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The binding effect of Collective Labour Agreements

German National Report

European University Viadrina Frankfurt (Oder)

Maksim Benenson

Benjamin Musisi

Natalia Smagiel

Weronika Tomala

Aicha-Marie Winkler

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1. Collective Agreement Act as Legal Basis

In Germany, there is a statutory regulation of the binding effect of collective agreements. The Collective Agreement Act regulates the collective agreement. The binding effect of legal norms is regulated by Section 4 of the Collective Agreement Act.

2. Regulation of Binding Effect in Section 4 of the Collective Agreement Act

The Collective Agreement Act is important for the rules and security of collective agreements. It does not dictate how the contracting parties should establish their rights and obligations. However, it stipulates that collective agreements must be directly and bindingly applicable. It also specifies the conditions that must be met for these rules to be effective.[1] The Collective Agreement Act provides a framework; the content is determined by the collective agreement parties.

II. Agreements and Criteria for Collective Agreements

1. Definition and Content of Collective Agreements

A collective agreement is an agreement between a trade union and an employers' association or an individual employer. It regulates the rights and obligations of the contracting parties and also contains legal norms. These norms relate to the conclusion, content, and termination of employment relationships as well as operational and industrial relations questions.

The collective agreement consists of two parts, the contractual and the normative part.

a) Contractual part

In the contractual part, the rights and obligations of the collective agreement parties are defined. This includes the duty to maintain industrial peace, which prohibits labor action to change during the term of a collective agreement, as well as the duty to implement the collective agreement. This includes both the obligation of the collective agreement parties

[1] NK-ArbR/Bepler, 2. Aufl. 2023, TVG § 4 Rn. 1.

to fulfill the collective agreement and the obligation to influence their members. There is generally no right to negotiate between the collective agreement parties unless there is an extraordinary termination.[2]

b) Normative part

In the normative part, on the other hand, the content, conclusion, and termination of employment relationships as well as operational and industrial relations questions are regulated. This includes content norms that define working conditions such as working hours, breaks, and holidays, conclusion norms that concern the conclusion of new employment relationships, and termination norms that regulate the duration, termination, and termination of employment relationships. There are also operational norms that affect the workforce, such as job requirements and occupational safety regulations, as well as operational constitutional norms that affect the legal status of employees and their organs in the company. The validity of operational constitutional norms only requires the employer's collective agreement and is regulated in the Works Constitution Act.[3]

2. Collective Autonomy and its Significance

Collective autonomy guarantees the authority to set law-like, i.e., directly and mandatorily, rules independently of state influence through collective agreements.[4] Collective agreements must be concluded in writing. Typical content of a collective agreement includes regulations on remuneration, working time, bonuses, vacation, company pension schemes, or protection against dismissal. With collective autonomy and the corresponding collective agreement law, the state grants the parties to the collective agreement autonomy to shape the rules of their cooperation autonomously. They can regulate this faster and more flexibly than would be possible with greater state involvement.

III. Binding to Collective Agreements

1. Direct and Mandatory Effect of Collective Agreements

The binding extends to all members of the concluding parties of collective agreements. This means that members of trade unions and employers' associations are bound by the collective

[2] ErfK/Franzen, 24. Aufl. 2024, TVG § 1 Rn. 95.
[3] Däubler, Tarifvertragsgesetz, 5. Aufl. 2022, Rn. 236.
[4] Dütz and Thüsing, *Arbeitsrecht,* 27th ed. (C.H. Beck, 2022), § 12 Rn. 560a.

agreement. The collective agreement has a direct and mandatory effect on employment relationships.[5]

a) Direct Effect

Direct effect means that the collective agreement provisions are automatically applied to every employment relationship without the parties to the contract needing to be aware of or agree to them, much like other legal provisions.[6]

b) Mandatory Effect (Principle of Favorability)

The mandatory effect states that agreements in individual employment contracts that are less favorable to employees are ineffective.[7] This is the so-called principle of favorability[8], which stipulates that individual contractual agreements deviating from the collective agreement are only permissible if they contain a more favorable provision for the employee than the collective agreement itself.

2. State Expansion of Collective Agreement Binding (see B.)

The state can extend collective agreement binding to individuals outside of the associations through governmental decree, for example, through the so-called declaration of general applicability. In many employment contracts, collective agreements are automatically included, meaning that while the collective agreement may not legally apply to all employees in a certain sector, it practically applies to all of them.[9]

IV. Scope of Application of the Collective Agreement

The parties to the collective agreement determine the scope of application of the collective agreement within their jurisdiction, as long as they do not arbitrarily treat employees unequally. If parties to the collective agreement do not include a group of employees in the scope of a collective agreement, they are merely waiving the opportunity to establish rules for this group. This waiver does not violate the Basic Law if there are factual differences between the groups. A collective agreement contains detailed rules for its scope of

[5] Brox et al., *Arbeitsrecht,* 18th ed., Rechtswissenschaften und Verwaltung Studienbücher (Verlag W. Kohlhammer, 2011), Rn. 680.
[6] Junker, *Grundkurs Arbeitsrecht,* 21st ed. (C.H. Beck, 2022), § 8 Rn. 546.
[7] Waltermann, *Arbeitsrecht,* 20th ed. (Verlag Franz Vahlen, 2021), Rn. 603.
[8] Wörlen and Kokemoor, *Arbeitsrecht,* 14th ed. (Verlag Franz Vahlen, 2023), Rn. 315.
[9] Preis and Greiner, *Arbeitsrecht: Kollektivarbeitsrecht Lehrbuch für Studium und Praxis,* 5th ed. (Otto Schmidt, 2020), Rz. 584.

application. If such rules are absent, the scope of application of a framework collective agreement can be relied upon, which is intended to be filled.

1. Geographical Scope

The geographical scope of a collective agreement is easy to determine. The parties to the collective agreement can use various criteria, such as the location of the company or the employees' place of work. In case of doubt, the collective agreement of the place where the employees are mainly employed applies. This also applies to the application of the collective agreement in the public sector. In the case of temporary assignments, the collective agreement of the company's location remains valid, while in the case of permanent assignments, the applicable collective agreement may change. Under the Posted Workers Act, all employers providing services within the geographical scope must grant contractual working conditions, regardless of the location of the company. An exception applies to nationwide collective agreements.

2. Industry

Trade unions in Germany are mostly organized according to the principle of industrial associations. Therefore, collective agreements are usually concluded for companies in a specific industry.[10] Under certain circumstances, collective agreements can also be concluded for all companies of a group that primarily belong to a particular industry. The industry to be covered is usually precisely described in the collective agreement. Whether individual auxiliary and secondary establishments are covered depends on the interpretation of the collective agreement.

3. Professional Scope

The professional scope can be considered as part of the personal scope and complements the scope determined by industry with specific groups of employees. The professional scope is determined by the nature of the activity.[11] If no specific professional scope is defined, the collective agreement applies to all employees employed in the covered companies with corresponding industry affiliation. Collective agreements concluded by professional associations usually only cover the groups of employees they represent.

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[10] Zöllner et al., *Arbeitsrecht,* 7th ed., Studium und Praxis (C.H. Beck, 2015), § 40 Rn. 25.
[11] Ibid., § 40 Rn. 27

4. Personal Scope

The personal scope concerns personal characteristics such as age or length of service and does not refer to the individual employee's activity. Collective agreements for such defined groups of employees are rare, but often distinctions are made within a collective agreement. The boundaries arise from the principle of equality and the provisions of the General Equal Treatment Act and equal treatment directives. On the employer's side, the scope of a collective agreement can be restricted for individual employers or initially limited to specific companies.

