-called 'restructuring clauses', have also been introduced in some West German collective bargaining regions since the mid-1990s, these were regionally limited, restricted derogations to instances of corporate crisis, and were very heterogeneous. In effect, they simply replicated a practice of informal derogation in cases of business reorganisation that had existed in the industry for several years. The employers' associations in the West German bargaining regions did not advocate the wider introduction of hardship clauses, mainly because they wanted a much more far-reaching provision without limiting criteria, but failed on this due to resistance from IG Metall.

Ultimately it was the overt political pressure from the Red-Green federal government and the threat to amend the law to allow company pacts, in which the undercutting of collective agreements by the workplace parties was to be permitted, that finally brought some movement into negotiations on derogations in 2003 and 2004. Two factors were decisive; firstly the Damoclean sword of unwelcome legislation that hovered menacingly over IG Metall; and secondly, the widespread perception that agreed rules on derogations had become unavoidable in order to avert the prospect of company-level pacts being concluded without any influence at all from the industry-level parties. On this, the interests of IG Metall coincided with those of Gesamtmetall and its regional affiliates. Most employers' associations also wanted to avoid new legal provisions as their concern was that company-level pacts negotiated under the proposed reform legislation would enhance the status of works councils to such an extent that they would have been able to legally claim the right to strike. The associations also emphasised the regulatory role of collective agreements in creating uniform conditions for companies within a collective bargaining area.

This then formed the basis the negotiation of the so-called 2004 'Pforzheim Accord', which not only had a significantly wider scope than its predecessors but was also intended to unify and standardise the regulation of deviations from industry agreements on pay for the entire

metalworking and electrical industry. This agreement superseded all the various hardship and restructuring clauses that had existed up until then. However, the close connection between political pressure and the conclusion of the Pforzheim Accord should not obscure the fact that it was also a response to the mounting problems in collective bargaining practice in the industry. These included both the expansion of uncontrolled decentralisation (especially in East Germany) and the lack of transparency and control over deviations from industry-level agreements in West Germany. The situation was aggravated by a sharp decline in collective bargaining coverage, which fell from well over 70 per cent to just over 56 per cent (by employees) between 1990 and 2007. The Pforzheim Accord was seen as a new means of addressing these problems, firstly by increasing the attractiveness of the industry agreement and secondly, and above all, by creating a new regulatory basis for managing deviations through a formalised set of procedures.

In contrast to manufacturing, there are hardly any opening clauses allowing for derogations from collective agreements in the service sector. This is due to the fact that ver.di, the large service sector trade union, is officially opposed to such derogations, albeit linking this basic stance to accepting conditions under which such a deviation might be possible. For example, ver.di's stance has not prevented collective agreements on wage deviation from being concluded in individual sectors within the union's organisational sphere, such as the retail trade or the banking industry, mostly in the form of hardship and restructuring clauses. In practice, ver.di has established a controlled coordination procedure under which, analogous to those in the metalworking and electrical industry, derogation agreements require the approval of the union bargaining committees that are responsible for the industry agreement. In addition, there is a clearing house at national level that makes recommendations to the union's executive committee either to approve or veto such an agreement or specify under which conditions an agreement could be permitted (see Wiedemuth, 2007) (see also the Chapter in this study on the retail sector).

4 Collective bargaining and decentralisation in the German metalworking industry

Interviews: Expert 1 and 2: IG Metall; Expert 3: Employers' Association (Metall NRW); Expert 5: Works Council Case Metal Forming; Expert 6: Expert IG Metall Case Metal Forming; Expert 7: Works Council Case Lights.

4.1 Collective bargaining and wild decentralisation in the German metalworking sector

Collective bargaining in the German metalworking industry is conducted at industry level by union IG Metall and regional employers' associations, all of which are organised within the national metal trades employers' confederation, Gesamtmetall. Collective agreements apply to all companies in the industry that are members of a signatory association, membership of which is voluntary.

The total of 12 regional employers' associations are mostly organised in line with the boundaries of the constituent German federal states. Gesamtmetall includes all these regional organisations together with nine 'opt-out' (*'OT-Verbände'*) associations, whose members are

not bound by collective agreements. Responsibility for negotiating and concluding collective agreements, however, lies with the regional associations, one of which will typically take the lead in the bargaining round and set a pattern that will be followed, possibly with detail differences, by other regional associations.

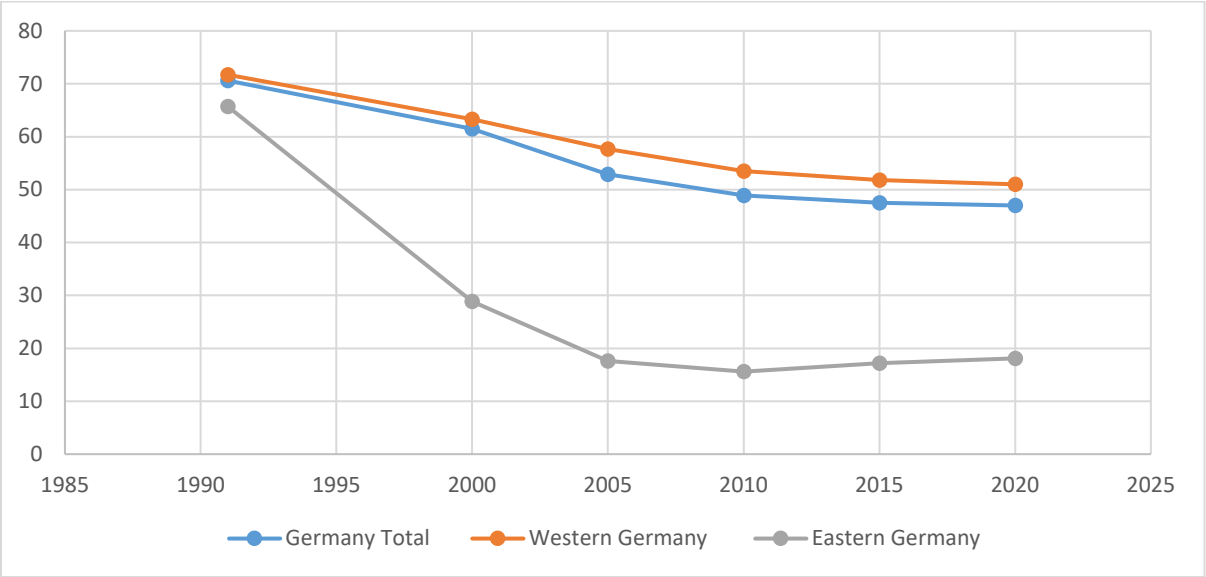
In contrast, IG Metall, by the far the most important trade union in the industry, is centrally organised. Although there is a Christian trade union, the CGM, it plays no role in collective bargaining. Ultimate decision-making authority at IG Metall lies with the union's headquarters. Nonetheless, negotiations are conducted by the union's seven regional district organisations (*Bezirke*) that form an intermediate level of organisation between the executive board and the union's local branches. Unlike local branch leaderships, which are elected by union members, district officials are appointed by the executive board and bound by its instructions.

In accordance with these organisational arrangements, collective agreements, referred to as *area collective agreements (pl. Flächentarifverträge)*, apply within a particular geographical region, the boundaries of which are usually coterminous with the German federal states, with some exceptions to this as a result of mergers between smaller bargaining regions. Most provisions on pay or working hours are identical – or at least similar – between the collective bargaining areas and this certainly applies to the core issues of pay increases or the duration of working hours. However, there are differences between regions on grading structures and the assignment of tasks to grades, the regulation of working time flexibility, and provisions on skills and training.

Processes of '*wild' decentralisation* have led to a shrinkage in the coverage of the industry by the actors and institutions of collective bargaining in recent decades. According to membership data from Gesamtmetall, 47 per cent of employees in the industry are covered by a collective agreement, about the same as the average for the German economy as a whole (Figure 8). Collective bargaining coverage corresponds directly to the organisational density of employers' associations as member companies must comply with collective agreements and will apply these terms to all their employees (although technically only union members have a legal right to them). Company collective agreements are not covered here as such companies are not members of the employers' associations.

Figure 8: Employer organisational density / collective bargaining coverage in metalworking

(per cent of employees)



Source: Gesamtmetall; authors' calculations

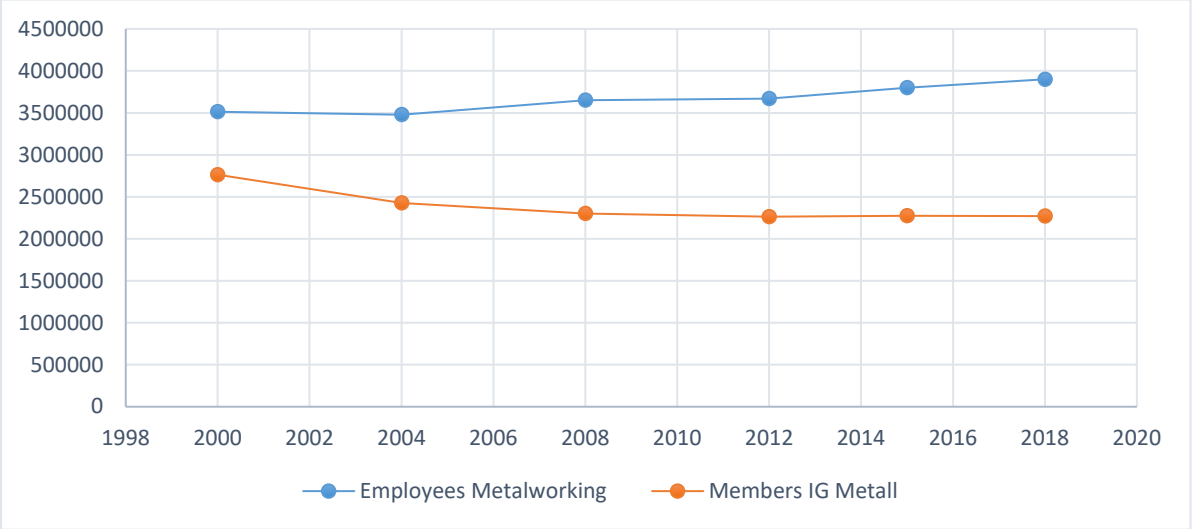
The main reason for the fall in collective bargaining coverage has been the decline in employer *organisational density*, which has seen a steep drop of more than 20 percentage points (in terms of employees) since the early 1990s. The decline was particularly sharp in East Germany, where many companies that were bound by collective agreements immediately after unification either did not survive the transformation process or left their employers' association. The low point in East Germany was reached at the beginning of the last decade. Coverage then stabilised at a low level and grew somewhat to reach just under 18 per cent by 2019. West Germany saw a steady decline, albeit at a much slower pace. Given that the number of employees the industry in West Germany is much larger than in East Germany, indices of collective bargaining coverage for the industry as a whole are mainly shaped by developments in the West.

Collective bargaining coverage – and hence *wild decentralisation* – depends primarily on the organisational performance of the employers' associations. Employers have a variety of motives for being a member of an employers' association, such as wanting to benefit from the services provided, including the provision of advice, valuing the links and networking with other companies in the sector, and appreciating the normative or moral dimension to this form of social participation. Accepting all this, the central motive in Germany has been a response to union organisational power at the workplace. Where unions have little organisational power, companies will find it easier to leave the employers' association without fearing union opposition; and where unions have considerable power, the more likely it will be that it can compel an employer that has left an association or declined to join one to conclude a company-level agreement that could set terms and conditions that might be better than those in the industry-level agreement, given that these essentially reflect just the average of the union's organisational power across the whole branch.

IG Metall's organisational power has declined slightly in recent years. Overall, the proportion of employees in its organisational scope that are members, at just over 58 per cent in 2018, is far higher than the average *trade union density* in the economy as a whole, which according to

OECD data was just under 17 per cent. And since the beginning of the last decade, by adopting new organising approaches, IG Metall has succeeded in stemming the decline in membership that had begun in the 1990s and which saw membership fall from 3.6 million members just after German unification to 2.2 million by 2010. However, since then employment in the branch has risen faster than union membership, so that the overall level of union density has declined (Figure 9). In particular, IG Metall has found it difficult to gain a foothold in new companies, especially those with higher proportions of highly skilled IT and R&D workers. IG Metall is trying to counter these developments with new forms of organising (Haipeter, 2016).

Figure 9: IG Metall members and employees in the metalworking sector, 2000-2018



Source: Schröder and Fuchs, 2019; authors' calculation

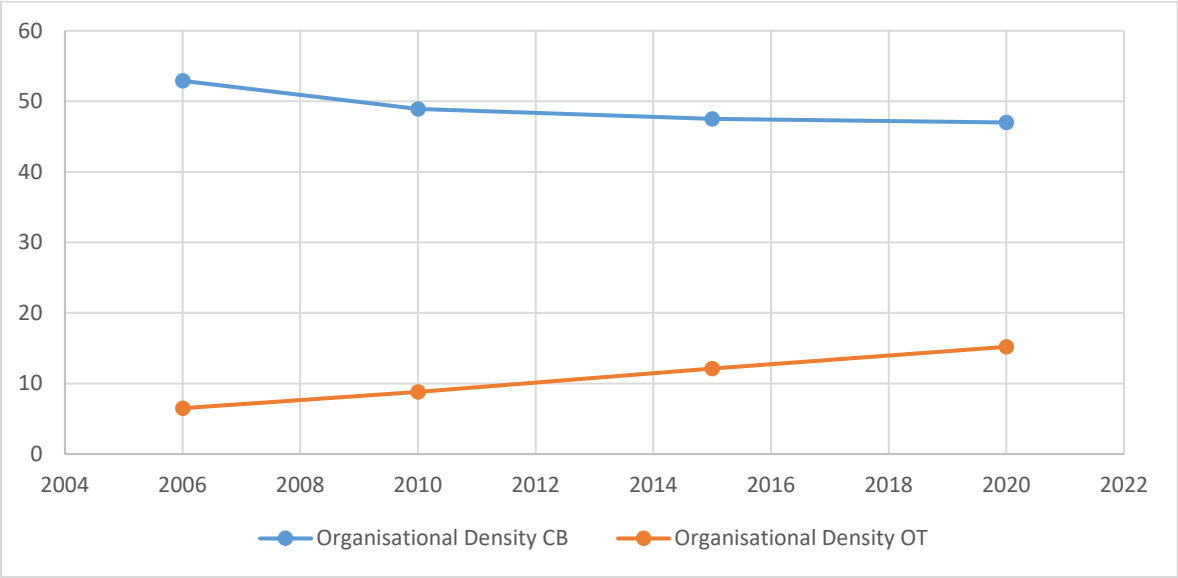
The decline in collective bargaining coverage due to companies leaving or staying away from employers' associations is the driving force behind 'wild' or uncontrolled decentralisation (Bispinck, 2004). However, wild decentralisation has also been actively promoted and hence legitimised by the employers' associations in the sector. The instrument for this has been the establishment of 'opt-out' associations, as noted above, membership of which does not require involvement in or compliance with collective bargaining. Such associations were first set up at regional level in the metalworking industry in the second half of the 1990s, in line with the strategy adopted by Gesamtmetall, which had recommended the formation of such associations after a collective bargaining round in 1995 that had gone badly from the employer standpoint.

Gesamtmetall had two aims in this: firstly, to avert a feared exodus of companies by offering the possibility of withdrawing from collective bargaining but remaining members of an employers' association; and secondly, to put more pressure on IG Metall in future bargaining rounds. However, some associations have also seen 'opt-out' associations as an opportunity to draw in new companies and create a possible intermediate stage to full membership, with its requirement to adhere to collective agreements (Haipeter and Schilling, 2006; Haipeter, 2016).

By 2020, more than 13 per cent of employees in the metalworking and electrical industry worked in companies with opted-out membership (Figure 10), a doubling since 2006 when the opt-out associations were admitted to Gesamtmetall, which publishes such membership data.

