WORKERS REPRESENTATION IN UNDERTAKINGS

German Team Report

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Introduction, general remarks and sources of law

1. Organizational forms in which employees and workers can collectively represent their rights

Today's German labour law originated in the era of mass industrialization.[1] At the time of the Industrial Revolution, workers had no influence whatsoever on their wages and working conditions. Men, women and children worked 12 to 15 hours a day in cotton spinning mills, weaving mills and mines. For self-help and protection, but also for the organization of resistance against these working conditions, workers' organizations were repeatedly founded.[2] The labour force politicized and led to the formation of the first trade unions.[3] In return, employers' associations were formed to defend themselves against these demands. The fact that workers today are no longer exposed to the unlimited power of disposal of employers and that social relations in the company are often regulated is not least the result of the efforts of works councils and unions .[4]

Employees and employers pursue different interests in the company. While management seeks to motivate the workforce through leadership styles, co-determination and wage formation are important criteria on the employee side. A distinction must be made between the works constitution and the institutions based on it and co-determination in company bodies.[5] In order to ensure democratisation, self-determination and control of power, the Co-Determination Act of 1976 was created.[6]

In general, the Works Council and the trade unions can represent the workers.

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[1] *Lingemann, Steinau-Steinbrück and Mengel,* Employment and Labour Law in Germany, (4th edn, C.H. Beck 2016) 1.
[2] Literatur G. Kessler, Die Deutschen Arbeitgeberverbände, Leipzig 1907-Wilhelm Adamy / Johannes Steffen, Handbuch der Arbeitsbeziehungen, Bonn 1985.
[3] *Lingemann, Steinau-Steinbrück and Mengel,* Employment and Labour Law in Germany, (4th edn, C.H. Beck 2016) 1.
[4] https://www.bpb.de/izpb/8554/kooperation-und-konflikt-menschen-im-unternehmen?p=all, 16.02.2020.
[5] Abbo Junker, Grundkurs Arbeits , Para. 802.
[6] Abbo Junker, Grundkurs ArbeitsR, Para. 805, 806.

1.1. Workers Council

The works council (*Betriebsrat*) is the main representative body vis-a-vis the employer. It is elected every four years.[7] If a works council exists in companies with more than five employees, the employees are involved in company decisions through it. Employers and works councils are obliged to cooperate in a spirit of trust for the benefit of the employees and the company.

Depending on the type of decision and the number of employees, the works council has graduated participation rights: it has full participation rights only in social matters, such as the working time situation, holiday principles and social facilities. Such decisions can only be made jointly by the works council and the employer. If more than 20 employees are employed in a company, the works council has the right to approve and object to personnel matters. This concerns for example the organization of the personnel questionnaire, the definition of evaluation principles and guidelines for the personnel selection with attitudes. It must be consulted on dismissals. From 20 employees upwards, it must be informed of economic decisions. A youth representation must be elected if a number of five employees under the age of 18 is employed.

In general - the activity of a works council is a huge field. § 80 of the Works Constitution Act sets out the general tasks which the works council performs in its daily work.

According to this provision, the works council has the task:

- to monitor compliance with laws, ordinances, accident prevention regulations, collective agreements and works agreements.

- to apply to the employer for measures that serve the company and the workforce.

[7] Lingemann,vonSteinau-Steinrück,Mengel,Employment & Labour Law in Germany (4th edn, 2016, C.H. Beck)59.

- to promote the implementation of equality between women and men, especially in recruitment and employment, and the compatibility of family and career.

- to receive suggestions from employees and, if necessary, to negotiate with the employer on these.

- to promote the integration of severely disabled persons and other persons in need of protection.

- to prepare and carry out the election of a youth and trainee representative body.

- to promote the employment of older workers in the company.

- to promote the integration of foreign employees and understanding between them and German employees, and to apply for measures to combat racism and xenophobia.

- to promote and secure employment in the company.

- to promote measures of occupational health and safety and operational environmental protection.

There is a division at three levels: the local works council, the central works council at company level and the group works council at group level. It is responsible for dealing with matters which concern the group as a whole or several of its member companies and which cannot be regulated by individual company or establishment-level works councils or need to be regulated uniformly for the entire group.[8] Furthermore there exist for instance the European works council, the economic committee, the youth and Trainee Representation.[9]

[8] https://www.eurofound.europa.eu/efemiredictionary/group-works-council-0, 16.02.2020.
[9] Sakkoulas, Labour Law, Part I,p.46 - 48.

1.2 Trade Union

Trade unions are associations of individual employees organized to represent their interests and in particular to conclude collecitive bargaining agreements. The constitutive characteristics are going to be discussed below.

The legal basis for trade unions can be found in Article 9 of the German constitution (GC), which, in addition to freedom of association as a citizens' right (Article 9(1)), grants freedom of association "for everyone and for all professions" in Article 9(3) "for the purpose of safeguarding and promoting working and economic conditions". Comparable legal guarantees are also provided by the ILO Conventions 87, 98 and 135 ratified by the federal republic germany FRG. There are no further legal regulations such as a law on associations or a specific trade union law that would define the structure, internal constitution and representativeness criteria. For historical reasons, the German Trade Union Confederation DGB and its member unions refuse to submit to the requirements of the law on associations and to take on the form of a legally capable association. Nevertheless, the organisational structure and internal decision-making process both meet formal democratic requirements and largely correspond to the criteria laid down in the German Civil Code (§§ 21 et seq.) and in the Associations Act.

The protection of the Basic Law under Article 9.3 covers not only the formation and existence of trade unions against state and private intervention, but also the collective bargaining autonomy of employers and trade unions. The Collective Bargaining Act, which was passed by the Economic Council even before the Basic Law was passed and came into force on 9 April 1949, regulates in a few paragraphs not only the basic principles for collective agreements but also the procedure for declaring collective agreements generally binding. As a compensatory measure to the restrained legal regulations, the collective bargaining law and the right to industrial action (the Basic Law includes the right to strike as an implicit part of the freedom of association) have been further developed by case law in labor court proceedings ("Richterrecht"). In addition, there are various legal provisions regulating the management of industrial relations and the participation and influence of trade unions in companies and enterprises. Although the

Works Constitution Act (BVG of 1952, amended in 1972 and 2001) provides for a clear separation between trade unions and workplace representation of interests ("dual representation"), in practice trade union involvement has become established in the majority of workplace representations (see IW Dossier 31: 6). The Coal and Steel Codetermination Act of 1951 (including subsequent legislation) and the Co-determination Act of 1976 expressly standardised the representation on the supervisory board and its influence on the appointment of management board members (labour directors).[10]

1.3 Codetermination at the supervisory board level

Works councils exercise employee codetermination at the works level, as opposed to codetermination at the supervisory board.[11] The supervisory board level has the typical Germantwo-tier board system, consisting of a managementboard (der Vorstand) and a supervisory board (der Auftsichtsrat).[12]

Employees have a right of co-determination at the supervisory board of their concern, according to the law on co-determination of the employees. In the supervisory board are representative employees, executive employees and union representatives represented from the side of employees. The representative employee is elected by the other employees.

The supervisory board controls, advises and supports the board of directors. It oversees management and in particular dismisses and appoints the managing directors.[13]

[10] Däubler, Wolfgang, Arbeitskampfrecht, 2018, §28 Para. 54-55; Seebacher Kommentar Arbeitsrecht, Para. 1-6.
[11] German Labour and Employment Law, p. 44 and 59ff.
[12] https://www.researchgate.net/publication/305379734_The_rise_and_fall_of_supervisory_codetermination_in_Germany, 02.03.2020.
[13] German Labour and Employment Law, p.59.

1.4 hierarchy between the forms, in particular: Trade union and works council?

Trade unions and works councils are both on the employees' side, but they perform different tasks.[14] Works councils are independent of trade unions. There is no hierarchy between trade unions and works councils due to different thematic fields. Whereas trade unions represent specific interest of their members not only within enterprises, works councils focus on internal issues. In fact, most works councils members are also members in trade unions.