5. Temporal Scope

The collective agreement usually determines when it comes into force, ends, or can be terminated. If such provisions are absent, the collective agreement comes into force immediately. Normally, not all effects end with the expiration of the collective agreement; rather, there is a post-effect.

6. Joint Institutions

Joint institutions are organizations created by the parties to the collective agreement, and their purpose and structure are determined by the collective agreement. They provide employees with benefits that they cannot receive directly from the employer. Joint institutions are usually declared generally applicable. The regulations on joint institutions are a special category of collective agreement provisions and extend the collective agreement binding of association members to the joint institutions of the parties to the collective agreement.

For the employer side, it is important that the legal entity, i.e., the company, is a member of the employers' association. It does not matter whether a specific company or group is a member. Even legally independent companies are not automatically bound by collective agreements just because the parent company is a member. Instead, they also have the right to freedom of association. Therefore, there are no "corporate collective agreements." In the case of partnerships, it is crucial whether the company itself is a member. For example, a construction consortium can become a member of the employers' association as a registered civil law partnership and thus be bound by the collective agreement. Sometimes the affiliation of individual partners is sufficient. If all partners of a consortium are bound by collective agreements, it is generally assumed that the consortium itself is also bound by collective agreements. The decisive factors are the interpretation of the accession

declaration and the legal authority of the respective partners to validly establish membership of the company.[12]

V. Forms of Membership

1. "Normal" Membership

Collective agreements automatically become effective for all members of the parties to the collective agreements, including those who are members of contractual unions. Membership in a union does not affect the validity of the collective agreement.

2. Concept of "Membership without Collective Agreement Binding"

Some employers want to utilize the services of an employers' association, such as legal advice and support in court, but they do not want to be bound by the association's collective agreement. That was okay in the past, as stated by the Federal Labor Court. They called it "membership without collective agreement binding." Today, they consider it a special type of membership, not just a limitation of the association's collective agreement jurisdiction. It means that these members are not automatically bound by the collective agreement. However, to ensure that this works, these members must not have a direct influence on the association's collective bargaining decisions, as stated in the association's bylaws.[13]

VI. Importance of Collective Agreements in Employment Contracts

1. Collective Agreements as Frameworks for Working Conditions through Minimum and Standard Provisions

Collective agreements can contain both minimum and standard provisions. Minimum provisions set the lower framework for working conditions. Standard provisions can be improved by individual agreements between employers and employees, but cannot be changed to the detriment of the employees. (Principle of favorability, see above under III. 1. b.)

[12] Henssler/Willemsen/Kalb, Arbeitsrecht Kommentar, 10. Auflage 2022, § 3 TVG Rn. 7.
[13] Junker, op. cit. *supra* note 6, § 8 Rn. 519.

2. Application of Collective Agreements in Individual Employment Contracts through Incorporation Clauses

Incorporation clauses are provisions in employment contracts that refer to collective agreements or specific parts thereof. These clauses serve to integrate collective agreement provisions into the employment contract and thereby establish application rules for the collective agreement provisions in the individual employment relationship.[14]

a) Static Reference

These clauses refer to a specific collective agreement that was concluded at a particular point in the past.

b) Time-Dynamic Reference

These clauses each refer to a currently valid collective agreement, and they are interpreted to include future tariff provisions.[15]

c) Tariff Change Clause

These clauses regulate that in case of changes in the employer's tariff commitment, such as switching to another employers' association, the applicable collective agreement in the employment contract will also be changed.

d) Equalization Agreement

These clauses determine that the employer must treat the employee according to the relevant collective agreements only as long as the employer is tariff-bound. If the employer's tariff commitment ends, so does the equal treatment with the tariff-bound employees.

Reference clauses can be static or dynamic and must be clearly and unambiguously formulated in the employment contract to take effect. They can also have implications for the employment contract after a business transfer, where the provisions of the reference clause follow the contractual rights and obligations, not the legal provisions of a collective agreement.[16]

[14] Schaub/Koch, Arbeitsrecht von A-Z, 27. Aufl. 2023, Bezugnahme auf Tarifvertrag.
[15] ErfK/Preis, 24. Aufl. 2024, BGB § 310 Rn. 80a.
[16] Löwisch/Rieble/Löwisch/Rieble, 4. Aufl. 2017, TVG § 3 Rn. 699.

VII. Tariff Collision

1. Conflicting Collective Agreements

In case of conflicting collective agreements, the one that is more specific or contains more specific provisions for the particular case applies. In case of uncertainties, labor courts can be consulted to interpret them.

2. Dealing with Tariff Diversity

When there are multiple unions, multiple collective agreements can often apply in one company. Even without different unions, problems can arise when specific and general collective agreements collide, for example, between agreements that apply to an entire region and those that only apply to a specific company. There is a difference between genuine tariff competition, which is rare and occurs when two collective agreements clash in a single employment relationship, and mere tariff diversity at the company level, which is more common and means that several collective agreements apply in the company without resulting in a direct collision of rules for individual employment relationships.[17] For example, in hospitals, nurses and doctors may belong to different unions without this leading to conflicts in individual employment relationships.

VIII. Duration of Binding and the Post-Effect of Collective Agreements

1. Determination and Modification of the Duration of Collective Agreements

Collective agreements have an agreed-upon duration. After this period expires, the parties to the collective agreement can commence negotiations for a new collective agreement. The collective agreement can also be terminated by both parties.[18]

2. Post-Effect of Collective Agreements

Post-effect means that the provisions of the collective agreement can continue to apply even after the expiration of the duration. The Collective Agreement Act does not impose a time limit on post-effect. This means that collective agreement provisions can theoretically remain in force indefinitely unless another agreement is reached. However, this can be

[17] Reichold, *Arbeitsrecht,* 7th ed. (C.H. Beck, 2022), § 12 Rn. 25.
[18] Waltermann, op. cit. *supra* note 7, Rn. 588.

problematic as such an agreement often can only be made in the form of another collective agreement, due to the nature of the contractual provisions.[19]

IX. Legal Protection and Judicial Enforcement of Collective Agreements

Employees can invoke compliance with collective agreements before a court. For labor disputes, Germany has a separate labor jurisdiction rather than the general civil jurisdiction.[20] Therefore, labor courts are responsible for such disputes. The court may also propose mediation or other forms of alternative dispute resolution.[21]

X. Summary

The legal framework for the binding effect of collective agreements in Germany is defined by the Collective Agreement Act, especially by Section 4 of this Act. Collective agreements consist of a contractual and a normative part and are concluded between trade unions and employers' associations or individual employers. Collective autonomy grants the parties to the collective agreement the authority to establish their own law, with collective agreements having immediate and mandatory effect, meaning they automatically apply to all members of the parties to the collective agreement.

The scope of collective agreements encompasses various aspects such as spatial, sector-specific, professional, personal, and temporal scope as well as joint institutions.

Collective agreements serve as a framework for working conditions and can be integrated into individual employment contracts through reference clauses. In case of conflicts between collective agreements, more specific rules prevail over more general ones, and the post-effect of collective agreements means that their provisions can continue to apply even after the duration has expired.

