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1) What is the practice of collective bargaining in your country: which are the major unions and organizations; are collective agreements mainly concluded for sectors, for the whole country of for particular enterprises; what is the unionization rate; what is the percentage of employees covered by collective bargaining

Article 9 (3) GG (Grundgesetz der Bundesrepublik Deutschland – German Constitution) guarantees the freedom of coalition. Concerning labour law this enshrines the right of the employees to found and to participate at the trade unions. On the other hand this Article provides that no one can be forced to the membership of a trade union. Trade unions must be a separate legal entity, formed freely and voluntarily with the purpose of improving working conditions, including engaging in labour disputes. They must be independent and organized on a supra-company level and may not have members from the side of employers. For details refer to point 3) of this report.

A) German trade union landscape

There are three main trade union umbrella organizations. The biggest one is the DGB (Deutscher Gewerkschaftsbund – German Trade Union Confederation). It was founded in

1949 and involves 6,2 Millions members. The DGB represents and protects collective interests of single trade unions towards law-making and local authorities, organizations and communities.[1] Inside of the organization works a principle: one enterprise - one trade union. The DGB is organized according to the principle of "industrial sectors", meaning that each DGB trade union is formed for one or several closely related industrial sector(s) and is responsible for negotiating collective bargaining agreements for the employees of that particular sector. The DGB trade unions are also organized by region, with state and national boards coordinating the work of the various regions.

The DGB includes such big trade unions as: Industry trade union IG Metall (Industriegewerkschaft Metall – Industrial Trade Union of Metal Workers). It covers such branches of the industry as metal and electronic industry, steel industry, textile and cloths, textile cleaning, woodcraft, automotive trade, electrical trade, sanitary etc; The second biggest trade union is the ver.di (Vereinte Dienstleistungsgewerkschaft - Trade Union for Services); it includes such branches of economy as public service, trade, banking and insurance, healthcare, transport, ports, media, social and education service, publishing industry, fire service etc. Together IG Metall and ver.di include 70% of all members of the DGB. Other trade unions are: the IG BCE (IG Bergbau, Chemie, Energie - Industry Trade Union in Mining, Chemical Industry, Energy), the IG BAU (IG Bauen-Agrar-Umwelt - Industry Trade Union in Construction-Agriculture-Environment); the EVG (Die Eisenbahn- und Verkehrsgewerkschaft - Railway und Transport Trade Union); the GEW (Die Gewerkschaft Erziehung und Wissenschaft - Trade Union for Education and Science); the NGG (Die Gewerkschaft Nahrung-Genuss-Gaststätten – Trade Union for Food-Enjoyment-Restaurants); the GdP (Die Gewerkschaft der Polizei - Trade Union for Police). Approx. 20 % of DGB members are pensioners, and aprox. 7% (463.000 members) are civil servants.[2] They enjoy freedom of coalition but the payment of their work is determined in the laws passed by the Parliament. That's why they are not involved in the collective bargaining process.[3]

The second biggest umbrella trade union is the dbb (Beamtenbund und Tarifunion - Public Servants' Confederation and Collective Agreement Union). It includes 39 federal trade unions and their organizations.[4] It's most famous member is the GDL (die Gewerkschaft Deutscher Lokomotivführer - German Trade Union of Locomotive Drivers) as strikes carried out by this union disable the entire German railway system, both regional and on the national level.

[1] *Dribbusch*/*Birke*, p. 2.
[2] *Dribbusch*/*Birke*, p. 2.
[3] *Dribbusch*/*Birke*, p. 2.
[4] *Dribbusch*/*Birke,* p.6.

The third biggest umbrella union is the CGB (Christlicher Gewerkschaftsbund Deutschlands – German Christian Trade Union Confederation). This confederation identifies itself in the contrary to other trade unions as a Christian oriented trade union. Only a part of its particular trade unions take part in collective bargaining.[5]

There are also a number of trade unions, which don't belong to any of the above mentioned umbrella unions. These are: the MB (Der Marburger Bund - Marburg Union, union of hospital doctors in Germany), the DJV (Der Deutsche Journalisten Verband - German Union of Journalists), trade union for pilots – the VC (Die Vereinigung Cockpit - Union Cockpit) and others.

In Germany trade unions have a right to conclude collective bargains: either with employers' associations or with particular enterprises. Most of them are concluded by the DGB trade unions.

Similar to the organizations who represent interests of employees, associations of employers are also normally organized according to the industry branch principle. Most of them are members of the BDA (Bundesvereinigung der Deutschen Arbeitgeberverbände – Federal Union of German Employers' Associations). It involves professionally organized and industrially mixed central and decentral/regional associations. Normally one employer is represented in two associations: professional associations (this means in the unions which refer to the industry branch) and mixed industry association (they are organized according to the territorial principle. They undertake the representation of inter-branch interests).[6]

B) Coverage by collective agreements

Figures from the government-backed research body IAB (Institut für Arbeitsmarkt- und Berufsforschung – Institute for Empoyment Research) in 2013 show that 53% of employees in the former West Germany are covered by collective agreements. In the former East Germany the overall figure is lower – 36% covered by any agreement. Collective agreements signed at company level are valid for 7% of employees from the western Germany and for 12% of employees from the eastern Germany.[7] The total collective bargaining coverage percentage in Germany is 62%, while the proportion of Employees in Unions is 18%.[8]

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[5] *Dribbusch*/*Birke*, p.6.
[6] *Preis*, p. 75.
[7] Institut für Arbeitsmarkt und Berufsforschung, Tarifbindung der Beschäftigten: Aktuelle Daten und Indikatoren, 03.06.2013, Internet: http://doku.iab.de/aktuell/2013/Tarifbindung_2012.pdf 22.02.2015 12:54.
[8] Internet: http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany, 22.02.2015 13:15.

According to a survey made by the Federal Ministry of Labour and Social Affairs of 70.000 collective agreements only 502 are now generally binding, 173 of them in the new federal lands.[9] One reason for this was to deal with the low wages often paid by non-German firms employing their own nationals in Germany, before the binding minimum was established. This number has been distinctly declining, although less pronounced in recent years. With the above mentioned establishment of the minimum wages this percentage will presumably significantly drop off.