Trade unions are organised according to two principles: The industrial and professional association principle. The individual trade unions, which are grouped under the umbrella of the German Confederation of Trade Unions (DGB) or the Christian Trade Unions, are structured according to the industrial association principle (e.g. IG Metall). According to this principle, all companies in the respective economic sector are grouped together in the corresponding trade union irrespective of the activities of the employees in the associated companies. The German Confederation of Trade Unions is an umbrella organisation to which eight individual trade unions (e.g. IG-Metall, Verdi, IGBCE) are affiliated. The professional association principle combines certain occupational groups, irrespective of the sector to which they belong. Examples are the Train Drivers' Union (GDL) and the Cockpit Association (VC). [15]

The works council is obliged to cooperate with the trade unions represented in the company for the benefit of the employees and the company (§ 2 para. 1 WCA). A trade union is represented in the company if at least one employee employed in the company is a member of this trade union. It is irrelevant whether this is the trade union responsible for concluding collective agreements in this company or another trade union, whether the

[14] https://www.boeckler.de/pdf/mbf_bvd_hintergrund_brgbrkbr_zustaendigkeit_betriebsverfassung.pdf.
[15] https://www.dgb.de/uber-uns/dgb-heute/gewerkschaften-im-dgb, 16.02.2020.

employer is bound by collective agreements or not. A trade union is represented on the works council if at least one works council member is organised in this trade union.[16]

Works councils and trade unions contribute in different ways to agreements between employees and employers on work organisation and salaries.[17] The rights of the works council are fully covered in the law on industrial relations. In contrast, the law on industrial relations does mention the trade unions, but assigns them certain rights to a much lesser extent.

2. Legal basis for the representation of employees in undertakings

There is a whole series of labour law provisions in numerous individual laws and regulations which relate both to the individual and to the opportunities for participation of his or her representatives.

In 1951, following the threat of a general strike by the trade unions, the Montan Codetermination Act was passed for corporations with more than 1000 employees in the mining sector and in the iron and steel producing industry. It stipulated that the Supervisory Board would be composed of equal numbers of employee and employer representatives, while the Chairman would have to meet special conditions of independence and be elected by both sides. The Executive Board must also include a labour director who may not be appointed or dismissed against the will of the majority of employee representatives.

The possibility of forming associations to promote working and economic conditions was constitutionally enshrined in Article 9 (3) of the Basic Law.[18]

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[16] Richardi BetrVG/Richardi/Maschmann BetrVG § 2 Para. 73-75.
[17] Zachert, Gewerkschaftsrechte und Betriebsratsrechte im Betrieb - ein neues Konfliktfeld vor dem Hintergrund der Krise ?, AiB 1983, 23-26.
[18] ArbG Koblenz, Urteil vom 29. Januar 2020 – 4 Ca 2629/19 –, juris; Kamp, Die Mitbestimmung des Betriebsrats nach § 99 Absatz 2 BetrVG bei Frauenfördermaßnahmen.

In addition to the constitutional basis, strike guarantees under international law also apply. In addition to Article 11 of the ECHR and the ESC, the focus is on the following. Both have been ratified in Germany.

The following is showing a general overview over the most important laws connected to the topic.

From collective labour law, this includes the following:

§§ 2 and 3 of the Collective Agreements Act 1949/1969

§ 75 Staff Representation Act 1955

§§ 74, 77 and 87 of the Works Constitution Act 1952/1972/2001

§ 1 Coal and Steel Codetermination Act 1951

§§ 1 sec. 2 and 32 of the Co-Determination Act 1976

as well as Article 9 (3) of the Basic Law 1949 as legal basis.

In addition, case law, with its judgements, constitutes the co-determination of the institutions as the most important lever. On the one hand, freedom from the state is guaranteed, and on the other hand, the claim against the state to enable associations to participate in legal transactions is also guaranteed.[19] Furthermore, case law decided that undertakings have to give access for trade unions for recruiting new members even if the trade unions is not yet represented in the undertaking.[20] Moreover, the Federal Labour Court clarified in a recent decision that for establishing works councils also subcontract

[19] BVerfG NJW 1992, 549; 1979, 699 (706); BVerfG NJW 2001, 2617, BVerfG NJW 1979, 699 (706), 2001, 2617.
[20] BAG 1 AZR 179/09

workers apply and have to be taken into account for laws of the WCA regarding the size of the undertaking.[21]

Freedom of association

3. Role of the fundamental right of freedom of association in the system of workers representation

The fundamental right to form associations to safeguard and promote working and economic conditions (Article 9 (3) of the Basic Law) guarantees the right of employees and employers to join forces for this purpose and to operate without state or other interference (freedom of association). Freedom of association protects the existence and activities of trade unions and employers' associations in pursuit of their objectives. The fundamental right to form associations to safeguard working and economic conditions (Article 9 (3) of the Basic Law) not only protects the freedom of the individual to form, join or leave an association. The existence, organisational structure and activities of the coalition itself are also protected, insofar as they serve to promote working and economic conditions. The protection of this fundamental right includes all coalition-specific behaviours of the association and its individual members. [22] These include, among other things, advertising campaigns by members for their trade union, activities as shop stewards and participation in trade union bodies and in their decision-making, e.g. through participation in meetings of the local executive committee of the trade union. Freedom of association, however, does not give unionised workers a general right to stay away from work in order to carry out their trade union activities. However, when designing shift plans, the employer must take into account an employee's wish to participate in trade union meetings at his own discretion. [23]

[21] BAG 7 ABR 69/11
[22] (BVerfG 14.11.1995 - 1 BvR 601/92).
[23] (BAG v. 13.8.2010 - 1 AZR 173/09).

4. Personal scope of freedom of association

Article 9 (3) of the Basic Law guarantees freedom of association "for the protection and promotion of working and economic conditions". According to its wording ("All Germans"), the general freedom of association constitutes a fundamental German right. The special feature of general freedom of association from a personal point of view is that it constitutes a so-called double fundamental right. The individual present and future members of an association are entitled to fundamental rights with regard to individual general freedom of association. This includes all Germans within the meaning of Article 116 of the Basic Law as natural persons.

According to Article 19 (3) of the Basic Law, domestic legal persons who wish to form an association within the meaning of Article 9 (1) of the Basic Law may also be entitled to fundamental rights. Non-Germans may invoke the general freedom of action under Article 2 (1) GG.[24] With regard to EU citizens, the Federal Republic of Germany is obliged to guarantee them the same protection of fundamental rights within the scope of application of the EU Treaties under Article 2 (1) of the Basic Law as Germans do under Article 9 (1) of the Basic Law. According to today's leading legislation, the freedom to strike is "at least insofar covered by the freedom of association" as it is generally necessary "to ensure a functioning autonomy of collective bargaining". [25]

4.1 Does this also apply to self-employed persons?

The substantive tension lies in the reciprocal effect of being self-employed. On the one hand, self-employed persons can exist in the context, that means that they work alone without employees.In the second case, however, a self-employed employer would be covered by the regulatory power of the parties to the collective agreement. The complete avoidance of the term "Employer" in the collective agreement and the regulation of a

[24] https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/AnnualReports.aspx, Annex, 16.02.2020.
[25] BVerfG 26.6.1991 – 1 BvR 779/85, BVerfGE 84, 213, 225; 26.3.2014 – 1 BvR 3185/09, NZA 2014, 493, Rn. 23; BAG 19.6.2007 – 1 AZR 396/06, DB 2007, 2038, 2039, Rn. 11.

minimum contribution independent of the payroll total, that the collective agreement would, however, be invalid in so far as it creates obligations for undertakings which do not employ any employees and do not intend to do so. Otherwise the parties to the collective agreement exceeded their collective bargaining power. According to the system and purpose of the TVG, they may only include employers, employees and persons similar to employees[26] in a set of obligations under the collective agreement , cf. § 2.1 of the TVG on the parties to the collective agreement, § 3.1 of the TVG on the Tariff-bound, § 12 a TVG for extension to persons similar to employees. § 4 2 TVG it is true that the joint bodies referred to in that provision (such as the applicant as Ausgleichkasse) a special position, but in all other respects expressly address the "employers and employees bound by collective agreements", which in turn refers back to § 3, Subsection 1, TVG. The "operation" appearing in some parts of the TVG was not, in its systematics the collective bargaining obligation is rather linked to the concept of an employer, see in particular § 3 Paragraph 2 TVG. The general definition of an employer, according to which the employment relationship is governed by I was thinking about the employee. An employer is someone who has at least one employee or one employs or wishes to employ a person similar to an employee (§21). The extension to the intended employment of workers serves the upstream conclusion of collective agreements with effect for the employment relationships then to be concluded, and vice versa also prospective employees (applicants), e.g. through company staffing rules according to § 3 (2) TVG could be affected by tariff regulations, whereby the interests of the other employees, whose employment relationships could be used as a basis for the standard. By contrast, solo self-employed entrepreneurs would be subject neither as employers nor as employees of the collective bargaining power, at most they could be considered as persons similar to employees under the requirements of § 12 a TVG .Article 9.3 of the constitution does not require any other interpretation. The functionality of the autonomy of collective bargaining is not affected. It guarantees the social protection of dependent employees by

