National Report

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Germany

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1. The concept of pay

1.1. Pay as a fundamental right; the concept of minimum wage

In Germany there is neither a codified labour contract law nor does the constitution contain a right to work and even less a right to pay. In spite of a complete codification the entire labour law consists of regulations that are spread across a plenty of acts. Among them the principles of contract law serve as guidelines to determine the main duties resulting from an employment contract. Hence the employment contract is to be handled like a contractual obligation composed of performance and return. That means the employee's main duty is to provide the employer with his work whereas the employer is obligated to pay therefore. Thus, it is the employment contract that constitutes the right to pay.

Moreover, there is no statutory wage law concerning a minimum of wage. Except for a few branches of industries a minimum of wage is set in the Law on the Posting of Workers. However, the act is silent about the actual amount. This kind of regulation is influenced by the assumption that such a negotiation is an issue of the trade unions. Nonetheless a minimum of wage is legally possible, but at present not in force.

The only vague minimum for a sufficient wage is set by § 138 BGB (violation of bonus mores). This provision allows the courts to judge the amount of the wage in relation to performance in accordance with the values found in the constitution. The result is a wage that does not exceed two-thirds of the relevant trade union agreement or average wage paid in this branch is considered as grossly unfair.

In cases the parties did not agree on a certain wage § 612 II BGB determines that fee schedule or the general wage shall apply. Relevant in this context is the average wage of comparable operations in the concerned region.

1.2. Pay; a definition

Pay is the return for the employee's performance. In the majority of cases it is paid regularly each week or each month for the performed work in a certain period of time. Pursuant to § 107 I GewO the employee has to obtain its wage in monetary form. Besides, employee and employer also can agree on wage in kind, if it is to the interest of the employee or customarily for the branch, § 107 II 1 GewO. For instance, wage in kind includes board and lodge, heating, lighting, discount and company car. In addition to the regularly paid wage employees also can be granted extra pay. Extra pay is characterized by its rare payment e.g. Christmas or vacation gratification, and relatedness to certain events, e.g. large profit.

1.3. Payment in absence of work

The German pay system is based on the principle “no pay without work”. However, it is deemed to be inappropriate to put the employee wage less in cases, he is not responsible for. Moreover, it is not on the employee to bear the entrepreneurial risk. Therefore, the employee has a right to payment in absence of work.

Pursuant to § 615 S. 1 BGB, § 611 I BGB the employer has to pay the employee’s wage, if the employee offers his disposition, but the employer refuses acceptance due to unwillingness or impossibility (default in acceptance). This situation typically occurs in cases of dismissals that turn out to be void in the aftermath. Since the employment contract was valid for the time of clarification the employee has a right to payment without being obliged to work over. He is only forced to deduct from the wage or other earnings that he was granted in the meanwhile. Another example for default in acceptance demonstrates the case that the employer is not able to provide the employee with his workplace, e.g. due to a fire. Even though the employer has not caused the impediment the employee is to be granted his payment.

According to § 616 BGB the employee has a right to payment, if it is unacceptable for him to work due to a personal impediment. Such impediments are:

- Family events: Marriage (children’s & parents), religious engagements, birth of a child, funeral

- Honorary office: lay judge, fireman

- Consultation, that needs to be in the morning, e.g. blood withdrawal

- Home care

Pursuant to § 3 I 1 EFZG the employee is entitled to receive sick pay in the amount of 100% of his normal wage, if he is incapable of work. Incapable of work in this context means that it is impossible for the employee to perform the employment agreement due to a mental or physical disease. Hence, the employee is incapable of work for office work for instance, if he has broken his hand but not if he has broken his leg. Further, the illness must not be caused by the employee purposely. Purpose was used to be considered rarely in cases the employee behaves grossly negligent, e.g. illnesses due to car accident because of using the mobile phone at the wheel. However, negligence was denied in cases of attempted suicide, addiction, and even accidents due to athletics. The duration of sick pay is limited to the first six weeks of the illness. However, this six-week period will recommence with every illness anew if it is not due to the same underlying ailment. Under the basis of the same underlying ailment sick pay is resumed after six months have elapsed since the end of the last illness or if one year has elapsed since the beginning of the first illness.

If the illness exceeds this six-months period employees can apply for sickness allowance paid by their statutory health insurance scheme. The sickness allowance amounts to 70% of an employee's normal wage and can be paid for a maximum of 78 weeks.

Every employee is entitled to vacation without losing his income, § 1 BUrlG. The minimum of vacation days consists at least of 24 working days, § 3 I BUrlG. As the German vacation act distinguishes between working days and office days, the four week minimum vacation amounts to 20 office days. The entitlement commences once the employment relationship has existed for six months. During the vacation period the employee is granted the full remuneration, calculated according to the average earnings of the last 13 weeks. The purpose of the federal vacation act is to give employees the possibility to relax and to have time at their free disposal. On the basis of this purpose the claim to vacation does not expire in cases the employee did not work at all because of an illness for instance. Then they are granted vacation once they regain their health. In the event that vacation could not be granted due to a termination of an employment agreement, the employee is entitled to compensation for vacation not taken, § 7 IV BUrlG.