C) Works Councils

The role of work councils and their relation to trade unions is also to be mentioned. The works council (Betriebsrat) is the main employee representative body vis-à-vis the employer. The legal basis for the election of a works council as well as its rights and duties is the BetrVG (Betriebsverfassungsgesetz – Works Constitution Act). The works council is elected by all employees working at an establishment every four years. The basic principle is one works council per works, but if a company consists of more than one works, it can have several works councils. In this case a joint works council is to be built (Sec. 47 et sqq of the BetrVG). A corporate group might have more than one joint works council. In this case they form a group of works council (Sec. 54 et sqq of the BetrVG).[10] Works councils do not have a right to take part in the collective bargaining by trade unions (see in detail point 5) of this report). German trade unions do not possess the legal capacity to appoint the members of the works council. But trade unions are entitled to submit a list of candidates for the works council elections, Sec. 14 (3) BetrVG. By doing so (and by using their rights of advising works councils) the trade unions influence the works council operation. An analysis of the works council election results in 2010, on behalf of the Hans-Böckler-Foundation, found that 77.3% of the members elected were members of DGB unions.[11] Additionally Sec. 2 (1) BetrVG prescribes a duty of trustful cooperation between the works council and trade unions. So works councils are not legal entities of trade unions, they remain however an area under trade union dominance. Other links between unions and works councils are that works councils have the right to invite a representative of the trade unions in this works council to

[9] Bundesministerium für Arbeit und Soziales, Verzeichnis der für allgemeinverbindlich erklärten Tarifverträge, Stand: 1. Januar 2015, Internet: http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/arbeitsrecht-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf?__blob=publicationFile 22.02.2015 15:06.

[10] *Lingemann/v. Steinau-Steinrück/Mengel,* p. 2.

[11] http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation, 22.02.2015 16:00.

attend as an adviser the meetings, if a quarter of the members are in favour (Sec. 31 BetrVG), and works council members often go on union-organised training courses.[12]

2) Answer the following questions in order to give a short synopsis of the legal system:

A) Does your country's legal system, case law or practice contain a formal definition of 'collective bargaining'?

B) Which are the parties that can participate in the bargaining process?

C) Are there any conditions on the possible contents collective agreements?

D) Which procedures have to be followed in the bargaining process, in adopting a collective agreement and ensuring that this agreement has full legal effect?

German federal collective bargaining system is historically marked by strong dominance of industry-wide collective bargains. The legal sources of collective bargaining are the TVG (Tarifvertragsgesetz – Act of Collective Agreements) and the BetrVG (Betriebsverfassungsgesetz – Works Constitution Act).

Collective agreements are concluded by the employee's as well as employer's side.

On the employees' side, only trade unions have the right to conclude collective agreements (Sec. 2, (1) TVG).[13] Neither other "employees' associations", such as "yellow unions", nor works councils have the right to conclude collective agreements in the sense of the TVG (for the legal perquisites to qualify as a bargaining party, please see point 3) of this report). [14]A works council can never be also a party to a collective agreement according to the Act of Collective Agreements, but they do have the legal capacity to conclude works agreements with the employer. For the role of the works council in the collective bargaining process, please refer to point 5) of this report. [15]

On the employers' side, the TVG provides that collective agreements may be concluded either by employers' associations or by individual employers.[16] Correspondingly there are agreements which are concluded at company level (Haustarifverträge) as well as at association or branch/sectoral level (Flächentarifvertrag).[17] Collective agreements are made for the entire branches or their parts and have effect regionally or federally for all enterprises

[12] http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation 22.02.2015 16:37.
[13] *Schulten*, *Thorsten*, Collective Agreement Act celebrates its 50th anniversary.
[14] The same.
[15] The same.
[16] The same.
[17] *Marquardt*, p. 1.

which belong to the employers' association who concluded these bargains. From this perspective the so called "Tarifautonomie" (e.g. the German principle providing the legal autonomy of the social partners to independently regulate salaries and working conditions) is of a great importance – the government does not interfere and the parties bargain independently.

The elaboration of collective agreements occurs as following: usually there is only one level of bargaining and the "Tarifkommission" (collective bargaining committee of the trade union head-organisation) decides on the actual demands.[18] Then the trade union representatives negotiate with the representatives of the employers association or one employer. If negotiations fail there can be an arbitration process in order to prevent industrial action or to finish it.[19] Usually a well-trusted person, (like the former minister of labour Georg Leber in 1984) is agreed to as arbitrator by both parties.[20] There is no compulsory state arbitration unlike in the time prior to 1933.[21] Sometimes the parties agree to a framework collective agreement on the federal level and leave wages and other details to smaller units of bargaining, like employers' organisations and unions in one or several Länder.[22]

Finally the subjects which are covered in collective agreements are: wages, (i.e. additional allowances, benefits, bonuses, piece-wages) vacation, sick leave, professional training, rules of employment contracts, e.g. terms of notice. Any part of the industrial relations can be subject to a collective agreement.[23]

3) Do legal criteria exist for qualifying as a bargaining party?

A) Which criteria for qualifying as bargaining party do exist in your legal system?

a) General information

As previously mentioned, Art. 9 Sec. 3 of the German Constitution guards the existence and the activities of coalitions such as trade unions and employers´ associations.[24]

In the course of the 19th century the term ´trade union` has composed and constitutes nowadays the denomination of a confederation of workers. In the German private sector the

[18] The same.
[19] The same.
[20] The same.
[21] The same.
[22] The same.
[23] The same.
[24] *Junker*, Rn. 484.

Trade Unions dominate which are incorporated in already mentioned the DGB (Deutscher Gewerkschaftsbund – Confederation of German Trade Unions). [25]

At the beginning of the development of labour disputes trade unions were forced to organize their actions discretely due to the repression by the government as well as by employers.[26] Therefore trade unions were commonly organized as non-registered associations since the foundation of a trade union as a legal person entails its registration and the disclosure of its members´ lists to authorities in charge. [27] As trade unions are widely recognized both referring to politics and in terms of constitutional law, The capacity to act of trade unions which are organized as non-registered associations are put on a par with the capacity to act of registered associations. Hence non-registered organizations hold the active capacity to sue and be sued both in labour court actions and civil actions.

The employers´ associations are merged into the BDA (Bundesvereinigung der Deutschen Arbeitgeberverbände – Confederation of German Employers). Two kinds of associations belong to the BDA: 52 central associations of different branches and 14 national associations. Today employers´ associations are organized as regional trade associations, which are distinguished by belonging to a certain commercial sector. In addition there exist interdisciplinary regional associations whose membership consists of all employers of a certain region.

Regularly employers´ associations exist as civil associations according to Sec. 21 et sqq BGB (Bürgerliches Gesetzbuch – German Civil Code). Their ideational purpose is ensuring and promoting the working and the economic conditions as well as the promotion of members in their capacity of employers.

b) Legal Definition of the term "coalition"

In the sense of Article 9 (3) of the GG (Grundgesetz – German Constitution) a coalition implies a union in which natural or legal persons or associations are allied long-term in order to pursue the same objective on voluntary basis and is submitted to a uniform decision-making.[28]

c) Voluntary civil union

Coalitions are bound to be formed voluntarily. "Voluntarily" signifies that the establishment is to be based on freewill. The right to establish a union derives from Article 9 (1) GG. For

[25] See *Junker*, Rn. 482.
[26] *Kocher*/*Sudhof*, p. 9.
[27] *Kocher*/*Sudhof*, p. 9.
[28] *Jarass* in: Jarass/Pieroth, Rn. 3.

that reason associations for which the public law stipulates a compulsory membership are excluded.[29] Though craft guilds, chambers of Industry and Commerce as well as associations of municipalities are excluded due to their establishment by governmental force; the legislator legally grants craft guilds the right to conclude collective agreements according to Sec. 54 (3) of the Handicraft Regulation Act.[30]

d) Requirement to be classified as coalition

A coalition has to rather equate to the pattern of a ***registered association*** (according to Sec. 21 BGB) than to the pattern of a partnership (partnership organized under the Civil Code). The regulations for partnerships do not quite "fit" for coalitions: In Sec. 709 (1) BGB is laid down that decisions amongst the members of a partnership are to be made unanimously and Sec. 723 (1) BGB regulates the liquidation of a partnership in case of members´ changeover. Just enlisting a few characteristic features of a partnership in sense of the Civil Code stresses the discrepancy of its pattern to the concept of a coalition.