Figure 10: Organisational density of employers' associations in metalworking, 2006-2020

(as per cent of employees in metalworking)



CB = subject to collective bargaining

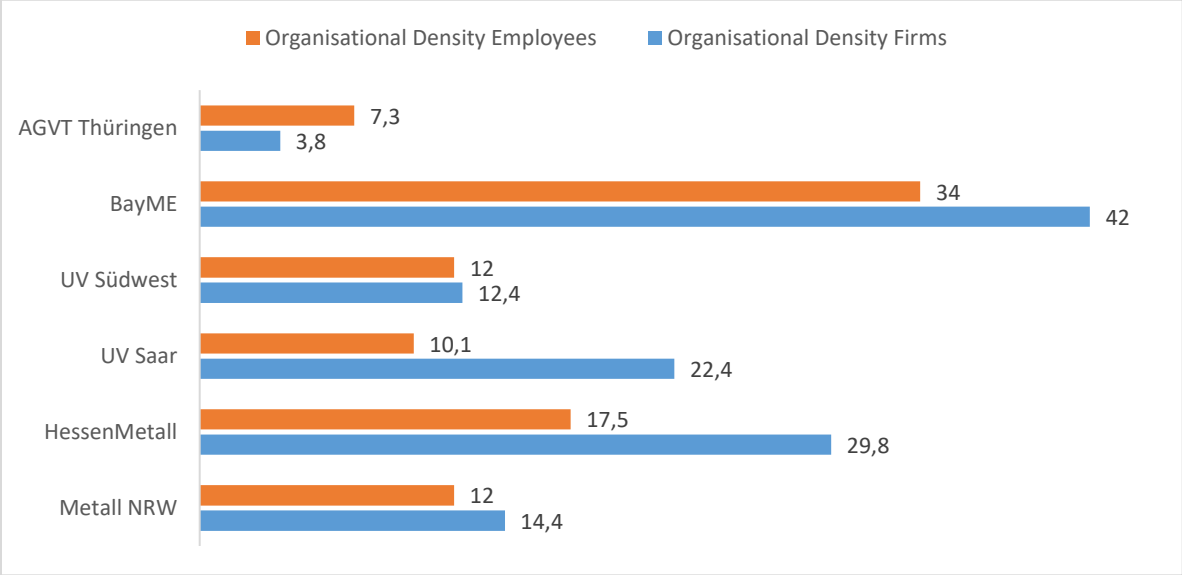
OT = 'opt-out' association, no collective bargaining

Source: Gesamtmetall, authors' calculations

The importance of opted-out associations is even greater when looked at from the perspective of the number of companies involved. By 2019, 15.7 per cent of companies in the metalworking industry were members of opt-out associations, higher than the 12.9 per cent that were members of the regular employers' associations that comply with industry agreement. The divergence between organisational density as measured in terms of companies and by employees can be explained by the fact that traditional employers' associations are mainly made up of the large companies in the sector while the opt-out associations are mainly composed of small and medium enterprises, many of which are positioned lower down value chains and subject to greater price and cost pressures than large firms.

However, the share of SME does not give a full explanation of the organisational density of opt-out associations as there are considerable variations in organisational density between the them. Figure 11 shows the density of six of the nine opt-out associations in the metalworking and electrical industry. The metal industry in North Rhine-Westphalia (NRW), for example, is more strongly characterised by SMEs than that of Bavaria, although the organisational density of its opt-out association is much lower. The explanation of this fact is the difference in strategies adopted by the individual associations. For example, the Bavarian employers' association BayME uses opt-out membership as a means of exerting pressure in collective bargaining and recommends that its members should switch to this association if they are unhappy with the outcome of collective bargaining, especially on pay. In this sense, opt-out associations are seen as a recruitment opportunity for new members. In NRW, the strategy is much more defensive and focused on the recruitment of new members.

Figure 11: Organisational Density of Opt-out Associations, 2020



Source: Gesamtmetall; authors' calculations

4.2 Organised decentralisation: bargaining moves to the workplace

Organised decentralisation differs from uncontrolled or wild decentralisation in that it is agreed by the collective bargaining parties and enshrined in 'opening clauses' (*Öffnungsklauseln*) in collective agreements and in that way legitimised (Traxler, 1995). However, organised decentralisation is not a coherent phenomenon and has developed in two forms in the German metalworking industry. On the one hand, it has taken the form of a shift in bargaining responsibilities from the industry-level actors to works councils – a shift to the workplace or in formal terms, the 'establishment', a process dubbed 'establishmentisation' or *Verbetrieblichung* in the German literature (Schmidt and Trinczek, 1989). In terms of the institutions involved, this process of localisation to the workplace includes a transfer of responsibilities – as defined in the opening clauses collective agreements – from the field of free collective bargaining to that of codetermination and the regulatory zone of the Works Constitution Act. It is this form of controlled decentralisation that will be dealt with in this chapter. The other form takes place within the collective bargaining system itself and involves a shift between the levels – industry and company/establishment – at which agreements are negotiated. It takes place mainly in the form of derogations from regional industry-level agreements and permits deviations from these. These will be dealt with in the next chapter.

Organised decentralisation in the form of localisation to the workplace has taken a variety of forms in the metalworking and electrical industry, mostly in relation to the regulation of working time (Box 1).

Box 1: Forms of bargaining localisation to the workplace

- Working time accounts
- Working time differentiation
- Collective reduction of working hours

- Individual working time reductions and working time options ('T-Zug') (see below)
- 'Agreements for the Future'
- Deviations from pay settlements

1) *Working time accounts*

The oldest and still the most important of these is the workplace-level regulation of *flexible working hours* in the form of *working time accounts*. The basis for these are the opening clauses that have been included in the industry-level agreements negotiated since 1984. These were forced on IG Metall by the employers' associations in return for the agreement on a staged reduction in weekly working hours in 1984, following a protracted dispute, that culminated in the introduction of a 35-hour week in the early-1990s. Opening clauses allow works councils and management to conclude workplace agreements on the organisation of working hours, permitting a degree of flexibility provided that the required basic duration is achieved over an agreed reference period. This was initially three months but was then gradually extended and is currently one year in most collective agreements in the metalworking industry. This has little practical relevance now as most regulations on working time accounts presently operate with upper and lower limits on working time credits rather than requiring an annual balancing.

The use of working time accounts spread rapidly from the 1990s and 66 per cent of all employees in Germany currently work under such arrangements, many based on 'flexible regulations' (Seifert, 2001) negotiated by managements and works councils at establishment level. This practice has prompted a number of problems, however, the most significant of which has been managing the rundown of working hours that individual employees might have saved on working time accounts or the accumulation of hours beyond the limits specified in the agreement, sometimes combined with a shift of these working hours to long-term accounts (Haipeter and Lehndorff, 2004).

In the metalworking industry, IG Metall tried to respond to these problems in the early-2000s by negotiating an agreed framework for regulating how working time accounts were to be operated. The union succeeded in introducing certain elements of such a framework in 2005 in Baden-Württemberg and North Rhine-Westphalia. In these two regions, a 'flexible working time account' was introduced to deal with fluctuations in output and capacity usage by allowing works councils and management to agree to lengthen or shorten working hours provided that employees did not accumulate working time credits as a result of any longer hours of more than 300 hours (and the current agreement says where this happens, there has to be works agreement on how the surpluses will be run down). The same industry agreements also set out a framework for long-term individual working time accounts, with scope for voluntary company agreements on long-term accounts, subject to a limit of 152 hours that can be accumulated in any one year. These surpluses can be used up when individuals are about to retire or for individual vocational training.

2) *Working time differentiation*

Another concession that the employers' associations were able to push through in exchange for the reduction in weekly hours agreed in the 1980s have been provisions on workplace quotas on *extending individual agreed working hours*. These refer to the proportions of employees who may extend their contractual working hours from 35 to 40 hours per week. From the outset,

these provisions have been mainly used to extend working hours for more highly qualified employees. Originally, the quotas of those permitted to agree longer hours were set at an upper limit of 13 to 18 per cent of employees in an establishment, depending on the collective bargaining area, but these have often been exceeded in practice in large establishments with a high proportion of highly-qualified staff, such as those working in research and development.

This factor is one of the reasons why the employers' associations have been able to steadily raise the agreed upper limits of the quotas. For example, under certain conditions, such as where there is a large proportion of highly-qualified staff, up to 50 per cent of an establishment's employees may lengthen their working hours. The employer's associations have set great store on further extensions to the quotas and this was agreed in the 2018 industry negotiating round. Three options were created: an extension to 30 per cent of employees at an establishment by works agreement, if there is proven shortage of skilled staff; an increase to 50 per cent if at least 50 per cent of employees in that establishment are in the highest agreed pay grades; and the introduction of what is termed a 'volume model', under which the overall average working time per employee can be set at 35.9 hours (where 18 per cent of employees are on 40-hour contracts) to 37.5 hours per week (for 50 per cent of employees on 40-hour contracts) - an attractive option for employers as this total includes part-time employees, with the consequence that any increase in part-time working creates scope for additional 40-hour contracts. All these models have to be agreed in form of workplace agreements negotiated between managements and works councils. Further changes were agreed in the 2021 bargaining round. In the collective bargaining agreement of 2021, the option of a new simpler 'corridor' model has been introduced under which establishments can agree that average weekly hours should be in the range of 34 to 36 hours per employee, including part time workers, with a requirement on works councils and management to respond if this is exceeded in either direction – including a works council right to refuse to approve 40 hours contracts if the average rises above a pre-set margin.

3) *Collective reductions in working hours*

Since 1995 collective agreements in the metalworking industry have also contained *opening clauses* to allow for collective reductions in working time – for certain groups, departments or whole establishments – to safeguard employment. These allow the parties at company or workplace level to agree reductions in working hours from the collectively-agreed norm of 35 hours per week down to 30 hours per week, with a proportional cut in pay in return for a commitment by the employer not to introduce compulsory redundancies for up to a maximum period of 12 months: compensation payments to cushion the impact on employee incomes can also be agreed locally. These agreements have typically been used during economic downturns, and notably during the financial crisis 2009 and 2010 when – alongside mechanisms such as short-time working or the running down of surpluses in working time accounts – they were responsible for a significant share of the reduction in working hours that took place in that period. They were used again during the Covid-19-pandemic as an alternative to short-time work. These provisions were modelled on the 'four-day week' approach, originally introduced at Volkswagen in 1993 and under which working hours for all employees were reduced from 35 to 28.8 hours per week in an initiative that continued until 2006.

The option for collective working time reductions was further extended in the 2021 bargaining round, where the focus was on dealing with processes of industrial transformation, such as digitalisation and decarbonisation, that will require more than one year. Under the 2021

agreement, the permitted reduction in working time was extended from 12 months to three years. In the second and third year, working hours can be reduced to 32 hours per week, with an additional payment of 25 per cent of the employee's usual hourly pay for each hour of reduction to cushion the impact. As with the older regulation, these arrangements require a workplace agreement: in the event of local failure to agree, an arbitration board composed of the industry-level negotiating parties can decide.

4) *Individual working time reductions*

A further form of organised decentralisation was introduced in the 2019 negotiating round. In addition to the collective working time reductions to safeguard employment, this provision introduced scope for *individual working time reductions*. Under this agreement, individual employees may reduce their weekly hours from 35 to 28 hours, or a figure between, for a period of up to two years with a corresponding reduction in pay but still retaining the status of full-time workers. An employer has a right to object where there is a shortage of either skills or capacity to compensate for the loss of working time; works councils can support any employees who apply for such a reduction.

A second element of individual working time reduction that was included in the 2019 agreement is based on options to make flexible use of a new collectively-agreed annual additional payment known in German the 'T-Zug' (*Tarifliches Zusatzgeld* or 'agreed supplementary payment'). This payment is in addition to the usual two agreed payments made each year, the holiday bonus and the Christmas bonus. Under this new arrangement, employees can choose either to receive the 'T-Zug' payment or, for certain employee categories – shift workers and workers who have to care for older dependants or children at home – can request additional time off. The 'T-Zug' has two components: 'T-Zug A' and 'T-Zug B'. 'T-Zug A" is worth 27.5 per cent of an employee's regular monthly earnings: qualifying employees may choose to forfeit all or part of this by taking up to eight annual days (or shifts) off each year. 'T-Zug B', now worth 12.3 per cent of a month's pay, based on the skilled worker rate, is paid out as cash and can be postponed, reduced or cut entirely by workplace agreement. According to IG Metall, about 340,000 workers made use of the opportunity for additional time off, about two-thirds of them shift workers (IG Metall, 2021).

The T-Zug regulation was extended in the 2020 negotiating round. Under this agreement, the T-Zug may be used collectively – based on a workplace agreement – by all employees to avoid or postpone short time work with up to eight days to be taken off. Additionally, up to six days may be take off by all workers, with a corresponding reduction in the 'T-Zug' payment, without a need to specify a reason.

5) '*Agreements for the Future'*

The 2018 agreement on 'mobile working' – that is telework or working from home – created a framework for workplace agreements by setting minimum agreed requirements. The agreement provides a definition of such work ('work that temporarily or regularly takes place outside the establishment but not tasks that must be performed outside the establishment such as service or sales activities'), requires compliance with the Working Time Law, limits when employees must be available, requires documentation of working times and stipulates what must be included in any agreements between employees and their managers. Although agreements on this issue had been concluded before the 2018 industry-level agreement, especially in larger companies, the new provision sets minimum standards for all future agreements in this area.

6) *Deviations from pay settlements*

In addition to the issues noted above, most of which deal with working hours, a further form of decentralisation relates to pay. Since 2006, a number – but not all – pay negotiations have provided for *opening clauses for deviations from regular pay settlements*, allowing companies to postpone payment of the industry-level settlement for a couple of months or reduce or postpone agreed lump-sum payments. Any such step must be agreed with the works councils and IG Metall.

These various forms of organised decentralisation differ from each other in one important respect as they aim either to allow scope for *collective decentralised arrangements* by works councils and management or *individual choice options* for employees within a collectively-agreed framework. While reductions in working hours to safeguard employment or deviations from industry pay settlements are clearly a collective form of decentralisation, converting certain elements of pay, for qualifying groups such as shift workers, are an individual form. Working time accounts and quota systems sit in between these and have features of both. On the one hand, both are regulated by workplace agreements with works councils. On the other, however, they open up individual options: in the case of working time accounts, these allow employees some freedom to determine the distribution of their working hours and in the case of quotas, the contractual extension of weekly working hours is voluntary for employees. This is one of the reasons – besides improvements in working time flexibility – why instruments like working time accounts have been welcomed and widely-used by employees. In this respect, the localisation of regulation to workplace level has chimed with a new interplay between collective regulation and employee participation and self-determination.

At the same time, there is little doubt that the dynamics and spread of this process has generated new challenges for works councils, calling on them to develop new capabilities and consolidate their bargaining power to ensure they can come to acceptable arrangements with management. Indeed, the evidence suggests that the quality of workplace agreements will vary depending on precisely these conditions, with close collaboration between unions and works councils constituting a key prerequisite for effective workplace codetermination (Haipeter, 2021). Unions can support works councils and contribute to the development of their capabilities through training and advice and through building their capacity to deal with new topics such as digitalisation or decarbonisation. As already noted, a high level of union organisation at a company will also strengthen the bargaining power of works councils in local negotiations. These relationships play an even more important role in the context of derogation, which will be analysed in the next section.

4.3 Organised decentralisation and derogations from collective agreements

4.3.1 Origins of derogations and the Pforzheim Accord

Derogations from industry-level agreements have been negotiated in the metalworking sector since the 1980s, mainly to respond to crises at individual firms. However, such cases were rare. This changed with the deep cyclical and structural crisis of the metalworking industry that took place following the reunification boom of the early-1990s (Jürgens and Naschold, 1994). Since then, the use of derogations has become more widespread. The crisis saw the emergence of two 'launching pads' for the practice: hardship clauses in East Germany and the negotiation of restructuring agreements in West Germany.

The *hardship provision* negotiated for East Germany in 1993 constituted the first collectively agreed instance of derogation from an industry-level agreement in metalworking and one of the first arrangements of this kind in the German collective bargaining system as a whole. The agreement stipulated that the industry-level negotiating parties should agree the substantive content of any derogation in a joint committee. Derogations were restricted to undertakings experiencing acute economic difficulties. Although firms were initially slow to make use of hardship clauses, the speed of adoption subsequently expanded rapidly and by mid-1996 91 such arrangements had been negotiated out of the total of 181 applications submitted (Hickel and Kurzke, 1997).

No provision equivalent to these hardship clauses was introduced in West Germany. Nonetheless, a separate practice of setting workplace standards that were below industry norms also emerged there. This took two forms. The first was the informal undercutting of industry collective agreements at company level. The second was the negotiation of restructuring agreements, with the involvement of the trade union, in firms experiencing economic difficulties. From the mid-1990s onwards, this practice resulted in formal agreements at industry level on so-called *restructuring clauses* that permitted the parties to derogate from the industry agreement when firms were experiencing problems. In contrast to the East German hardship provisions, these clauses did not include procedural standards for negotiations and there were no stipulations on the quality of the substantive provisions. Not least for these reasons, little is known about their incidence except that they have steadily increased in number over the years. These restructuring clauses, combined with uncontrolled derogations, initially led to the creation of a 'grey area' in which collectively-agreed standards have been undercut but without transparency and with no central control exerted by unions or employers' associations.

This situation changed with the 2004 *Pforzheim Accord*. The negotiation of this wide-ranging provision was to a certain degree a response to political pressure from the then federal government that had threatened to change the law to allow such derogations. This led IG Metall to the conclusion that were this to happen, it would be impossible to prevent the spread of such derogations and that the best option for the union was to be involved in determining the form they would take. From the outset, however, trade union advocates of such derogation clauses hoped that they would be able to use such provisions to get a grip on the increasingly uncontrolled undercutting of collectively-agreed standards then under way.

Both of these objectives were reflected in the 'Accord on the Safeguarding of Existing Employment and the Creation of New Jobs', signed on 12 February 2004 in Pforzheim in Baden-Württemberg. In 2008, this agreement, together with some stipulations on collective working time reductions, was folded into the 'Agreement on Safeguarding and Increasing Employment' (Box 2) ('*Tarifvertrag zur Beschäftigungssicherung und zum Beschäftigungsaufbau')*.This specified that derogation agreements would be permitted provided that jobs would be safeguarded or created as a result and additionally that they would help to improve competitiveness, promote innovation, and encourage investment. The agreement said little about the contents of derogations, but it contained a number of provisions on procedural norms: for example that companies had to provide comprehensive information on their economic situation; that the union had the right to check this in the light of spillover effects to other companies; and that derogations would have the status of formal collective bargaining agreements and could only be negotiated by the recognised parties to collective bargaining proper – the trade union and either the individual employer or the employers' association.