In the time before and after giving birth to a child women are not allowed to work (maternity protection). Pursuant to § 3 I MuSchG women are absolutely forbidden to work six weeks before the expected date of birth. During pregnancy women are not obliged to perform tasks, which are considered to endanger the health of mother and/ or child. Though women are not able to work, they are entitled to full remuneration, § 11 MuSchG. In the period of the eight weeks following the birth women obtain maternity pay by the health insurer and the employer is obliged to compensate the difference to the last paid net wage, § 14 MuSchG.

Pursuant to §§ 15-21 BEEG both mother and father of the new born child are entitled to parental leave for a period up to three years. During the parental leave the entitlement to remuneration is suspended. To compensate the loss of income the state provides with parental benefits that amounts to 67% of the employee's average income of the last 12 months and which is limited for 14 month starting from the date of the child's birth.

In accordance with the nursery time act employees are entitled to 10 day nursery time to react to a recently occurred nursing case. During this nursery time the employees are granted full remuneration § 2 III PflegeZG, which is in contrast to the general six months nursery time leading to loss of income according to § 3 I 1 PflegeZG. In addition to this employees also have the possibility to reduce work time for 24 months up to 15 hours per week in order to care for a family member, § 2 I FPfZG. During this family nursery time the income is to be reduced in relation to the reduced work time but the employer is obliged to pay the half of the reduced remuneration in advance. Therefore the employer can be provided with a credit by the state. After the family nursery time the reduced remuneration is to be paid until the advance payment has elapsed.

To conclude the German employment law contains a variety of different regulations recognizing the employee's need for protection since it is his capacity for work his final income depends on. Additionally to these mandatory rules many collective agreements have incorporated further regulations the employee benefits from, e.g. more vacation. Thus, due to this accumulation of norms the employee is not unsecured when he is absent from work but not responsible for.

2. Mechanisms for determining pay

2.1. Individual Employment contract

The primary legal basis for determining pay is the employment contract, which is deduced from § 611 BGB. In general, the employee and the employer are free to decide on the provisions of their contract. This complies with the principle of private autonomy, which belongs to the cornerstones of civil law. The employee's wage shall apply the result of its individual negotiation depending on the worth of its work. Though it seems as this constitutes an appropriate mean leading to a fair compromise it lacks of one aspect: The employee might find itself in an inferior position to the employer as he needs the employment in order to earn his livelihood. Thus, the final wage either would depend on the employee's ability to promote itself or the consideration to be content with less than landing no job at all. Hence, in practice the individual employment contract is overridden by statutory law, collective bargaining agreements and works agreements. However, this protection only applies if it is necessary. Is the employee in the position to claim a remuneration higher than the wage set by the bargaining agreement, he is allowed to close a contract that differs to his favour (favourability principle). The other way around it is also possible to profit of the trade unions advantages though the employee and/ or the employer should not be bound by the bargaining agreement by referring to the set amount in the individual contract. Furthermore, the German labour courts are permitted to review the content of an individual employment contract with regard to its fairness according to §§ 315 BGB. For reasons of efficiency employers often use standard employment contracts, which are amended if necessary, particularly for higher-level employees. If standard contracts are used, the control of general terms and conditions pursuant to §§ 305-310 BGB apply.

2.2. Case law

The German national legal system is based on the concept of codified law. However, in labour law the labour courts are much more often forced to fill gaps in the statutory law than in other fields of law. For instance, the regulation of employee's liability is developed by the courts. Even in cases the employee acted grossly negligent its liability is restricted in relation to its wage and to the occurred damage.

2.3. Costume and practice

Another source for determining pay is company practice. Company practice provides the employees with a claim though it is not explicitly mentioned in the employment contract. If the employer repeats a certain action at least three times, the employee may conclude that the employer intends to continue this behaviour also in the future. The result is a claim entirely equivalent to a contractual obligation. Thus, the employee has the right to demand the repetition of such actions in the future. In practice, this way employees are often granted staff bonuses in context of large profit or gratifications on the

occasion of Christmas. The employer only can prevent that a claim arises by explicitly stating that such benefits were made on a voluntary basis. Moreover, a company practice cannot be set out of force by a "negative company practice"; meaning that the employer cannot terminate a company practice by refraining for three–times.

2.4. Requirements of law for wages

The private autonomy as a derivation of the basic right for the general freedom of action, which is to be found in Article 2 I Grundgesetz (GG), German Constitution, is the starting point of each contract in Germany. Working conditions, and also in particular arrangements of wages, are therefore in principle at the disposal of the employment contract parties. The general freedom of action can be restricted by law, so the lawmaker is free to make requirements for the employment relationship, which restrict the private autonomy. The employee's weakness of negotiation with his potential employer, being based on current labor market conditions, justifies therefore, that the German authority created regulations particularly for securing a certain wage level in certain cases, because only wage secures the existence of an employee.