[26] Bayreuther/Deinert, RdA 2015, 129; LAG Köln v. 23.10.2015 – 9 Sa 395/15; LAG Berlin-Brandenburg v. 21.7.2016 – 14 BVL 5007/15ua.; LAG Hessen v. 23.1.2017 – 9 Sa 1171/16; Rieble, in: Giesen/Junker/Rieble, Ordnungsfragen des Tarifvertragsrechts, 2017, S. 65; Vetter, NZA-RR 2017, 281; Löwisch/Rieble, Tarifvertragsgesetz, 4. Aufl. 2017, § 4 Para. 374 ff..

means of collective private autonomy. Because the direction of protection of the collective bargaining standards is one-sided: employees are protected, employers are obliged. The essential teleological idea that stands in the way of an over-extension of collective bargaining power is the prohibition of a contract at the expense of third parties. Collective bargaining autonomy, understood as collectively exercised Private autonomy, must take into account this fundamental principle of private law. Nothing else as an agreement at the expense of third parties, however, it would be, if the parties to a collective agreement could create payment obligations for solo self-employed persons without their consent.[27] Self-employed persons who work a lot for a client and are therefore "economically dependent and in need of social protection comparable to an employee" but are not pseudo self-employed are defined by the Collective Agreement Act as "persons similar to employees". And finally, the trade unions are allowed to conclude collective agreements similar to those for employees.[28]

5. Requirements for qualification as a legally or actually recognized organization

Essential requirements

In order for an association of employees to be a trade union - a coalition in the sense of the Basic Law - the following criteria apply:

- Voluntary association

In a trade union, the employees have voluntarily joined together for a certain period of time

- Statutory purpose: to promote and safeguard working and economic conditions

[27] Wutte, Wir wollen nur euer Bestes, RdA 2019, 180-187.
[28] https://selbststaendige.verdi.de/was-tun_1/tarifvertraege/++co++8457f8a6-fa91-11e2-9e35-525400438ccf, 20.02.2020.

The statutes of a trade union are formulated as a common task and objective to maintain and promote working and economic conditions.[29]

- Independence

A trade union is financially, personnel and organisationally independent of third parties (state, parties, churches) and of its counterpart (employer). It is also "opponent free", i.e. employers may not be members of trade unions. Sometimes the inter-company activities of a trade union are also cited as a sign of independence.[30]

- Democratic organization

A trade union is democratically organised and legitimised by elections and co-determination of its members.

Requirements under collective bargaining law

In addition, there are the requirements of collective bargaining law for a trade union:

A trade union is eligible for collective bargaining. The ability to bargain collectively can be checked primarily on the basis of three criteria:

- Social power

A trade union must be able to assert itself. It needs this social power in order to be recognised and taken seriously by its counterpart as a negotiating partner.[31] A trade union is characterised by an assertive organisation with an appropriate number of members, which is in principle prepared to take industrial action and which has already

[29] BAG, Beschluss vom 16. Januar 1990 – 1 ABR 10/89 –, BAGE 64, 16-24.
[30] ver.di v UFO (2004)German federal labour court(1 ABR 51/03).
[31] BVerwG, Beschluss vom 25. Juli 2006 – 6 P 17/05 –, juris.

concluded collective agreements in the past (this does not include any accommodation or sham collective agreements).[32]

- Willingness to bargain

Here the principle of "all or nothing" applies - a trade union must be willing and able to negotiate and conclude agreements on all working conditions. Its own negotiating power must not be restricted to certain areas, because there is no such thing as partial collective bargaining.

- Assertiveness

A trade union is characterised by its willingness to engage in collective bargaining and to enforce collective bargaining demands.[33]

Independence and self-governance: protection against acts of interference

6. Protection of independence and self-governance of workers' organizations against external influences

The representation of interests is already protected by the German Constitution. According to this, a member must not be preferred or disadvantaged.

The interest groups can also set up rules. The rules of the works council only apply within a company, whereas the union primarily concludes collective agreements.

[32] BVerfG, Nichtannahmebeschluss vom 31. Juli 2007 – 2 BvR 1831/06, 2 BvR 1832/06, 2 BvR 1833/06, 2 BvR 1834/06 –, juris.
[33] Seebacher, Arbeitsrecht, Para 24-28.

6.1 protection against external influences

Independence and self-governance of workers` organisations are protected against external influences by ban of influence by state, camps or social opponent.[34] There is also a ban of discrimination or preferential treatment of members of a workers' organisation.[35]

These organisations are also protected by the German Basic Law. Art 9 (3) German Constitution (GC) protects the stock and activities of coalitions. Every contract with violation of Art 9 (3) GC is void.

The injured parties can have a damage claim in individual cases and the suit for discontinuance against other impairing is also possible.[36]

Art 9 (3) GC

The right to form association to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. (…)

The election of the members of the works council is secret and immediate according to § 14 (1) Works Constitution Act (WCA). The works council's independence is guaranteed through the formation by the workforce (§§ 7,8, 16-18 WCA). Furthermore, the executive

[34] Anno Hamacher/Hendrik van Laak 'Koalitionsrecht' in Moll Münchener Anwaltshandbuch Arbeitsrecht (4th edn 2017) § 71 Para 12.
[35] Manfred Löwisch/Georg Caspers/Steffen Klumpp, Arbeitsrecht (12th edn 2019 Vahlen), § 26 Para 1309.
[36] Raimund Waltermann, Arbeitsrecht, (19th edn 2018 Vahlen), § 23 Para 511.

employees (§ 5 (3) WCA) are excluded from the application of the Works Constitution Act and thus from the workforce represented by the works council.

Deliberate preferential treatment is punishable according to § 119 (1) no. 3 WCA. There must be a causality between preferential treatment and the official activity.[37] But the problem is that favouring third parties is not covered, only if the member gains an indirect advantage.[38]

There is also no protection against corruption on the labour market.[39]

Discrimination against trade union- and works council members is also prohibited.[40]

6.2 limits to the self-governance of workers' organizations: democratic organization as a requirement

The organisations of the workers are democratically organized not by law, but from jurisdiction.[41] In decision making all members in the organisations must be treated equally. Thus, the organisations must have a democratic internal organisation. The democracy in the workers organisation is no democratisation in the sense of the state constitution.

The need for membership legitimacy is decisive. The leadership of a coalition or a workers' organisation must be legitimized by the membership. The decision-making process within the organization is based on the principles of association law and the principle of equality of organisation members.

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[37] Klaus-Stefan Hohenstatt/Boris Dzida 'STraftaten gegen Betreibsverfassungsorgane und ihre Mitglieder' in in Hessler/Wilemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 119 BetrVG Para 4.
[38] Volker Rieble, Gewerkschaftsbestechung?, Corporate Compliance Zeitschrift (2008) 121.
[39] Volker Rieble, Gewerkschaftsbestechung?, Corporate Compliance Zeitschrift (2008) 121.
[40] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Hessler/Wilemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 29.
[41] ver.di, Berlin vs CGZP (2010) German federal labour court (1 ABR 19/10).

6.3 setting rules in the works council

6.3.1 general

The works council is the main employee representative body vis-à-vis the employer. It is elected by all the establishment`s employees every four years and has its own rights.[42]

The members of the works council can apply for any measures which benefit the company and the workface, but only in legally regulated cases.[43] Its one of the general tasks according to § 80 WCA.

6.3.2 types of self-setted rules

6.3.2.1 Works agreements (*Betriebsvereinbarungen*) § 77 WCA

Conclusion of agreements on the conclusion and termination of employment contracts as well as operational issues. Agreements between the works council and the employer shall be implemented by the employer, unless otherwise specifically agreed on in an individual case. The works council may not unilaterally intervene in the management of the establishment.

The agreement must be recorded. Such agreements have immediate and binding effect on the individual employment contract (§ 77 (4) WCA). As a result of the priority of collective agreements, remuneration and other working conditions cannot be part of a self-set rule.[44]

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[42] Frauke Biester 'Mitbestimmung (Betriebsrat)' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn, 2019) Para 18.
[43] Frauke Biester 'Mitbestimmung (Betriebsrat)' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn, 2019) Para 15.
[44] Gregor Thüsing 'Ehrenamtliche Tätigkeit, Arbeitsversäumnis' in Richardi Bertriebsverfassungsgesetz (16th edn 2018) § 77 Para 18.

6.3.2.2 settlement agreement (*Regelungsabrede*)

These self-established rules are formless agreements between the company parties. They only apply between the company parties and not for all employees.[45]

There is no number limit by the conclusion of agreements, but in the limitation of effect.