Employees can enforce compliance with collective agreements before labor courts.

B. Extension of collective agreements by public authorities

It is plausible to examine, whether it is possible in the german labour law to declare a collective agreement binding for a larger group than the members of signatory parties.

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[19] Preis and Greiner, op. cit. *supra* note 9, Rz. 804.
[20] Löwisch et al., *Arbeitsrecht,* 12th ed. (Verlag Franz Vahlen, 2019), Rn. 1687.
[21] Wörlen and Kokemoor, op. cit. *supra* note 8, Rn. 396a.

I. General Applicability Declaration

In the German legal system, it is possible through a so-called "General Applicability Declaration," regulated by the Collective Agreement Act (§ 5 subsection 11 ff. TVG). The Federal Ministry of Labour and Social Affairs, in coordination with the Federal Ministry for Economic Affairs and Energy, declares a contract to be generally applicable. According to § 4 sentence 1, the provisions of the General Applicability Declaration also cover employees and employers who were not previously bound by a collective agreement, thus binding them directly and mandatorily[22]. There is debate about the cases in which the General Applicability Declaration should be issued. According to the prevailing opinion, it also includes those who are otherwise organized and already subject to another collective agreement[23]. Instead of being bound by membership under § 3 subsection 1, it is a binding force through a state order[24]. According to a counter-opinion, the General Applicability Declaration would only cover employment relationships in which congruent union membership already exists[25]. Regarding the procedure itself, it generally consists of the following 4 steps: first, the parties must submit an application and the Federal Ministry of Labour and Social Affairs (BMAS) has to publish the application in the Federal Gazette (BAnz.)[26]. The BMAS must also convene a hearing on the application, including discussions on the tariff agreement[27]. The decision on whether and to what extent the public interest is affirmed is made by the Federal Ministry of Labour and Social Affairs (BMAS)[28], with particular attention to the principle of proportionality.

II. Limitations to the binding effect

In the case of a limited general applicability declaration, it may occur that only specific sections of the legal norms are considered generally applicable or that the general applicability declaration does not cover the entire scope of the collective agreement[29]. The

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[22] Bundesarbeitsgericht (Federal Labour Court, BAG) 17.4.2013 – 4 AZR 592/11, EzA TVG § 4 Günstigkeitsprinzip Nr. 11 Rn. 19.
[23] BAG 25.7.2001 – 10 AZR 599/00, AP TVG § 1 Tarifverträge: Bau Nr. 242.
[24] BAG 3.7.2014 – 6 AZR 953/12, juris Rn. 19 mwN.
[25] Sittard, *Voraussetzungen und Wirkungen der Tarifnormerstreckung nach § 5 TVG und dem AEntG: Zugleich ein Beitrag zur Debatte um staatliche Mindestlöhne*, Schriften des Instituts für Arbeits- und Wirtschaftsrecht der Universität zu Köln No. 111 (C.H. Beck, 2010), p. 234 et seq.
26 ErfK/Franzen, TVG § 5 Rn. 20, 21.
27 ErfK/Franzen, TVG § 5 Rn. 22.
28 Forst/Boecken/Düwell/Diller/Hanau, Gesamtes Arbeitsrecht, TVG § 5 Rn. 95.
29 Lakies/Rödl/Däubler, Tarifvertragsgesetz, TVG § 5 Allgemeinverbindlichkeit, Rn. 221.

most important aspects are time limitations, exemptions from the extended collective agreement and competences of authorities.

1. Time limitations

The binding effect is also subject to various time limitations. According to § 7 subsection 2 DVO, the general applicability declaration determines the starting point of its general applicability. § 5 subsection 5 sentence 3 TVG regulates that a general applicability declaration no longer applies at the expiration of the collective agreement. It can also be revoked by the ministry according to § 5 subsection 5 sentence 1 TVG if the public interest has been violated.

2. Exemptions to the extended collective agreement

Exemptions to the extended collective agreement are possible through so-called limitation clauses[30]. Companies can be excluded from the application if specific additional conditions for the work to be performed in the company are present, especially in the context of generally applicable building industry collective agreements[31]. Another limitation applies if the employer is a member of an association mentioned in the general applicability declaration and responsible for him[32].

3. Competences

In principle, the Federal Minister of Labour and Social Affairs is responsible in such cases[33], with the authority to appoint the supreme labor authority of a specific state, according to § 5 subsection 4 of the Collective Agreement Act. If the exception is rejected, the party is entitled to administrative legal protection in the form of a declaratory action[34].

30 Zur erforderlichen Auslegung BAG 16.11.2022, AP TVG § 1 Tarifverträge: Bau Nr. 420 = NZA 2023, 437; zu einem Redaktionsversehen bei der Allgemeinverbindlicherklärung BAG 12.5.2010, AP TVG § 1 Tarifverträge: Bau Nr. 320 = NZA 2010, 953.
31 Vgl. etwa BAG 13.4.2011, AP TVG § 1 Tarifverträge: Bau Nr. 330; 18.3.2009, AP TVG § 1 Tarifverträge: Bau Nr. 309 (unmittelbarer Zusammenhang von Abbrucharbeiten mit anderen baulichen Leistungen); 21.1.2009, AP TVG § 1 Tarifverträge: Bau Nr. 307 (Teil eines Industriebetriebs).
32 BAG 20.6.2007, AP TVG § 1 Tarifverträge: Bau Nr. 26 = NZA-RR 2008, 24; 18.10.2006, AP TVG § 1 Tarifverträge: Bau Nr. 287 = NZA 2007, 1111.
33 MünchKomm/Spinner, BGB, § 611a Rn. 256.
34 Franzen, Erfurter Kommentar zum Arbeitsrecht, TVG § 5 Rn. 27; vgl. Bundesverwaltungsgericht (Federal Administrative Court, BVerwG) 3.11.1988, AP TVG § 5 Nr. 23.

C. The binding effect on the basis of the individual contract or employment relationship

There are some situations, in which there is no legislation ensuring the binding effect of collective labour agreements or the legislation does not apply to particular collective agreements or provisions thereof. The question is, which rights do workers and employers have under those conditions?

I. Invoking provisions of a collective agreement

According to § 4 subsection 1, § 3 TVG, the direct and mandatory effect of collective agreements arises when the parties to the individual employment relationship are bound by membership in an association (§ 3 and 4 subsection 1 TVG) or due to a declaration of general applicability (AVE, § 5 subsection 4 TVG). However, employees who are not parties to the collective agreement can refer to its provisions through incorporation clauses, which is a manifestation of contractual freedom[35]. Collective agreements only apply when the contracting parties expressly desire it; the content of the provisions is determined by the parties and documented in writing in the employment contract[36].

II. Applying provisions of a collective agreement

It is possible for employes to apply provisions of a collective agreement to workers, in particular provisions that restrict workers' rights. However, the non-organized individuals cannot be treated more favorably than the union members due to Article 9 subsection 3 sentence 2 Basic Law based on their lack of membership[37]. The reference clauses are generally subject to a review under general terms and conditions law (AGB-rechtliche Inhaltskontrolle), with particular emphasis on compliance with the transparency requirement pursuant to § 307 subsection 1 sentence 2 BGB and the uncertainty rule of § 305c subsection 2 BGB[38]. The reference must make clear what exactly is to be included in the employment contract[39]. The restriction of employees is permissible as long as it does not exceed the principles mentioned above.