2.4.1 Minimum rates of pay by the Law on the posting of employees (AEntG)

The effect of generally applicable collective agreements comes to a limit at foreign employers, because they are not covered by a German collective agreement. Based on the European Posting of Workers Directive 96/71/EG the German authority enacted the AEntG therefore. Originally this law should ensure fair and efficient competitive conditions and applying of minimum working conditions also for foreign employees who were sent to Germany. Since the last reform the law pursues in accordance with § 1 AEntG ensuring of minimum working conditions for all domestic employees. Therefore in accordance with § 3 AEntG now generally applicable collective agreements apply for all employment relationships, in which the employee is employed in the territorial scope of the collective agreement, also if the employer is resident in foreign. Same effect, but with much greater practical importance, is developed by executive order laws being enacted according to § 7 AEntG: This regulation allows the Federal Ministry of Labor and Social Affairs to expand a collective agreement by an executive order law to employment relationships being bound not yet, if both parties of this collective agreement has filed a common application for extension of the collective agreement. But § 3 AEntG only applies for these lines of business being called in § 4 AEntG. Finally therefore employers are bound to pay at least the following wages in these lines of business currently:

lines of business	**West Germany**	**East Germany**
waste management including street cleaning (to 31st december 2012)	8,33€	
Education and training services under SGB II (Social Security Code II)	12,60€ (including Berlin)	11,25€
Building and construction industry	unskilled workers: 11,05€ (including Berlin) skilled workers: 13,70€ (Berlin: 13,55€)	10,25€
Special mining work in coal mines (to 31st march 2013)	11,53€ (skilled workers: 12,81€)	
Roofing Trade	11,20€	
Electrical Trade	9,90€	8,85€ (including Berlin)
Building Cleaning (interior cleaning)	9,00€ (including Berlin)	7,56€
Building Cleaning (Glass and facade cleaning)	11,33€	9,00€
Painting Trade	unskilled workers: 9,75€ skilled workers: 12,00€	9,75€
Care sector	8,75€ (including Berlin)	7,75€
Security Services	7,50€ - 8,90€ (differently in the German Federal Lands)	
Laundry services for commercial clients (to 31st march 2013)	8,00€	7,00€ (including Berlin)

In Eleven of these twelve cases the legally required minimum wages are based on an executive order law being enacted according to § 7 AEntG. Only wages in electrical trade are based on a generally applicable collective agreement. According to § 9 AEntG an abdication of these minimum rates of pay is possible only by a settlement in front of a court. Moreover there is in accordance with §§ 11, 12 AEntG the exception for the care sector, that the Federal Ministry of Labor and Social Affairs can regularize minimum working conditions through an executive order law also without the proceeding to § 7 AEntG and without a generally applicable collective agreement.

Thus the AEntG is an effective instrument for securing a certain wage level in certain cases, but generally it is criticized for strong intervention in Article 9 III GG, the freedom of associations and collective agreements.

2.4.2. Minimum rates of pay by § 3a personal leasing act (AÜG)

Also the problematic of securing equitable wage levels appears in sector of temporary agency work. According to § 10 IV 1 AÜG in principle the lessor has to pay his employee accordance with the principles of equal pay. But if a collective agreement for the employment relationship with a differing settlement exists, employer's obligation for paying an equal wages will not persist, § 10 IV 2 AÜG. Therefore in § 3a II AÜG law gives possibility for the Federal Ministry of Labor and Social Affairs to regularize a binding wage floor by an executive order law also in sector of temporary agency work, if there is an proposal of a collective agreement party, which is proposal entitled in accordance with § 3a I AÜG. Currently such a wage floor is in West Germany at 8, 19€ whereas it is in East Germany including Berlin at 7, 50€. If an applicable collective agreement undershoots this wage floor, according to § 10 IV 3 AÜG the principle of equal pay will be back to use in affected employment relationships.

2.4.3. Minimum rates of pay by the Law of minimum conditions of employment (MiArbG)

Finally in accordance with § 4 I MiArbG minimum rates of pay can be set by expert commit-tees of the Federal Ministry of Labor and Social Affairs also for those economic sectors, in which nationwide less than 50% of employees are employed who are falling in scope of collective agreements, § 1 II MiArbG, and if there are social grievances in this economic sector, § 3 I MiArbG. It can be spoken of social grievances then, if in affected economic sector the mechanism for formation of the market-clearing price is disturbed for certain activities and therefore a living wage can't longer be ensured for affected full-time working employees. However, up to now not one single executive order law was enacted according to § 4 I MiArbG, so that up to now there is no practical significance of this possibility for wage regulation.

2.5. Collectively agreed basics and additions

2.5.1. Historical introduction

The industrialization, which started in Germany in the 19th century, created the requirement to find common rules for wages and working conditions. The principle of freedom of contract led by the superior position of the employer to the impoverishment of broad sections of the working class and had significant social tensions. The result was the formation of the labor movement. Although unions and socialist parties were long exposed governmental repression, it came to the turn of the century to the adoption of the first laws that were intended to create fair working conditions. Even the German economy accepted under the pressure of workers increasingly contractual arrangements, so in 1913 there were already over 13 thousand collective agreements in the German Empire. After the Second World War on 9.4.1949 the collective bargaining act (TVG) in West Germany was adopted before the Constitution. Because of this act the right to create rules for wages and working conditions without any governmental influence got constitutional status.