6.4 setting rules in the labour union

Trade unions are associations of individual employees organized to represent the interests of the employees vis-à-vis the employers' association, and to conclude collective bargaining agreements.[46]

The members of the labour unions participate in different state organs. Many labour laws and regulations require prior consultation with the unions.[47] The members also participate in administrative committees.[48] They suggest voluntary judges at the labour and social court and representative employees and employers at the self-governing bodies of the federal employment agency.[49]

Labour unions also have collective bargaining power. The parties should be equally strong, because the labour unions need the ability to force the other party to negotiations and conclusion.[50] To this end the labour union must be permanently and with enough numbers of members.[51]

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[45] Raimund Waltermann, Arbeitsrecht, (19th edn 2018 Vahlen), § 23 Para 526.
[46] Raimund Waltermann, Arbeitsrecht, (19th edn 2018 Vahlen), § 23 Para 527.
[47] Raimund Waltermann, Arbeitsrecht, (19th edn 2018 Vahlen), § 23 Para 528.
[48] Krikor Seebacher 'Gewerkschaft' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 24.
[49] Krikor Seebacher 'Gewerkschaft' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 25.
[50] Krikor Seebacher 'Gewerkschaft' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 26.
[51] Volker Rieble 'Reichweite der Koalitionsfreiheit' in Kiel/Lunk/Oetker Münchener Handbuch zum Arbeitsrecht Band 3 (4th edn 2018) § 218 Para 60.

7. The Problem of "yellow unions" and their position in law and jurisdiction

Yellow unions are not independent of the employer. They primarily represent his interests and not those of the employee. For this reason, they are not capable of being party in collective agreements and cannot conclude collective agreements.

7.1. Problem of yellow unions

A "yellow" union is a worker organization which is dominated or influenced by an employer, and is therefore not an independent union. These yellow unions are not independent and not free of opposition. The members are employees and employers. If a trade union is biased, then there is a danger for effective enforcement for the interests of the employees.[52] The problem still exists in Germany today. Like in the case of Aldi and Siemens. In this case, the AUB trade union was set up by the companies as a counterweight to the DGB (German federation of trade unions) in order to prevent industrial action. The discounter paid 120.000€ annually to the AUB and Siemens even paid 50 million euro. The companies concluded contracts with the AUB that were in line with the company's interests. Because of the payments, the court ruled that AUB was not independent and did not primarily represent the interests of the employees. [53]

7.2. Position in law and jurisdiction

The requirements for being capable of being a party in collective agreements are not standardised by law. That means there is no law against yellow unions. Through the interpretation of Article 9 (3) GC by the courts, the requirements for being capable of being a party in collective bargaining and thus for a trade union were established.[54]

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[52] Bernd Waas 'Tarifvertragsparteien' in Rolfs/Giesen/Kreikebohm/Udsching BeckOK Arbeitsrecht (53rd edn 2019) § 2 TVG Para 10.
[53] Tom Strohschneider 'Fremdgesteuerte Funktionäre' (der Freitag, 19.01.2020) https://www.freitag.de/autoren/der-freitag/fremdgesteuerte-funktionare (22.01.2020).
[54] ver.di, Berlin vs CGZP (2010) German federal labour court (1 ABR 19/10).

7.3. requirements for labour unions

Labour unions must fulfil eight requirements to be rate capable and a labour union in the trade union sense.[55] The statutory task must be the protection of members' interests and to conclude collective agreements. It also must be freely formed, free of opposition, independent and democratically organized. The following requirements are yellow unions.

- voluntary association

The unions must be freely formed for a period.

- free of opposition

The unions must be free of opposition. A union is free of opposition if no employer and no person with employer function is a member. [56] Organisation must be sufficiently independent to represent interests effectively and sustainably.[57] Employers must not be able to influence the independent representation of interests. [58]

- independent

The unions must be independent of social opponent. The independence is violated due **personnel** or **organizational** interdependencies or major **financial** grants from the employer and third parties, like the country or religion.[59] The unions must be able to enforce interest of members effective and sustainably. The union must be free to decide on its organization and decision-making. The independence is only lacked when the association is structurally dependent on the social opponent.

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[55] ver.di v UFO (2004) German federal labour court (1 ABR 51/03).
[56] Volker Rieble 'Reichweite der Koalitionsfreiheit' in Kiel/Lunk/Oetker Münchener Handbuch zum Arbeitsrecht Band 3 (4th edn 2018) §218 Para 60.
[57] ver.di v UFO (2004) German federal labour court (1 ABR 51/03).
[58] Anno Hamacher/Hendrik van Laak 'Koalitionsrecht' in Moll Münchener Anwaltshandbuch Arbeitsrecht (4th edn 2017) § 71 Para 13.
[59] ver.di v UFO (2004) German federal labour court (1 ABR 51/03).

- organization

A union must be organized democratically. It is organized through elections and participation of the members.

It must also be interplant organized. It is not in the way of the interplant organization, the most members in the trade union are employees at one and the same company.

7.4 legal consequence

Even today there are still yellow trade unions in Germany. They exist as soon as one of the above characteristics is not present. Because of their dependence on the employer and the representation of their interests, they are not capable of being party in collective bargaining. For this reason, they can't conclude collective agreements. If they nevertheless conclude a collective agreement, it is void. For this reason, in Germany yellow unions have rarely external influence today.[60] Nevertheless, employers keep trying to create yellow unions, which leaves the problem

Protection against discrimination

8. Protection of workers' representatives and remedies against discriminatory actions based on their representative status and activities

Any discrimination is prohibited. Should a member nevertheless be discriminated against, he or she may, under certain conditions, sue and thereby force the employer to behave lawfully. This applies to termination, payment and the entire employment relationship.

8.1 ban of discrimination

The general principle bans discrimination based on the representative status and activities of the members. This principle is derived from Art 9 (3) GC. It includes inter alia

[60] Volker Rieble 'Reichweite der Koalitionsfreiheit' in Kiel/Lunk/Oetker Münchener Handbuch zum Arbeitsrecht Band 3 (4th edn 2018) §218 Para 60

the protection against termination, provides similar wage to employees in a comparable position and protection of professional development. The tasks of the members must be equivalent to the tasks of similar employees.[61] Unequal treatment is only admitted on compelling grounds of operational necessity.[62]

8.2 termination

8.2.1 no ordinary termination

A member of a works council can only be dismissed by extraordinary termination. This is regulated in § 15 DPA. It applies for the whole office period plus 1 year after the end of the term of office.[63]

§ 15 (1) 1 DPA

The dismissal of a member of a works council (…) shall be unlawful unless circumstances exist which entitle the employer to dismiss for good cause without notice, and the required consent, pursuant to section 103 of the Works Constitution Act, has been obtained or a court ruling has been obtained in lieu of such consent.

8.2.2 conditions for extraordinary termination

Three requirements must be met according to § 626 GCC (German Civil Code). There is need for an important reason for termination, a prior consent to the termination and it must be given within two weeks.

§ 626 GCC

[61] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Hessler/Wilemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 29.
[62] Hermann Reichold 'ehrenamtliche Tätigkeit, Arbeitsversäumnis' in Hessler/Wilemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 30.
[63] Manfred Löwisch/Georg Caspers/Steffen Klumpp, Arbeitsrecht (12th edn 2019 Vahlen) § 26 Para 1317.

(1) The employment relationship may be terminated without notice by either contractual party for good cause if circumstances are present which, taking the entire situation of the individual case into account and weighing the interests of both parties, render it unreasonable to expect the terminating party to continue the employment relationship until the termination period has elapsed or until the agreed upon conclusion of the employment relationship.

(2) The termination must take place within two weeks. The two-week period commences when the party entitled to terminate learns of circumstances justifying the termination. On request, the terminating party must immediately inform the other party in writing of the reasons for termination.

8.2.2.1 important reason

An important reason for termination is present if continued employment until the end of the period of notice would be unacceptable for a similar employee. The interests of both sides must be weighed against each other.[64]

8.2.2.2 consent to termination

The consent from the works council must be given before termination. If the works council denies the consent it can then be obtained from the labour court. As soon as the consent has been given, the termination must be pronounced.[65]

[64] Martin Quecke 'Unzulässigkeit der Kündigung' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 15 KSchG Para 42.
[65] Martin Quecke 'Unzulässigkeit der Kündigung' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 15 KSchG Para 42.