The coalition has to be set out to ***exist over a certain period***. The reason behind this criterion is that coalitions hold the right to conduct labour disputes in order to enforce their objectives.[31] Since labour disputes often cause damage to disputants (or third parties) the legislator insists on the injured parties´ feasibility to be indemnified. Within the framework of Article 9 (3) GG the legislation also approves of the establishment of ad hoc-coalitions. But its association is bound to the requirement that their actions do not only consist of a one-time action but they also pursue an enduring objective.

The coalition has to be able of forming a ***common will.*** As demonstrated above employers´ associations are often organized as registered associations according to Sec. 21 of the BGB. As laid down in Sec. 26 and 27 of the BGB the executive board has to be appointed by a resolution of the general meeting. Thus the executive board is obliged to act upon their members´ will. In accordance with Sec. 54 BGB the provisions of Sec. 26 and 39 of the BGB apply to trade unions. In both cases the entities in question feature a statutory structure, which implies an organ whose function is the representation of its members´ will.[32]

e) Independency

<u>Independence of third parties</u>

[29] *Waas* in: BeckOK, Sec. 2 TVG Rn. 4.
[30] See *Junker*, Rn. 528.
[31] See Fn. 18 Rn. 5.
[32] *Waas* in: BeckOK ArbR Sec. 2 TVG Rn. 9; BAG, judgment of 15. March 1977 – 1 ABR 16/75.

The coalition has to be independent of third parties. In particular the coalitions are to be independent of the government, political parties and the church.[33] Solely the coalitions are granted the power by Article 9 (3) of the Constitution to regulate the working and the economic conditions. In this context the independency also implies the freedom of instructions.

Being independent of the government implies especially the prohibition of forming any governmentally organized or institutionalized trade union as they occur in totalitarianism. Furthermore neither the government nor any other social group is allowed to allocate financial means.[34] The reason is that there is a risk that trade unions make decisions based on the expectations of governmental agencies, which are in charge of the subsidies. The provision of Article 160 (2) SGB III (Sozialgesetzbuch III – Third Book of Social Insurance Code) states that the Federal Employment Agency is not permitted to indemnify the loss of pay in case of striking employees. Thus this regulation constitutes the peculiarity of the governmental neutrality precept. By this means the trade unions´ independence of the government is ensured. Additionally it is inadmissible if employees call in sick during the strike in order to making a claim on health insurance companies thus they receive sickness allowance.[35] About 40% of the employees called in sick during the strike for the Collective Social Compensation Plan at AEG/Electrolux in Nuremberg. In that case they intended to avoid straining the trade union´s budget.

The criterion of independency rather illustrates a formal requirement. Being simultaneously a member of a political party as well as a member of a coalition is not forbidden (see Art. 9 (3) and 21 of the Constitution) which often occurs in practice. Consequently personal interdependences are inevitable. Nevertheless this requirement is still applicable, as by-laws may not be subordinated to political parties´ objectives.[36] Trade unions, which were founded after World War II, have been emerged to the DGB. The DGB is organized according to branches´ membership. In particular it implies that trade unions are not organized according to their ideological principles but their branches. Thus in practice the issue of the dependency of third parties is eased.[37]

Independence of the opponent

[33] *Wieland* in *Tschöpe*, Teil 4 C Rn. 7.
[34] *Henssler* in Henssler/Willemsen/Kalb, Sec. 2 TVG Rn. 11.
[35] *Löwisch*/*Rieble*: Sec. 2 TVG.
[36] Junker, Rn. 533.
[37] *Junker*, Rn. 460.

Independence of opponents connotes being in a position to make own decisions referring to its organization and its decision-making process.[38] But not every curtailing of the opponent´s independence entails the denial of the coalition´s character.

The coalition in question has to be either a trade union or an employer´s association. An association which includes both employers and employees does not hold the qualification of a coalition in sense of Art 9 (3) of the Constitution because of its inability to efficiently representing the employers´ interests and the employees´ interests. So-called "gemischter Verband" or "Harmonieverbände" (literally translated: mixed or harmonious coalitions) were common during the period of the Weimar Republic. By-laws need to ensure that former employees who perform now employers´ functions do not hold any member rights. Being formally a member is not yet opposed to this requirement. But as soon as they exercise their voting rights, electoral rights and speaking rights the trade union loses its credibility.

But there are exceptions to this principle. A mayor who is by office as head of the city a board member of a local employer´s association is enabled to be a trade union´s member in the field of the public sector. Specific issues arise as trade unions´ members belong to the board or the governing body of a corporation. This issue concerns the company´s employee participation. In this case they also exercise employers´ functions.

f) The opposition´s relativity

Independency of the opponent is only to be considered in relation to the opponent. A trade union´s member can be an employer for example of a housekeeper. But the employee must not be a member of the same field.

The freedom of coalition entails that the interests need to be internally consolidated before seeking settlement with the opponent. It depends on the collective-bargaining competence in order to knowing who is the opponent. Regularly the by-law contains a description of its regional, its functional and its personal sphere of influence. Consequential a third person figures out who is to be considered as an opponent and who is not. Even if the Federal Minister of the Interior is a member of a trade union but also an employer of public service, it is not a problem, as long as he is not provided with decisive influence on the collective bargaining decision-making concerning the public sector.

[38] *Treber* in *Schaub*, § 189 Rn. 16.

g) Internal Democracy

The coalitions, which rely on the protection provided by Article 9 (3) of the Constitution, have to have to respect the democratic principles. Their members need to have the possibility of directly or indirectly contributing to its internal decision-making. The trade union´s by-laws need to stipulate democratic voting procedures in order to ensuring that minorities are sufficiently protected.

h) Social power

The employer or employer´s association is not bound by this requirement since deriving from the employer-employee relationship the employer already holds a superior position compared to the employee. Furthermore the employer´s capability to conclude collective agreements prevails as catchall element in order to ensuring the collective bargaining system´s efficiency.[39]

In order to being able to conclude collective agreements with the employer or employer´s association the trade union has to hold a certain degree of assertiveness. The term of assertiveness concerning the rules on collective bargaining arises from the number of members and the financial power as well as successful concluded collective agreements.[40]

In its judgment the Federal Labour Court[41] stated that the trade union has had to conclude an extensive amount of collective agreements, which proves its assertiveness and its efficiency. Its determination is only carried out by prediction. Therefore the trade union, which claims the capacity of concluding collective agreements, is bound to demonstrate or in case of a conflict to prove facts that the employer will not probably ignore its social partner and he does not withdraw from the collective bargaining procedure. For instance the organizational strength as well as the ability of applying pressure by employees in key positions is considered as suitable facts. In result the BAG (Bundesarbeitsgericht – Federal Labour Court) stated that the Christian Union of Metalworkers is capable of concluding collective agreements due to their organizational strength in spite of the lack of members.