However, the procedural arrangements laid down in the Pforzheim Accord quickly proved unsuited to the exercise of control over collective agreements. It soon became evident that the employers' associations themselves had no interest in controlling derogations and in many cases were merely acting as advisers to companies engaged in negotiations. Consequently, it fell to the trade union to exercise control. However, IG Metall's faith in its own ability to control derogations had already received a bitter blow as a result of instances in which works councils had already agreed to management's demands before the union had been even asked for its opinion or taken any part in the negotiations.

Box 2: Agreement on the Safeguarding and Increasing of Employment (2012 version)

…§2 Securing and creating employment

2.1 The aim of this collective agreement is to secure existing employment and create new jobs in Germany. This requires the maintenance and improvement of competitiveness, innovative capacity and investment conditions. The parties to the collective agreement are committed to these objectives and to their task of shaping the framework for more employment in Germany.

2.2 The parties to the collective agreement shall examine whether the measures within the framework of the applicable provisions have been exhausted in order to secure and promote employment. At the request of the parties to the collective agreement, the parties to the collective agreement shall advise the works councils on the possibilities for doing so within the framework of the collective agreements. If, after weighing the social and economic consequences, it is necessary to secure a sustainable improvement in the development of employment by means of deviating collective agreement provisions, the parties to the collective agreement shall agree on supplementary collective agreement provisions after joint examination with the parties to the enterprise or shall deviate from collective agreement minimum standards for a limited period of time by mutual agreement, e.g. by reducing special payments, deferring claims, increasing or reducing working hours with or without full wage or remuneration compensation (insofar as not regulated by this collective agreement). The prerequisite for this is comprehensive information with the relevant documentation. The persons involved are obliged to maintain confidentiality in accordance with the Works Council Constitution Act. Any effects on competition and employment in the industry and the region,

as far as companies belonging to the same collective agreement are concerned, shall be included in the overall assessment.

2.3 The parties to the collective agreement agree that the agreement of 25 February 2004 has contributed to improving the competitiveness, innovative capacity and investment conditions of companies and thus to securing jobs and creating new jobs in Germany. For this reason, it is agreed that this agreement will be continued by this collective agreement. The parties to the collective agreement shall examine in the years up to 31 December 2011 how this collective agreement can be further developed for the benefit of the companies and the employees. In doing so, the experience gained from the cooperation between the parties to the collective agreement and the company parties shall be evaluated on an ongoing basis. The parties to the collective agreement shall decide whether the balance between the decision-making possibilities of the parties to the collective agreement/company level should be changed towards more decision-making competence of the company level….

The union's executive concluded from this experience that effective control required tighter procedural standards than those laid down in the collective agreement. As a consequence, in 2005 IG Metall drew up a set of *coordination guidelines* centred on the following points. Firstly, applications to negotiate agreements on standards below the industry norms had to be submitted to the union's area headquarters (*Bezirke*), the organisational equivalent of the regional employers' associations, and required approval by officials at that level after considering extensive information about the company in question. Secondly, area officials could give local union branches authority to conduct negotiations. Thirdly, negotiations were to be supported by firm-level collective bargaining committees, whose role was to ensure that union members took part in the negotiations, were informed, and could participate in decision making.

4.3.2 Outcomes and development of derogations

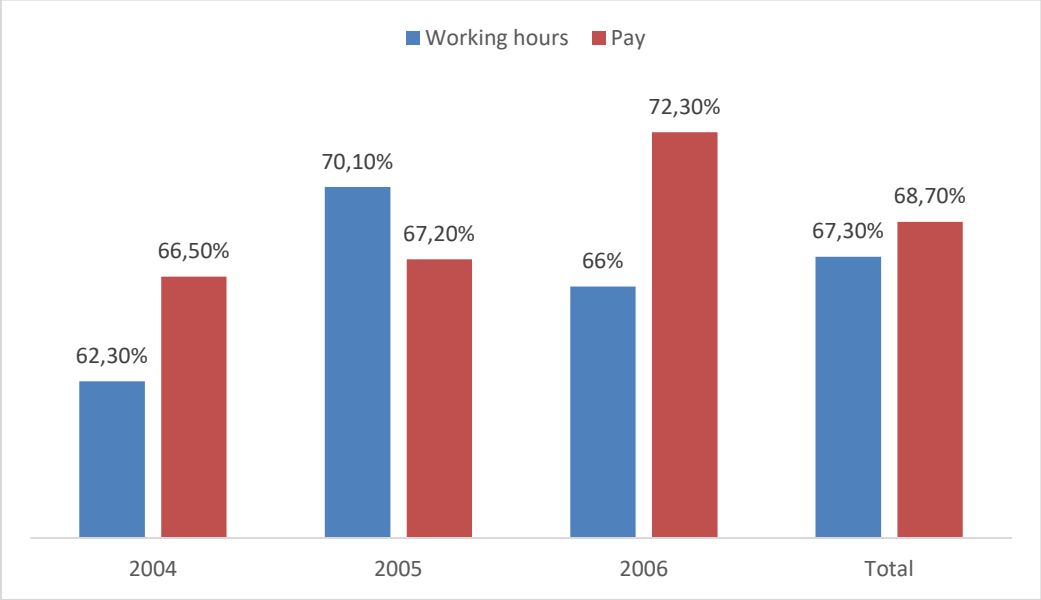
There is little available public evidence on the outcomes of derogations. The best documented phase are the years from 2004 to 2006, immediately after the implementation of the Pforzheim Accord. An analysis of derogation agreements negotiated in those years has shown that in all 850 derogation agreements were concluded, of which 412, or almost 48.5 per cent, were agreed in 2005, 271 (32 per cent) in 2006 and 167 (about 20 per cent) in 2004 (Haipeter, 2009). By 2006, excluding any agreements that had since expired, a good 10 per cent of firms in the sector that were in the scope of collective bargaining had negotiated a valid derogation from the relevant agreement. The number of agreements went down after the 2005 peak, which can be interpreted as an indication of the success of IG Metall's coordination efforts.

The main issues on which employees made *material concessions* were working time and pay. Of all derogation agreements, 58.5 per cent (and 86.9 per cent of those concerning working time) contain provisions on lengthening working hours. Other working time issues, such as working time flexibilisation (in 19 per cent of all derogations from agreed working time norms), scheduling and working time reductions (both under 6 per cent), lagged significantly behind. By far the most common form of the various types of working time extension were increases in weekly working hours, which accounted for almost 65 per cent of all derogations on this issue, followed by 'working time budgets', specifying a certain number of additional hours to be worked by employees over a specified period (26 per cent), and the use of saved time in working time accounts for further and advanced training (about 12 per cent). In 2006, however, the share

of agreements on lengthening weekly hours declined to 53.5 per cent, suggesting an improvement in the union's capacity to control the substance of derogations.

Figure 12: Main issues regulated in derogations in the metalworking industry, 2004-2006

(per cent of derogation in each year dealing with pay and working hours)

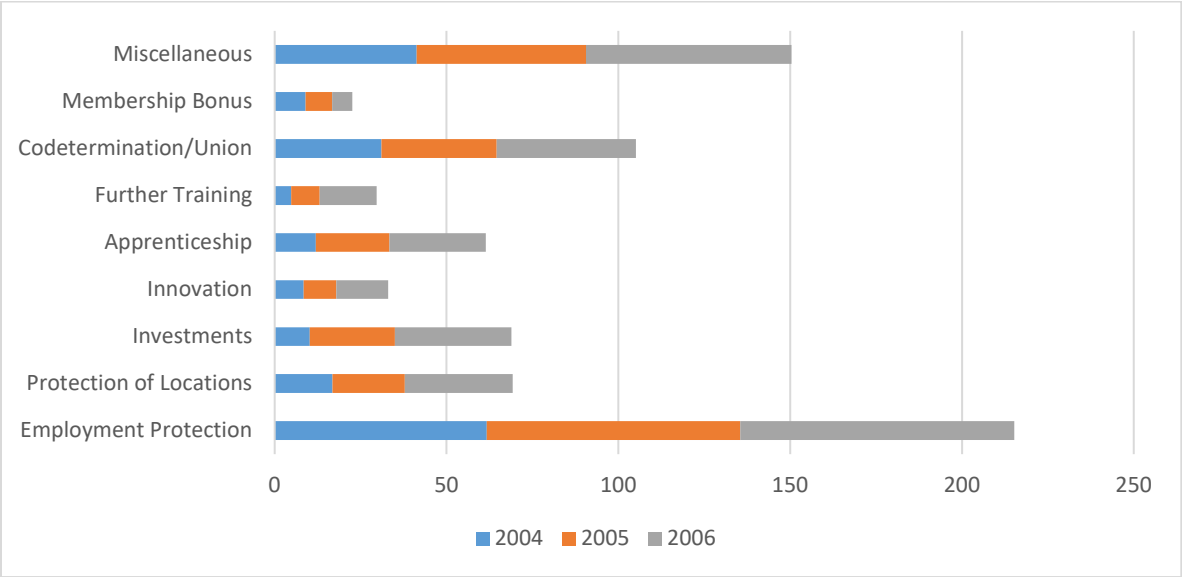


Source: Haipeter, 2009.

In contrast to working time, there was a broader range of issues on derogations on pay. The three most important were the Christmas bonus, holiday pay, and pay increases. As far as control of derogations was concerned, the most important of these were derogations that provided for a lower pay increase than that stipulated in the main industry settlement. This issue cropped up in precisely 32 per cent of the collective agreements. The most common provision was for agreed wage increases to be postponed or cancelled, with postponements clearly gaining in relative importance compared with cancellations over the course of the observation period.

However, derogations are not simply concessions bargaining and have involved quid pro quos in the form of employer '*counter concessions'*. Such counter concessions featured in 83 per cent of all derogation agreements in that period, with a marked rise in the proportion of agreements with employer concessions increasing from 70.7 per cent in 2004, to 86.9 per cent in 2005 and 84.5 per cent in 2006. The dominant issue for employer concession was job security (Figure 13). The most prominent trend as far as counter concessions were concerned was the steady rise in the shares of the individual issues addressed. Besides job security, a wide range of other issues gained in importance: these included investment commitments, which featured in more than one third of agreements in 2006, extending codetermination rights to improve control over the agreements, measures to improve competitiveness (40 per cent), and profit-sharing to allow employees to benefit from any improvement in their company's position (more than 50 per cent).

Figure 13: Employer concessions in agreed derogations, metalworking, 2004-2006 (proportion of each issue in total number of derogations, by year)



Source: Haipeter (2009).

The subsequent trend in the metalworking and electrical industry is much less well documented. According to the IAB Establishment Panel for the economy as a whole, in 2011 10 per cent of companies had used opening clauses dealing with pay, 13 per cent had agreed derogations on working time and 20 per cent had used an opening clause on 'some' issue (Ellguth and Kohaut, 2014). The figures from the WSI works council survey are higher; in this case, works council members are asked not only about agreed opening clauses but also 'differentiation clauses' that deal with issues other than agreeing standards below industry norms, such as agreed scope for flexibility. The WSI study found that the incidence across the whole economy averaged 21 per cent, with manufacturing (together with mining) at 28 per cent and capital goods at 22 per cent (Amlinger and Bispinck, 2016). Of the works councillors surveyed, 13 per cent stated that derogations did indeed exist in their companies but these had not been agreed using opening clauses and were therefore informal in nature. Given that 'opening clauses' and 'derogations' are not entirely coterminous, this data does not seem to deviate fundamentally from the findings from the initial period of agreed derogations: that is, between 10 and 20 per cent of companies subject to industry agreements or those with works councils have made use of opening clauses to agree derogations. This figure was also confirmed in our expert interview with a representative of Metall NRW.

> *10-15 per cent of the companies bound by collective agreements, that sums up the prevalence of collective agreement deviations very well. From my point of view, the number of agreements has been at a similar level over the past ten years. We as an employers' association collect the agreements. All applications for derogations have to be approved by us. So we have a good overview of the negotiations. (Expert 3)*

IG Metall has also published very little data. One exception is an evaluation by the North Rhine -Westphalia district of IG Metall, which noted 150 ongoing derogation agreements in 2016, corresponding to 12 per cent of the companies covered by collective bargaining in that district

(Bahnmüller, 2018). According to the IG Metall representatives interviewed for this study (as expert sources), the lack of more up-to-date figures was due to a complex update of the software used to record agreements that was necessitated by the fact that the old software could not correctly record the expiry dates of the agreements, leading to some confusion between current and expired agreements.

> *In the past, however, this platform was designed in such a way that the expiry of these agreements was not always actually properly stated. This means that if I run an analysis today and say: 'Give me all the derogation agreements that we have concluded in the metal and electrical industry with companies that are bound by associations', I get a lot of collective agreements that no longer exist. (Expert 1)*

Although there are no current precise figures on the incidence of agreed derogations, there are estimates of the main areas of derogation prior to the Covid-19 pandemic. Overall, in the years of economic growth since the financial market crisis, the number of derogations has decreased according to the experts interviewed. However, there are some regional differences, which also depend on the sector, company structure, and level of collective agreement coverage.

> *In the last few years we have seen that the economic situation is better. So the number of supplementary collective agreements has decreased. But we can also see that there are differences between districts. There are structurally weaker regions where we have more deviations, where the economic hardship is greater. (Expert 1)*

Darker clouds appeared on the economic horizon in 2019, which led to more pressure to agree derogations. However, the 'classic' means by which companies have exerted pressure on unions and works councils – threats of relocation, especially to Eastern Europe – have become less salient as the main motive for requesting a derogation. Overall, the collective bargaining experts interviewed for this study felt that the prime factor was the economic or structural situation in which firms found themselves

> *Eastern Europe is no longer the dominant issue in derogation cases. There are cases where it is important. But it is no longer the rule. The rule is rather that a company is in economic difficulties, either structural or cyclical, and cannot cope with the collective agreement conditions. (Expert 2)*

4.3.3 Works councils and topics of derogations

Although derogations in the metalworking and electrical industry are collective agreements proper (*Tarifverträge*), and therefore fall within the scope of the trade union as one of the parties entitled to conclude such agreements, the cooperation between the union and *works councils* is critical in the success of negotiating and implementing such provisions. There is no prospect of a successful negotiation without or in opposition to works councils. In principle, works councils must be convinced that such negotiations have become unavoidable; but at the same time, the union needs to ensure that works councils are not too willing to concede when faced with employer pressure. From the works council perspective, having the union take the lead in negotiations can be a great help, relieving them of the challenge of facing management, who will have to sit down with the union's typically highly experienced negotiators, and allowing them to benefit from the power resources that the union can mobilise during the negotiation

process. Negotiations on these issues can also enhance works councils' capabilities, as they will be provided with comprehensive business information by the employer that they would not otherwise have received in such a detailed form, despite their statutory right to such information in the normal course of codetermination (Haipeter, 2010).

Moreover, joint negotiations can deepen the relationship between works councils and trade unions (Haipeter, 2010). Although negotiations are led by the union, works councils usually play a central role on negotiating and action committees. They are the experts in their own companies and their approval is vital, as no viable agreement can be reached without their involvement and consent. Works councils, workplace union representatives and the union itself as negotiation leader have to coordinate their interests and develop common negotiating aims and strategies, working together on this issue much more closely than usual in the normal operation of the dual system. Works councils become much better acquainted with the union's goals and, for their part, union negotiators, usually officials from the local trade union office, get a better informed view of works councils than would get from sporadic visits or meetings.

This can also lead to the union recognising and systematically addressing shortcomings in how works councils engage with the practice of codetermination. This has also led to an interface between negotiating derogations and trade union activation projects under the rubric of 'Better not Cheaper' (see Haipeter et al., 2011), an approach aimed at improving the capabilities and effectiveness of works councils. Negotiating derogations seems to have exposed shortcomings that the union can identify and address.

> *Of course, we have works councils that are actually well positioned and know everything. But we have noticed... even in the good companies, that there is still room for improvement. Especially when you have detached works councils that are somehow far away from many individual processes, not from the processes themselves, but from individuals in certain areas. (Expert 2)*

With regard to the *content of the regulations*, the overarching priority for employee representatives will be to minimise their own concessions and maximise the quid pro quos from the employer. What does that mean in concrete terms? IG Metall has not indicated if it has any 'red lines' on concessions that must not be crossed in any circumstance, in part because even if set such rules could still be broken or circumvented. Instead, a more flexible rule applies: the more extensive the concessions, the more employers must offer in return:

> *We discussed this for a long time and said: It is difficult to define 'no-gos'. Because rules are not always observed. This leads to something being twisted and fiddled with afterwards. But we should make one thing clear. The more sacrifices the workers have to make, the higher the price for the employer. (Expert 1)*

Despite this, IG Metall did, however, specify two 'no-gos': firstly, there must be no interference with holiday entitlements; and secondly there should no reduction in agreed basic pay rates. Concessions on pay should be limited to single payments and performance-related pay, or to postponing pay increases for a limited period of time. Were these 'no-gos' nevertheless to become an issue in negotiations, any decision on them would have to be escalated to IG Metall's head office.

With regard to the quid pro quos, in terms of the concessions offered by the employers, the focus has been on job and employment security. This can be defined in different ways: securing

the future of a facility, prohibiting compulsory redundancies, retaining a defined number of employees or including the possibility of exceptions based on the consent of IG Metall or the works councils. It is therefore important to the union that any provision is as clear and incontestable as possible.