8.2.2.3 period of declaration

The period of declaration amounts 2 weeks starting at knowledge of the reason for termination.[66]

8.3 remuneration

A member of the works council must get remuneration at the same level as other employees with similar work according to § 37 IV WCA. It complements the protection against dismissal from § 15 DPA. This applies also for the whole office period plus one year after the end of the term of office.[67]

The law prohibits the reduction of remuneration and discrimination in the development of pay because of the activities in the works council. The activities of a member of the works council are being compared with related activities of other employees.[68] Members are comparable with other employees, which do mainly the same activity as the member at the time of takeover of the post. The personal skills and capacity must also be considered.[69]

For a fair customary and professional development, the member is compared to employees with similar personal and professional qualification. The usual remuneration development arises from the employer's behaviour.[70]

A member of the works council has an entitlement to information about his development according to § 242 GCC. According to this norm the employee trusts in the reliability,

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[66] Martin Quecke 'Unzulässigkeit der Kündigung' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 15 KSchG Para 48.
[67] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Hessler/Wilemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 23.
[68] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 24.
[69] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 25.
[70] Hermann Reichold 'ehernamtliche Tätigkeit, Arbeitsversäumnis' in Henssler/Willemsen/Kalb Arbeitsrecht Kommentar (8th edn 2018) § 37 BetrVG Para 26.

consideration and sincerity of the employer, [71] including information about payment and development in the company. The claim exists if the employee is excusably uncertain about the existence or scope of his right, while the employer is easily able to provide information.

8.4 remedies

If an employer violates a right or claim of a member, the concerned person has a claim of failure to act.[72]

8.4.1 force employer to lawful behaviour

8.4.1.1

A member of the works council and a member of one in the company represented trade union can apply at the labour court to force the employer to lawful behaviour according to § 23 III 1 WCA.

§ 23 (3) 1 WCA

(3) Where the employer has grossly violated his duties under this Act, the works council or a trade union represented in the establishment may apply to the labour court for an order to the employer enjoining him to cease and desist from an act, allow an act to be performed or perform an act. If the employer does not obey an executory court order to cease and desist from an act or allow an act to be performed, the labour court shall, on application and after prior warning, impose a fine on him for each such violation. If the employer does not carry out an act imposed on him by an executory court order, the labour court shall, on application, give a decision that he shall be made to perform the act imposed on him subject

[71] Sutschet, Bamberger/Roth/Hau/Poseck, BeckOK BGB (52nd edn 2019), Rn § 242 Rn 1
[72] Malte Masloff, 'Betriebsrat' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 72.

to payment of fines. Such application may be made by the works council or by a trade union represented in the establishment. The maximum amount of the fine shall be Euro 10,000.

8.4.1.2 requirements

- objectively significant and obviously serious infringement

For a valid claim there is need for an objectively significant and obviously serious infringement.[73]

- concrete danger of repetition

There must be the concrete danger of repetition.[74] As a precondition there must be an objectively serious risk, based on facts, of further disturbances which cannot be tolerated.[75]

- breach of duty must already be committed

There must further be a gross breach of duty, which must have been committed already.[76] It is largely a question of the individual case wether a gross breach of duty exists. The repeated non-observance of co-determination rights of the works council will intensify the fault of the employer in any case.[77]

In case of violation of the co-determination right, there is also a right to forbearance.[78]

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[73] (2005) German federal labour court in NZA 2005, 1372 (1 ABR 29/04).
[74] LAG Baden-Württemberg (2016) in ArbRAktuell 2016, 561 (21 TaBV 4/16).
[75] Krikor Seebacher, 'Unterlassungsanspruch' in Grobys/Panzer-Heemeier StichwortKommentar Arbeitsrecht (3rd edn 2019), Para 2.
[76] Malte Masloff, 'Betriebsrat' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 74.
[77] Malte Masloff, 'Betriebsrat' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht (3rd edn 2019) Para 74.
[78] Trägerverein der Symphoniker v Betriebsrat BAG (2015) in ArbRAktuell 2015, 557.

- temporary injunction

The concerned party can obtain a temporary injunction according to § 62 (2) 1 LCA with §§ 935 – 945 ZPO. But it can only be granted on request from the concerned employee.

There are two types of temporary injunction, the security order and the regulatory order.

The security order prevents the change of an existing state, so that the realisation of claims and rights will not be hindered by the employer.

The regulatory order regulates a temporary state regarding a disputed legal relation.[79]

8.4.2.1 admissibility

- request

The restraining order is issued only upon request. [80]

- civil course of law

The civil course of law must be opened. The civil course of law is opened if there is a civil litigation or an urgent special assignment exists.[81]

§ 13 GVG

The ordinary courts shall have jurisdiction over the civil disputes, family matters and non-contentious matters (civil matters) as well as criminal matters for which neither the competence of administrative authorities nor the jurisdiction of the Administrative Courts

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[79] Martina Ahrendt 'einstweiliger Rechtsschutz' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht, (3rd edn 2019) Para 3.
[80] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 8.
[81] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 8.

has been established and for which no special courts have been created or permitted by provisions of federal law.

- visible claim

The applicant must have a visible claim. The possibility of an injunction shall be excluded where the aim is to secure future enforcement in respect of a pecuniary claim or a right which may become a pecuniary claim.[82]

- no exclusion

An injunction is inadmissible and therefore excluded if other specific instruments of interim relief are available. This includes above all the family law issues.[83]

8.4.2.2 reasonable justification

The request is justified if the applicant can claim right of disposal and reason for disposal conclusively and show credibility.[84]

- right of disposal

A right of disposal can be any individual claim under civil law that is not a monetary claim or a claim that can be converted into a monetary claim. [85] The entitlement may also be

[82] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 4.
[83] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 5.
[84] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 10.
[85] Martina Ahrendt 'einstweiliger Rechtsschutz' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht, (3rd edn 2019) Para 6.

limited in time or condition. Maturity is not required. However, the claim must be enforceable.[86]

- reason for disposal

A ground for disposal exists if the change in an existing situation could thwart or significantly impede the realisation of a right of the applicant. It depends on whether there are circumstances which, in the judgement of an objective, reasonable person, give reason to fear that the realisation of the claim could be thwarted or made considerably more difficult by the change in the given circumstances. [87] It must be an urgent case.[88]

- credible

The right to dispose of the property and the reason for disposition must be substantiated according to § 294 GCC.

The required degree of certainty has already been achieved if the applicant's submission shows that the overwhelming probability is correct.[89]

[86] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 12.
[87] Rainer Kemper 'Einstweilige Verfügung bezüglich Streitgegenstand' in Saenger Zivilprozessordnung (8th edn 2019) § 935 Para 13.
[88] Martina Ahrendt 'einstweiliger Rechtsschutz' in Grobys/Panzer-Heemeier Stichwortkommentar Arbeitsrecht, (3rd edn 2019) Para 8.
[89] Federal Supreme Court (2003) in NJW 2003, 3558 (IX ZB 37/03).

9. Workers' representations: how is their relationship defined in legal terms?

9.1 Works councils

9.1.1 General

Part of the German dualism are next to traditionally trade unions works councils at plant level. Works councils must be independent and autonomous.[90] They are kind of participation bodies for the employees and elected by them secretly and for a regular term of office about 4 years. The number of works council members is laid down in § 9 Works Constitution Act (WCA). It is a proportional representation.

Works councils do not get paid extra for their work. It is a kind of honorary capacity. However, works council members have an extensive dismissal protection in § 15 Dismissal Protection Act (DPA).

9.1.2 Principles

There are three fundamental principles[91] works council adhere to: First, the dual system of worker's representation. Trade unions should not control the works council, but both pursue the improvement of working conditions. So somehow there should be a cooperation even though there is a strict division between them. Main and important differences will be declared later in the text. IN short, the institutional independence of the works council must assured.

Second, there should be a trustful cooperation with the employer. The employer should build up a trusting work relationship with the works council. Effort and patience depend on the individual characters but in the long term it will be better to be co-operative for the

[90] *Lingemann, Mengel, von Steinau-Steinrück,* Employment & Labor Law, p. 3.
[91] *Junker,* Grundkurs Arbeitsrecht, § 10, margin no. 640, p. 371.

employer.[92] Costs like necessary premises, material facilities, information or communication are defrayed by the employer.

Third, there are several rights of co-determination the works council can refer to, like the right to get informed or the right to be consulted. These rights are legally enforceable. The right of getting informed in § 99 WCA refers to the employer. He must notify the works council of recruitments, transfers or implications of measures envisaged. § 80 (1) WCA contains some participation and co-determination rights.