But in its latter judgments the BAG focus rather on the member´s rate.[42] Scholars contradict to its judgments because at some point trade unions do not conclude collective agreements

[39] *Franzen* in: Erfurter Kommentar, § 2 TVG Rn. 11.
[40] *Junker*, Rn. 463.
[41] BAG, judgement of 28. March 2006 – 1 ABR 58/04.
[42] *Kocher*/*Sudhof*, p. 38.

which are solely in the interest of the employees but rather pursue the organizational objectives. [43]

i) Supra-enterprise organisation

The trade union has to be organized on supra-enterprise level. There are different opinions about this requirement. Some state that trade unions, whose members are only restricted to those, who belong to the company, cannot be summarized as coalitions according to Sec. 9 (3) of the Constitution since their membership would depend on the member´s engagement and leave.[44] On the other hand there is the opinion that the trade union´s capability of concluding collective agreements should require its organization on supra-enterprise level in order to distinguish the scope of the trade union and the works council.

B) Are measures taken to exclude yellow unions, and by whom and by what means?

Exceptionally in German jurisdiction so-called yellow unions are accepted. Yellow unions are unions, which unite both employers and employees or which are not independent from the employer's side. The German Association of University Professors and Lecturers (GAUPL) can be mentioned as example. The GAUPL represents its member's vis-à-vis the government. But on the other hand the professor holds the employer´s status towards the university´s staff.

Another example is the AUB (Arbeitsgemeinschaft unabhängiger Betriebsangehöriger – Working Group of Independent Staff Members). In the end of the 1970s the board of the company Siemens AG founded and funded an own yellow union.[45] The board´ aim has been the building of a competing Trade Union to the IG Metall. In the course of its activities the AUB concluded with the company an agreement on working time flexibility and on unpaid extra work. The close financial and personal ties between the Siemens managements and the AUB became public and led into a huge scandal. The AUB chairman was convicted for fraud, fraudulent breach of trust and tax fraud as Siemens managers illegally allocated money to the AUB through middlemen.

4) The Binding Effect of Collective Bargaining Agreements

The German collective bargaining ensures employers and / or employers' organizations on the one hand, but also the trade unions as representatives of workers on the other hand. They negotiate the terms and important content like hours of work, vacation time exceeding the

[43] *Kocher*/*Sudhof*, p. 38.
[44] *Junker*, Rn. 466.
[45] http://www.labournet.de/wp-content/uploads/2014/05/schramm_gelbe.pdf , last seen on 26th of March, 2015.

statutory requirements addition, holiday pay, Christmas bonus, the amount of wages and salaries for the conclusion of contracts. The negotiation of these terms is self-determined and independent of government influence. But the legislature may (in principle) define certain upper and lower limits such as a minimum wage because of reasons of social policy.

The collective bargaining agreements combine two legal components, which have different effects: on the one hand, they form legal obligations, giving rights and duties to the contracting partners. On the other hand, they have a normative component, meaning that they have an immediate and direct legal effect in the working relations between employers and employees, called "normative effect".

Collective bargaining agreements can generally apply to an employment relationship in the following situations:

- normative application (if employer and employee are members of the respective association and union or the employer itself is a party of the collective bargaining agreement),
- reference clause in the employment agreement,
- collective bargaining agreement is declared generally binding,

Collective bargaining agreements can be declared to be generally binding like in Sec. 5 TVG. In this case, employers and employees who were not previously bound by the agreement will now covered by it.[46]

Since January 1st 2015 the government released an Act of minimum wage by the MiLoG (Mindestlohngesetz – Act on Minimum Wages) and simplified the application of Sec. 5 TVG (Tarifvertragsgesetz – Act of Collective Agreements). Until then the old Sec. 5 TVG had an abstract description of the procedure to declare a collective agreement universally applicable. It was necessary that the collective agreement in question was already applicable on 50% of the employees in the specific region and branch covered by the agreement. Only then an extension on non-bound employees and employers was possible. Now this is not the case anymore. The main perquisite for the Ministry of Labour to extend the binding effect of a collective agreement is now the public interest.

[46] *Kirchner*/*Kremp*/*Magotsch*, p. 193-194.

The AEntG (Arbeitnehmerentsendegesetz – Act on Posting of Workers) also has an influence on the applicability of collective agreements. It regulates the extension of minimum standards to employers with legal registration in a foreign country who delegate their employees to Germany for work. If such an extension is in place, they get bound by the effect of German collective bargaining for the time they operate in Germany. Up to now the AEntG applies only in some sectors, however it is since the January 1st 2015 for all sectors valid. But it is possible to deviate from the statutes till 2016 as temporary solution.[47]

A) What are the requirements for binding effect in legislation and in case law?

In Sec. 4 (1) TVG (Tarifvertragsgesetz = Act of Collective Agreements) the first requirement is the membership in a trade union or employers' association for both parties. The collective agreement itself must be valid: Collective agreements must be made in writing and both contracting parties must sign them. They must not be published formally. However employers are obliged to display them in their enterprise, which is not a requirement for validity. The Federal Ministry of Labour registers collective agreements. This is not a formal requirement either.[48] The collective agreement must not be in opposition of higher-ranking law such as the constitution.

B) Who is (directly or indirectly) bound and who not bound by a collective agreement?

A collective bargaining agreement applies to an employment relationship on one side if the employer is either a member of the employers' association that has entered into a collective bargaining agreement or the employer her- or himself is a party to the company agreement. On the other side, the employee has to be a member of the respective union which has entered into the collective bargaining agreement. If both is the case the collective bargaining agreement applies to the employment relationship of the respective employees like Sec. 3 (1) TVG (Tarifvertragsgesetz – Act of Collective Agreements). The provisions of the agreement are binding for the parties even after expiration of the agreement, Sec. 4 (5) TVG. As the period after the expiration may last for years, commentators often consider this to be unconstitutional. However, the Federal Labour Court upholds this principle, considering it important to promote the stability of associations and to protect employees.[49] It is important to note that termination of membership of the union or association will not end the responsibilities imposed by the agreement, Sec. 3 (3) TVG.