[35] Eylert and Rinck, "Arbeitsvertragliche Bezugnahme auf Tarifverträge – eine aktuelle Bestandsaufnahme", (2022) Recht der Arbeit (RdA), 146–159.
[36] Koch/Schaub/Koch, Arbeitsrecht von A-Z, Bezugnahme auf Tarifvertrag.
[37] Löwisch/Rieble, Tarifvertragsgesetz, TVG § 3 Rn. 513.
[38] Reufels/Hümmerich/Reufels, Gestaltung von Arbeitsverträgen, § 1 Rn. 1694-1695.
[39] Däubler/Lorenz TVG § 3 Rn. 237; HWK/Henssler TVG § 3 Rn. 19.

III. Enforcing the agreement

It is also crucial, whether worker's organizations can enforce the agreement. According to Article 9 subsection 3 Basic Law, employees and employers have the right to form associations to protect working and economic conditions. This is primarily achieved through the negotiation of collective agreements, in which specific conditions apply directly and mandatorily[40]. However, if this is not effective, the coalitions can achieve their goals through the conciliation process and industrial action, thereby compelling the opposing party to comply with the collective agreement[41]. At the company level, this is accomplished through participation in works council and co-determination processes[42].

IV. Specific role of the collective labour agreement

There are some particularities regarding the collective labour agreement. One of those things is so-called "OT membership", i.e. membership in the employers' association without collective bargaining agreement[43]. In this situation, the affected employers are intended to be exempt from the applicability of the collective agreement, but they still should take part in the services of the employers' association[44]. Another important aspect is the fact that the waiver provision according to § 4 subsection IV of the German Collective Agreement Act (TVG) does not apply to rights arising from a collective agreement that is applied due to a written reference clause in the employment contract, because it has to be based on mutual collective bargaining obligations[45]. The collective agreement consists of a contractual and a normative part according to § 1 subsection of the Collective Agreement Act (TVG). The contractual part regulates obligations of the parties, while the normative part fulfills the protective and shaping function of the collective agreement[46]. It should be noted that the reference to collective agreements entails tariff privileges if certain conditions are met[47].

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[40] Preis and Temming, *Individualarbeitsrecht,* 6th ed. (Verlag Dr. Otto Schmidt, 2020), § 12 Rn. 374.
41 Ibid.
[42] Ibid., § 12 Rn. 374.
[43] BeckOK ArbR/Giesen, TVG § 3 Rn. 3.
[44] BeckOK ArbR/Giesen, TVG § 3 Rn. 3.
[45] Richter, ArbRAktuell 2015, 291.
[46] Preis and Temming, *Individualarbeitsrecht,* 6th ed. (Verlag Dr. Otto Schmidt, 2020), § 17 Rn. 654.
[47] Löwisch/Rieble, Tarifvertragsgesetz, TVG § 3 Rn. 535.

D. Relationship between competition law and collective labor agreements

I. Introduction and Problem Statement

The relationship between competition law and collective labor agreements lies in the potential tension between the two legal frameworks. Competition law, championing open markets and free enterprise, aims to ensure fair competition in the market and prevent anti-competitive practices. On the other hand, collective labor agreements, which are negotiated between employers and employee representatives (often unions), primarily address employment conditions, wages, and other work-related matters.

1. The Essence of Competition Law

Competition law is designed to ensure that competition in the market functions properly. It aims to establish a fair playing field for businesses, ensuring that they compete on equal terms and merit. To achieve this, competition law prohibits various anti-competitive practices, such as agreements between companies that restrict competition. [48] In Germany, the Act against Unfair Competition (UWG) is the primary legislation protecting against violations of competition law.

Due to the primacy of Union competition law, issues pertaining to competition law are now predominantly discussed as matters falling within the scope of Union law. Following the antitrust prohibition of the Article 101(1) Treaty on the Functioning of the European Union (TFEU), specifies that "all agreements between companies, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market are incompatible with the internal market and prohibited."

2. Labor law

Labor law originated to safeguard dependent workers, acting as a shield against market forces and reinforcing the employee's standing vis-à-vis the employer. It offers protection against risks like accidents or unemployment.[49] However, it accentuates the hierarchical

[48] Riesenhuber, *Europäisches Arbeitsrecht,* 2nd ed. (De Gruyter, 2021), § 4.
[49] Schulze Buschoff, "Vom Umgang mit Regulierungslücken: Solo-Selbstständigkeit und Tarifautonomie", 76 WSI (2023), 202–210.

relationship, emphasizing the employer's authority through directives and the right to impose sanctions for non-compliance.[50]

Conversely, self-employed individuals operate under contracts governed by general civil or commercial law. Their performance adheres to market rules, with both parties, the self-employed and the client, considered equal contractual partners. The self-employed professional assumes sole entrepreneurial risk. Legislation, especially protective measures, introduced over time, typically centers more on preserving the principles of free and fair competition than on addressing the "vulnerability" of self-employed individuals.[51]

3. Challenges

Self-employed persons are generally considered as undertakings under competition law, meaning they would have to comply with rules designed to prevent anti-competitive agreements. Associations of self-employed individuals or unions representing the interests of self-employed persons may, under specific conditions, be regarded as associations of enterprises within the scope of competition and antitrust laws.[52] Even though individual self-employed persons might have limited market power, their associations can collectively have significant influence on the market. By acting together, they can agree on practices that restrict competition, such as setting minimum prices, boycotting suppliers, or dividing up the market between members. That would be contrary to the principles of competition law.

II. How does Germany deal with employment conditions laid down in collective agreements?

Consequently, the remaining question is whether self-employed individuals can also avail themselves of the German collective bargaining autonomy.[53] To address this question adequately, it is essential to first delineate the distinctions between bogus self-employed and self-employed individuals and comprehend their respective legal standings.

[50] Ibid.
[51] Ibid.
[52] Kocher, "Selbstständige und Tarifautonomie – Gleichzeitig: Anmerkungen zur Crowdworker-Entscheidung des BAG und zur Plattforminitiative der EU-Kommission", (2022) Soziales Recht (SR), 125–136.
[53] Ibid.

1. Bogus self-employed persons

The EU's plan to improve working conditions for platform workers was a key move to protect the rights of workers in the European Union. The draft aimed to fight against bogus self-employment and secure employee rights for those in the platform economy.[54] Unfortunately, the proposed rules for better working conditions did not get enough support in a vote among member states on February 16, 2024.