2.5.2. Legal concretization

Article 9 III of the German constitution (Grundgesetz) gives every citizen the fundamental right to enter into coalitions for "Protecting and promoting the economic and working conditions". Even in case of War the government is not allowed to take any measures, which are directed against a labor conflict. His legal concretization that fundamental right has found in the Collective Bargaining Agreements Act, according to which the collective agreement can organize the content, conclusion and termination of employment and aspects of the works´ constitution. The parties of a collective bargaining agreement shall be unions, individual employers or associations of employers. It should be noted, that the concept of the coalition and the union are not identical. A coalition of works is only allowed to become party of a collective bargaining agreement, if it has "social- power". This means that the coalitions have to be able to compensate the superior market positions of the employer in terms of members, the organizational strength and financial possibilities in the region, in which the union wants to make contracts. If it does not come to an agreement in wage negotiations, the coalition needs to be in a position to organize a labor dispute to put the employer under pressure. In that question the jurisprudence of the Federal Labour Court has changed in the last years. Until the year 2004 the main factor for "social- power" was the number of members. But in his famous "UFO- decision" (name of a union) the court accepted the power of a small flight attendants union because the strike of this small number of worker has a significant effect.

2.5.3. General characteristics

In Germany 20% of the workers are member of a union and there are more than 60.000 collective bargaining agreements. Two different types of these agreements can be distinguished. A framework agreement applies over a long period and sets the basic standards, like the classification of different groups of workers. The most important type is the collective bargaining agreement on pay, which essentially determines the salaries and wages. Because of the different inflation the agreement is usually made only for one or two years. The sphere of application is determined by the parties in terms of personal, technical and regional level. The collective bargaining agreement under comes to legislative effect to the parties; nevertheless it is a private contract, which must be compatible with the law. It should be noted in particular that the agreement may not intervene in the fundamental right of business decision liberty under Article 12, 14 of the German constitution. The regulations on the product strategy of the company, for example, would exceed the regulatory power of the parties.

2.5.4. Relationship to the Works Constitution Act

Furthermore the parties of a works agreement, that is concluded between the works council and the employer, is legally void under § 77 III of the Works Constitution Act, if it contains anything that is usually covered by a collective bargaining agreement. A works agreement, for example, that concludes bonus payments is not allowed. The situation is different only when the collective bargaining agreement contains a term under § 4 III TVG (Opening clause), which says that the parties of a works agreement can come to different regulations. Especially in companies that are suffering under economic problems, is often deviated from the collective bargaining agreement to avert the threat of insolvency and to save the jobs. To prevent that by holding such agreements the superior market positions of the employer comes to fruition, the areas that can be regulated by a works agreement are usually strictly limited.

2.5.5. The parties of a collective bargaining agreement

According to § 3 I TVG the members of the parties of the collective bargaining agreement, the union members, members of employers' association and the employee of an company agreement, are bound by the collective agreement. For matters relating to the operation of the establishment and legal aspects of the works` constitution, for example the company holidays, it is sufficient if only the employer is bound by the collective agreement in question.

2.5.6. Declaring the generally binding nature of collective bargaining agreement

In § 5 TVG the possibility for declaring the generally binding nature of collective bargaining agreements is written. On request by a party, the Federal Ministry for Economics and Labor, acting in consultation with a committee consisting of three representatives of the central organizations of the employers and three representatives of the central or-

ganizations of the employees, may declare the agreement to be generally binding if the employers bound by the agreement employ not less than fifty percent of the employees coming within its sphere of application, and the declaration appears necessary for the public interest. Departures from the requirements shall be permissible if the declaration appears necessary in order to overcome a social emergency.

2.5.7. Reference clause

Even if only 20% of the workers are unionized in Germany, indirectly far more employees are paid according to a collective agreement, because non-organized employers and employees are often regarding to a collective bargaining agreements in their sector (reference clause).

2.5.8. Validity

The validity of a collective agreement is determined by the parties in the contract. In § 4 V TVG is written, that upon the expiration of the collective bargaining agreement, the legal norms set forth therein shall continue to apply until they are replaced by another arrangement. The legal norm of § 3 III TVG also prevents separation from the collective agreement by leaving the federation, thereafter remains the constraint in effect until the contract ends. If an employee leaves his association of employers, it does not apply to the legal norm of § 4 V TVG. This aims to bridge a period without a collective agreement and the employer expressed its intention not to conclude any new collective agreement. The collective bargaining agreement is a continuing debt obligation and may be terminated by the parties in unless there is important cause, but a deterioration of economic fundamentals is not sufficient for this purpose.

3. The principle of equal treatment in terms of pay

Art. 23 of the Charter of Fundamental Rights of the European Union is an important executive order that tackles the subject on a European international level. This article is determined to grant equal conditions of employment with an emphasis on equal wages for both genders. Art. 157 of the Treaty on the functioning of the European Union, the European Parliament and the Council, gives a duty to adopt measures to reach this goal. It can also be a legal basis for an individual employee's appeal to court if his employer refuses equal payment and his national legislation lacks to follow relevant measures given by the European authorities.