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[47] http://www.haufe.de/personal/arbeitsrecht/mindestlohngesetze-auf-das-muessen-sich-arbeitgeber-einstellen_76_262158.html; last update March 2nd 2015.
[48] *Marquardt*, p. 3.
[49] *Kirchner*/*Kremp*/*Magotsch*, p. 194.

In order to ensure that benefits of a collective bargaining agreement apply to employees who are not automatically bound by it ("outsiders"), individual working contracts often include so called referring clauses. Employers usually put such reference clause in all employment agreements in order to avoid the administration of two different salary schemes and to avoid that all employees would immediately join the union to get the benefits of the collective bargaining agreement. The question of which agreement will be applied depends on the wording of the referring clause.[50]

The referring clause may take reference to the collective bargaining agreement for a specific region and industry effective from time to time. It is called a "small dynamic referring clause". If the employment agreement only states the collective bargaining agreements applicable to the business and effective from time to time, such clause is known as a "large dynamic clause". In the case of dynamic clauses, employees will participate in the modification of the collective bargaining agreement over time.

As dynamic referral clauses mainly have the purpose of treating all employees as if they were union members, the Federal Labour Court has interpreted dynamic referral clause in the past as equal treatment clauses. As a result, if the employer's membership of the association ended, the referral clause lost its dynamic effect and only the current collective bargaining agreement was binding on the employees. The Federal Labour Court has changed its position on this issue. Employment contracts signed after January 2002 are no longer interpreted as equal treatment clauses. Now it must be explicitly mentioned in the referral clause if it is to have the purpose of equal treatment. Otherwise, dynamic clauses are interpreted literally, in other words, as having dynamic effect. As a result, modifications of the contract – whether to the benefit or to the detriment of the employee – are binding.[51]

C) Is there a system of extending the binding effect by means of a decision of the government/ministers or other public authority: who is bound by such extension and in which way?

Furthermore collective bargaining agreements can – as mentioned introductory – be declared to be generally binding by the Federal Ministry of Labour. In this case, the agreement is directly and compulsorily binding on all employees within the regional and sectoral scope of application of the agreement. In Sec. 5 (1) TVG the Federal Ministry of Labour may only declare the agreement to be generally binding if both parties of the contract have applied for

[50] *Kirchner/Kremp/Magotsch*, p. 195.
[51] *Kirchner/Kremp/Magotsch*, p. 195.

such a ruling, and if a commission of three members of each head association of employers and employees gives it consent to the declaration.

An exception exists for the construction and building cleaning industry, postal service, nursing services, security services, laundry services, the coal mining industry, the waste industry and trade union institutions for further education. Under the Posted Workers Act, all minimum employment conditions contained in collective bargaining agreements, which have been declared to be generally binding, are applied to employment relationships between employers, which have their head office in one country, and employees working for them in a different country. The collective bargaining agreement about minimum wage for the electronics industry is one such agreement, whereby all employees of that sector are granted a specific minimum wage.[52]

Since August 18th 2014 an amendment to the TVG applies. There are thus new rules for the general binding effect under Sec. 5 of the TVG and the AEntG (Arbeitnehmerentsendegesetz – Act on Posted Workers).

a) Facilitating the General Binding Effect of the Collective Bargaining Agreement Act

As mentioned the content of a collective bargaining agreement act applies to every bound employee and employer (Sec. 4 (1) and Sec. 3 (1) TVG) by trade union/employers' association membership. But if the employer were not bound a collective bargaining agreement would in principle not apply. The employer could pay a lower wage because the collective bargaining agreement has no effect.

In this situation Sec. 5 TVG allows to allocate a generally binding effect to collective bargaining agreements, so the employer could be anyway bound and it does not matter if the employees are members of a trade union.

Until the year 2014 the Ministry of Labour could only declare a collective bargaining agreement generally binding, if

1. one party of the agreement propose a motion
2. both (the representative of employers and employees) agreed by majority vote to the proposal
3. the bound employers employed about 50% of the employees in the scope of the collective bargaining agreement

[52] *Kirchner*/*Kremp*/*Magotsch*, p. 196.

4. the general binding effect was a public interest

The past years showed a recession of bound collective bargaining agreements in many regions and industries. In consequence the relatively high 50%-barrier was often not met and did thus not allow to extend the binding effect of a collective agreement. But as it makes sense to establish the general binding effect in low structured regions and industries to protect the employees by collective bargaining agreements, the relatively high 50%-barrier was criticised.

Therefore the Sec. 5 TVG was changed to abatement of the high barrier of 50%. In future it is necessary that both social partners support the motion to extend the binding effect of a collective agreement. Furthermore the Ministry of Labour may declare a collective agreement universally applicable if it considers that the public interest requires the extension of the binding effect. This is according to Sec. 5 of the TVG the case if the collective agreement in question has an extraordinary significance in the respective industry sector or if the generally binding effect is necessary to avoid aberration in the respective industry sector's collective bargaining landscape. So the Ministry of Labour has a wide discretion to extend the binding effect of a collective bargaining agreement.[53]

b) Facilitation of extension of the Minimum Wage by the AEntG (Act on Posted Workers)

Another possibility to extend the applicability of a collective agreement is stipulated in the AEntG (Arbeitnehmerentsendegesetz – Act on Posted Workers). It was an effort to establish a minimum wage by the Wage Autonomy Act, a bill passed in the year 2014. Until then there were nine branches in which the Federal Ministry of Labour was allowed to make use of the possibility to set minimum wages based on Sec. 7 AEntG. Since August 18th 2014 the AEntG is open to all industries, the Sec. 4 AEntG was amended with a new Para. 2, the previous industries are listed in Sec. 4 (1). The Ministry of Labour made use of the possibility to set sector minimum wages by ordinance to the whole industry in the past.

The proceeding now is quite similar to before, that means both parties have to propose a motion because of the minimum wage collective agreement. The projected ordinance has to be announced in public, so that the involved employers and trade unions have the possibility to comment on within three weeks. Finally a commission of three trade union and three employers' representatives need to comment it. If more than one collective agreement exits

[53] http://www.hensche.de/Aenderungen_des_TVG_des_AEntG_und_des_ArbGG_ab_16.08.2014.html (Last update 07.03.2015).

within a given area or branch the Ministry of Labour has to choose one of them. It has to take the representativity into consideration.

In this connection arises the question, if there is a need of the binding by extension ordinance based on the AEntG because we have the possibility to the simplified general binding effect by Sec. 5 TVG. Furthermore as of the January 1st 2015 Germany has a minimum wage at 8,50€. As yet the useful benefit of the extension ordinance under the AEntG was that the AEntG does not contain the strict rules of the past Sec. 5 TVG for the declaration of collective agreements as generally applicable. Now it is not necessary anymore because the requirements of Sec. 5 TVG are simplified.