The biggest challenge lies in determining at what legal threshold self-employed individuals cease to be recognized as independent contractors and, instead, are classified as employees. This inquiry specifically addresses the concept of what is commonly known as bogus self-employment.[55] To address the question of how Germany deals with collective agreements for bogus self-employed individuals, one can refer to a decision by the Federal Labor Court (BAG). Section 12a TVG deals with “arbeitnehmerähnliche Personen” which translates to “persons similar” to employees. Under § 12a TVG, self-employed persons are similar to employees if they are economically dependent and socially in need of protection comparable to an employee. One of the first collective agreements based on § 12a TVG was the Compensation Collective Agreement (Vergütungstarifvertrag) for Designers (VDV), which was established in 1977 for self-employed designers economically dependent on commissioned design studios.[56] Pioneering in collective agreements based on § 12a TVG is the media and culture sector. For instance, the DGB union ver.di has negotiated collective agreements for worker-like individuals (“Fixed Freelancers”) with all public broadcasting institutions affiliated with the ARD.[57] Another agreement based on § 12a TVG for so-called “Fixed Freelancers” exists between the German Journalists Union (DJU) and the Federal Association of Digital Publishers and Newspaper Publishers (BDZV).[58]

2. Solo self-employed in Germany

In Germany, the regulation of wages and working conditions for employees traditionally occurs through collective bargaining agreements negotiated by social partners, namely

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[54] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796; accessed on March 13th, 2024 2:08 pm.
[55] Kocher, "Selbstständige und Tarifautonomie – Gleichzeitig: Anmerkungen zur Crowdworker-Entscheidung des BAG und zur Plattforminitiative der EU-Kommission", (2022) Soziales Recht (SR), 125–136.
[56] Schulze Buschoff, op. cit. *supra* note 49.
[57] Ibid.
[58] Ibid.

employers' associations and trade unions. This process is founded on the principle of collective autonomy (Tarifautonomie), which is enshrined in the German Basic Law (Grundgesetz) and operates largely autonomously, free from state intervention. However, the rise of solo self-employment presents a challenge to this established system. Solo self-employed individuals, who are neither classified as employers nor traditional employees, do not fit neatly into the structures of social partnership that underpin collective bargaining in Germany.[59] For over two decades, the 1999 Albany decision by the European Court of Justice (ECJ) has served as a cornerstone of legal certainty for collective bargaining in the EU.[60] It affirmed the crucial role of social partner agreements while ensuring they remain compatible with competition principles.[61] According to the definition of workers within the scope of the European Union as outlined in Article 45 TFEU, (only) bogus self-employed persons fall under the category of employees.[62]

Despite this, like employees, solo self-employed workers depend on selling their labor and face similar social risks. Yet, due to their employment status, they are often afforded fewer social and labor rights and bear entrepreneurial risks.[63] Moreover, similar to employees subject to the directives of their employers, solo self-employed individuals frequently find themselves in economic dependence on their clients, resulting in a weaker bargaining position. Given these challenges, collective bargaining agreements could offer a crucial mechanism for securing fair working conditions for solo self-employed individuals.

III. European Commission guidelines for self-employed

In recent years, the European Union (EU) has demonstrated a heightened interest in harmonizing specific facets of labor law and employment relationships. This includes a focus on conditions pertinent to self-employed persons. The European Commission has acknowledged the distinctive position of solo self-employed individuals and has consequently issued guidelines.[64] These guidelines encourage member states to enhance support for such individuals, facilitating their access to certain collective bargaining

[59] Kocher, op. cit. *supra* note 52.
[60] Ibid.
[61] Ibid.
[62] CJEU, Case 413/13, FNV Kunsten Informatie en Media, EU:C:2014:2411, para 42.
[63] Kocher, "Selbstständige und Tarifautonomie – Gleichzeitig: Anmerkungen zur Crowdworker-Entscheidung des BAG und zur Plattforminitiative der EU-Kommission", (2022) Soziales Recht (SR), 125–136.
[64] European Commission, "Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02", C/2022/6846.

arrangements without infringing upon competition laws. The European Commission's guidelines on call for a precise differentiation and corresponding treatment of these working groups in order to ensure fair competition and fair working conditions. Highlighting the importance, it's essential to note that the category of those deserving protection extends beyond individuals displaying characteristics akin to employees or economic dependence.[6566] This recognition encompasses solo self-employed, acknowledging that they too may have protective needs. Consequently, collective agreements should be feasible for these varied groups of self-employed individuals.

In Germany, these guidelines are met by a mixture of national laws and sector-specific regulations that aim to clarify and facilitate the applicability of collective agreements to self-employed persons. There are concrete examples where collective bargaining agreements have been successfully applied to self-employed groups, particularly in sectors where many freelancers traditionally work, such as journalism or logistics.[67] These applications demonstrate how collective agreements can set minimum fees and working conditions that would otherwise be considered problematic under competition law.

IV. Future perspective

The European Union has recently taken two important steps to improve the working conditions of solo self-employed persons and platform workers. The first is a guideline on collective agreements for solo self-employed persons, which clarifies the circumstances in which EU competition law does not stand in the way of these workers' efforts to negotiate collectively to improve their working conditions The second is a draft directive on improving working conditions in platform work, which aims to combat bogus self-employment and ensure that platform workers are granted the legal employment status that corresponds to their actual work arrangements.

These initiatives are welcome developments, as they offer new opportunities to improve the lives of solo self-employed persons and platform workers. However, there are also some challenges that need to be addressed.

One challenge is the lack of clarity about who is responsible for negotiating collective agreements on behalf of solo self-employed persons. In traditional employment

[65] Collective bargaining agreements are already applicable for these groups.
[66] Schulze Buschoff, op. cit. *supra* note 49.
[67] Ibid.

relationships, this is usually the role of trade unions. The translation of these directives into national law may encounter difficulties due to varying legal systems and bureaucratic hurdles in member states. Industries and businesses could resist the proposed changes, especially if they perceive the introduction of collective agreements for solo-self-employed as burdensome.[68] The diversity of solo-self-employed individuals, spanning different sectors and activities, coupled with intricate employment relationships, could complicate the establishment of comprehensive collective agreements, requiring consideration of individual needs and working conditions. Additionally, delineating between "true" self-employed and those considered vulnerable may pose practical challenges, introducing uncertainties that could impact the effectiveness of the guidelines.

E. System of collective agreements in practice

I. Extent of Coverage

The German system of collective agreements stands out for its broad coverage, impacting a substantial portion of the workforce. This widespread influence is attributed to the principle of general applicability of collective agreements that extends beyond the signatory parties to encompass entire industries or sectors.[69]

The principle of general applicability plays a pivotal role in preventing the potential fragmentation of labor standards within specific sectors. By designating agreements as universally applicable, it ensures that negotiated terms, be it related to wages, working hours, or other conditions, reach all employers and employees within the defined scope. This inclusivity promotes a sense of fairness and equity in employment conditions, irrespective of individual union memberships or affiliations.

In practice, the extension of collective agreement benefits to non-union members helps avoid a scenario where certain workers might enjoy better terms negotiated by unions without contributing to the bargaining process. This prevents disparities within industries, contributing to a more balanced and harmonized employment landscape. [70]

Moreover, the broad coverage of collective agreements fosters stability and consistency in labor standards. Industries characterized by diverse employment structures and a mix of

[68] Ibid.
[69] BeckOK ArbR/Giesen TVG § 5 Rn. 25.
[70] BeckOK ArbR/Giesen TVG § 5 Rn. 1-4.

unionized and non-unionized workers benefit from a cohesive set of terms that serve as a benchmark for fair and competitive employment practices.[71]

The system's commitment to inclusivity also aligns with broader societal goals of promoting social cohesion and minimizing disparities within the labor market. The collaborative nature of collective bargaining, supported by the principle of general applicability, ensures that the benefits negotiated by social partners are not confined to a select group but are extended to the entire workforce within specific sectors. This approach contributes to the overall effectiveness and resilience of the German collective bargaining system.