However, securing employment is not the only priority for quid pro quos. A second focus is on measures to improve the competitive position of a company where concessions have been agreed to enable it to return to agreed industry norms, if possible, once the derogation has expired. IG Metall's main priority here has been to press for investment commitments that are transparent and verifiable for the trade union and works councils. In addition, employers are also expected to commit themselves to projects, in which IG Metall and works councils will be involved, to improve the firm's organisational structures and processes. To support this, companies are also expected to pay for the trade union to draw on consultancy to enable them to oversee any such projects. This redefines the traditional compromise between capital and labour: rather than leaving the responsibility for an employer's future growth solely to management, and then seeking to share the results, the union will engage in projects to generate growth and innovation as a means of securing employment.

Agreements and side agreements on derogations can also include a range of other issues, such as training quotas or numbers, an agreed block on relocating operations, extended codetermination rights for works councils on strategic decisions, and a commitment to repay any foregone payments to the workforce if defined profitability or earnings targets are achieved. In some cases, IG Metall has concluded deals on benefits to be paid only to union members, a legal possibility within a collective agreement and intended to reward and boost union membership. . With extended codetermination rights, the development of organisational improvement projects and scope for employee oversight and control, collective bargaining derogations have introduced a set of procedures that entail a degree of a codetermination during the agreements' period of validity. On the issue of exercising control over investments, the process is described as follows:

> *We usually agree on control dates. And ideally also a steering committee or steering group, whatever we call it, where company actors sit together with IG Metall on the one side and company representatives and, if necessary, the employers' association on the other and do reporting. And we then reserve a special right to terminate the agreement. (Expert 2)*

Such a special right of termination is a fairly common element in derogation agreements. It gives each side a 'nuclear option', but deploying it would be highly problematic for the union, however, as this would also lead to the removal of any of the agreed employment safeguards. Sanctioning violations of the derogation by the union is therefore less straightforward than it might appear at first glance and requires careful case-by-case assessment.

> *If you do that, the protection against dismissal is gone. In doubt, if you have a company that is really on the edge, you might push the company into insolvency. How far do the members, does IG Metall, go at that point, to really pull that. And does that even make sense? (Expert 2)*

4.3.4 Derogations, employee participation and union organising

Derogations in the metalworking and electrical industry have another core element: *participation by union members.* This was included by the trade union as a requirement in its 2005 coordination rules and is intended to foster a closer relationship between the union and its members, as well as employees more generally, when it is engaged in negotiations over derogations, given that, in contrast to bargaining over pay increases, these can entail a lowering of terms and conditions, at least temporarily. The core idea was that members would be more receptive to such an outcome if they were involved in the process. Three important forms of participation were developed in the initial years in which derogations were negotiated: ongoing information of trade union members through members' meetings during negotiations; member participation in company-level union bargaining committees; and, crucially, votes by members on whether to start negotiations and whether to accept a negotiated outcome.

This practice has now been established as the arrangement in negotiating derogations. Experience has shown that members who are involved are much more likely agree with the outcome of the process. There has also been a further, and largely unexpected, effect, however. In many cases, the union has been able to recruit new members as employees have wanted to participate and have a voice (Haipeter, 2010). Given these unexpected results, in 2006 the union's district organisation in North Rhine-Westphalia demanded that certain benefits should be available for IG Metall members only. In this respect, derogations also proved to be the first instrument in a new union organising strategy.

The question of *organising power* is posed at the beginning of every negotiation over derogations. This is a central criterion for starting or refusing negotiations, for three reasons. Firstly, organisational power is an important precondition for employee bargaining power: that is, the capacity to use a high degree of union organisation at company level to resist pressure for derogations and press for appropriate quid pro quos from employers. Secondly, a high organisational density legitimises trade union action as the union can speak for a larger proportion of employees. And thirdly, it becomes a criterion in deciding when the union should devote scarce resources to bargaining at a company: the current basic guideline is that the union will not engage in bargaining in the absence of a convincing sign of willingness on the part of the workforce, with a minimum requirement of 50 per cent employee union membership.

> *Do we actually have a mandate to negotiate there on the ground? What legitimacy do I have to agree a collective agreement with a level of organisation of less than 50 per cent? (Expert 2)*

There may be exceptions to this rule, one of which is related to the size of the company. If a company is very large, even a 20 per cent union density could mean that there are many members who are entitled to representation. Perhaps even more important is the second reason, the prospects of building union organisation at the company.

> *If I have a 20 per cent level of organisation in a very large company, then there are 400 members to be represented, and I can't leave them out in the cold because we say you have to have a 50 per cent degree of organisation. In the end, however, you look at the development of membership, and in case of doubt you'll refuse to sign if it is determined that there is no or even a negative development. (Expert 1)*

This argument is very powerfully advanced by IG Metall both to company managements and works councils: that is, an active effort to strengthen the organisational power of the union is a price that firms have to pay in exchange for being allowed to deviate from the industry agreement. This also applies to works councils, which are directly called on to help to recruit members. The union will also direct its own ongoing organising projects ('GEP') to engage in the company before or during the application of the derogation, which then acts as a gateway for union development.

> *This is controlled via the GEP-coordinator. He also gets these requests on the table. Then she or he looks at what resources his people have on site. And then we try to involve them. It depends on the process involved. Does it make sense? Do we need resources? Or are we so well organised that we don't need it at all? (Expert 2)*

These processes mean that member recruitment will usually takes place even before any negotiations have begun. However, the bargaining process itself offers further scope for raising membership. The most important starting point is member participation, which should not only open up opportunities for union members to influence the course of negotiations but also enhance the legitimacy of the process and, crucially, raise the attractiveness of IG Metall. Participation is envisaged at the two key decision-making moments in the negotiation process: when to start negotiations and whether to accept the negotiated outcome.

> *Member participation is standard operating procedure. Also from our side, that is the district side, there are checklists that are quasi demanded. There has to be a member vote on the derogation. (Expert 2)*

Another element of participation is represented by the collective bargaining committees that include not only full-time and lay officials but also shop stewards and rank-and-file members. Such broad-based collective bargaining committees have proven to be a good way to involve members from different areas of the companies, including white-collar areas such as R & D or sales that have traditionally been less central to representation by works councils and the union. The bargaining committee can also be used to create the basis for a shop stewards' body if no shop stewards have yet been appointed.

> *The bargaining committee should be as broad as possible. We have had good experiences with this. At the beginning of last year, we had a case of a company with about 400 employees and a collective bargaining committee with over 20 members from many different areas. Because we said: We want to have members from all areas in the company on the bargaining committee, also from the administrative areas. In essence with the idea that this would be a basis for a shop steward organisation. And together with the bargaining committee you can have a deeper discussion about what needs to be changed at the company. (Expert 2)*

From the trade union's point of view, there should also be a further form of participation: '*expert participation' by* employees in processes to improve the organisation and performance of the company, based on the union principle of 'Better not Cheaper' *('Besser statt billiger'*). In theory, this should take place before any decision to negotiate in order to establish whether there are alternatives to the derogation and what they might look like, and this should involve drawing on employee's expertise. A further option is expert participation by employees in the ongoing improvement processes that have been specified as preconditions for allowing the derogation.

One final aspect of participation is the involvement of members by ensuring that they have access to information during the negotiation process. This can involve a wide variety of methods, ranging from e-mails to members' meetings. The aim, as reported by our interviewees, is that transparency will serve to strengthen the bond between the union and its members as well as create scope for reaching a consensus on the conduct and outcome of negotiations. Simply presenting union members with a finalised negotiation outcome without prior information would run the risk of it being rejected, despite acceptance by IG Metall.

> *That happens very rarely. Of course, there are different opinions. But as a rule, the results of the negotiations are accepted […]. Keyword member participation: Members have to agree to the outcome of the negotiations and if the members have not been regularly informed in advance then there is of course a much greater risk that problems will arise than if this process is managed properly. (Expert 1)*

In retrospect, experiences with derogations were the starting point for a 'member-oriented offensive strategy' (Wetzel et al. 2013) that IG Metall developed in the early-2010s. This involved tying the budgets of IG Metall's organisational units to income from membership dues, underpinned by annual operational objectives and target membership figures (Wetzel, 2012). Member orientation thus became a cross-sectional strategy and a benchmark for measuring success across the full spectrum of the union's activities, a process in which the experiences of negotiating derogations played a decisive role (Hassel and Schroeder, 2018).

4.3.5 Activities and roles of the employers' association

Although derogations are formally concluded between the union and individual companies, employers' associations in the metalworking industry play an active role in these negotiations, aside from being the driving force pressing for opening clauses in the first place. One reason for this is that the union usually insists that the relevant employers' association should sit at the table with an individual employer on the premise that, since derogations are a collective agreement, employers' associations are the appropriate bargaining counterpart. For their part, employers' organisations want to be involved in derogations in two respects: acting as a consultant on labour and social law; and as a professional negotiator, either advising on negotiations or as a negotiator themselves. In this way, they can also help develop a frame that can raise the acceptance of agreeing a derogation.

> *As an employers' association, we have two roles in the negotiations. The first is that of an advisor. This includes legal advice, that's obvious, labour and social law. But it also includes making the perspective of the workers' side known and clear and explaining this to the employer. And providing the narrative, the story that frames the negotiations and makes them acceptable to the workers. The second role is that of the social partner in the negotiations. That is, to see the big picture and to bring the social partnership dimension into the negotiations. Our role can either be to advise a manager, or we or the local employers' associations can lead the negotiations ourselves. (Expert 3)*

This role in either conducting negotiations or providing expert advice is seen as particularly important as it makes negotiations both more professional and less complicated; experts from

the trade union will then sit opposite experts from the employers' association with each familiar with the expectations of the other party, and often knowing each other personally from other negotiating contexts.

Derogations are coordinated by Gesamtmetall, with regular meetings between the managing directors of the regional associations and the heads of the collective bargaining departments that are responsible for negotiating derogations. The focus is on two issues: first, whether an increase in derogations signals a need for reforms of the industry agreement, as this can be read as an expression of member company dissatisfaction; and second, how to deal with sensitive cases in which derogations might change the conditions for inter-firm competition in a market, leading to demands from competitors who will also then want a derogation agreement.

> *There are two issues at the forefront of this. One is the question of collective bargaining policy. If an average of 10-15 per cent of companies bound by collective bargaining agreements have derogations, what does that mean for the regional collective agreement? Wouldn't we have to adjust it so that fewer companies are induced to conclude a decentralised agreement?... And secondly, competition policy. How do I deal with the fact that I create unequal conditions of competition? If I give a foundry a deviation, but there is a second one nearby and it doesn't get it, then it will come to us and ask what's going on. So we have to be very careful. The same applies to IG Metall, which also has to pay close attention to this. (Expert 3)*

This expert did not see any need for changes in the existing arrangements and thought that the regulations were both sufficiently open and able to render the process, which is accepted by the union, legitimate.

> *I don't see any need for further regulation there. For one thing, the agreement has proven itself. It is lived, and also by the union. And for another, there is only a mutual obligation on the contracting parties to do something under certain conditions. It is thus a political document that creates legitimacy and trust, but which otherwise does not set any standards. (Expert 3)*

4.3.6 Company-level 'Agreements for the Future'

The 2021 settlement in the metalworking industry included a new opening clause for bargaining at company level. This provides for so-called 'Agreements for the Future' ('*Zukunftsorientierte Tarifverträge'*) which, in contrast to derogations, are not about concessions but rather aim to promote joint initiatives to modernise firms, increase their competitiveness and safeguard employment: in short, to develop processes and instruments to manage digital and ecological transformation. Under the industry agreement, management and works councils can develop joint analyses of the current position of and future challenges to the company. If they come to a common position on this, IG Metall and the employers' association, together with works councils and management, can negotiate a collective agreement on ways to respond to the challenges, including joint working parties and projects, training programmes, business reorganisations, and investment. They will also be able to drawn on assistance from a 'Transformation Agency' (*Transformationsagentur*), established jointly by the trade union and the employers' association to provide advice and support. If no agreement can be reached either on the company's position or in the negotiations, the process can be moderated; and if no

consensus can be reached after that, the parties will register their understandings of the challenges and the process will stop: the agreement expressly does not include a formal process for resolving differences.

As yet, there have been very few instances of this procedure in practical operation. A number of possible challenges can be identified in advance, however. The first is that companies may have little interest in negotiating on the issue of transformation as such negotiations touch on traditional managerial prerogatives. And in contrast to derogations, companies might not have a clear sense of the advantages for them in engaging in such processes given that there are no employee concessions on the table. This might lead to the second challenge: that employers could demand concessions for giving the employee side a say in management. In this case future agreements would differ only very little from the more innovative derogations that have also included investment commitments. And finally, even if everything worked well and an agreement was to be reached at company level, this would mean a huge new workload for both the works council and the union, who would become drawn into managerial processes and would need the skills and resources to play a role in this. However, should these problems be solvable, 'Agreements for the Future' would seem to offer a very promising perspective for a more proactive practice of codetermination by works councils than has been the case in the past, and moreover one that is backed up by collective bargaining and an active role on the part of the union at company level.

4.4 Case study 1: The derogation agreement at *Metal Forming*

4.4.1 The case: *Metal Forming*

Metal Forming is a medium-sized company with around 400 employees at its headquarters. The company makes parts for applications in the automotive industry, such as components for car bodies and powertrains. Customers include large automotive manufacturers, such as BMW, VW, Daimler and Ford, as well as their suppliers.

The case study investigates a derogation agreement that the company concluded with IG Metall in 2019, following a similar agreement negotiated the previous year. The company had been experiencing liquidity problems and had undergone a change in ownership.

4.4.2 Prehistory and developments up to the derogation agreement

The origins of the derogation agreement date back to management's plans to expand the business some years ago. This involved developing a global strategy intended to strengthen its presence in important regions of the world by establishing small local operations or engineering bureaus. This was financed by bank loans that the company subsequently began to struggle to service, with the banks involved unwilling to ease the terms. Management's response was to shut down virtually the entire toolroom, which employed 50 staff at company headquarters, and retain only maintenance and production support. To this end, in early-2018 the works council was given a 100-page document on the company's plans in line with the requirement, under the Works Constitution Act, that works councils must be informed of any 'alteration' in the operation of an establishment 'which may entail substantial prejudice to the staff' or a large proportion of it, with a requirement to discuss the proposed change and come to an agreement

on ‘reconciling the interests’ of management and workforce, with the outcome embodied in a ‘social compensation plan’ (*Sozialplan*) to mitigate the social consequences of the measure, which has the status of a workplace agreement.

The works council immediately took two steps: first it informed IG Metall’s local administrative office and second it used its network to locate and engage legal advice. Talks then began with the company that revealed that there was a major liquidity problem that could not be dealt with by closing the tool shop alone and that further measures would be necessary that would include seeking a derogation from the industry agreement. The works council then set two key conditions for further talks: that there should be no redundancies and no lowering of the overall headcount and that it was not willing to engage in further negotiations with the managing director, who in its view had failed.

> *So we then said pretty quickly what is definitely not going to happen here is that we are talking about redundancies and at the same time discussing a derogation where we still give money. Either one or the other. We said from the beginning that we would not negotiate these changes with the manager who is currently sitting there because there were various problems. We just didn’t trust him. (Expert 5)*

The banks were also critical of the managing director and insisted that management had to be closely advised by consultants who would need to approve any decisions. Following further negotiations with the works council, the company withdrew its notification to close the toolroom. The focus then shifted to negotiating a derogation agreement for the company, with IG Metall now leading the negotiations. The first agreement was concluded in the summer of 2018 and agreed by employee representatives once the company had acceded to the union’s demand to dismiss the head of the toolroom who had advocated closing his own department.

This agreement was also the prerequisite for finding new owners for the company, which up until then had been owned by the founders’ family. They were now willing to sell their stake. An M&A process was initiated that culminated in the company being purchased by an investor that specialised in acquiring firms with ‘potential for operational improvement’. This secured the agreement of the employee side. The arrival of the new investor also came with fresh demands for derogations. This entailed renegotiating the existing derogation agreement, a process that had the express support of employee representatives who hoped that the new owners would not only improve the liquidity situation but also significantly strengthen management’s capacity for strategic thinking.

4.4.3 Negotiations

In contrast to the usual practice when negotiating derogations in the metalworking industry, the union did not conduct a quick check of the company’s economic situation as this was already well known from the negotiations of the previous year. The economic situation had also been thoroughly checked by the new investor. The position was therefore familiar to both sides. IG Metall was also continuously involved in the process and negotiations could begin once the North-Rhine Westphalia (NRW) district leadership had agreed.

The first task was to appoint a bargaining committee. This was a major step and with the aim of making it as broadly based as possible was to include works councillors and shop stewards from every department in the company, enabling information and concerns to flow in both

directions between the committee and individual departments. In the end, 20 members were appointed, corresponding to the number of departments in the company. The bargaining committee then appointed a five-person negotiating committee, headed by an experienced collective bargaining official from IG Metall's local administration. The company side was represented by the new management; in addition, there was a representative of the consulting firm that had been advising management since 2018 and a representative of the regional employers' association. Overall, the negotiating atmosphere and relations with management were described by employee representatives as being based on social partnership.