The new Sec. 4 (2) and Sec. 7a (1) AEntG have their justification for one peculiarity of the new German minimum wage in force since January 1st 2015. Between 2015 and 2017 deviation in peius from the general minimum wage of 8,50 € is possible by collective agreement. The two laws ensure that sector collective agreements are not widely used to avoid the minimum wage in the transitional period between 2015 and 2017.

D) Is deviation in peius possible from statutes or collective agreements by other collective agreements or works councils agreements?

The hierarchy of standards which collective agreements are subject to begin with the GG (Grundgesetz – German Constitution) and the core of the basic laws (unalienable rights) stated in it. Especially the principle of equality (Art. 3 GG) is an important measure when rules of a collective agreement have to be inspected. Next come the „simple“ laws, which the norms of the agreement must comply with.

Principally there is no hierarchy of levels between collective agreements, although there might be a framework agreement complemented by several agreements concerning wages and other specific items. When there is a concurrence of several agreements which might be applicable there are methods to solve the problem, especially the principle of speciality: The agreement which has the more specific rules for the enterprise in question (regionally, personally or concerning the subject) will be applied, but only one collective agreement will be in power at the end.[54]

According to Sec. 4 TVG (Tarifvertragsgesetz – Act of Collective agreements) the norms of an agreement are mandatory in the sense of minimum standards and cannot be altered to the worse by individual contracts – even if both parties are not aware of the applicability of a collective agreement. Neither can works agreements derogate the collective standards except

[54] *Marquardt*, p. 3.

when the collective agreement itself allows it. The employee cannot waive his rights except with the permission of the parties of the collective agreement. This happens very rarely. More favourable working conditions can always be provided by individual contracts. In general, works agreements may not cover subjects of a collective agreement, even if they are favourable (Sec. 77 (3) BetrVG (Betriebsverfasssungsgesetz – Works Constitution Act)).[55]

The question if collective agreements may set conditions of unequal treatment is -like almost every question in the context of collective agreements - debated controversially in the juridical literature. Simplified it might be said that collective agreements may not set conditions of unequal treatment except when there are due reasons for it. However, the parties of the collective agreement have a wide prerogative of assumption for good reasons when they form different groups of employees and treat them differently (e.g. salary earners and workers). The courts have often ruled out unequal treatments in collective agreements, though, especially between women and men.[56]

E) Does the favourability principle apply in case of concurring instruments?

If an employment relationship is covered by multiple collective bargaining agreements, agreements apply alongside each other, insofar as they differ in their content. If one matter is covered by more than one collective bargaining agreement, however, the concurrency of agreements, or the question of which agreement is to applied, arises. As a result of overlapping agreements, the legal rules applying to an employment contract often conflict. According to the principle of uniformity, only one collective bargaining agreement, the one which is most specific, will be applied to the relevant employment contract. Concurrency of agreements is only possible if the validated collective agreement is in the personal, spacial and the functional scope of the employment. E.g. an employer is bound to an associational/sectoral collective agreement and in addition to a company agreement. The two kinds of agreements apply side by side.[57]

Another situation in which collective bargaining agreements may conflict, is the case of plurality of agreements. This arises where numerous collective bargaining agreements would apply to employment relationships in the same business concluded by different trade unions. E.g. if one part of the employees have collective agreements with trade union A and the others with trade union B and the employer have with both trade unions collective agreements. In a

[55] *Marquardt*, p. 3.
[56] *Marquardt*, p. 3.
[57] *Kempen*/*Zachert*/*Wendeling-Schröder*, TVG, p. 1162 (Sec. 4 Rn. 196).

long line of cases the Federal Labour Court has as well ruled that in this case only the most specific agreement applies.[58]

Until 2010 this problem was resolve by the principle of unity of the collective agreements. Only one collective agreement was applicable in one establishment, any conflict was solved by the principle of speciality. But in this case the speciality principle may not really work due as multiple contractual partners are involved. It may not always be clear to say which agreement is special compared to another collective agreement. Since 2010 the Federal Labour Court distanced from this principle because both collective agreements stay side by side, every employee succumb their own agreements.[59]

Also if the enterprise is merged with another one or sold to another one which is under the rule of another collective agreement the same applies until a new agreement is concluded. The norms of a collective agreement become content of the employment contract and cannot be changed to the worse for one year (Section 613a BGB (Bürgerliches Gesetzbuch – German Civil Code). According to Section 4 (5) TVG (Tarifvertragsgesetz – Act of Collctive Agreements) the norms of a collective agreement stay in force until they have been replaced by another agreement (which must not necessarily be collective). When the parties of a collective agreement have negotiated and concluded a new one the latter replaces the old one automatically, if nothing else is provided.[60]

5) Do works councils have any formal role in the collective bargaining?

It is a characteristic of German Law to consider two different kinds of representation (dual system).[61] As mentioned, there are trade unions: nonincorporated associations, which have the capacity to act. While most of the regulations about the works council can be found in the Works Constitution Act (Betriebsverfassungsgesetz) the trade union has its legal basis in the German Constitution and their membership is voluntarily.

Isolated from this – on the level of business operation – there is the possibility of establishing a works council.[62] The established works council is representing the work force of the business operation. It is a committee, made up of eligible employees and elected by the workforce (Sec. 7, 8 BetrVG – Betriebsverfassungsgesetz – Works Constitution Act)). The

[58] *Kirchner*/*Kremp*/*Magotsch*, p. 198.
[59] *Kempen*/*Zachert*/*Wendeling-Schröder*, TVG, p. 1163 (Sec. 4 Rn. 197).
[60] *Marquardt*, p. 9.
[61] *Junker*, Rn. 642 et sqq.
[62] *Junker*, Rn. 672.

works council is just a representing institution without legal entity, which can nevertheless assert claims in the relationship to the employer. The relationship between the employer and the works council is deeply affected by the instruction of trustful cooperation (Sec. 2 (1) BetrVG) and the prohibition of labour dispute-acts (Sec. 74 (2) 1 BetrVG).

Contracts/collective agreements between the works council and the employer, which are concluded to improve the working conditions or to cope with special problems, are called works agreements. Basically works agreements apply for all employees of the business operation, whether they are members of a trade union or not.[63] The collective [bargaining] company agreement – a contract between the employer and a trade union that applies only for the company, needs to be sharply distinguished from that. For its applicability the membership in the particular trade union is decisive, as stated above, point 4) B) of this report. Exceptions from that assumption will be mentioned.

As an important difference to other European countries there are those two instruments of representation. Both, trade unions and works councils conclude agreements of normative effect with the employer's side. On the one hand you have the *Betriebsvereinbarung* (works agreement), which can be concluded between the employer and the works council. And on the other hand you have the *Tarifvertrag* (collective [bargaining] agreement) – a contract between the trade union and the employer, which cannot be concluded by the works council. Both types could be called "collective agreement" as they are concluded not by individual employees but by collective bodies like trade unions or works councils. However, there are a great number of differences between works agreements and collective agreements concluded by trade unions. There is a possibility of deviation, which will be mentioned later.