Some criticism about the German dual system is that those responsibilities of hearing, consulting and asking the works council may impair the flexibility of the company. Because of the given respites for asking, thinking and answering between the employer and the works council, the decision-making process may be time consuming.[93]

9.2 Trade Union and works council

9.2.1 Important Differences

There are some important things to differentiate between works councils and trade unions. Traditionally trade unions represent branches or sectors and sometimes professions, too. Everyone can join and be part of it. Works councils get elected by the employees of the local company and represents only them. Trade unions can be able to conclude collective bargaining while works councils negotiate collective agreements with the employer.[94]

If a works council consists, it must be integrated in the company's structure. A works council is part of the company. In respect to the rights of works councils, they have nearly the same power as the employer in some decision-making-processes. In contrast, trade

[92] *Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 210.
[93] *Bernd Waas*, Employee Representation, II 3. Legal doubts and criticism, p. 27.
[94] *Abbo Junker*, Grundkurs Arbeitsrecht, § 10, margin no. 640, p. 371.

unions are free to form and exist. Member can be any employee, who takes part. Art. 9 GC is the right to form trade unions and not a need. The main interest of trade unions is to conclude collective bargaining agreements with companies to ensure good conditions for their members. Those collective agreements can apply to one single establishment, for whole sectors or even complete branches. The only way to be able to conclude collective bargaining with a single company is to have members, who are employees locally. And even in this case trade unions will never have approximately the same power as works councils.[95]

9.2.2 Collaboration

§ 2 (2) WCA claims some points of necessary collaboration between trade union and works council:

"In order to exercise the powers and duties set forth in this Act, the trade unions represented in the establishment shall, through their representatives and after informing the employer or his representative, be granted access to the establishment, […]"[96]

The trade union, which has members in the establishment, should be able to visit several buildings e.g. to control working conditions or to hire new members.

§ 17 (3) WCA gives trade unions a special part in view of works council's elections:

[95] *Abbo Junker*, Grundkurs Arbeitsrecht, § 10, margin no. 644, p. 372.
[96] *Lingemann, Mengel, von Steinau-Steinrück,* Employment & Labour Law in Germany, XI WCA, p. 289.

"[…] or a union represented in the establishment may convene a works assembly and nominate candidates for the election committee."[97]

Trade unions can convene elections if there was no works council before in the establishment. Also, they are allowed to place a trade union member at the election board, see § 17 (2) in conjunction with § 16 (1) WCA.

If a works council consists, trade unions can support him with information, guidance and advanced training or seminars to develop works council's skills.

9.3 Levels of works council

Next to the 'normal' local works council there are several forms and structures for works councils on different levels, depending on the size of the undertaking.

9.3.1 Company works council

A company works council (*Gesamtbetriebsrat)* consists of work council members from different establishments of the same undertaking. There are minimum two local works councils needed. Each of them represents the establishment he came from. The company works council deals with matters affecting at least two establishments which cannot be settle by the local works council. It is a group decision process with a majority vote. The company works council is not competent for establishments, where no works council exist.[98]

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[97] *Lingemann, Mengel, von Steinau-Steinrück,* Employment & Labour Law in Germany, XI WCA, p. 300/301.
[98] *Hans-Böckler-Stiftung,* Co-Determination- A beginner's guide, p. 17.*; Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 215.

9.3.2 Group works council

If there is a group of companies combined, a group works council (*Konzernbetriebsrat*) is needed. This one is composed of the individual works councils and deals only with matters that affect at least two companies in the group. It is not some kind of higher organ; it is just a platform to discuss and referred to the company works council.[99]

Competencies of trade unions and other forms of workers' representation

10. Regulations concerning collective bargaining collective agreements

In Germany collective bargaining agreements mainly regulate working conditions, particularly remuneration, working hours, overtime, bonuses, holidays and notice periods. An employee who is member of a trade union is bound by a collective bargaining agreement if entered by that union. There are two ways in which employees may be bound by a collective bargaining agreement. Firstly, an agreement between the employer's association and trade union, called association agreement (*Verbandstarifvertrag*), or between trade union and employer, called company agreement (*Haustarifvertrag*). Requirement for a company agreement is that employees of the company are members of the trade union, too.[100]

There are two possible distinct agreement types[101]: First, a framework collective agreement, that regulates general working and employment conditions. Second, the collective bargaining agreement, that includes payment and condition, which could alter short timed. The essential German statute book is the Collective Bargaining Agreement Act (CBAA) (*Tarifvertragsgesetz).*

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[99] *Hans-Böckler-Stiftung,* Co-Determination- A beginner's guide, p. 18.*; Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 215.
[100] *Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 17.
[101] *Lingemann, Mengel, von Steinau-Steinrück* , Employment & Labor Law, II. Collective Bargaining Agreements Law, p. 57-58.

10.1 Requirements for collective bargaining parties

There are three preconditions for collective bargaining agreements. The agreement must be in written form and must be signed by the contracting parties. Those can be trade unions, their head, employer's associations and their head, too. And, of course, self-employed employers who do not join an employer's association. [102]

Parties of collective bargaining agreements can be trade unions, that are formed freely, independent, interplant organised and recognise the applicable collective bargaining law.

Art. 9(3) GC and case law pretend (*Gegnerfreiheit)* for trade unions. This means that trade unions must consist of employees only. Another important requirement is to be independent of social opponents or potential co-contractor financially. Also, there should not be a dependence from other employees, may in manpower or membership.[103]

Current case law defined a new requirement- assertiveness. A trade union should be able to pile co-contractors on pressure. Trade unions such as employers' associations must be able to use collective agreements to socially pacify the community. Therefore, only those associations that have a minimum negotiating weight and therefore a certain assertiveness towards the social opponent can be regarded as eligible. An important factor for that is the number of trade union members and their positions in the company. A little number of strikers can cause high pressure if they have key positions.[104]

The Federal Labour Court (*Bundesarbeitsgericht*) advanced settled case law e.g. the decision NZA 2005, 679. The occupational union for stewards working in the aircraft cabin had about 20,000 members in Germany. Several airlines did not accept this union as trade union and did not negotiate with them. They said, that those occupational group is too small and too special to have an own trade union and to impose conditions. Short; the union had no assertiveness. The Federal Labour Court disagreed because stewards in the

[102] *Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 191.
[103] *Abbo Junker*, Grundkurs Arbeitsrecht, § 7, margin no. 454 (p. 278).
[104] BAG, NZ 2005, 697.

cabin have an important key position. Without them a smooth flow is not possible. They can put airlines under pressure with a strike because those positions can not replace spontaneous in a short time.

10.2 Function of a collective bargaining agreement

There are 4 material functions of a German collective bargaining agreement[105]:

A. Protection of employees

Conditions regulated in the collective bargaining agreement are the minimum employees can expect. It is absolutely forbidden to fall below those agreements conditions, laid down in § 4 (3) CBAA.

B. Order function

Because trade unions are orientated at branches or professions their collective agreements can be examples for other working agreements, too. So, those collective bargaining agreements arrange and order conditions of whole sections at the employment market.

C. Distribution function

Payment conditions could regulate that employers have a holding in the national product. That means a proportionate distribution of national wealth.

D. Pacification

In Germany collective bargaining agreements include a kind of pacification. Industrial actions are not allowed during the period of the agreement. More details will be explained later in the text.

[105] *Abbo Junker*, Grundkurs Arbeitsrecht, § 8, margin no. 500 (p. 301).

11. Concept of 'preferential' or 'most representative trade union'

In Germany there is the principle of one collective bargaining agreement per business. The Collective Bargaining Unit Act - CBUA (*Tarifeinheitsgesetz)* consists of two essential paragraphs which are enclosed in § 4a and § 8 CBAA. In 2015, when the CBUA became effective, there was a dispute about its compatibility with Art. 9(3) GC.

11.1 § 4a CBAA

Basically, employers can conclude more than one collective bargaining agreement[106]. However, there must be at least one employee who is member of the particular trade union. In cases of overlapping of different collective bargaining agreements, the one with more members in the company prevails.[107] This is defined in § 4a CBAA since 2015:

> *"Pursuant to section 3, the employer can be bound to multiple collective bargaining agreements of different trade unions. Where the spheres of application of collective bargaining agreements with different content overlap (conflicting bargaining agreements), only the legal norms of the collective bargaining agreement of that trade union will apply in the establishment which has the most members who are employees at the time of the conclusion of the conflicting collective bargaining agreement that was most recently concluded. If the collective bargaining agreements do not conflict until a later point in time, that time shall be decisive for ascertaining the majority. […]"*[108]

The aim of § 4a CBAA is to guarantee the functionality of autonomy in wage bargaining. In practice, the employer should be able to conclude numerous collective bargaining

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[106] § 3 CBAA.
[107] *Berg, Kocher, Schumann,* Tarifvertragsgesetz und Arbeitskampfrecht, §4, margin no. 98a, p. 532.
[108] *Lingemann, Mengel, von Steinau-Steinrück,* Employment & Labour Law in Germany, XII CBAA, p. 399.

agreements for several jobs, positions, branches or key positions, but if those agreements overlap, coextensive majority rule will exert.[109]

11.2 § 8 CBAA

Next to § 4a CBAA, which defines the majority rule, § 8 CBAA is about the announcement of the applicable bargaining agreement by the employer:

"The employer shall be obliged to publicly display in the establishment the collective bargaining agreements that are applicable in the establishment, as well as final and binding orders pursuant to § 99 of the Labour Court Act regarding the collective bargaining agreements which is applicable pursuant to § 4a (2) sentence 2."[110]

The legal purpose of § 8 is to inform the employees about the currently applicable agreements in the company. Depending on which collective bargaining agreement will be concluded, several rights and claims can result.[111] The announcement should be in written form easily available for all employees in company. At works council's or staff department's office seem to be the most appropriate place for that.