> *We have a good working relationship. Yes, you can also use that word which unfortunately has lost its meaning: social partnership. It also means we negotiate clearly and hard on the issues, but in the end for a common cause. (Expert 6)*

There were several key points in the negotiations that both parties insisted on. Management's main focus was, according to the expert of the works council, on the savings to be made and on the scope for reducing employee numbers.

> *And what was also very important to the negotiating partner was the number of employees. What possibilities did he have to downsize the company as well. This minimum number of employees that was set in the agreement. We negotiated incredibly hard on that side." (Expert 5)*

Job security was a 'red line' issue for the employee representatives and they were not prepared to agree to both concessions and headcount reductions. In addition, there were a number of other important concerns, such as whether monetary concessions would be repaid if the business situation improved (so-called 'Besserungsscheine' or improvement certificates, in effect a form of profit sharing) and the number of apprenticeships.

> *The other thing we have done in the new agreement is to determine the number of apprentices. We had not included that in the previous agreement. And that was important. This number of seven, which is in there, is one more than we had on average before. It was very important to us that this should continue. (Expert 5)*

A conflict arose over the question of a bonus payment for union members only; these bonus payments were intended here – as generally in the metalworking industry – to offset union dues, strengthen member loyalty and create incentives to join the union. For these reasons, employers' associations in the metal industry have decisively rejected any such arrangements, as was also the case at *Metal Forming*. IG Metall therefore then concluded an agreement on this only with the company and without the consent of the employers' association as an addendum to the derogation agreement.

> *Yes, and then member bonus – a calculation example: If I get €500 a year, then I also get part of my union dues back. By the way, that was also a huge issue in the negotiations because of course nobody wanted that, especially not the employers' association, and of course the new owner also tried to prevent that. But IG Metall in North Rhine-Westphalia has, I think since 2015 or 2012, said quite clearly that we will no longer negotiate a Pforzheim-style agreement without a member bonus. (Expert 5)*

On the other hand, both sides had a common interest in reducing the high management consultancy costs that the company had incurred in recent years. This point was also therefore dealt with in detail in the derogation agreement.

4.4.4 Key points of the agreement

The derogation agreement at *Metal Forming* contains the following key provisions, made up of a mixture of material concessions by employees and quid pro quos from the company on job security, investment commitments, repayments of foregone income, and information and monitoring rights:

- The term of the agreement is 3.5 years;
- Salaried staff outside the scope of the collective agreement (so-called 'AT employees') and managerial staff must make concessions comparable in scope to employees covered by the collective agreement, specifically quantified at more than 100 per cent of a monthly salary;
- Employees covered by the collective agreement are giving up Christmas and holiday pay, amounting in total to approximately one month's pay;
- Costs for external consultants to be limited to €50,000 per year;
- Dismissals of employees for economic reasons during the term of the collective agreement are only possible with the consent of IG Metall; in addition, the agreement specifies a minimum employment level, ranging between 375 (2019) and 360 (2022) employees;
- The new owner will not sell any fixed assets and commits to investments of €1.9 million (in 2020) and €2.25 million euros in each of the following years; the nature of the investments is to be discussed with the works council;
- If company profits exceed a 3 per cent return on sales, 50 per cent of the profits will be paid to employees for up to three years after the agreement expires;
- The steering committee (made up of the economic committee of the works council and management representatives) is informed monthly about business and financial developments;
- A monitoring committee including IG Metall will meet twice a year;
- Should the restructuring plan not be implemented or in the event of or non-compliance with the agreed commitments, the parties can terminate the agreement; six-monthly dates are defined for monitoring implementation. If the agreement is terminated, any remuneration foregone by employees must be refunded;
- The company shall ensure that it is bound by the collective agreement;
- A minimum number of seven apprenticeships per year is guaranteed;
- The company pays a bonus for trade union members of €500 per year.

4.4.5 Implementation of the agreement

According to employee representatives, the agreement has been implemented and monitored on a cooperative basis. The few conflicts that have emerged have turned on two issues. The first concerns the how much of their salary management should sacrifice as part of the overall plan. When two new managing directors were hired, they initially gave no details of this but then

said what they had agreed, with the employee side assuming that this merely represented a 'mark-up' they had negotiated when they were hired. The works council considered this a 'moral disaster'. The second point concerned the approval of consultancy costs, which regularly exceeded the limit specified in the agreement. This involved a company request for the works council to approve a higher budget, which it did eventually as, in its view, it made little sense to terminate the agreement as this would entail the loss of the new codetermination possibilities which the agreement provided

> *You see there, aha, the company spent €150,000. They didn't inform us in time. Then there are announcements. What other options do they have? Of course, the moment we see that it has been exceeded, we can terminate the collective agreement, either as IG Metall or as the works council or as the workforce. But with all the codetermination that we have created with the agreement, that would make no sense. (Expert 5)*

The meetings set up for monitoring the implementation of the agreement are attended by both the works council and two IG Metall representatives, one from the local union administration and one from the regional district level. From the company side, the representative of the employers' association that signed the agreement is also involved. Six-monthly monitoring is important for the works council because should disagreements occur, for example, about consultancy costs, it can point out that this will be discussed by the monitoring committee that also includes IG Metall representatives whose consent would be needed.

> *You can, I don't want to say threaten, but you can make it clear that okay, we don't agree, but it will be discussed in the monitoring meeting. That's where IG Metall attends. (Expert 5)*

4.4.6 Prospects for the derogation agreement

The employee representatives at *Metal Forming* see themselves in a good position following the agreement. In their view, the most important reason for this is that monthly pay has not been touched and that employee concessions only refer to additional payments. such as Christmas and holiday bonuses. This makes it much easier to rejoin the industry agreement. Nonetheless, at the time this research was conducted, management did not consider that the economic situation was sufficiently strong to allow thus, given that the company had not yet achieved the 3 per cent return required to trigger the profit-sharing arrangement.

> *So, I would be very surprised if they didn't just try to say: 'No, the economic situation doesn't allow that yet.' But I believe that we will be in a good position to do exactly the right thing at the right time and in the right place. (Expert 5)*

4.4.7 Interactions between the trade union and the works council

The works council's optimism is also based on the fact that union density has reached a high level, with 87 per cent of employees now members of IG Metall. This high level of unionisation also brings the advantage that it would not pay the company to leave the industry agreement as it would continue in force for union members with no expiry.

> *For anyone who was a member before, their collective agreements are frozen for them from the moment the employer leaves. And if they only have 13 per cent non-members, then it doesn't do them any good because it would be better for them to take the benefits of the agreement. (Expert 5)*

The high level of union organisation has also meant that there are now shop stewards at the company – quite untypical for a firm of this size – as well as the works council. A total of 20 employees are shop stewards: these work closely with the works council and some of them are members of the bargaining committee, allowing all departments to be represented on this.

Our interviewees also emphasised the close relationship between the works council and the union. Not only are all the members of the works council in the union, but there are also close ties between the works council and the local union administration. Works councillors regularly attend union training sessions and seek union advice if problems crop up. Each side values and respects the other. While IG Metall's local office praises the professionalism of the works council, the works council appreciates the competence and skills of the local union officials. This also applies in particular to the cooperation that occurred during negotiations on the derogation agreement. As the expert of the IG Metall commented:

> *Therefore, at Metal Forming we have to deal with works councils that are well trained and undergo further training. But of course it's good when you have well-organised and well-trained works councils […]. That's why the team we put together, also in connection with the collective bargaining committee, was fun – it's still fun and it's also a very good basis for the result of the negotiations. So that we […] can also push the employer, I don't want to say up against the wall, but we can also bring our arguments, our power as a works council and IG Metall through there, if I may say so. (Expert 6)*

4.4.8 Information, participation and organising

It was not only the relationship between the works council and the union that formed an important resource for the employee representatives at *Metal Forming* but also the fact that the workforce was also intensively involved in both sets of negotiations. This began when management announced its plan to close the toolroom. The works council immediately informed the shop stewards, who in turn disseminated the information to their departments. In addition, there was extensive information and discussion of the proposal at shopfloor meetings. Works councillors and shop stewards frequently went to departments to talk to workers in person and explain the risks posed to the whole workforce from closing the toolroom, helping strengthen employee unity.

> *There were workers' meetings, we called them directly... We basically took care of them day and night because there was a lot of fear. Some said: 'Well, I am not affected, I'm in another department'. And then you have to inform a lot, listen. If there really is a dismissal involving 50 people, then there will be a social selection procedure that means they don't just go in the toolroom, they can go everywhere. (Expert 5)*

The works council has also used digital media such as WhatsApp, with groups set up for each department and were able to reach, on their own estimate, more than 90 per cent of employees

in this way. This was not quite legal at the time, however, but in 2020 the works council was able to conclude an agreement with the company that officially allowed it to have social media contact with employees; the company agreed as it also enabled the works council to pass on information from management.

The works council also intensively informed the workforce during the negotiations on the derogations. In this way it was possible to set out the range of options and convince employees that the derogation could not be avoided but that the negotiators would try to get the best result possible within this framework, including the union bonus payment for members.

> *Which is not to say that there were no contrary opinions. There were heated discussions about whether it was all right. But because we always took them along, we said, 'Yes, in the end it's also about your money' […] But at the same time we wanted to make sure that the members got a bonus, some advantage. That is very, very important. And we could inform more about that. And take the people with us. Workers, non-members, workers as a whole and the management noticed that in the end. (Expert 5)*

One central instrument in information and participation were union members' meetings, in which non-members were also allowed to participate.

> *At some point you don't distinguish, at 87 per cent [union density], between members and non-members. Besides, you need the whole workforce. (Expert 5)*

This approach also enabled union membership to be raised still higher. Both the works council and the union attribute this to intensive communication, the negotiation of the union membership bonus and, importantly, the legal protection offered by membership – an important argument for joining the union in view of the threat of job cuts. Despite the absence of any explicit organising strategy, it was possible to convince another 50 or so workers, some 10 per cent of the workforce, to join the union.

> *So we didn't have a strategy. It was simply a matter of communication. Of course, we have been approaching the workers for years, you do your typical recruitment talks. It was relatively clear that if things had gone wrong with the toolroom, it would have been worth its weight in gold to have legal protection by the union... Yes, and then the membership bonus - an example. If I get €500 euros a year, then I have also got back part of my dues. (Expert 6)*

4.5 Case Study 2: The derogation agreement at *Lights*

4.5.1 The case: *Lights*

Lights is a medium-sized company with about 5,500 employees worldwide, of which around 1,500 work at the German headquarters. Of these, about 800 are blue-collar workers in production and 700 white-collar workers in administration, development and sales. The company produces luminaires and offers system solutions for lighting. It has both industrial and private customers and is represented by sales subsidiaries almost worldwide. The subject of the case study is a derogation agreement concluded with IG Metall in 2021.

4.5.2 Prehistory and developments up to the derogation agreement

The context and pre-history of the derogation agreement at *Lights* is connected with the transformation of the lighting industry. This includes the conversion to LED luminaires, a process addressed and finally completed in the 2000s even though management had been unable to make a decision on this over a long period and had hesitated for too long.

> *At that time we still had a management that thought that LED would not prevail. That was a huge mistake. Until 2006, we had hardly any products that included LED technology and had to catch up in no time. Of course, that was a huge effort. And we still notice that now. (Expert 7)*

This resulted in two specific challenges: on the one hand, a high volume of investment that delivered only weak returns over a sustained period; and on the other hand, an increased need for additional skills that the company found difficult to implement. This led to the conclusion of a company-wide workplace agreement on skills at the beginning of the 2010s that provided for investment in additional training for employees. There were two further aspects: the digitalisation of lighting management for the 'Smart Home', for which the company had to develop system solutions, and the digitalisation of production ('Industry 4.0').

Another important building block in the context of the derogation agreement at *Lights* was the participation of the works council and the company in a trade union project aimed at strengthening the competences of both employee representatives and employers in dealing with digitalisation. Within the framework of this project, entitled 'Work 2020', a so-called 'Agreement for the Future' was concluded between IG Metall and the company. This was not a collective agreement in its formal sense but rather a form of workplace agreement, concluded at company level, that focused on improvements in training opportunities for employees and included provisions on obligatory discussions on training between employees and supervisors and 'digital skills' surveys to be conducted, if desired, by the works council.

All these issues – skills, the digitalisation of products and processes – represented long-term challenges for the company. In late-2019, however, management approached the works council and IG Metall with a request to negotiate a derogation agreement. The works council and union then undertook a quick check of the company's situation and realised that management's wish was not without foundation. The IG Metall and the works council then invited the IG Metall members among the employees to a membership meeting to vote on whether or not negotiations should be initiated.

> *We called a general meeting, put it up for discussion in the general meeting and then got a mandate to negotiate in the general meeting. We already had a company bargaining committee and also a negotiating committee from negotiations that we had conducted before, and then we had them reconfirmed. After that we entered into negotiations with the employer. (Expert 7)*

However, the process was not entirely straightforward as this was not the first time that management had made such an approach. Negotiations for a derogation agreement had been held twice before – the last time only a year previously – and on both occasions without a result. In the previous year, negotiations had been broken off by the decision of union members at a membership meeting of IG Metall. This had been called by the collective bargaining committee

after negotiations had stalled and there was no longer any prospect of agreement as the company had insisted on extending weekly working hours without offering any concessions in return.

> *We then presented the interim results of the negotiations to a general meeting and asked the general meeting again whether we still had a mandate to negotiate under these conditions. In concrete terms, it looked like the company only wanted to push through its demands, simply a longer working week. We then had the negotiating mandate withdrawn by the general meeting and thus declared that the negotiation had broken down. (Expert 7)*

As a result, from the standpoint of the works council, the mood in the workplace was split between employees who welcomed a determined stance against management and those who would have favoured a derogation but who, according to the works council, were in the minority.

In any event, the breakdown of negotiations in the preceding dispute proved helpful in obtaining a mandate to start negotiations in the general meeting held to discuss fresh negotiations. IG Metall and the works council were able to argue that they would adopt a tough stance and would not hesitate to break off negotiations if necessary. This was an important consideration in the fact that a large majority of members then agreed to the new negotiations.

> *First and foremost, we said that when we enter into negotiations, we are open to results, and we also said 'You saw last time that if we don't get what we want, then we are quite capable of refusing. We won't let ourselves be forced into anything'. And that actually led to a very high level of agreement, at least on the question of whether we should enter into negotiations. I think we got the mandate to negotiate with well over 90 per cent support. (Expert 7)*

4.5.3 Negotiations

In order to begin negotiations, employee representatives had to form a collective bargaining committee. One hurdle in this was that the workforce at the company's headquarters was formally employed by three legally independent firms, one of which had only been covered by a company level collective bargaining agreement since 2015. The price for collective bargaining at this company at the time was that the union had agreed to a 40-hour working week instead of the 35 hours stipulated in the industry-level agreement. This led to employees in the different companies having differing interests, fuelled by a sense of injustice on the part of those on 40-hours.

For this reason, too, the union and the works council were anxious to make the bargaining committee as broad in composition as possible and to represent as many company affiliates, departments and employee groups as they could. In doing so, they were able to take over large sections of the bargaining committee from the previous negotiation, which they then expanded by adding a few more people.

> *In principle, we had the previously existing bargaining committee confirmed again. We supplemented it a bit because a few people had left. But again, we made sure that we had people from similar areas on the committee. So that we could really represent all companies and all areas of employment. (Expert 7)*

This body then appointed a smaller negotiating committee, led by IG Metall but also including six works councillors from different areas of the company.

Prior to the negotiations, the bargaining committee and the local union administration produced an employee questionnaire to gauge the workforce's priorities. This took the form of suggested negotiation topics and points, with employees able to indicate which they thought most important, plus free text boxes that could be filled in with topics of their choice. This survey was a great success, with a response rate of over 90 per cent. The free text boxes were also used in many cases.

> *Participation was well over 90 per cent and colleagues really engaged with the questionnaires. So not only did they tick the boxes, but the free text fields were also used in more than half of the returned questionnaires […] It was a hell of a lot of work, but what we then had as a result, we then regarded as our negotiation mandate. So, we processed the questionnaires and developed our negotiation mandate from that and then entered into negotiations with that. (Expert 7)*

The company side was represented by management and a representative of the regional employers' association. They entered the negotiations with two main demands: firstly, to extend weekly working time without pay compensation; and secondly, to postpone the industry-level collectively agreed pay increases and not implement a new element in the industry collective agreement, an annual one-off payment that can also be converted into additional time off (the 'T-Zug', see above). Of these, employee representatives were more willing to agree to longer working hours than to a reduction in pay. However, this was only on the condition that this would also promote the harmonisation of working time standards between the company's various parts.

Negotiations were not limited to these points, however, and were widened, not least due to the demands raised by the employee side. The emergence of the Covid-19 pandemic also meant that some negotiations had to be conducted virtually. Among the main points raised by employee representatives, apart from the central issue of job security, were the duration of the contract and investment commitments. On these, the employee side wanted a long-term agreement, exceeding five years, together with extensive investments to create a package that could be framed as an 'Agreement for the Future'.