II. Differences Between Union and Non-Union Members

In Germany, there exists a distinction in the influence and involvement of union and non-union members in the collective bargaining process. Unionized workers typically enjoy a more direct impact on negotiations and the content of collective agreements. Their union membership grants them representation and a voice in shaping the terms and conditions of employment, ensuring that their specific needs and concerns are addressed.

The dominant German trade union is the Confederation of German Trade Unions (DGB), representing over three-quarters of the 7.94 million members in 2015.[72] This number declined from 6.1 million to 5,7 in 2023.[73] The German Civil Service Association (DBB) is the second-largest, and the Christian Trade Union Confederation (CGB) is the third. Despite their influence, umbrella organizations have limited power, with sectoral unions driving collective bargaining and strikes. The DGB plays a crucial political role, coordinating with members on labor legislation and social policies.

In Germany, collective bargaining predominantly takes place at industry level. This is due to the fact that both trade unions and employers' associations organize their members within specific sectors and do not pass on the power to negotiate collective agreements to their higher-level umbrella organizations.

On the other hand, non-union members benefit indirectly from the collective bargaining process. The extension of agreement benefits to all workers within a sector means that non-

[71] Söllner, "Grenzen des Tarifvertrags", (1996) Neue Zeitschrift für Arbeitsrecht (NZA), 897–906.
[72] International Labour Organization, *Collective bargaining in Germany and Ukraine: Lessons learned and recommendations for Ukraine* (2021).
[73] Statista2024, Link: https://de.statista.com/statistik/daten/studie/3266/umfrage/mitgliedszahlen-des-dgb-seit-dem-jahr-1994/.

union members receive comparable terms, although they might not have the same level of direct influence as unionized counterparts. This approach fosters a degree of fairness and equality across the workforce, irrespective of individual union affiliations.

III. Impact on Unionization Rates

As already mentioned, the labor landscape has witnessed a gradual decline in unionization rates over the past few decades, mirroring trends seen in many developed nations. Despite this decline, the impact of collective agreements remains robust, showcasing the resilience and adaptability of the German industrial relations system.

The key to this sustained impact lies in the principle of general applicability. Even as the proportion of unionized workers decreases, the extension of collective agreement benefits to all employees within specific industries ensures that a significant segment of the workforce continues to benefit from the negotiated terms. This feature is particularly crucial in preventing a decline in labor standards and maintaining a degree of uniformity in employment conditions.

Moreover, the principle of general applicability serves as a stabilizing force in the face of changing unionization dynamics. It allows for a broader impact on a variety of industries, ensuring that the benefits of collective agreements are not confined to certain sectors with higher unionization rates. This inclusivity contributes to the overall social cohesion within the labor market, preventing the emergence of stark disparities between unionized and non-unionized sectors. The reach ensures that negotiated terms continue to influence and improve the conditions of workers across various sectors, contributing to the enduring influence of the collective bargaining system in Germany.

IV. Competition Between Unions and Workers' Organizations

In Germany, trade unions engage in competition across three interconnected domains. Firstly, there's the rivalry for members, occurring in overlapping organizational territories. The second arena involves the competition for committees, where conflicts arise over mandates for works councils and supervisory boards. Lastly, the third crucial aspect of inter-union competition revolves around collective bargaining policy. In this context, collective bargaining policy competition refers to the effort to establish and enforce distinct collective

agreements exclusively within the claimed application areas of the respective union, distinct from the agreements advocated by other trade unions collective bargaining systems.[74]

In Germany, collective agreements can be concluded at various levels, including national, regional, sectoral, company and plant level. The sectoral level has become predominant due to the trade union structure. In the past, only one collective agreement could apply in a company (collective bargaining unit). In 2010, however, the Federal Labor Court abandoned this principle and allowed competing agreements within a company. The Collective Bargaining Unity Act (2015) restored this principle and ensured that the collective agreement signed by the union with the most members applies in the event of a dispute.[75]

Multiple unions often operate concurrently, each vying to represent the interests of workers within specific sectors. This competitive environment fosters diversity in the labor movement, leading to innovative approaches to bargaining, representation, and advocacy.

V. Contents of Collective Agreements

Collective agreements in Germany are comprehensive in scope, covering a wide array of employment conditions beyond just wages. The scope of collective agreements extends beyond the basic elements of employment, addressing broader issues related to workplace conditions. This inclusivity is reflective of the collaborative nature of the bargaining process, where social partners engage in negotiations with the aim of enhancing overall working conditions for the entire workforce within a sector.

There are over 40,000 valid collective agreements in Germany that regulate various working conditions such as working hours, vacation, health and safety and notice periods. General collective agreements regulate long-term working conditions and are usually valid for five years. Framework wage agreements define wage grids and classification criteria and are also often valid for five years. General wage agreements set wage rates and are usually negotiated for one or two years. Specific issues such as training or protection against rationalization are usually regulated in separate agreements.

Collective wage agreements can have a longer period of validity, especially if various issues are negotiated at the same time and improvements are financed by wage restraint. Extensive

[74] Dribbusch, "Konkurrierende Tarifpolitik: Herausforderung für die DGB-Gewerkschaften", (2009) WSI, 193–200.
[75] ErfK/Franzen TVG § 4a Rn. 1-1b.

reductions in working hours in recent decades have often been financed by such long-term wage agreements.

In the past, general framework collective agreements improved the statutory minimum standards, as the trade unions concentrated on regulating working conditions in their area. However, as the scope of collective agreements decreased, statutory minimum standards became more important, which led to a change in the attitude of trade unions, who also campaigned for a national minimum wage after 2005.

In the metal industry, the agreed-upon pay raises since 2000 were much higher (about 19 percentage points) compared to industries with weaker unions, like retail. The introduction of the national minimum wage gave rise to reflections on the interaction between the minimum wage and collectively agreed wages, which revealed different patterns in sectors with weak and strong trade unions.

In places with weak unions, like agriculture or retail, the lowest wages adjust to the minimum wage. When the minimum wage goes up, it means they need to renegotiate the wages for everyone. On the other hand, in sectors with strong trade unions, such as metal and chemical industries, they follow a different approach. They have their own way of negotiating wages, and the pay groups are usually higher than the minimum wage. [76]

German labor law allows a working week of up to 48 hours, and every employee is entitled to 20 days of paid vacation[77]. On average, the contractual working week in 2022 is 34.7 hours[78] and the average vacation entitlement is 31.8 days per year[79], indicating significant improvements in working standards through collective agreements. However, there are significant differences between companies that are bound by collective agreements and those that are not, where the working week can be up to 44 hours and vacation can be limited to 20 days.

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[76] International Labour Organization, op. cit. *supra* note 72.
[77] Statistisches Bundesamt, Link: https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-2/urlaubsanspruchl.html.
[78] DeStatis, Link: https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-3/woechentliche-arbeitszeitl.html#:~:text=34%2C7%20Stunden%20betrug%20die,jedoch%20getrennt%20voneinander%20betrachtet%20werden.
[79] DeStatis, Link: https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-2/genommene-Urlaubstage.html#:~:text=Während%20Arbeitnehmerinnen%20und%20Arbeitnehmer%20im,32%2C1%20Tagen%20überdurchschnittlich%20hoch.