Art. 15 CFR concerns equal conditions for employees from foreign and EU-member countries. For an understanding on how the German legislation was initiated by the EU to pass the following legal acts, three European directives should be exemplarily known: 2000/43/EC (equal treatment between persons irrespective of racial or ethnic origin); 2000/78/EC (general framework for equal treatment in employment and occupation); 2006/54/EC (equal treatment of men and women in matters of employment and occupation).

3.1. German law on equal pay

The principle of equal pay was adopted into German law within several acts.

3.1.1. The general Equal Treatment act

The AGG aims on overcoming discrimination against individuals based on certain attributes. Consequently, it is illegal to differ wages of individuals with certain attributes from those of individuals, who do not show these. These attributes are listed in § 1: Race and ethnic origin, religion or belief, disability, age, gender and sexual orientation/identity. Section 2 specifies on how far the employee shall be protected from dis-crimination. § 7 declare an infringement of the act's principles as a breach of contract. Thus, if an employee is not granted the same wages of another, comparable employee, and this discrimination results from one of the attributes listed in § 1, the employer has an obligation to replace the original, unlawful agreement with a condition that grants equal wages for both employees. This general prohibition of discrimination is restricted by certain conditions. Unequal treatment in face of the attributes in question can be justified if the attribute is in striking correspondence with a fundamental requirement of the particular job. Since the AGG does not give further specification on when this is the case, the jurisprudence has to fulfill further definition by case law. § 10 AÜG controls - in accordance to Art. 6 of directive 2000/78/EC - that unequal treatment because of age can be justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary. In accordance to Art. 6 of the Directive 2000/78/EC, § 10 AGG defines that unequal treatment because of age can be justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary. § 10 appear to differ from Art. 6 so far, as the

German regulation does not point out examples for "legitimate aims" (and thus leads to a rather wide understanding of this term), while Art. 6 explicitly classifies "employment policy, labour market and vocational training objectives" to be legitimate. This leads to wider possibilities of unequal treatment, which can be explained by the will of the German legislation to include the expertise of the parties to a collective agreement into the assessment of legitimacy of one particular aim.

3.1.2. The Works Constitution act

Within the BetrVG, the principle of equal pay is manifested in § 75. It gives an obligation to both employer and works council to watch over the equality of wages and to oppose discrimination because of the attributes mentioned in § 1 AGG.

3.1.3. Act on part-time work and fixed term employment contracts

§ 4 TzBfG declares discrimination of part-time employees to be illegal. Employers are obliged to grant the part-time employees the same work conditions and especially the same wages in relation to those who work full time. This principle is also valid in a compromise between fixed-term employees and permanent employees. Different wages can only be justified by factual reasons going further than the employee's status as "part-time-" or "fixed-term-" worker.

3.1.4. Temporary agency work act

According to § 1 AÜG, employers are bound to demand for an official permission by the Federal Employment Office to lease their employees. This permission is to be denied, if the leased employee is not awarded with equal wages as comparable workers in the firm of the borrower (§ 3 I Nr. 3 AÜG).

§ 9 Nr. 1 AÜG declares ineffectiveness for both contracts of leasing employment in spite of a lacking permission as well as an agreement concerning unequal wages for the leased employer. To protect an employee from the effects resulting in the ineffectiveness of his contract or parts of it, § 10 AÜG makes an ineffectiveness caused by § 9 AÜG not lead to a complete loss of the contract. In fact, it shall breed a contract of employment between the employee and the borrower and, furthermore, to a claim for an adjustment of the contract against the lessor.

An infringement of these regulations can lead to a penalty up to € 500,000 (§ 16 AÜG).

3.2. Conclusion

The principle of equal treatment in terms of pay came into compliance by numerous acts amongst the German legal system. Particularly, the AGG builds a legal basis to overcome discrimination by unequal wages. The pursuit of this ideal is also an aim of collective labour law, as § 75 BetrVG shows. In the domain of precarious temporary agency work, the AÜG gives legal instruments to reach fair and equal wages. Nevertheless, unequal wages in spite of comparable working conditions are in factual existence. One of the

most prominent examples is the gender pay gap. Thus, one has to face that the German legal acts did not yet lead to the desired social changes that are necessary for the achievement of equal pay.

4. Flexible pay systems

Additionally to the basic pay the parties can agree on flexible pay. In Germany exist several types of flexible pay systems, e.g. time-related pay and output-related pay.

4.1. Related to employee`s performance

Piecework rates strictly measure according to the quantity of work done. Furthermore piecework rate even can be set a certain time limit. In this case the rate is calculated according to the produced quantity in a certain time. As the increase of pay only can be received by an increase of the work pace the agreement on piecework rates with pregnant women and young people is prohibited to avoid dangers to health (§ 4 III MuSchG, § 23 JArbSchG).