The works council also demanded two important extensions of its scope for codetermination. The first was a demand to be involved in outsourcing decisions ('make-or-buy') earlier than before in order to be able to influence product development at the gestation stage as 'this is where the course is set for outsourcing' (Expert 7). Second, employee representatives requested the establishment of a joint task force with management to solve operational problems. This would enable previous positive experiences to be anchored in an institutional framework and therefore contribute to long-term improvements: one previous example was the reorganisation of a division whose performance had been lagging and for which the works council had developed and contributed its own proposals.

> *The employer is always happy about the participation of the works councils when it benefits the employer, but the fact that we can have a say in where the task force is to be used was actually a major sticking point with the question: 'Do you want to become the entrepreneurs here?' But in the end we were able to get it through*

that something like this is discussed within the framework of the economic committee meetings that take place twelve times a year. (Expert 7)

In addition, there were demands for an increase in the apprenticeship quota, an extension of part-time work for older workers, the conversion of temporary workers' contracts into unlimited contracts, a guarantee that the company would become full members of the employers' association and the payment of a bonus for union members. This latter payment became a bone of contention between the negotiating parties, especially given the resistance of the representative from the employers' association. Although employee representatives realised that their chances of winning this were slim, it offered helpful leverage to push through other demands.

I think that was the worst thing for him. Of course, he grinned a lot at our demand to become a full member of the employers' association, he thought that was nice. But he thought the membership bonus was the work of the devil, he didn't want that at all. But that didn't stop us from keeping it as an ace up our sleeve until the very end although it was clear from the start that it would be difficult to implement. (Expert 7)

4.5.4 Key points of the agreement

The derogation agreement at *Lights* contains the following key provisions, representing a mixture of material concessions on the part of the employees and some quid pro quos from the employer:

- The term of the agreement is five years;
- A convergence of working times by a *reduction* in weekly working hours in the sales subsidiary to 37.5 hours and an *increase* in weekly working hours for other employees to 37.5 hours from the 35 hours previously worked; this to last for two years, followed by 37 hours for another two years and then to 35 hours for all employees for the final year of the agreement;
- The postponement of agreed industry-level pay increases up to a total savings of €4.4 million, after which industry increases will apply again;
- Company investment commitments of €60 million for the operation in question;
- Monitoring of the investments by the trade union and the works council, with the possibility of a sanction for any shortfall in the form that the company has to pay back the additional working times given by the employees;
- A commitment by the company to remain a member of the employers' association;
- Commitments by the company to hold three general meetings of shop stewards;
- A financial contribution from any senior managers and employees paid outside and above collectively agreed salary levels;
- An apprentice quota of seven per cent and a guarantee that apprenticeships will be retained at that level;
- An increase in the quota of employees permitted to enter the phased early retirement scheme (*Altersteilzeit*);

- Two-thirds of temporary workers to be taken on to open-ended contracts;
- No compulsory redundancies;
- A guarantee that the agreed supplementary payment in the industry agreement (the 'T-Zug') will apply, but with some of the additional time-off to be used for further training;
- Works council to participate in make-or-buy decisions at an early stage in product development;
- The establishment of a task force consisting of management and the works council to jointly work out solutions for any operational problems.

4.5.5 Implementation of the agreement

Our interviewees indicated that the process for monitoring investments had run smoothly so far. From the works council's point of view, the biggest challenge in implementing the agreement has been exercising the extended codetermination rights over make-or-buy decisions and the establishment of the task force. The derogation agreement provides for the conclusion of a workplace agreement on these issues. This is seen as a major challenge from the works council's point of view as there has been no previous experience of this.

> *I read through the derogation agreement and we wrote in the topics of make-or-buy and the formation of a task force 'the parties shall conclude a works agreement on this'. And I thought, what the hell were you thinking, that we wanted to have that. Because I had no idea at all how to conclude such a works agreement and what it should contain. So I do have some idea but this is really going to be a mammoth undertaking (Expert 7)*

In this situation it was helpful that IG Metall asked the works council if it would like to participate in a trade union project; this was a continuation of the 'Work 2020' project aimed at increasing works councils' capacity to deal with digitalisation and its consequences at the workplace. IG Metall and the *Lights* works council will now focus on developing a workplace agreement to implement that aspect of the derogation package.

> *Fortunately, we're now involved once again in an IG Metall project and are getting support from IG Metall in drafting this works agreement. I got a call from IG Metall one day when I was just about to start thinking up something that could be included in it. The colleague told me that we had been chosen to take part in this project and whether I could think of something where we could use support. Yes! I immediately thought of something. (Expert 7)*

4.5.6 Interactions between the trade union and the works council

The *Lights* works council has benefited greatly from the close cooperation it has enjoyed with IG Metall in implementing the agreement. One important factor in this is the importance of the company to the local union administration; *Lights* is the second largest company in the area and the chairman of the works council sits on the executive board of the local union office.

> *The connection is very strong anyway. It is also a two-way relationship. Lights is the second largest company in the union office and at the same time I am the second*

authorised representative of the office, so the connection is very strong anyway". (Expert 7)

This form of networking between the union and the works councils at large companies has existed for a long time. However, it has been recently complemented by the involvement of works councils in union projects to support and activate works councils that go beyond the well-rehearsed patterns of union support on specific enquiries and problems. These projects involve a more fundamental approach to the capacity of works councils to act and exercise their codetermination rights effectively against the background of new challenges such as globalisation and digitalisation. The North Rhine-Westphalia district of IG Metall was a pioneer in the development of such projects, beginning in 2005 with its 'Better not Cheaper' campaign ('Besser statt billiger') that was aimed at supporting works councils in developing alternatives to outsourcing. The *Lights* works council was already involved in this project and this continued with the 'Work 2020' project.

From the works council's point of view, this development was based on a mutual coincidence of interests. Whereas the union was looking for works councils to participate in its projects and develop the best possible codetermination practice that could be disseminated elsewhere, the *Lights* works council had repeatedly called for greater support.

The original initiative also comes from the works council. And it's been around for a long time. (Expert 7)

4.5.7 Information, participation and organising

Employee access to information played a major role at the negotiations at *Lights*, although it was severely hampered by the Covid-19 pandemic, which precluded holding meetings or face-to-face forms of direct communication. The union and works council developed a two-pronged communication strategy to deal with this. On the one hand, they have used digital communication channels to disseminate information on the progress of negotiations but have not made this the main channel as production workers do not have access to digital information at the workplace; and where there are computers in the production departments, they only run business or production-related programmes, not social media software. Employee representatives therefore placed a lot of emphasis on providing information via leaflets and – separately for IG Metall members – letters to members.

So, we have quite consciously only done the communication digitally as an accompaniment. In fact, we have mainly decided to use paper, because at Lights the colleagues in production feel a bit left behind when it comes to digitalisation. We do have a social intranet. But only the colleagues in the administration area benefit from it, i.e. those who have a computer at their workplace […] But well, for the reason that colleagues feel very disconnected, we have deliberately communicated by leaflet or by member letters. (Expert 7)

The pandemic also meant that it was not possible to hold a general meeting where members could vote on the outcome of the negotiations. Therefore, the works council and IG Metall organised a postal vote. This had the disadvantage that union members could not meet directly and the agreement could not be explained in detail. However, one upside was that significantly

more union members took part in the vote than would have been the case at a face-to-face meeting.

> *And then, in the end, we also voted on the outcome of the negotiations by postal ballot. And we actually had a very high turnout, much higher than usual at a general meeting. One would be satisfied if just over 10 per cent took part. So, we had a turnout of just over 70 per cent in this postal vote. (Expert 7).*

In the end, according to the works council, the members voted in favour of the agreement by a clear majority, which the works council believed was mainly due to the fact that the union and the works council were successful in winning many of their own demands in return for the extension of working hours.

> *Well, in principle I am a great friend of the 35-hour week and in principle I think deviations from the collective agreement are rubbish, but I think we got a lot for it and it was worth it. (Expert 7)*

The union and the works council also made great efforts to create incentives for employees to join the union. First of all, they provided comprehensive information and secondly only union members had a right to vote on the outcome of the negotiations. Both of these are typical incentives used by IG Metall in negotiations on derogations. However, at *Lights* a further instrument was added. In the questionnaire sent out at the beginning of negotiations to ask employees about their priorities, employee representatives also asked about union membership and enclosed a piece of paper asking if employees would like to have a say in the negotiations. As a result, the union was able to recruit up to 80 new members.

> *In the survey phase, we added a slip of paper to each questionnaire: 'Are you a member of IG Metall? Yes, No. And 'Would you like to have a say?' Yes, and then the colleagues actually gave their names and we were able to get a lot of colleagues into IG Metall through this questionnaire campaign, but also afterwards through the leaflet campaign. Everyone was allowed to read the leaflets, only the members were allowed to read the letters. I estimate that we gained 70 to 80 new members through this. (Expert 7)*

Trade union density in the company was thus increased by about 5 per cent and is now some 70 per cent according to the works council.

5 Collective bargaining and decentralisation in the German retail sector

Interviews: Expert 8 and 9: ver.di; Expert 10: Employers' Association; Expert 11: Works Council Case Fashion.

5.1 The German retail sector

The retail sector is one of the biggest economic branches in Germany in terms of employment with some 1.3 million employees in 2020 (HDE, 2021a). Prior to Covid-19, employment in the retail sector had been growing and remained largely stable during the pandemic.

Retailing in Germany is characterised by a high share of part-time work and female employment. The share of part time employees increased from around 54 per cent in 2005 to

nearly 63 per cent by 2020 (HDE, 2021a; Haipeter and Bromberg, 2015). Of those employed in retail, 37 percent are currently full-time and another 37 percent part-time, all of whom are in conventional insurable employment (HDE, 2021a). In addition, 26 percent of employees in retail work on the basis of special, and marginal, part-time contracts known as 'mini jobs' (HDE, 2021a). 'Mini jobs' are employment contracts that have an upper pay limit of €450 per month, are tax-free and largely free of social insurance contributions for employees;[4] employers pay a flat-rate tax and social insurance contribution. Over time there has been a steady decline in so-called 'standard employment relationships' in the sector. The retail sector has one of the highest rates of part-time work in Germany (Schulten and Bispinck, 2017). In addition, 67 percent of all employees are female. From the trade union's point of view, this is associated with specific challenges (see also Voss-Dahm, 2009).

> *Another issue that we have in the retail sector is that collective agreements still contain regulations that are, I would say, below the median of the average wage level and that we still have wage groups that have to be judged as low paid. That means that we have to achieve a significant increase in the lower wage groups here. Formally, our basic wage group is the saleswoman in the last year of her career, where the majority of employees are grouped. This is currently €2,701. In comparison to other industries, this is supposedly quite respectable. However, two things come together in the retail sector: on the one hand, most of our employees are women; and on the other hand, most are part-time or marginally employed, meaning that we hardly have any living wages and salaries in the retail sector. (Expert 8)*

The retail sector is mainly characterised by small and medium-sized enterprises (SMEs), with 94 percent of retail firms employing fewer than 20 employees. The largest group (46 per cent) are companies with one or two employees. Only 6 per cent of retail enterprises have 20 or more employees (HDE, 2021a).

5.2 Collective bargaining and 'wild' decentralisation in the German retail sector

Collective bargaining in the German retail sector takes place at industry level between the recognised collective bargaining parties, namely the service sector union *ver.di* (affiliated to the main German Trade Union Confederation, the DGB) and employers' associations affiliated to the national umbrella organisation *Handelsverband Deutschland (HDE)*. Collective agreements are concluded at regional level by the regional branches of ver.di and the corresponding regional employers' associations. For the most part, regions correspond to the German federal states.

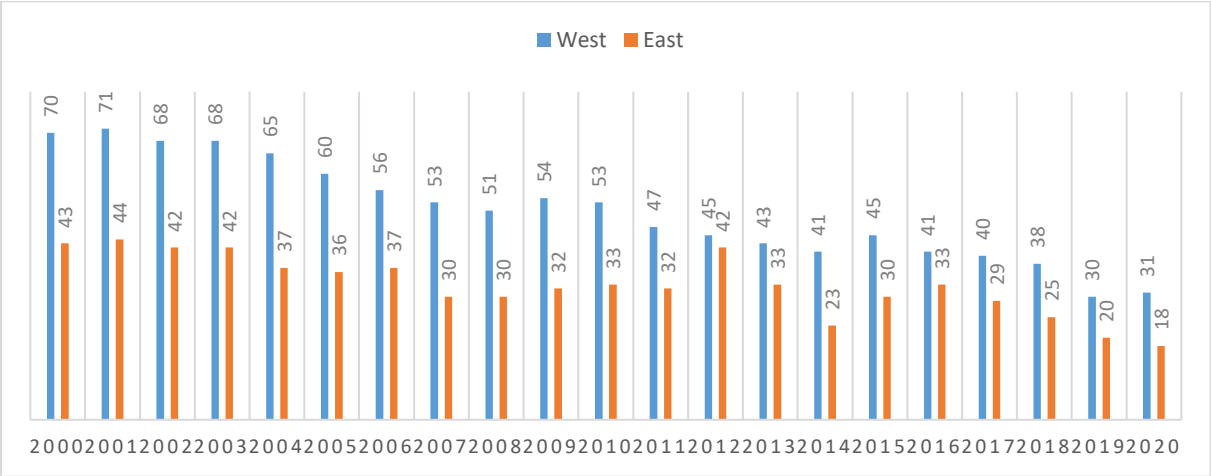
As in metalworking, collective agreements in the retail sector cover trade union members and firms that have joined an employers' association: it is virtually universal that employers extend the terms of a collective agreement to non-union members. Membership in employers' associations is purely voluntary. There are some features that are specific to individual regional agreements. Although the first agreement reached in a bargaining round serves as a model for subsequent negotiations ('pilot agreement'), considerable differences exist as the bargaining

[4] Employees do not contribute to health or unemployment insurance and are not are not entitled to benefits. They can make contributions to the statutory pension scheme.

regions in the sector have traditionally had quite a high level of autonomy (Haipeter and Bromberg, 2015).

Figure 14 Collective bargaining coverage for the German retail sector from 2000 to 2020

(by employees)



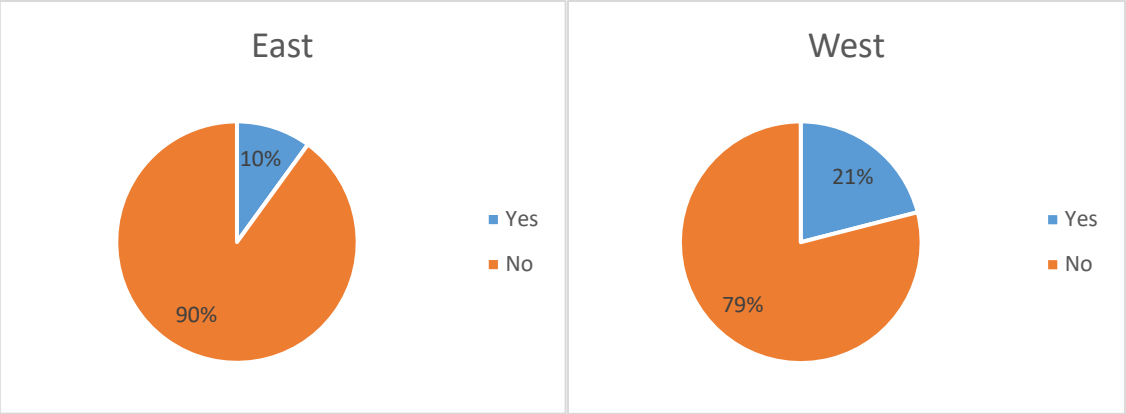
Source: IAB Establishment Panel authors' illustration

Collective bargaining coverage has been declining for many years. As Figure 14 shows, in 2020 only 31 per cent of employees in West Germany and 18 per cent in the East worked in an establishment covered by a collective agreement, with less than half of all employees overall in retail currently covered by a collective agreement (Ellguth and Kohaut, 2021; see also HDE 2021b). Collective bargaining coverage by establishment is around 21 per cent in West Germany and 10 per cent in the East (Ellguth and Kohaut, 2021): that is, 80-90 percent of all establishments in retail are currently outside the scope of collective bargaining (see Figure 15).

The retail sector is therefore characterised by a significantly lower level of collective bargaining coverage than the German economy as a whole (see Section 2 above) (Ellguth and Kohaut, 2021). In 2020, for the first time in many years, however, there has been a slight stabilisation, albeit at a rather low level. This is mainly driven by a slight increase in West Germany (31 per cent in 2020 compared to 30 per cent in 2019), whereas the downward trend persists in East Germany. It remains to be seen whether this is an exception or whether this trend will continue.

Figure 15: Collective bargaining coverage for the German retail sector, 2020

(by establishments)



Source: IAB Establishment Panel authors' illustration,

The situation has changed dramatically since the early-2000s. In 2000, 70 per cent of all employees in the retail sector in West Germany and 40 per cent in East Germany worked in an establishment covered by a collective agreement (see Figure 14). The main factor behind this downward trend has been the discontinuation of extension procedures in the sector.

Up until the late-1990s, collective bargaining in retail was characterised by the fact that the regional collective agreements had been declared generally binding by the Federal Ministry of Labour and therefore applicable to all employments in the industry. One statutory pre-condition for this was a certain level of pre-existing bargaining coverage together with agreement on the part of the negotiating parties that the extension should take place. This was mainly based on the shared view that pay and other working conditions should be taken out of inter-firm competition and that fair conditions should exist across the sector. Collective agreements defined general minimum standards for all employees irrespective of whether their employer was a member of an employers' associations.