If the employer did not make the announcement accessible to the employee, the involved trade union can sue him to do so. Also, employees who got disadvantages (because of getting not informed) are eligible for compensation.[112]

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[109] *Sura,* Nachbesserungsoptionen für die gesetzliche Tarifeinheit, I 1. P. 1.
[110] *Lingemann, Mengel, von Steinau-Steinrück*, Employment & Labour Law in Germany, XII CBAA, p. 404.
[111] *Berg, Kocher, Schumann*, Tarifvertragsgesetz und Arbeitskampfrecht, §8, margin no. 1, p. 690.
[112] *Berg, Kocher, Schumann*, Tarifvertragsgesetz und Arbeitskampfrecht, §8, margin no. 5, p. 691.

11.3 Compatibility with the German Constitution

Some legal scholars were concerned that 4a CBAA violates Art 9 of the GC. If trade unions with minority could not take part at collective agreements or could be replaced by bigger trade unions, first the freedom of association is not given, and second the recruitment of members and the willingness for industrial action are impaired. So, there is an intervention in the autonomy in wage bargaining.[113]

On 13th September 2019 the Federal Constitutional Court (*Bundesverfassungsgericht*) has decided that Art 9 GC is not violated. Neither, The GC or the CBAA, define criteria for trade unions to have bargaining power. That is why Labour Courts can paraphrase and justify requirements for them. Only trade unions, which are able to arrange sensible collective agreements for social pacification, should take part at collective bargaining.[114]

There should be no neglect of trade union minority or exempt employees. Even though a trade union's agreement got priority this union must represent all employees, so they must bargain conditions for exempt employees and members from other unions, too. Every trade union must have abstractly defined rules for minority unions and exempts in their agreement concepts.[115]

12. Industrial action

In general, industrial action is an effectuated collective exertion of pressure by interrupting employment relations to affect disadvantages for the opponent.[116] Industrial action in Germany needs a legal purpose with regard to changing working conditions can be part of a collective bargaining agreement. Trade unions who liked to organise a strike,

[113] *Sura,* Nachbesserungsoptionen für die gesetzliche Tarifeinheit, I 3. p. 2.; *Sura,* Nachbesserungsoptionen für die gesetzliche Tarifeinheit, II 1. p. 2.
[114] *Bundesverfassungsgericht,* press release from 13/9/2019 1BvR 1/16; last view 3/3/2020.
[115] *Sura,* Nachbesserungsoptionen für die gesetzliche Tarifeinheit, III 1. p. 4.; § 4a II 2 CBAA.
[116] *Abbo Junker,* Grundkurs Arbeitsrecht, § 9, margin no. 592 (p. 342).

should be competent to conclude collective bargaining agreements like § 74 (2) WCA says.[117] Strikes are necessary to improve working and life conditions of the employees.[118]

In Germany, the right to strike belongs not to the trade union. It is the right of every single employee, even though the final strike is organised by the trade union. This right can only refer to natural persons, who do industrial action to "*safeguard and improve working and economic conditions*" – Art. 9 (3) GC.

The duty not to engage in industrial action can be part of the collective bargaining agreement. In this case it is not allowed to do industrial action. Mostly this apply to the period of the agreement. Industrial action should be used to form new collective bargaining agreements if the old one pass off or during round of collective bargaining.

Wildcats strikes (not organised by a trade union), political strikes and the only purpose to influence or criticise the employer are unlawful and therefore illegal.[119] This is partially criticised by legal scholars and discussed in part 14.

Worker representation in small enterprises

13. Workers in small and medium sized enterprise

The Works Constitution Act (*Betriebsverfassungsgesetz*) provides works councils. The most important employee representative body is the Works Council (Betriebsrat). This collective bodies sole requirement is at least five permanent workers who are entitled to vote of which three or more are eligible.[120] However, if an enterprise is not fulfilling requirement (number), the works council is not existing and has no participation rights, because the

[117] *Abbo Junker,* Grundkurs Arbeitsrecht, § 9, margin no. 603 (p. 348).
[118] *Berg, Kocher, Schumann*, Tarifvertragsgesetzt und Arbeitskampfrecht, Part 1, margin no. 1, p. 73.
[119] *Kirchner, Kremp, Magotsch*, Key Aspects of German Employment and Labour Law, p. 200.
[120] Lingemann, von Steinau-Steinrück,Mengel, Employment & Labour Law in Germany (4th edn, 2016, C.H. Beck) 59

requirement is mandatory.[121] Furthermore, there are no additional requirements for a work council regarding the establishment whereas the structure is different depending on the size of the enterprise. The Commission of the European Union distinguishes small and medium- sized enterprises in economic respect (turnover for small enterprises <=€10m and medium enterprises <= €50m) and size (staff headcount for small enterprises <50 and medium enterprises <250)122. In contrast, german labour law is not taking economic respects into account for distinguishing the size of a collective body and the sole basis is the staff headcount. Therefore, applying the staff headcount numbers of the European Commission for Small sized enterprises in Germany these are able of having a work council consisting of one or three members depending on their staff headcount and Medium sized enterprises are capable of a collective body up to nine members. However, there is one big difference between the worker´s council of enterprises with a staff headcount less than 200 and bigger enterprises. Whereas members of a works council can always be exempted for tasks related to the work council when necessary, medium and big enterprises´ work councils (staff headcount >200) can have members whose sole work purpose are the works councils123. The reason for permanent exempted members is the broader and more complex task field of a work council that is linearly increasing with a larger staff headcount. All things considered, small and medium sized enterprises have the same competences as the workers´ representation in bigger firms.

However, it is important to note that only 10% of small and medium sized enterprises in Germany have a work council.[124] There are four main reasons: comfort, negative consequences, independent self-representation and contentment.[125] In small and medium

[121] Hess, Schlochauer, Worzalla, Glock, Nicolai, Rose, BetrVG Kommentar (8th edn, Luchterhand) 181
[122] EU Comission, `What is an SME` https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en accessed 23 January 2020
[123] Kirchner, Kremp, Magotsch, Key Aspects of German Employment and Labour Law (1st edn 2010, Springer-Verlag) 213
[124] Friedrich Ebert Stiftung, Gewerkschaften in Deutschland: Heruasforderungen in Zeiten des Umbruchs 2019, chapter 3 p 13
[125] Michaela Staffel, Management der Personalkosten im Mittelstand (Springer Verlag 2019) p 85 accessed 31 January 2020.

sized companies many workers can directly approach issues and therefore a work council is unnecessary. Furthermore, some fear personal negative consequences, when establishing a work council or are satisfied with the current situation and a work council is not taken into consideration and in conclusion there is no waiver.

Recent developments in law and the future of workers representation

14. The position of trade unions and other workers' representations nowadays and in the foreseen future as to their role and their powers as collective bodies

Trade unions and other worker´s representations have a decent image in Germany as three quarter of respondents connotate a positive image with collective bodies. In contrast, there is a tremendous decline of members especially in trade unions. The decline is a result of job reduction in former distinctive powerful industrial enterprises such as coal mining, but also the privatization of train and post service are another indicator.[126] Now only 15% of workers are members of a trade union which threatens not only formative capacity but also the legitimacy of their claim of participation. Furthermore, approximately 50% of employees are included in collective agreements and in the future numbers are likely to be lower.[127] Collective agreements have a tremendous impact for employees due to higher salary, surcharges or special payments. Moreover, collective agreements are binding for both parties and cannot be revoked arbitrary by employers. Another threat to unions is the increasing number of flexibility clauses, which allow a deviation from collective agreements. In addition, these clauses are applicable even if they do not correspond with regulated standards set in collective agreements. Work councils are negotiating this flexibility clause and their approval is mandatory, but many of them especially in small and medium size enterprises are not powerful and often flexibility clauses end up in special agreements to the disadvantage of employees. Some academics argue that the result of less collective agreements and an increasing number of flexibility clauses is a more

[126] Friedrich Ebert Stiftung, Gewerkschaften in Deutschland: Heruasforderungen in Zeiten des Umbruchs 2019, chapter 3 p 13

decentralised tariff policy that shifts their focus to company level. Consequently, as previously mentioned at company level employers take advantage of their power and arrange flexibility clauses that are not corresponding with collective agreements leading to a widespread low- wage sector in Germany.