In terms of the relationship with statutory law, collective agreements in Germany are designed to complement and build upon existing legal standards. While they cannot provide less protection than statutory law, they often go beyond the minimum requirements, ensuring that workers benefit from additional rights and protections negotiated through the collective bargaining process. The principle of not providing less protection than statutory law establishes a baseline, ensuring that workers are safeguarded by a floor of minimum legal standards.[80]

The dynamic interaction between collective agreements and legislation is crucial. While collective agreements are not allowed to deviate from fundamental statutory provisions to the detriment of workers, the innovative provisions within these agreements can influence legislative developments over time. This dynamic interplay ensures that the German labor system remains adaptable and responsive to evolving needs and challenges in the workplace.

In summary, the German system of collective agreements is characterized by its inclusivity, impact on a broad spectrum of workers, competition among unions, comprehensive coverage of employment conditions, and adherence to legal standards. It is based on balance between the autonomy of social partners and the need to maintain fundamental protections for workers in accordance with statutory law.

F. The system of collective labour agreements

I. Structure

The system of collective labour agreements in Germany is determined through two main protagonists: the unions and the employer's organizations. Unions are organisations of employees by a specific occupational group to assert their social interests.[81] Employees sign a form and pay a monthly fee to the union in order to financially support their efforts. This fee regularly amounts to 1% of the monthly gross remuneration. The union on the other hand offers counselling, financial support during industrial action, representing interests at various levels and more.[82]

[80] BeckOK ArbR/Giesen TVG § 4 Rn. 29.
[81] https://www.bpb.de/kurz-knapp/lexika/lexikon-in-einfacher-sprache/267644/gewerkschaft/, accessed on March 3rd, 20. 25 pm.
[82] https://www.verdi.de/ueber-uns/verdi-international/++co++3751f256-1ab1-11e3-bdf2-5254008a33df, accessed on March 4th, 2024 20:38 pm.

One important task unions are doing is negotiating with the employer's organisations for working conditions and wages. The result of the negotiation is ideally a collective labour agreement that does justice to all parties.

Another fundamental aspect of the German model rested on the dual system of interest representation. This system relied on works councils operating at the company level and multi-employer bargaining conducted at the industry level. It involved collaboration between trade unions and employers' associations, aiming to guarantee extensive bargaining coverage and the efficient enforcement of collective agreements.[83]

1. Basic principles

The Collective Agreements Act (Tarifvertragsgesetz, TVG) is the main legal source in Germany and was enacted in 1949. A few main principles where already set at that time and are still relevant today:[84]

- Only unions and employers associations can conclude a collective agreement
- The agreed standards are binding on union members and members of employer's organisations
- Social partners have certain obligations, such as refraining from industrial action while the agreement is in force and enforcing the agreement by informing their members
- The agreed standards cannot be undercut but only improved at the plant level (the so-called "favourability principle"); however, negotiating partners at the sectoral level can agree to allow downward deviations
- The state can declare collective agreements as generally binding if there is a "public interest" to do so or an agreement already covers 50% of the employees in the industry in question, and if the majority of the central collective bargaining committee agrees.
- If a company leaves the employers association, the validity of the agreement is extended until a new agreement has been concluded (after-effect). This extended validity makes it difficult for companies to opt out of sectoral collective agreements. However, this extended validity does not apply to newly employed personnel.

[83] Müller and Schulten, "Germany: parallel universes of collective bargaining" in Müller et al. (Eds.), *Collective bargaining in Europe: towards an endgame* (ETUI, 2019), 239–265.
[84] International Labour Organization, op. cit. *supra* note 72

2. Historical developments of German unionism and collective labour

a) Overview

Unions initially emerged in the USA and Great Britain during the industrialization period when companies expanded, and employees sought to protect their rights and prevent exploitation. In Germany, unions gained prominence as guilds represented the typical form of labor association.

However, the growth of unions in Germany was interrupted by the rise of National Socialism, which dismantled the existing system. Despite underground resistance, German workers' organizations were effectively crushed without resistance, and the Nazis established their own workers' organizations, funded with expropriated union funds. The Deutsche Arbeitsfront (DAF) was not merely a replacement but a tool for the Nazi Party to control the labor force.

Following the experiences of Weimar and Nazi Germany, the representation of interests in collective bargaining became constitutionally enshrined. Article 9 (3) of the Basic Law established "collective bargaining autonomy," requiring the state to create a legal framework for employers and employees' organizations to freely negotiate agreements. Workers' organizations were granted the right to strike, though they were prohibited from engaging in political strikes.

Through centrally organized associations and the binding nature of collective agreements for entire regions, collective bargaining autonomy played a pivotal role in preventing fragmented negotiations. The economic success of the Federal Republic of Germany after 1945 was undoubtedly bolstered by the peaceful collective bargaining relations, which were among the most harmonious in Europe.[85]

As workforce and personnel is an important part of economy, the history and evolution of labour law has been largely affected by the market system and its changes in Germany. Since the 1980s, Germany has implemented significant neoliberal policies in response to global competition and the challenges of reunification. These changes include deregulation of financial markets, leading to a focus on short-term shareholder value. Social and labor market deregulation has weakened worker protections, resulting in increased precarious

[85] Welskopp in: Görres-Gesellschaft, Staatslexikon, Gewerkschaften, Historische Entwicklung, 8. Auflage 2018.

employment. Additionally, privatization and liberalization of public services have reduced the size of the public sector. Furthermore, there has been a shift in industrial relations away from cooperative partnerships with trade unions, leading to a decline in industry-level collective bargaining. These reforms have fundamentally altered the socio-economic landscape of German capitalism and therefore contributed to the evolution of collective bargaining in Germany towards the decline and fragmentation of traditional industry-level collective bargaining.[86]

b) Central union actors

The Deutsche Gewerkschaftsbund (Federation of German Trade Unions, DGB) is the umbrella organisation of the individual unions affiliated to it and is based in Berlin. Only unions can be members.The DGB initially comprised 16 affiliates, which aimed to organize all workers regardless of their status, profession, or political beliefs. However, due to various union mergers in the 1990s, the number of DGB-affiliated unions decreased by half to eight. Among the DGB affiliates, the two largest are the German Metalworkers' Union (IG Metall) and the United Services Union (ver.di), each boasting approximately 2 million members. Together, they represent around 70 percent of all DGB-affiliated trade union members.

IG Metall primarily focuses on metal manufacturing, particularly in the automobile industry, which serves as its primary stronghold. Additionally, IG Metall extends its coverage to steel, textile, and wood processing industries. On the other hand, ver.di is more diverse, representing not only the public sector but also approximately 200 industries in private services.