By the mid-1990s, however, consensus on this had broken down, mainly due to a reappraisal by some members of the employers' association who were severely critical of the requirements stipulated by the regional agreements. The employers have refused to apply for an extension order since 1999. This development was accompanied by an organisational split on the employers' side. Some employers, led by the department store Karstadt, created a collective bargaining association independent of the HDE, the *Bundesarbeitsgemeinschaft der Mittel- und Großbetriebe des Einzelhandels* (BAG).[5] This association then created scope for an 'opt-out' form of membership (*OT – ohne Tarifbindung*) as noted above for metalworking in Section 4, followed shortly after by the HDE. This strategy aimed to reduce collective bargaining coverage and consequently remove the precondition for declaring collective bargaining agreements generally binding, an approach at complete odds to the strategy that had prevailed up until then. *Peek and Cloppenburg*, a large German clothing retailer, was the first company to adopt this new status and more companies followed, with many of the larger retailers withdrawing from collective bargaining in recent years. Ending the extension of collective agreements and introducing scope for association membership without collective bargaining coverage – triggering a sharp decline in organisational density at the employers' associations that applied collective bargaining – has led to an enormous shrinkage of collective bargaining coverage in

[5] In 2009, the BAG was dissolved due to financial problems that were rooted in the crisis at the Karstadt group.

the German retail sector. From the point of view of a representative of one of the regional employers' association, this development is linked to the decreasing attractiveness of collective agreements.

> *For about 20 years now we have membership with or without collective bargaining agreements. That is something that ver.di thinks is terrible, which is why they always postulate that the collective agreements should be generally binding, but this also follows the idea that a regime whose acceptance is diminishing should become mandatory for everyone. But we say it can only be mandatory if it gains more acceptance. In principle, this is the dispute that we have been involved in for many years. We have also made it clear that if we did not offer membership without collective bargaining agreements, we would no longer exist as associations. (Expert 10)*

Moreover, in food retail in particular, which is dominated by rather large firms, smaller organisational entities have been created that operate as independent merchants and are not bound by collective agreements. Transitioning to company-level bargaining seems to be rather rare; in most cases, these employers are not covered by branch-level agreements and indeed do not negotiate any collective agreements at all, in part because ver.di often lacks the power to force them into company-level negotiations once they have left the employers' association. A substantial proportion of companies (48 per cent) state that they use the standards set by industry agreements as a benchmark for their own policies (Ellguth and Kohaut, 2021), although this does not necessarily mean that they offer the same pay levels and conditions as companies formally within the scope of industry bargaining.

The decline in collective bargaining coverage due to companies leaving or staying away from employers' associations is the main driving force of *wild or uncontrolled decentralisation* (Bispinck, 2004) in the German retail sector. This process has been triggered mainly by the creation of opt-out associations by the employers' associations. Why do employers avoid or opt out of collective bargaining? According to the expert interviews with representatives of both the employers' association and ver.di, many companies have joined opt-out organisations because they want to deviate from specific regulations and standards stipulated in the collective agreements. Typically, this includes working time and the lump-sum payments usually made twice each year to employees covered by collective agreements.

> *Working time flexibility is a crucial point, pay level never. We are in a competition, so mostly it is working time flexibility and then it is pay models that include performance-oriented components because our collective agreement does not include any bonus system or anything like that. […] It's always the issue of working time models, the issue of pay structures, these are actually the trigger issues. (Expert 10)*

A similar assessment can be found on the trade union side.

> *It is usually the case that the companies more or less say goodbye to Christmas and holiday payments, so, that there are no longer any additional special payments. Then also working time. In the retail sector we did not agree on a 40-hour-week, but this is quite often implemented, a 40-hour week and this, of course, also affects*

earnings. And, of course, some get rid of the premia, they then no longer want to pay those. (Expert 9)

In the department stores and in city centre areas, we've seen that they were concerned about the 40-hour week and on saving on bonuses and overtime. […] There are variations. Extra payments are not paid, for instance Christmas and holiday bonuses are not paid. Or working hours are expanded and, above all, the premia that we have agreed for late opening hours or for night work are not adhered to. (Expert 8)

Besides these issues, the grading structure has long been criticised by the collective bargaining parties for being outmoded (see also Kädtler and Kalkowski, 2008). For the employers' associations, the structure does not adequately reflect the changes the sector has passed through in recent decades. This was also one of the reasons why the employers' associations wanted to end the practice of extension in the late 1990s.

We have a great need for modernisation, our collective agreements were developed in principle in the 1950s and the classification criteria are outdated. Just thinking about scanner cash registers, but also e-commerce clerks, so the weightings have shifted and therefore we would like to modernise our collective agreements in the sense that we say there are requirements and performance criteria and some kind of points system and then group these together. We would then have somewhat more accurate examples, also in the sense of fairness. […] Quite simply …. the issue has been stalled for many, many years. (Expert 10)

Likewise, ver.di sees also a need to modernise the existing system:

We are still working on the issue of new pay structures. From our point of view, it can't be in the interest of the employees that 70 percent of all employees are in one pay group. There is no longer any differentiation. (Expert 8)

The discussion about grading mainly turns on the criteria used to evaluate skills levels and job demands. This concerns for example, the grading of cashiers and shelf fillers, which – on a narrow approach – could lead to these activities being classified as unskilled labour. The union is then confronted with the risk that this would lower terms and conditions for these employees, who make up most of its members. Although both actors see the need to modernise the system, as yet they have not been able to reach a consensus, despite several rounds of negotiations. One sticking point is the possibility that some employees could be downgraded, as a trade union expert noted.

Some of the groups are currently still somewhat better paid, cashier jobs and things like that. We are concerned that they are simply becoming cheaper because the opinion is that this is not such a high-quality job anymore. So, that's quite clear and we're also discussing this with the employer […] Of course we also see that our collective agreement, well that's an old lady, so it's already quite old and of course there is a need for revision. We don't deny that at all. But in any case, it must be an improvement for our colleagues or a level playing field, so that no one is worse off and we can't open the floodgates so that it becomes a cheap collective

agreement. That's why it's very difficult. […] But we are very hopeful that we will get something going. (Expert 9)

However, from the standpoint of the employers' association, this is one significant reason why companies' are exiting the collective agreement and why new market participants are discouraged from applying it.

Yes, they are oriented to this and also pay the salaries, they also participate in the increase percentages accordingly, but they do not want to be completely regulated. We ourselves also find this regrettable, but the suit, which fits badly and is ill-fitting, is being increasingly rejected. (Expert 10)

5.3 Derogations form collective bargaining agreements: the marginal significance of controlled decentralisation

Derogations from industry-level collective agreements of the type seen in the metalworking branch are something of a rarity in the German retail sector. There are few examples and these are mostly confined to instances of corporate restructuring with a small number of hardship provisions for small enterprises in East Germany (Schulten and Bispinck, 2017). These agreements have been mainly aimed at preserving jobs, and have applied only in very specific situations and on a temporary basis.

We have such agreements. When we make so-called 'agreements for the future' or reorganisation agreements, then the rule for us is: at the end of the day, the regional collective agreement must be in place again because otherwise it would lead to the fact that if we do something in one company other companies would follow and this would lead to the situation that we would undermine our own collective agreement. (Expert 8)

Such negotiations are always led by the trade union, not the workplace actors. However, should such a reorganisation agreement be concluded – as happened at one large department store owner – the process will include information meetings with works councils and town hall meetings with employees and trade union members, with the latter having the final say on the negotiating outcome.

In the process at [company name], we regularly bring the works councils together from all stores, inform them about it, and then, in parallel, there is a survey to all members and they also a vote at the end. That means they have to vote for it, ultimately the trade union members decide whether such a collective agreement result is accepted or not. (Expert 8)

We always try to work with all the parties that are responsible for employee rights, that is the works council, the central works council, we always try to ensure that they are also represented in the collective bargaining commissions and that there is close cooperation and that we are not played off against each other. (Expert 9)

In addition, any collective agreement that deviates from an industry-level agreement must be formally approved by ver.di's federal executive eommittee, which has a veto right. Derogations

are consequently strictly monitored and controlled by the union's headquarters (see also Wiedemuth, 2006). However, there are no general opening clauses in collective agreements comparable to those found in the metalworking industry. Overall, ver.di has been quite reluctant to accept derogations or deviations from the standards stipulated in regional industry-level agreements.

> *Of course, the employers try this every now and then but our collective bargaining committees do not accept that because we say if we allow an opening clause then the door is wide open. (Expert 9)*

This difference between ver.di's approach and the strategy adopted in manufacturing can be explained by the different circumstances of these sectors. In most service sectors, trade unions are traditionally much less firmly anchored at company level than those in manufacturing industry. This relative weakness, and the associated lower trade union organisational capacities at local level, means that opening up collective agreements poses a much greater risk as any local bargaining, that could ultimately entail an industrial dispute, requires a minimal level of organisational capacity and a readiness to engage in conflict.

> *But it always requires that we have workforces that are willing to commit to it. And that is, of course, incredibly difficult to organise in the retail sector with such a high number of chain-store retailers even if works councils are convinced of this. The works councils are put under a lot of stress when people are worried that the store will be closed and that people will lose their jobs. (Expert 8)*

Ver.di has been able to negotiate 'recognition agreements' (*Anerkennungstarifverträge*) in a few companies, however, under which a firm that is not a member of an employers' association agrees to comply with sector-wide standards. These agreements can be a first step towards bringing a company that was not previously covered by a collective bargaining into the scope of the branch-level agreement. In this sense, such agreements represent a specific form of company-based collective bargaining and will often be accompanied by temporary derogations (see 5.4 'The "recognition agreement" at *Fashion*' below).

Although ver.di has been reluctant to accept any form of derogation or differentiated provisions, employers' associations continue to pursue them nevertheless.

> *Of course, this [a demand for differentiation and deviation] is a demand, demanded again and again, yes, the sub-sectors are different and one should, and so on. But we have always resisted this. There is an industry-wide collective agreement and we want it to be strengthened and to become even stronger, and then we can't ruin it ourselves and damage it ourselves, so we pretty much agreed that we won't do that. And that's why we won't be agreeing any differentiations. (Expert 8)*

During the most recent bargaining round in 2021, the employers, once again, requested a differentiated approach, depending on whether a company had been affected by the Covid-19 crisis. This was not aimed at introducing decentralised company bargaining but rather granting employers some latitude in the timing of pay increases.

> *We have 30 percent of companies that have come through the pandemic quite well, in some cases very well, some have had high sales increases - but 70 percent*

had a drop in sales […]. That's why we're saying we need a differentiated solution, where we say we'll pay everyone the same in the end, but we'll give those who have come through the pandemic worse a bit more time to do so. (Expert 10)

The employers did not succeed in this , however, and no such provisions featured in the autumn 2021 pilot regional settlement or any other regional agreements.

5.4 Case Study 3: The 'recognition agreement' at *Fashion*

5.4.1 The case: *Fashion*

Fashion is a clothing discounter notable for its low prices. The company is part of an international retail group and has been expanding rapidly in Europe since the mid-2000s. In contrast to other companies in the sector, *Fashion* concentrates entirely on bricks-and-mortar sales and does not currently have an online business. It has 27 stores in Germany with around 7,000 employees. The subject of the case study is a so-called 'recognition agreement' (*Anerkennungstarifvertrag*) that the company concluded with ver.di in 2015. This was preceded by negotiations that originated in the successful unionisation of workers in one of the stores, leading to a collective bargaining campaign for the whole company.

5.4.2 Prehistory and developments up to the 'recognition agreement'

The case study store, which opened in 2009, was largely 'union-free' and not covered by any of the institutions of the German dual system; that is, there was no works council and the company was not subject to collective bargaining. This situation changed in 2013 when some employees started an initiative to set up a works council and requested support from the regional branch of ver.di. Finally, a group of active employees organised themselves to promote and prepare for works council elections. This resulted in the establishment of a works council and a 90 per cent turn out in the elections, with the majority of its members belonging to ver.di's electoral list.

The newly-established works council quickly developed into an active source of union organising and an important actor in membership recruitment. For instance, the chair of the works council came in contact with many employees as a result of their new role, providing an opportunity to recruit new members. Within just two years, 70 per cent of the workforce were union members. Later on a shop stewards' committee was set up to ease the works councillors' workload. Overall, this was quite a remarkable achievement, given that no other store in that region had any such body.

At that time, average wages at *Fashion* were significantly lower than those at retailers subject to the collective agreement, mainly due to differences in the premia paid for evening and night work. In fact, *Fashion* did not pay any supplements for evening work, compared with the 20 per cent premium for work after 6.30 p.m. under the collective agreement, and supplements for night work were also lower. Moreover, employees at *Fashion* had shorter annual holidays (five weeks instead of six) and no supplementary holiday bonus. It was also practically impossible for employees to move into higher wage grades, either through acquiring skills or many years

of experience, as there was no procedure for this. These conditions were a source of considerable and growing contention.

> *At some point the subject of salaries came up. We had a rigid wage scheme […] and then there was an increase of 2 per cent or 1 per cent if business went well but it was totally discretionary. And if things went really well, there was sometimes a thirteenth salary. But you always had to hope for the employer's willingness. (Expert 11)*

5.4.3 Negotiations and outcome

The gap between pay and conditions at *Fashion* and retailers covered by the collective agreement was then used by the works council and trade union to campaign for collective bargaining at the company. Having set out employees' experiences of injustice, ver.di called on the employer to engage in collective bargaining over a 'recognition agreement', a strategy that was significantly influenced by the high union membership at that specific store. This is seen by the union as a prerequisite for building that minimum level of strength and capacity needed to begin negotiations.

> *So we don't just set off when employees knock on our door and say 'Oh, we'd like to have a collective agreement' […] that always has something to do with membership figures, with organisation, we try to set up activist circles, company groups, we clarify with colleagues how many members would be needed? […] There has to be a certain number of members already there to give us some power, because collective agreements just sketched out on a drawing board are usually not the best collective agreements. It must always be clear that the workforce is willing and able to 'take to the streets' and fight for themselves. (Expert 9)*

Negotiations were then accompanied by several strikes and protest actions.

> *We'd organise an active lunch break, putting on our union strike tabards and so on, and then it all went relatively smoothly. We were one of the first stores to go on strike. Later, some other stores joined in. It was the three big stores who ultimately made sure that [Fashion] got brought under a collective agreement. And at that time we still had a different management and the [home country] is really afraid of negative press. And we really took advantage of that, we really used all the channels to build up pressure. We had muffins baked with our wage claim on them when the board of directors was in our store. (Expert 11)*

In the end, ver.di and *Fashion* agreed on a 'recognition agreement' under which the company will adhere to the standards stipulated in the branch-level agreement after a transition period.

> *Exactly, that [reaching the level of the industry agreement] is always the goal but I have to admit that immediate adoption might not be suitable, financially in every case. … there is often a transition period, the collective agreements then state that within two or three years the standards will apply unconditionally, usually it is done step-by-step. That is the way but we don't apply any other derogations because that would be to damage ourselves. (Expert 9).*

The agreement led to significant improvements in pay and conditions. As a result, hourly pay for many employees has risen from around €9 to €14, with a large proportion of employees benefiting from this increase.

6 Conclusions

This report has focused on recent trends and debates on decentralisation in collective bargaining in Germany. This has shown that decentralisation is now a core feature of the German 'dual system', with its two pillars of free collective bargaining and statutory workplace codetermination. Three forms of decentralisation have been identified: firstly, uncontrolled or '*wild' decentralisation* through the erosion of its institutional foundations and the gradual shrinkage of its scope; secondly, *decentralisation between the levels of the dual system*, in which regulatory competence is shifted from the actors at industry level (that is, regulation by means of formal collective agreements, *Tarifverträge*) to actors at company and workplace level (with regulation through 'workplace agreements' – *Betriebsvereinbarungen*); and finally, *decentralisation within the collective bargaining system* through agreed derogations from industry-level collective agreements that allow for deviations from these agreement at the company level.

Our analysis revealed considerable differences between the metalworking industry and the retail sector. While the decentralisation of collective bargaining in the German metalworking industry is characterised by an interplay between *wild* and *organised decentralisation*, with both forms of *controlled decentralisation (localisation to the workplace and agreed derogations)*, playing a crucial role, decentralisation in the retail sector has mainly taken the form of *wild and uncontrolled decentralisation*.

In the retail sector, collective bargaining coverage has been shrinking for years due to more and more companies leaving the employers' association or adopting a membership status that exempts them from collective bargaining compliance. Overall, the retail sector has one of the lowest collective bargaining coverage rates of all economic branches in Germany (Ellguth and Kohaut, 2021), with less than half of employees and only 18 per cent of the establishments currently covered by collective agreement. In contrast to the metalworking industry, *controlled decentralisation* by agreement between the parties to collective bargaining is a rarity. Rather than making use of agreed opening clauses in collective agreements, employers in the German retail sector have departed from the terms of branch-level agreements by the simple expedient of opting out of collective bargaining altogether. In that respect, decentralisation in the German retail sector mainly takes the form of *wild or disorganised decentralisation.* One exception to this are 'recognition agreements' negotiated between the trade union and an individual employer that often allow derogations for a specified transition period. These agreements can be regarded as a first step towards bringing companies (back) into the scope of branch-level collective agreements. They are rare, however, and require a minimum level of organisational capacity and a willingness to engage in conflict on the part of workforces at company level, as our case study underlined.