Wage on a commission basis is linked to the employee's success regarding brokering or the conclusion of contracts on behalf of the company. Besides, commission is the standard compensation for commercial agents pursuant to § 87 HGB.

Supplemental pay may be granted for different reasons. Mainly they serve to compensate inconveniences at work, e.g. overtime, night work, Sundays, holidays, noise, and dirt. Moreover they can be tied to personal circumstances, e.g. supplemental pay for married couple and children. Besides supplemental pay also can be granted for no particular reason, but to increase, for instance, the standard wage if it is deemed to be too low.

Target agreements are based on the concept that employer and employee agree on certain targets to be reached in certain time period harmonizing with the employee's individual workplace. After the end of a term the supplemental pay is calculated according to the rate of the target achievement.

Attendance bonuses remunerate the employee's low absence from work. On top of this the employer may also pay a loyalty bonus awarded for a given numbers of years with the company.

Finally the employer can pay staff bonuses on the occasion of certain events, e.g. Christmas bonus (often a monthly salary), vacation bonus.

4.2. Related to company results

Profit sharing is primarily granted management employees in addition to their basic pay. In contrast to the commission profit sharing does not refer directly to the employ-

ee's dealings. However, profit sharing creates incentives to contribute to good company results.

Furthermore, employees can agree on stock options as an component of their pay or as a voluntary benefit. Thereby, employees receive direct or indirect subscription rights to the company's stock. The concept of stock options as component of pay is that the difference between the exercise price and the rising market price presents a benefit to the employee. However, in many cases the agreement to grant stock options is only for the benefit of management employees or board members.

5. Variation of pay in time of crisis (Collectively agreed basics and additions)

The normal employment relationship is an unlimited and depended fulltime employment. But the normal employment does not give the employer many opportunities of reacting following external developments. Especially the globalisation, the fluctuation of supply and demand lead to changed external conditions which make it necessary to react. Especially the pay is an important cost factor for the employer. So the employers are interested in reducing the pay, which is made possible by introducing flexible employments.

5.1. The opportunities of flexibility

5.1.1. Overtime

There are two possibilities to work extra hours. You can work longer as the regular internal working time and you can work longer as the legal regulation of working times basically allows. The last possibility is allowed within tight restrictions. If there are no agreements about pay for overtime, the entitle follows from § 612 BGB.

5.1.2. Short-time work

During the short-time work, the employer´s duty to give work is reduced by an agreement or defining by the employer into tight restrictions. The pay which is paid by the employer is reduced by the same factor, too. The state settles the difference between the „new" and the „old" pay, which is called short-time allowance. But the employer needs a legal recognized reason for introducing short-time work: A transitory significant loss of work with lost earnings, which often follows from crisis, must be in.

5.2. Restriction of working conditions

The restriction of working conditions has to be differentiated from a restriction of an employment. Because the restriction of working conditions is not verifiable by the TzBfG but it can be the subject to a GTC (General Terms & Conditions) control. The temporary employment causes the end of the whole job contract meanwhile the restriction of working conditions causes the end of a working condition, as one part of the job contract, whereas the old condition takes effect again. For example: It is also possible to restrict the pay if the employee is taking somebody´s place temporarily (Replacement).

But a GTC control with regard to pay is not possible because of the evaluation of § 307 III BGB. The essentalia negotii (prime obligation) can´t be subject of a GTC control. But in case of the restriction of working conditions there is no GTC control of the pay, but of the restriction as such. Therefore a GTC control with regard to pay is possible. During the GTC control the assessments of the TzBfG are subject of this verification, because there are demanded compelling reasons for the restriction of working conditions, as well.

5.3. Collective Law Possibilities

5.3.1. Collective restructuring agreement

The employer or employer`s association and the labour union have the possibility to amend a collective agreement, which is disadvantageously to the employee. For example, they can reduce the pay ore the holidays. In general they can deal with all labour and economic conditions. For the employer, it is also possible to make a company collective agreement, which has priority towards an association agreement. It can also agree an association level agreement which changes the labour and economic conditions of an association agreement favourable to the employer.

5.3.2. Works agreement getting worse

The possibility of making a works agreement worse is affected by the time collision rule. The younger arrangement, which was better for the employee, represses the older arrangement. Basically works agreements have priority over individual contractual agreements but only, if they are favour for the employee. Unless the individual agreement refers to works agreements or integrates the works agreement into the contract of employment. By a unanimously system, like a company pension scheme, the works agreement, which is bad for an individual, is also allowed, if it is in favour for collective.

But, § 77 I 1 BetrVG doesn´t allow a works agreement which deals with pay. A works agreement can only handle with collective wage-policy and performance related pay. These are subject of rights of participation of the employee representative committee (§ 87 Nr. 10, 11 BetrVG). The wage in relation to a collective wage-policy includes all equivalents of the employee's performance. Then, it means collective elements of wage-policy which are minted by characteristics which apply to more than one employee. For example the method of payment can be such a collective element of wage-policy. The performance related pay includes something like piece-work or premium pay.