In addition to the Federal Congress, the bodies of the DGB are the Federal Committee, the Federal Executive Board, the Executive Federal Executive Board and the Audit Commission.[87] Compared to its affiliated unions, the DGB holds relatively less power and is primarily involved in representational issues and political advocacy.[88]

So in total there are three levels on which there are legal relationships on collective labour law: between the employee and the union, between the union and the employers

[86] Müller and Schulten, op. cit. *supra* note 83, p. 241.
[87] Ulrich Koch in: Schaub/Koch, Arbeitsrecht von A-Z, 27. Auflage 2023.
[88] Müller and Schulten, "Germany: parallel universes of collective bargaining" in Müller et al. (Eds.), *Collective bargaining in Europe: towards an endgame* (ETUI, 2019), 239–265, at 242.

organisation and between the union and the DGB (if it is part of the DGB) and equally on the employers side.

c) Numbers/Statistics

The unions wield significant influence in Germany's economy and politics, owing partly to their considerable size. As of 2022, approximately 5.64 million workers were organized within one of the eight unions affiliated with the DGB, constituting about three-quarters of all trade union members in the country.[89]

At their zenith, during the late 1970s, unions organized about a third of all German workers. This percentage experienced a resurgence following German reunification but gradually declined, plummeting to just 16.5% by 2018. Nevertheless, union coverage remains relatively robust, hovering around 42% in 2013. Certain industrial branches boast exceptionally high trade union density, such as the steel industry, where it reaches up to 90%.[90]

II. The freedom of association as a foundation for the development of unions in Germany

The freedom of association is an important part of the foundation of collective labour law in Germany and therefore at the root of the legal foundation on which unions base their whole existence and action. The freedom of association is a fundamental right and manifested in the German constitution (Article 9 (3) Basic Law). The freedom of association is a right to freedom. That means that its basic function is to prevent state intervention.

On the other side the state is obliged to protect the freedom of collective association by creating and implementing the necessary legal institutions and complexes of norms, so that unions and the individual state member are able to exercise this freedom.[91]

Furthermore, the freedom of association is also protected against interference by private parties (Article 9 (3) sentence 2 Basic Law). The freedom of association consists of two parts, which complement each other, but can also collide:[92] the individual freedom of association and the freedom of collective association. The individual freedom of association protects "anyone and all professions" (Article 9 (3) sentence 1 Basic Law). Regarding the wording, this

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[89] DGB-Seite: https://www.dgb.de/uber-uns, last accessed on 2nd of March, 2024; 8:04 pm.
[90] Müller and Schulten, "Germany: parallel universes of collective bargaining" in Müller et al. (Eds.), *Collective bargaining in Europe: towards an endgame* (ETUI, 2019), 239–265, at 244.
[91] Preis and Greiner, op. cit. *supra* note 9, § 81 Rn. 91-92.
[92] Ibid., § 81 Rn. 94

fundamental right was composed as an individual right for all employees/ workers. But on the other hand, the association formed, i.e. the coalition/union is itself the central tool to realise the constitutional purpose of the norm, so that it only makes sense that the union itself is protected by Article 9 (3)Basic Law. It is generally recognised that the unions themselves and their measures are also constitutionally covered by the scope of application of the fundamental right.[93]

At the same time, the fundamental right of association in German labour law has two sides: It not only guarantees the right to form unions, but also protects the right to not form unions or stay away from coalitions. This is referred to as the positive and negative freedom of association.[94] The freedom of collective association in German law consists of three basic aspects: protection of operations, preservation and industrial action.

1. Protection of operations

Whereas previously the question had to be asked whether the activity was part of the indispensable core area in order to be covered by the scope of protection of Article 9 (3) Basic Law, all activities specific to the coalition are now included in the scope of protection. They can only be restricted by legal interests with constitutional status. This means that membership recruitment and the means used by a trade union for this purpose are also protected by the guarantee of activity. According to recent case law, this also includes the conclusion of collective agreements with differentiation clauses.[95]

2. Preservation

According to its wording, Article 9 (3) Basic Law is designed as an individual fundamental right. However, since the individual positive freedom of association can only be optimally realised if, in addition to the freedom to form and join and the freedom to leave and remain outside, the existence and activities of the coalitions themselves also enjoy fundamental rights protection, Article 9 (3) Basic Law also protects the coalition as such.[96]

[93] Ibid.
[94] Ibid., § 81 Rn. 101.
[95] Ibid., § 81 Rn. 123- 124.
[96] Ibid., § 81 Rn. 113.

3. Industrial action

Article 9 (3) Basic Law explicitly refers to industrial action as a form of collective action. All means of industrial action must first of all be regarded as covered by the constitution. Restrictions on their legality therefore require justification. Strikes, lockouts and boycotts are the central, classic means of industrial action.[97] Industrial action is a form of collective action that not only puts pressure on the other party (the employers' organisation) but also raises a lot of awareness for the dissatisfaction with the working conditions in the labour sector among the population.

IV. How does the system treat the affected employees?

Fundamentally, the system treats employees who are union members and those who are not, differently. The union members fall into the scope of the collective agreement and are therefore directly affected by its regulations. Non- union members on the other hand are not covered by the agreements but are not completely unaffected by the negotiations and regulations that the social parties agree on.

So called free-riders take advantage of the positive aspects the unions achieved without being part of the organisation and therefore contributing to the success. The legal norm that opens up the scope of the collective agreements and allows free-riders to sneak in is §4 TVG.

1. Section 4 Collective Agreements Act (Tarifvertragsgesetz, TVG) as a gateway

A collective agreement is made up of a normative part and a contractual part. The contractual part of collective agreements refers to the rights and obligations of the parties and mostly determines their relationships with each other.[98] The contractual part must be interpreted in accordance with the rules of general civil law and applied to each individual case before it unfolds its effects.

According to Sec. 4 TVG, the normative part of the collective agreement hovers over the individual work contract like a constitutional law,[99] they apply directly and mandatorily between the parties.

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[97] Ibid., § 111 Rn. 1115.
[98] Thomas Lakies/Florian Rödl in: Däubler, Tarifvertragsgesetz 5. Auflage 2022; TVG § 5 Allgemeinverbindlichkeit, Rn. 72.
[99] Franzen in: Erfurter Kommentar zum Arbeitsrecht, 24. Auflage 2024, § 4 TVG, Rn. 1.

It is therefore not important that the parties agree on the validity of the provisions of the collective labour agreement or that they are even aware of the effect of the collective labour agreement.[100] The collective agreement has an effect on every employment relationship that falls into its scope. The collective agreement thus takes on a law-like character.

A common tool to incorporate collective agreements into the individual work contracts are reference clauses. They are clauses in the work contract that clearly name a specific collective agreement and obviously show the correlation between the two agreements. They are also often used in work contracts of non- union members. Employers use those to harmonise the working conditions in their company.

As the union members gain a lot of advantages through the collective agreements and they at the time commit themselves by paying contributions and taking industrial actions, it would seem only fair that they are the only ones taking advantage of the agreements their unions so hardly fought for.

The tool to guarantee this exclusivity would be the opposite: clauses that differentiate union members from non- union members. The admissibility of differentiation clauses is controversial. Simple differentiation clauses that merely make union membership the constituent element of a collective bargaining claim correspond to the regulatory concept of Art. 9 (3) Basic Law. The negative freedom of association of "outsiders" is also not violated by a social compensation plan that only provides for benefits for union members organised on a specific date.[101] But on the other hand, the widespread contractual equality of outsiders with employees covered by collective agreements is a significant organisational policy problem for the trade unions, because "free riders" receive the same entitlements as organised employees without having to pay contributions.[102] A general conceptual differentiation (of the clauses) is made between static and dynamic reference clauses according to their mode of action (see of part A.VI. this report).

[100] Franzen in: Erfurter Kommentar zum Arbeitsrecht, 24. Auflage 2024, § 4 TVG, Rn. 1.
[101] Linsenmaier in: Erfurter Kommentar zum Arbeitsrecht, 24. Auflage 2024, GG Art. 9, Rn. 33.
[102] Hartmann, "Reichweite und Grenzen der normativen Tarifwirkung", (2020) ZFA, 152–177.

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