A) Are works councils legally allowed to bargain with the employer and conclude agreements on employment conditions or other issues related to the interests of the employees?

Works councils are legally allowed to bargain and conclude works agreements with the employer, Sec. 77 (1) BetrVG. Those need to be decided in common by the employer and the works council. They have to put it in written form and signing it is necessary. Works agreements can regulate working conditions like time or form of payment of remuneration or general matters relating to the rules of business operation. A catalogue in Sec. 87 (1) BetrVG legally defines matters in which the works council shall have the right of co-determination as far as they are not prescribed by legislation or collective bargaining agreement. Works agreements can also be concluded on a voluntary basis like regulations preventing accidents

[63] *Junker*, Rn. 717.

at work and health damages, Sec. 88 BetrVG.[64] There is also a non-written form of a works agreement (Regelungsabrede), which is not defined legally and has a different legal effect from the works agreement, which is considered in the following.

B) What is the legal effect of agreements by the works council?

As it was mentioned introductorily works agreements are contracts between the employer and the works council, that apply to all employees in the business operation, whether they are trade union members or not. A works agreement shall be executed and displayed by the employer (Sec. 77 (1), (2) BetrVG). They are mandatory and directly applicable (Sec. 77 (4) BetrVG). Works agreements grant rights – like law or collective agreements- directly for employees, which cannot be waived, except with the agreement of the works council, Sec 77 (4) BetrVG. There is only a possibility to remove a member of the works council or to dissolve the works council. The employer, a trade union represented in the establishment or one-fourth or more of the employees may apply for that to the labour court, Sec. 23 (1) BetrVG.

The "Regelungsabrede" – a non-formal agreement, which does not need the written form to be valid – just grants rights and duties between the parties; there is no normative effect, what means that individual employees are not able to claim rights.[65] This kind of agreement is not invalid in consequence of Sec. 77 (3) BetrVG which provides the superiority of collective agreements over works agreements. But the Federal Labour Court awarded a injunctive relief to a trade union, if a regulation of a collective agreement is suppressed by this type of agreement, which grants rights just between the employer and the works council (basis for the claim: Sec. 1004 (1) 2 BGB, 823 (1) BGB (Bürgerliches Gesetzbuch – German Civil Code) in conjunction with art. 9 (3) of the GG – Grundgesetz – German Constitution).[66]

This type of regulating a business operation should not be suggestive of decreasing the decision-making autonomy of the employer that much as it might seems. It is clearly prescribed, that "the works council shall not interfere with the management of the establishment by any unilateral action" (Sec. 77 (1) BetrVG).

C) What is the relationship between works councils and trade unions in the context of collective bargaining?

As mentioned introductorily, the representation of employees by the trade union is – at least formally – separated from the works council. For an employee it is possible to be active in

[64] *Junker*, Rn. 756.
[65] *Junker*, Rn. 720.
[66] *Junker*, Rn. 722; so called „BURDA-judgement": BAG, judgement of 20. April 1999 – 1 ABR 72/98.

both, a trade union and a works council and both are responsible for the interests of the employees, but they have different duties anyway. That does not mean that the legislation also mentions the duty of cooperation between the trade union and the works council like in Sec. 2 (1) BetrVG. In addition to that the trade union is entitled to submit a list of candidates for the works councils elections, Sec. 14 (3) BetrVG.

Exclusively the trade unions are responsible and legally allowed to bargain collective bargaining agreements in representation of their members.[67] It is legally specified, that the BetrVG, which is mainly prescribing the works councils rights, shall not limit the duties and rights of trade unions (Sec. 2 (3) BetrVG). It is rather one of the works councils' general duties to make sure that the effect of regulations of a collective bargaining agreement, which are favouring the employees, is implemented (Sec. 80 (1) No. 1 BetrVG). Furthermore, in Sec. 74 (3) BetrvG it is prescribed, that employees, who have assumed duties of the BetrVG shall not be restricted in trade union activities even where such activities are carried out in the establishment. To exercise the duties, which the Works Constitution Act prescribes, the trade unions have even the right of access to the establishment, Sec. 2 (2) BetrVG.

Also in the context of industrial actions the separation of trade unions and works councils is maintained. To gain the right to strike in Germany the failure of collective bargaining is necessary.[68] In such a case, where a trade union has the right to strike, it is not possible for the works council to participate or support the strike of the trade union. It is legally prescribed that any industrial action of the works council shall be unlawful (Sec.74 (2) 1 BetrVG). The same applies to trade unions: they cannot claim works agreements with industrial actions. That shall not apply to industrial action between collective bargaining parties (Sec. 74 (2) BetrVG).

But works agreements are not the only collective agreements, that have binding effect for the whole business operation, regardless of the employees' membership to a trade union. Also in collective agreements one can find regulations of the business operation (*Betriebsnormen*), that are effecting the whole workforce.[69]

[67] *Junker*, Rn. 516.
[68] Illustrative example in *Junker*, Rn. 613 et sqq.
[69] *Junker*, Rn. 536.

D) Can works councils agreements be invoked or challenged by individual employees?

As it was mentioned before it is prescribed in Sec. 77 (4) BetrVG that the effect of works agreements is mandatory and directly applicable.[70] Individual employees cannot challenge works council agreements in court. The fact, that works agreements grant rights for the employees normatively, which are mandatory and can be claimed directly like it was pointed out earlier, does not mean, the individual employee can ask for a certain works agreement to be concluded.

Because works agreements are mandatory and directly applicable, the employee can claim the rights, which are granted by them in the same way he would claim rights, which are granted by legislation or a collective bargaining agreement.

In legislation the relationship between the works council and the represented employees is not mentioned very often. There are for example the of the employees in the employees meeting (Sec. 42 et sqq. BetrVG) and the works council's duty to observe secrecy about personal matters, Sec. (82 (2) BetrVG, Sec. 83 (1), 99 (1), Sec. 102 (2) BetrVG).[71]

In case of gross violation of legal duties by the works council, one fourth of the employees with voting rights can apply to the labour court for an order to remove any member of the works council from duty or to dissolve the works council, Sec. 23 (1) BetrVG. A fourth of the employees with the right to vote is also legally granted to request a convention of a employees assembly (Betriebsversammlung[72]) and to put the matter they want to discuss on the agenda, Sec. 43 (3) BetrVG.

E) Can works councils agreements deviate from collective agreements?

As mentioned before, the representation of employees by a works council is isolated from the representation by a trade union. Even if both want to represent the employees, their goals can be different.[73] Works councils are more willing to deviate from a collective agreement- maybe to safe jobs- because they have a closer relation to the personnel. Trade unions would undermine their own collective bargaining autonomy, if they would deviate from a concluded collective agreement.[74] Nevertheless you can see in many cases the works council is made up of people, who had been suggested by the trade unions.