5.4. Individual Measures

5.4.1. Modified Contract

A modified contract can be necessary, if the employer wants to push for poorer working conditions through, which can´t be subject of his executive prerogative. But, § 311 BGB controls the employer to arrange a contract with the employee. So, the employee´s consent is a necessary part of this. Changing the pay can be agreed upon, too.

5.4.2. Dismissal for variation of contract

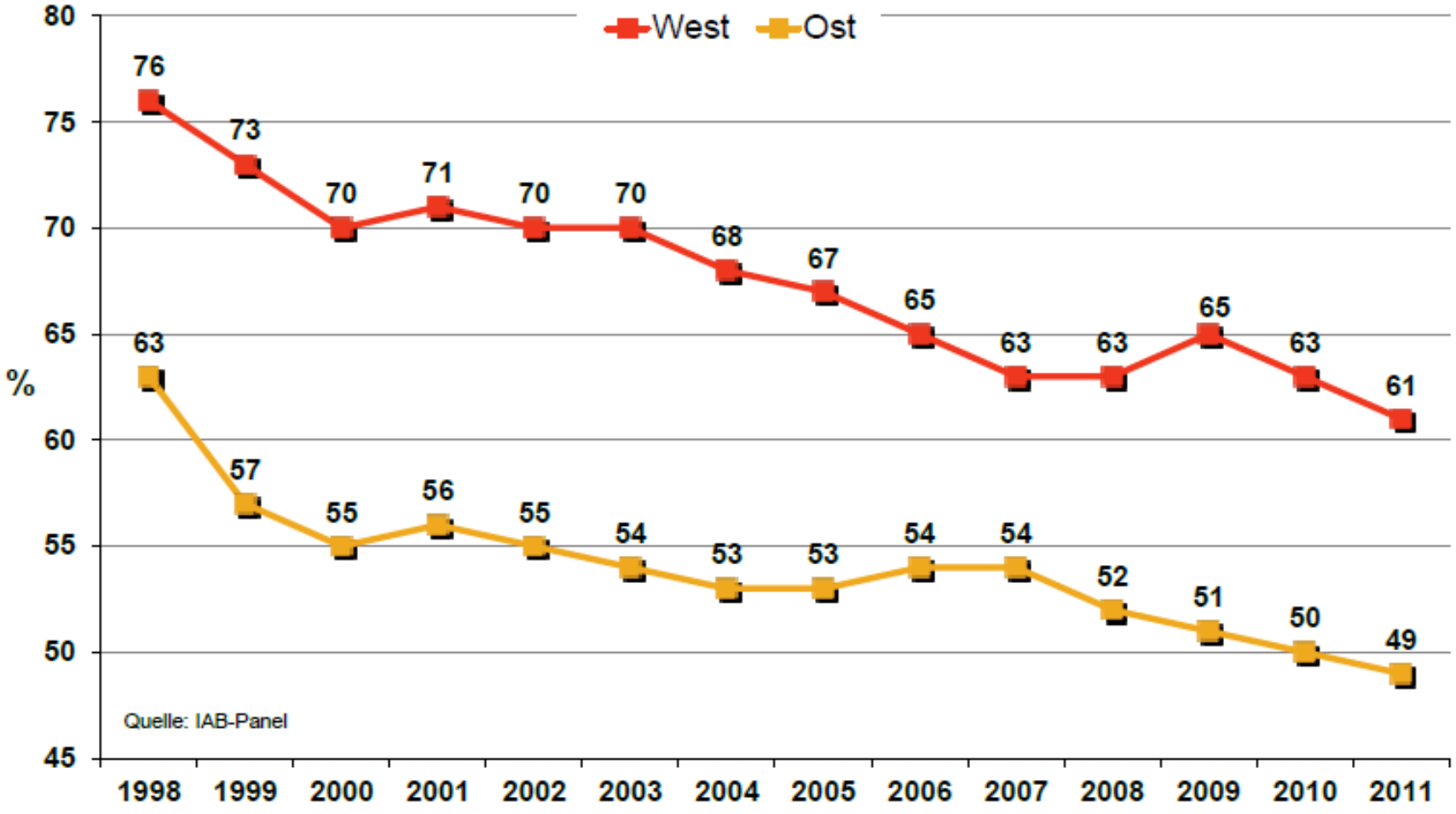
In case of the notice of dismissal for variation of contract, the employer quits the contract, by presenting a new offer, which includes the continuation of the contract during poor working conditions, to the employee. It´s up to the employees decision, whether he accepts the poorer working conditions under the condition, that the notice of dismissal is being justified. He can also settle the dismissal for variation of contract in court. So,

the social justification of the changed working condition, for example the pay, is subject of the judicial check. The ground for giving notice has to be suitable for changing the working conditions.