In order to increase their members, trade unions need to shift their remit to policy areas that are preliminary dominated by political parties or NGOs such as housing shortage128. This issue is for many workers especially in big cities as important as working conditions.

14.1 Political Strikes

Further topics with increasing interest are political strikes such as the Global Climate Strike or the International Women´s Strike. These Strikes do not have a direct link to working conditions and go along with political objectives. Furthermore, trade unions supported these strikes only symbolically and justified omitted calls for a strike with the prohibition of political strikes in Germany. As previously mentioned, the right to strike is not explicitly mentioned in the German constitution or in any other legislation, but the so-called "Freedom of Association" is codified in Art. 9 sec. 3 of the German Constitution129. Therefore, labour law is shaped by case law in Germany and the Federal Labour Court decided in 1952 after a strike initiated by the German Association for Labour Unions for modifying the Works Constitution, that strikes are only permitted for Collective Agreement demands and that political strikes are unconstitutional. The basis for this decision was a previous understanding of a separation between state and society.[130] The state with its independent institutions is responsible for the common good and operates in a vacuum floating above the society.[131] Clearly, this image has no connection to the political and social

[129] Deutscher Bundestag, wissenschaftliche Dienste, Generalstreik- Rechtliche Bedingungen und Streikkultur im Vergleich (WF VI G - 3000-103/06) <https://www.bundestag.de/resource/blob/411676/1d0739e54a2a47a77ccb8ac1500c271a/wf-vi-103-06-pdf-data.pdf> accessed on 3 February 2020 .

[130] Däubler,Hjort,Schubert,Wolmerath, Arbeitsrecht (4. edn. 2017 Sec. 122)

131 Detlef Hensche, Politischer Streik illegal? (Sozialistische Zeitung, März 2004) p. 5.

reality and there are numerous overlaps between these spheres. Furthermore, the economic authorities to dispose of workplaces, sites and investments have a tremendous leverage on municipalities, lands and the state. In conclusion, political strikes could create a balance of power between those who already have an impact on political decisions and those who only have their manpower and voter turnout as leverage. Furthermore, after an interpretation from the committee of experts of the ILO Convention No 87 there are no restrictions regarding the right to strike when the strike is against social and economic policies from the government.

Another ongoing intense discussion is about reforming strikes in the basic public services.[132]The affected areas are such as medical care, energy supply and traffic. In these sectors the public interest is overlooked and employers give in, because of public pressure instead of financial distress. In conclusion, the proposal aims to set a framework that enables trade unions to pursue their objectives, but restrict the public only as far as necessary.

First, a quorum determines whether trade unions are permitted to strike. The strike is permitted if 15% of the entire workforce is affected by the collective agreement in order to complicate strikes for smaller trade unions.

One central component of the German legal system is the principle of proportionality. This principle "serves as a limitation to all exercise of public power or that entails a burden on the individual" and to be in accordance with that principle strikes are only a measure of last resort. Therefore, mandatory arbitration procedures, which are non- binding, are inevitable.

[132] Anne- Christine Herr, Ein paar Bahnen sollen weiter fahren, 27 February 2015 https://www.lto.de/recht/hintergruende/h/streik-daseinsvorsorge-gewerkschaft-gesetzesvorlage.

Another proposed requirement are special announcements from trade unions at least four days in advance. The announcements need to specify when and where the strike takes place and also the duration, which is especially necessary for the traffic system.

15. Proposals of reforms of the law envisaged regarding the role and competences of workers' representation

Digitalisation is the main catalyst for a rapidly fast-growing economy. Therefore, it is no surprise that most of the current reforms and proposals regarding workers representation are connected to this topic. Now there are three main proposals: regulating the power of work regarding the introduction of electronic devices and systems, a guaranteed right of telework and video conferencing for work councils. Another main aspect that goes along with digitalisation is data protection. In contrast, data protection is not even mentioned in the German workers council law and the only influence of work councils regarding topics like implementation of IT systems, communication via social media platforms or supervising work is to obtain information by a "catch all" clause whereby codetermination in data protection is inevitable due to tremendous changes in the working world.

New technology enables new and different approaches compared to the traditional working life and its 9 to 5 job. Crowdsourcing – an outsourced intern subtask from enterprises via internet for "clickworker"-is getting more popular. The workers accepting this job are not permanent employed and uncertain is whether "clickworker" are considered as staff and consequently are represented by a work council. In order to prevent distortion of competition and to set a minimum standard "clickworker" and similar working forms need to be represented by a work council133. The English literally translation of the German work council is running council. Jurisdiction requires a clear allocation of workers to be included in the "running" term. New working forms complicate this allocation and consequently "clickworkers" are not represented by a works council.

[133] Dr. Manteo Eisnelohr, Muss das Betriebsverfassungsgesetz nachgebessert werden? (Haufe Personalmagazin 11/ 17) <https://www.haufe.de/personal/arbeitsrecht/digitalisierung-macht-anpassung-des-betrvg-noetig_76_429266.html> accessed on 14 February 2020.

The clear allocation of workers to an enterprise need to be modified to fulfil the interest of "clickworker".

15.1 Mobile Working

Furthermore, mobile working is another outcome of digitalisation and the sole requirement is a functioning online connection. Mobile working is a great opportunity for workers to organize work better in accordance with their individual needs134. Nevertheless, mobile working allows enterprises to organize mobile working in their best interest. In order to increase return many enterprises request greater flexibility and permanent availability from employees. Permanent availability is creating stress for mobile workers and binding rules are inevitable. Furthermore, politicians request a claim of teleworking embodied in law. This prevents workers from being hinge on employers whether mobile working is possible or not.

Whereas, starting and closing hours of workers need to be approved by works council, agreements between employer and employee regarding place of work are not part of the codetermination between work council and employer if these agreements are characterized by individual circumstances. In order to take workers interests regarding their flexibility into account work of place needs to be part of the codetermination between employer and employee.[135]

15.2 Video Conferencing for Works councils

Video conferencing is a fast and effective tool for meetings. Whereas, video conferencing is more and more used by employers there is no doubt that also works council have a requirement for flexible and cost- effective meetings especially large general works council. §33 of the WCA is specifying work council meetings, but video conferencing or any other

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[134] Monika Brandl, Digitalisierung und Mitbestimmung(Gegenblende Debattenmagazing 36-2016) https://gegenblende.dgb.de/36-2016/++co++d1a45ad8-1063-11e6-8994-52540088cada accessed on 12 Februar 2020.

[135] Schiefer, Worzalla, Moderne Arbeitswelt (Teil 2): Der Betriebsrat und Betriebsratsaufgaben (Der Betrieb 36 72nd edn.) p. 2019.

electronic tools are not mentioned.[136] In contrast, §41a of the Act on European Works Councils allows the use of new electronic services for the crew of a vessel. In conclusion, §33 WCA might be incomplete and §41a of the Act on European Works Councils could be used as an analogy. Most academics consider video conferencing inadmissible for work council meetings arguing that for resolutions the majority hast to be "present" and that meetings are private. However, some academics argue that "present" also includes members participating via video conferencing or other audio-visual tools, which is not fulfilled by conference calls or chatrooms. Also, the requirement that work council meetings have to take place in private does not lead to the inadmissibility of video conferencing, because there is a close to zero opportunity for unnoticeable hearers if the meeting is encrypted.

15.3 Implementation of technical facilities

Work councils have the power to participate and supervise the introduction and implementation of new technical facilities if the devices and systems can supervise the behaviour and performance of employees. This is interpreted extensively by the Federal Labour Court leading to delays and upheavals. Technical facilities can supervise when they are capable of collecting and levying performance or behaviour information about employees. Furthermore, it is not necessary that the technical facilities are used for supervising or that the facility itself collects the information. The requirement of being able to supervise is already fulfilled if the information is entered manually and the facility reuses the information. An approach by the Federal Labour Court to limit the interpretation by highlighting that technical facilities need to directly supervise the employees itself failed but is lately used by a labour court again[137] with an outstanding decision from the Federal Labour Court.

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[136] Löwisch, Caspers, Klumppp, Arbeitsrecht (12th edn. 2019 Vahlen) p. 423.

[137] Schiefer, Worzalla, Moderne Arbeitswelt (Teil 2): Der Betriebsrat und Betriebsratsaufgaben (Der Betrieb 36 72nd edn.).

New IT- applications are capable of collecting data from several linked enterprises especially for Smart Engineering or self- controlled factories. In conclusion, a whole value-chain comes to a standstill if only one work council from the linked enterprises withhold their approval.138 Many academics request a modification that is adjusted to the modern digitalized work reality.

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