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[70] *Junker*, Rn. 715.
[71] *Junker*, Rn. 652.
[72] In particular to the „Betriebsversammlung": *Junker,* Rn. 677.
[73] *Junker*, Rn. 642.
[74] *Junker*, Rn. 653.

The competition is legally solved in Sec. 77 (3) 1 BetrVG, which prescribes, that works agreements shall not deal with remuneration or other conditions of employment, which have been fixed or are normally fixed by a collective bargaining agreement. Just in case the collective bargaining agreement expressly authorizes the making of additional works agreements this is not applicable.

As a consequence we see that the rivalry is solved in favour of the collective bargaining economy, which means in favour of trade unions, and that works council agreements are concluded with a collective bargaining agreement proviso (Tarifvorbehalt). Just the collective agreement itself can content a regulation, which allows a deviating agreement (Öffnungsklausel Sec. 4 (3) TVG- Tarifvertragsgesetz- Collective Bargaining Agreements Act).

F) Is anything known on the issues addressed by works councils in their agreements?

Works agreements can be concluded about a number of organizational matters of the works council representation, like hours of consultation (Sec. 39 (1) BetrVG) or the size of the joint works council (Sec. 47 (5), (6) BetrVG). They are also the appropriate instruments to schedule staff questionnaires or formulate general assessment criteria (Sec. 94, 95 BetrVG). In a works agreement the parties can also undertake each other to certain mutual behaviour (works agreements in personam). Especially to execute the enforceable co-determination rights in Sec. 87 (1) BetrVG the works agreement is the most appropriate instrument. In addition to that- considering the co-determination rights in social affairs[75]- one can find Sec. 88 BetrVG, which prescribes, that voluntary works agreements can not only be concluded about the matters that are enumerated in the section, but also about other similar issues, like regulations about the gate control, a no-smoking-rule or the canteen.

6) Can two (or more) collective agreements (on sectoral or company level) be applied simultaneously in the same company?

Sometimes it occurs that a company falls within the scope of different collective agreements. As mentioned above, the German Labour Law distinguishes between the concurrence of collective agreement and the plurality of collective agreements.

[75] *Junker*, Rn. 736.

A) The concurrence of collective agreements

The concurrence of collective agreements implies that several collective agreements are relevant to one and the same employment relationship according to the collective bargaining competence, the scope and the collective agreement's binding structures. It requires that both contract parties are bound normative for example by the regulation ruled in Sec. 3 (1) TVG or by the statutory extension of collective agreements ("Allgemeinverbindlichkeitserklärung") ruled in Sec. 5 (4) TVG.

The concurrence of collective agreements occurs in case of causation by both parties themselves if the employer is bound by a collective agreement of an employers' association while he also concludes with a Trade Union an in-house collective agreement.[76] Another case of the concurrence of collective agreements is the change of the employer to another employer´s association. In that case the employer is bound by the former concluded collective agreement according to Sec. 3 (3) TVG and at the same time by the recent concluded collective agreement according to Sec. 3 (1) TVG.

The concurrence of collective agreements needs to be dissolved by conflict rules because the conflicting collective agreements can compose different legal consequences in the same employment relationship which are not compatible with each other. In order to ensuring the order function of the collective bargaining system only one collective agreement is applicable. The dissolution of cases of the concurrence of collective agreements is not clearly ruled in German Labour Law. The only normative regulation concerning the dissolution of the concurrence is laid down in Sec. 8 (2) AEntG (Arbeitnehmerentsendegesetz – German Law on the Posting of Workers). It states that the collective agreements concluded by the employer according to Sec. 4 – 6 AEntG, which falls within the scope of the ruling according to Sec. 5 TVG, prevails other collective agreements concluded according to Sec. 3 TVG or Sec. 5 TVG.

Concerning to other cases of concurrence the Bundesarbeitsgericht (Federal Labour Court) has developed the principle of proximity or specialty as a conflict rule. The principle of proximity or specialty implies the application of the one collective agreement which is proximate to the company regionally, operationally, functionally and personally and which is able to do justice to the company´s demands and characteristics. But the concurrence can also be dissolved by the collective agreements themselves in which a limitative clause is laid down which for example rules the subsidiarity towards other collective agreements.

[76] *Franzen*: in: Erfurter Kommentar, Sec. 4 TVG Rn. 65.

B) The plurality of collective agreements

The plurality of collective agreements is existent if the employer is bound by several collective agreements on operational level and the entirety of employees is or may be also bound by several collective agreements.[77] The plurality of collective agreements occurs if employees of the same company belong to different trade unions which conclude collective agreements with the employer or the employer´s association itself. Another case of plurality of collective agreements is existent if one part of employees is members of the trade union while the statutory extension of collective agreements applies to the other part of employees. Due to the concurrence of collective agreements the statutory extensions of collective agreements do not apply to trade union´s members.

According to the main doctrine several concluded collective agreements are simultaneously applicable to one company. While collective agreements concluded by trade unions apply to their members, non-organized employees fall within the scope of a generally binding collective agreement.

7) To what extent has your collective bargaining system changed or has it been changing in recent years (are there, in particular, decentralization trends?)

Trade unions in Germany compete in the next three issues, and namely: the quantity of members, competence for participation at works councils and mandates at supervisory bodies and finally collective agreements politics.[78] Collective bargaining competition takes place when a trade union tries to push ahead its collective agreements by offering exclusive and beneficial conditions for its potential participants in contrast to other trade unions. During long period of time a so called principle of the Tarifeinheit (literally: collective agreement unity) was valid in Germany. It worked on a basis of the following rule: one enterprise – one collective agreement. One will not find a corresponding norm at the law on collective bargaining as this legal practice developed by the courts. But on the 23 June 2010 the Federative Labour Court decided to change its jurisprudence and deviate from this principle: from now on more than one collective agreement can be valid within one enterprise. For the particular worker that agreement is valid which was concluded by the trade union that he/she belongs to. For those employees who do not belong to any of available trade unions problems may arise concerning the so called referral clauses mentioned above (point 4)B)). Some fear

[77] *Dütz/Thüsing*: § 12 Rn. 653.
[78] *Dribbusch*, p. 7.

that this development may cause the splintering of big trade unions and creation of many small trade unions and as a consequence an increase of number of strikes.

Currently there is a bill of the German government on this issue. It amends the Act of Collective Agreements and The Act of Labour Court. Section 1(2) of the bill allows an employer to be bound by collective agreements with different trade unions in one business operation. But only the most representative agreement shall be applicable on the employment relations with the employees. This change of the outlook on the principle of unity of collective agreements might positively affect collective bargaining in Germany which is nowadays negatively influenced by the significant weakening of organizational and structural power of unions due to a sharp decline in membership and a change in the social and economic framework conditions.[79] Employers' associations suffer a decline of membership as well. In order to stop this, they now offer their members to opt-out of the collective agreements concluded by the employers' association. This leads to a decentralization of the collective bargaining system as well as to a decline in the coverage of collective agreements as a whole.

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