6. Consequence of non-payment of wages by the employer/enforcement of pay

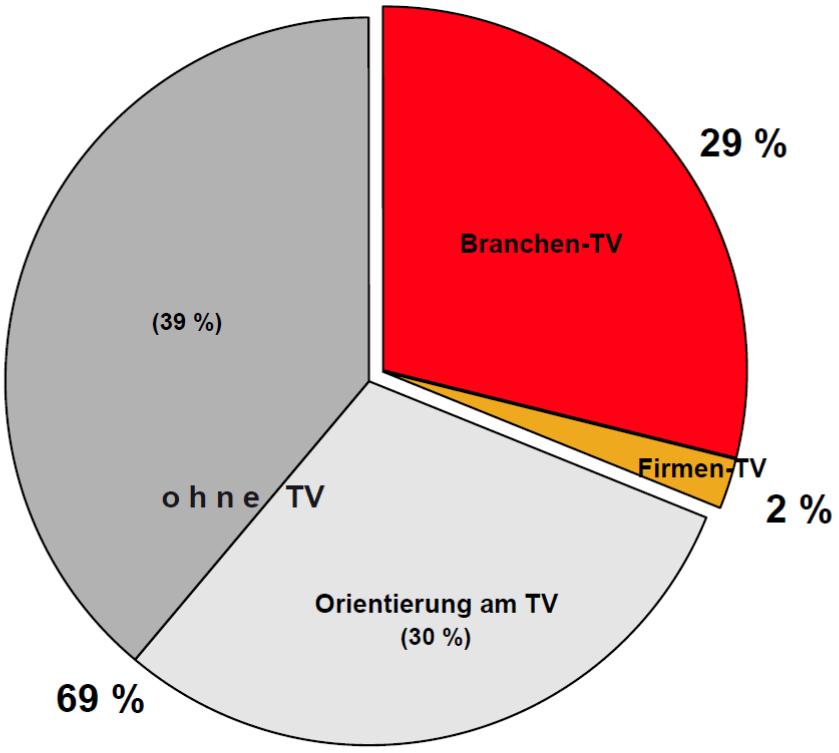
The main duties of the employment contract are in accordance with § 611 German Civil Code (BGB) the payment of wages and the performance of work. If there is no payment of wages, this is a breach of the contract. The correct form of action for the employee before the Labour Court is the “performance- lawsuit”. But there are also justifiable reasons for not paying the wage. When it comes to a legal strike, the main obligations of the treaty no longer exist for that period; nevertheless the employment contract is not terminated conclusively by that action. If there are no justifiable reasons for not paying the wage, the worker has the right for a dismissal for cause. According to § 628 II BGB the employer shall be liable for the damages resulting from the termination of the service relationship.

Tarifbindung der Beschäftigten 1998 - 2011 in %



Tarifbindung 2011 (West und Ost)

- Betriebe in % *-



* Abweichungen von 100 % aufgrund von Rundungsfehlern möglich.

Quelle: IAB-Betriebspanel 2011.

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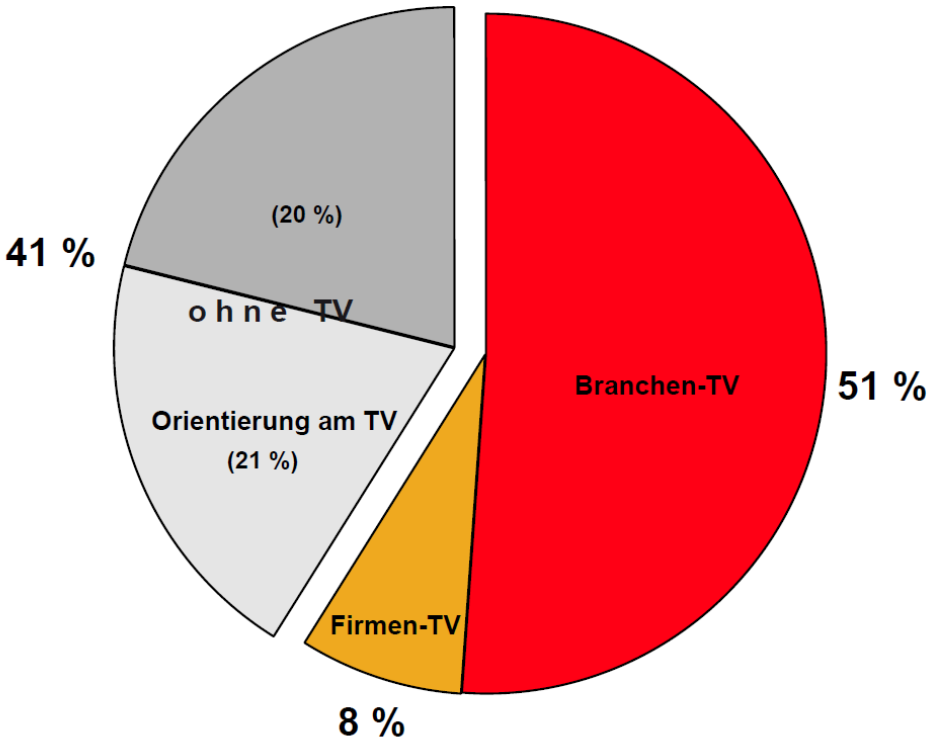
Tarifbindung 2011 (West und Ost)
- Beschäftigte in % *-



* Abweichungen von 100 % aufgrund von Rundungsfehlern möglich.

Quelle: IAB-Betriebspanel 2011.

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