Within retail, the industry-level negotiating parties have adopted very different strategies for addressing this situation and revitalising their organisational status. While ver.di has campaigned to reinstate the statutory extension of collective agreements to the whole sector, including calling on government to simplify the criteria and procedure for declaring an

agreement generally binding, the employers' association HDE has set its face against any such efforts and continues to offer employers 'opt-out' membership. Overall, it remains to be seen whether the fall in collective bargaining coverage and wild decentralisation will continue or whether a stabilisation – for instance by agreeing on a new grading structure – can be achieved.

In contrast to the retail sector, decentralisation of collective bargaining in the German metalworking industry is characterised by a complex interplay between wild and organised decentralisation. On the one hand, industry-level collective bargaining coverage has been shrinking as a result of *wild decentralisation* due to companies' leaving the employers' associations, shifting to the 'opt-out ('OT') sections of the associations, or, in the case of new companies, not joining the associations at all. Growing wild decentralisation has also led to a decrease in the scope for organised decentralisation, which is based on the coexistence of industry collective bargaining and works councils' codetermination. At the same time, organised decentralisation is characterised by the rapid growth of its two elements: localisation of regulatory competence to the workplace (*Verbetrieblichung*), entailing a shift in responsibilities from the formal collective bargaining arena to works councils and codetermination; and decentralisation within the collective bargaining system by strengthening company bargaining in the form of agreed derogations that are enshrined in company-level collective agreements.

Works councils are the core actors in both of these processes. Given that localisation to the workplace means a shift in competences to works councils in terms of both topics and responsibilities, works councils must rise to the challenge of negotiating, regulating and monitoring what the collective bargaining actors have empowered them to do, as specified in the opening clauses in the industry-level agreements. This development began in the 1980s with the opening clauses that delegated the regulation of flexible working time to works councils. The collective bargaining framework in this area – and with it the scope assigned to works councils – was subsequently widened to include the operation of long-term working-time accounts. In addition, works councils have also been given responsibility for dealing with quota regulations that allow contractual working hours to be extended. Collective working-time reductions introduced to safeguard employment also have to be implemented at workplace level as do agreed provisions on a framework for home- and teleworking .

In case of *decentralisation within the collective bargaining system via derogations from branch-level agreements*, the trade union is the most important negotiating actor at workplace or company level. Under the scope for opening clauses agreed in the Pforzheim Accord, local derogations are permitted for a wide variety of reasons where this can be shown to improve competitiveness, innovation, and the safeguarding of employment. In these instances, it is the union that checks company applications for derogation, establishes and leads the collective bargaining committees, negotiates with management and organises membership participation and membership recruitment. Works councils are far from unimportant in this process, however, as they need to work hand-in-hand with the trade union to help organise negotiations and employee participation. In doing this, they also become de facto collective bargaining actors via their close collaboration with unions.

Although the dynamics of *wild decentralisation* might have been curbed, any real revival of bargaining coverage is still some way off. Moreover, organising new establishments and supporting local conflicts makes huge demands on unions, which is why IG Metall, for

example, has begun regional organising projects in all its bargaining regions. The shift of bargaining to the workplace has so far has produced what can be called a 'regulated flexibility' that has offered new prospects for working time autonomy for employees and the safeguarding of employment at local levels. At the same time, there has been a tremendous increase in the workload of works councils and the demands on their capacities and capabilities. With respect to *derogations*, the success of such a process very much depends on the presence of union officials that are skilled in collective bargaining and on works councils that are able and willing to collaborate with the union.

However, in both the sectors considered in this study, it is the *employers or the employers' associations* that are the main driving forces behind decentralisation, of whatever form. In the case of wild decentralisation, employers abandon employers' associations. Moreover, attempts by employer associations to retain members through 'opt-out' forms of membership (*OT-Verbände*) arguably fuel and legitimate this process. In the case of the localisation of regulation to the workplace, this is also propelled by employer interests as it transfers greater decision-making scope to the company-level and circumvents industry-level agreements. And by agreeing to opening clauses allowing for regulation at workplace level, as with working time flexibility, trade unions have sacrificed some of their influence over these important topics. On the other hand, some forms of localisation to the workplace have been developed by unions themselves, as in the case of opening clauses to safeguard employment or the scope for individual working time arrangements under the agreed supplementary payment, the 'T-Zug', which allows employees under some circumstances to trade off money for additional free time. Finally, opening clauses on derogations also have their origins in employer demands for deviations that permit terms and conditions below the minimum standards set by branch-level agreements. Trade unions in manufacturing industry were finally compelled to concede such arrangements given the threat of wage competition from lower-cost operations abroad and the growth of informal derogation. Developments in the metalworking industry have shown that IG Metall has come to terms with derogation and responded with its own strategies of negotiation, participation and organising in order to make a success out of what can be regarded as the inevitable.

In any event, decentralisation has brought new challenges for trade unions and works councils. One of the main approaches in responding to these challenges would appear to be an intensification of cooperation between these actors. In the case of *derogations*, trade unions need works councils as the latter are the link to both employees and management as well as being indispensable for monitoring how derogations are implemented. Shifting the locus of regulation to the workplace will not work without works councils that are able and willing to step in and implement what unions have negotiated on this at industry level. At the same time, works councils need the trade unions, firstly, to provide professional support in dealing with the tasks arising from the localisation of regulation to the workplace and, secondly, to supply the organising and bargaining power necessary to negotiate fair *derogation deals* with management. Organised decentralisation calls for much more closer cooperation between these two actors than has previously been the case.

Close cooperation also refers to the collaboration between different departments within trade unions. In the case of *wild decentralisation*, collaboration is needed between collective bargaining and organising departments as employee demands need to be brought within collective bargaining and organisers need professional negotiators in order to produce outcomes

that will motivate employees to join the union. Collaboration between collective bargaining and organising functions is also important in dealing with derogations where the union tries to take a more strategic approach to improving its organisational power. However, these developments also highlight the relationship between collective bargaining departments and departments responsible for union policy at workplace level. While derogations and localisation increase the importance of the latter, given that unions need to develop means to raise the competencies and capabilities of works councils to negotiate and implement local regulations or cooperate effectively with union during negotiations, collective bargaining departments also need to have a grasp of what they can expect works councils to do and what would be a step too far. This is then the precondition for deciding what can be delegated and what should remain with the union.

7 References

Amlinger, M., & Binspinck, R. (2016). Dezentralisierung der Tarifpolitik – Ergebnisse der WSI-Betriebsrätebefragung 2015. *WSI-Mitteilungen* 69(3)*,* 211-222.

Artus, I., &, Röhrer, S. (2019): Betriebsratsgründungen als kollektive Deutungskämpfe um Mitbestimmung. *Industrielle Beziehungen* 26(1), 89-112.

Bahnmüller, R. (2018). Von der Erosion des Flächentarifvertrages zur Chance gewerkschaftlicher Erneuerung. Tarifdebatten in der IG Metall vor und nach dem „Pforzheimer Abkommen. In T. Schulten et al. (Hrsg.), *Tarifpolitik als Gesellschaftspolitik. Strategische Herausforderungen im 21. Jahrhundert* (S. 34-47). Hamburg: VSA.

Behrens, M. (2013). Arbeitgeberverbände auf dem Weg zum Dualismus? *WSI-Mitteilungen* 66(7), 473-481.

Behrens, M., &, Dribbusch, H. (2020). Umkämpfte Mitbestimmung: Ergebnisse der dritten WSI-Befragung zur Be- und Verhinderung von Betriebsratswahlen. *WSI-Mitteilungen* 73(4), 286-294.

Bispinck, R. (2004). Kontrollierte Dezentralisierung der Tarifpolitik: Eine schwierige Balance. *WSI-Mitteilungen* 57(5), 237-245.

Bispinck, R., Schulten, T. (1999). Flächentarifvertrag und betriebliche Interessenvertretung. In: Müller-Jentsch, Walther (Hrsg.), *Konfliktpartnerschaft. Akteure und Institutionen der industriellen Beziehungen* (S. 185-212). München, Mering: Hampp.

Bispinck, R., Schulten, T. (2017). Varieties of decentralisation in German collective bargaining – experiences from metal industry and retail trade. Working Paper. WP CSDLE MASSIMO D'ANTONA.IT.

Ellguth, P., & Kohaut, S. (2014): Öffnungsklauseln: Instrument zur Krisenbewältigung oder Steigerung der Wettbewerbsfähigkeit? *WSI-Mitteilungen* 67(6), 439-449.

Ellguth, P., & Kohaut, S. (2021). Tarifbindung und betriebliche Interessenvertretung: Ergebnisse aus dem IAB-Betriebspanel 2020. *WSI-Mitteilungen* 74(4), 306-314.

Ellguth, P., & Trinczek, R (2016). Erosion der betrieblichen Mitbestimmung – welche Rolle spielt der Strukturwandel? *WSI-Mitteilungen* 69(3), 172-182.

Groß, H., & Seifert, H. (2017). Regulierte Flexibilität. Betriebliche Regelungsstrukturen von Arbeitszeitkonten. *WSI-Mittteilungen* 70(6), 432-441.

Haipeter, T. (2006). Arbeits(zeit)politik zwischen Innovation und Eigensinn. *Arbeit* 15, 73-84.

Haipeter, T. (2009). *Tarifabweichungen und Flächentarifverträge: Eine Analyse der Regulierungspraxis in der Metall- und Elektroindustrie.* Wiesbaden: VS Verlag für Sozialwissenschaften.

Haipeter, T. (2010). *Betriebsräte als neue Tarifakteure: zum Wandel der Mitbestimmung bei Tarifabweichungen*. Berlin: Edition Sigma.

Haipeter, T. (2011). 'Unbound' employers' associations and derogations: erosion and renewal of collective bargaining in the German metalworking industry. *Industrial Relations Journal* 42(2), 174-194

Haipeter, T. (2016). Variety of Strategies. Arbeitgeberverbände ohne Tarifbindung in Deutschland. *Zeitschrift für Politikwissenschaft* 26(2), 75-91.

Haipeter, T. (2021). Between Industry and Establishment: Recent Developments in German Collective Bargaining and Codetermination. *Labour & Industry: a journal of the social and economic relations of work*, DOI: 10.1080/10301763.2021.1901333

Haipeter, T., & Bromberg, T. (2015). *'Country Report: Wage Setting and Wage Inequality in Germany'*. Manuscript.

Haipeter, T., & Schilling, G. (2006). *Arbeitgeberverbände in der Metall- und Elektroindustrie: Tarifbindung, Organisationsentwicklung und Strategiebildung*. Hamburg: VSA.

Haipeter, T., & Lehndorff, S. (2004): *Atmende Betriebe, atemlose Beschäftigte: Erfahrungen mit neuartigen Formen betrieblicher Arbeitszeitregulierung*. Berlin: Edition Sigma.

Hall, P. A, Soskice, D. (2001). *Varietes of Capitalism. The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press.

Hans-Böckler-Stiftung (2018). Allgemeinverbindlichkeit erleichtern. Böckler-Impuls 16. Düsseldorf: Hans-Böckler-Stiftung.

Hassel, A., & Schröder, W. (2018). Gewerkschaften 2030. Rekrutierungsdefizite, Repräsentationslücken und den Strategien der Mitgliederpolitik. WSI-Report 44. Düsseldorf: Hans-Böckler-Stiftung.

Handelsverband Deutschland (HDE) (2021a), Beschäftigungsstruktur. Available at: https://einzelhandel.de/beschaeftigungsstruktur

Handelsverband Deutschland (HDE) (2021b), Tarifbindung. Available at: https://einzelhandel.de/tarifbindung

Herrmann, C., Promberger, M., Singer, S., & Trinczek, R. (1999). Forcierte Arbeitszeitflexibilisierung. Die 35-Stunden-Woche in der betrieblichen und gewerkschaftlichen Praxis. Berlin: Edition Sigma.

Hickel, R., & Kurzke, W. (1997). *Tarifliche Lohnpolitik unter Nutzung der Härtefallregelung*. Köln.

IG Metall (2021). Metall- und Elektroindustrie: Immer mehr wollen freie Tage statt Geld. Available at: https://www.igmetall.de/tarif/tarifrunden/metall-und-elektro/immer-mehr-wollen-freie-tage-statt-geld

Jentgens, B., & Wagner, H. (2007): Probleme und Perspektiven der Arbeitszeitpolitik aus dem Bereich der IG Metall. In: WSI-Mitteilungen 4, S. 221-225.

Jürgens, U., & Naschold, F. (1994). Arbeits- und Industriepolitische Entwicklungsengpässe der deutschen Industrie in den neunziger Jahren. In Zapf, W., & Dierke, M. (Hrsg.), *Institutionenvergleich und Institutionendynamik* (S. 239-270). Berlin: Edition Sigma.

Kädtler, J., & Kalkowski, P. (2008). Rahmenbedingungen, Erarbeitung und Konturen einer Entgeltstrukturreform für den Einzelhandel. Endbericht. Göttingen. Available at: https://www.boeckler.de/pdf_fof/97047.pdf

Massa-Wirth, H. (2007). *Zugeständnisse für Arbeitsplätze? Konzessionäre Beschäftigungsvereinbarungen im Vergleich Deutschland – USA*. Berlin: Edition Sigma.

Müller-Jentsch, W. (2007). *Strukturwandel der industriellen Beziehungen. ‚Industrial Citizenship' zwischen Markt und Regulierung*. Wiesbaden: VS-Verlag.

Müller-Jentsch, W. (1986). *Soziologie der industriellen Beziehungen*. Frankfurt: Campus.

Rehder, B. (2003), Betriebliche Bündnisse für Arbeit in Deutschland. Mitbestimmung und Flächentarif im Wandel. Frankfurt/New York: Campus.

Schmidt, R., & Trinczek, R. (1999), Der Betriebsrat als Akteur der industriellen Beziehungen. In Müller-Jentsch, W. (Hrsg.), *Konfliktpartnerschaft. Akteure und Institutionen der industriellen Beziehungen* (S. 103-128). München, Mering: Hampp.

Schroeder, W. (2016). Konfliktpartnerschaft – still alive. Veränderter Konfliktmodus in der Verarbeitenden Industrie. *Industrielle Beziehungen* 23(3), 374-392.

Schroeder, W., & Fuchs, S. (2019). *Neue Mitglieder für die Gewerkschaften. Mitgliederpolitik als neues Politikfeld der Gewerkschaften*. OBS-Arbeitsheft 97. Frankfurt: Otto-Brenner-Stiftung.

Schmidt, R., & Trinczek, R. (1989). „Verbetrieblichung" und innerbetriebliche Austauschbeziehungen. In Aichholzer, G., & Schienstock, G. (Hrsg.), *Arbeitsbeziehungen im technischen Wandel. Neue Konfliktlinien und Konsensstrukturen* (S. 135-146). Berlin: Edition Sigma.

Schulten, T., Lübker, M., & Bispinck, R. (2019). *Tarifverträge und Tarifflucht in Sachsen*. WSI-Study 19. Düsseldorf: Hans-Böckler-Stiftung.

Seifert, H. (2001), Zeitkonten: Von der Normalarbeitszeit zu kontrollierter Flexibilität. *WSI-Mitteilungen* 2, 84-90.

Streeck, W. (2010). *Re-Forming Capitalism. Institutional Change in the German Political Economy*. Oxford: University Press.

Streeck, W. (1997). German Capitalism. Does it Exist? Can it Survive? *New Political Economy* 22(2): 237-256.

Streeck, W., & Hassel, A. (2003). The crumbling pillars of social partnership. *West European Politics* 26(4): 101-124.

Silvia, S. J. (2017). Mitgliederentwicklung und Organisationsstärke der Arbeitgeberverbände, Wirtschaftsverbände und Industrie- und Handelskammern. In Schröder, W., & Weßels, B. (Hrsg.), *Handbuch Arbeitgeber- und Wirtschaftsverbände in Deutschland* (S. 169-182). Wiesbaden: VS-Verlag.

Silvia, S. J. (2013). *Holding the Shop Together. German Industrial Relations in the Postwar Era*. Cornell: Cornell University Press.

Turner, L. (1997). *Negotiating the New Germany. Can Social Partnership Survive?* Cornell: Cornell University Press.

Turner, L. (1998), *Fighting for Partnership. Labor and Politics in Unified Germany*, Ithaca/London: Cornell University Press.

Voss-Dahm, D. (2009). Ü*ber die Stabilität sozialer Ungleichheit im Betrieb. Verkaufsarbeit im Einzelhandel*. Berlin: Edition Sigma.

Wetzel, D. (2014). Wie ein Abkommen Beschäftigung sichert. Available at: https://www.igmetall.de/tarif/besser-mit-tarif/wie-ein-abkommen-beschaeftigung-sichert

Wetzel, D. (2013). Für eine neue gewerkschaftliche Agenda. In: D. Wetzel (Hrsg.), *Organizing. Die Veränderungen der gewerkschaftlichen Praxis durch das Prinzip Beteiligung* (S. 13-29). Hamburg: VSA.

Wiedemuth, J. (2006). Notlagen- und Härtefallvereinbarungen als Gegenstand tarifpolitischer Koordinierung. *WSI-Mitteilungen*, 59 (7), 401–414