# Chapter 6 Trade Union Rights at the Workplace in Germany

Wolfgang Däubler*

## I. INTRODUCTION

In Germany, workers' interests can be represented via three channels:

1. works councils elected by all employees in a plant;
2. workers' representatives on the supervisory board of large companies; and
3. trade unions whose main function is to conclude collective agreements.

The three channels are closely interrelated, and various sets of formal and informal rules are applied to try to ensure that representatives' activities are all moving more or less in the same direction. This contribution is focused on trade union rights at the workplace but will include the legal and informal relationships between unions and works councils, both present at the same arena.

Unlike the two channels of 'codetermination' – works councils and workers' representation on supervisory boards – trade union law has not been an object of intense legislation in Germany. Its rules are based on the constitutional right to form trade unions and on a large number of court decisions pronounced over six decades by the Federal Labour Court and the Constitutional Court.[1] The only aspect that has been addressed by the legislator is the

* Professor, University of Bremen.

1. W. Däubler, Gewerkschaftsrechte im Betrieb (Baden-Baden: Nomos, 2010), 128 et seq. Decisions, books and articles are written in German; they are quoted in the usual German manner.

Roger Blanpain, Thomas Klebe, Marlene Schmidt & Bernd Waas (eds), Trade Union Rights at the Workplace, pp. 61–69. # 2011 Kluwer Law International BV, The Netherlands.

relationship between unions, on one side, and works councils and workers' representatives on the supervisory board, on the other.

## II. CONSTITUTIONAL BASIS

Article 9 § 3 of the German Basic Law (Constitution) guarantees the right of all individuals to form a union or to join an existing one. The Federal Labour Court and especially the Federal Constitutional Court have extended the guarantee to unions as such: their existence is protected as well as all their activities in pursuit of the defence and the improvement of living and working conditions.[2] They include, in particular:

1. the right to conclude collective agreements;[3]
2. the right to strike or take other collective actions in pursuit of a new (and better) collective agreement and (perhaps) other aims;[4]
3. the right to cooperate with works councils and workers' representatives on the supervisory board;[5]
4. the right to distribute leaflets and to send e-mails to workers;[6] trade union representatives also have a right of access to workplaces;[7]
5. the right to represent workers' interests in relation to public authorities and political parties.[8]

At the same time, the judge-made law conferring these rights has established limits. Trade union rights must be balanced against the fundamental rights of the employer and can be restricted by statute in the public interest.[9] Before 1995, the Federal Constitutional Court had decided that the union rights were only guaranteed in their 'core', a rule, which implied that only indispensable activities were protected by the Constitution.[10]

## III. CASE LAW REFERRING TO WORKPLACE ACTIVITIES

Based on the Constitution, the Labour Courts have recognized certain union activities at the workplace, which do not depend on any permission of the employer.

2. BVerfGE 19, 313,321; BAG AP Nr. 10 zu Article 9 GG.
3. BVerfGE 4, 96, 106; 18, 18, 27.
4. BVerfGE 84, 221, 224; BVerfG DB 1995, 1464.
5. BVerfGE 19, 303, 313.
6. BAG NZA 2009, 615.
7. BAG NZA 2006, 798; LAG Niedersachsen NZA-RR 2009, 209.
8. BVerfGE 28, 295, 305.
9. BAG NZA 2009, 1347.
10. BVerfGE 93, 352 et seq. The new case-law is described as an 'interpretation' of former judgments which were often 'misunderstood'.

Unions can give information about their aims and their activities to all employees working in the plant. Collective negotiations can be discussed as well as public declarations dealing with the current economic and social situation. Unions are entitled to recruit new members.[11]

Unions are allowed to use certain means. They can distribute leaflets and journals to their members as well as to non-unionized people. They may stick posters to the walls or install a notice-board. According to a recent decision, they can send e-mails to all employees. They can offer a website to be consulted by the workers.[12]

Union speakers representing 10 to 20 union members can be elected in the plant.[13] They have no special legal rights; their tasks are described in the union's by-laws. Normally, they exist in big enterprises. A recent judgment of the Regional Labour Court of Hessen[14] gives them the right to send e-mails on trade union matters from their workplace to other employees.

Employees are allowed to wear a union sticker. They may participate in all legal activities of the union being protected in the same way. Nobody must be discriminated against for union membership or activity.

The union has a right of access to the plant in order to fulfil its functions.[15] It can send one or two officials to distribute leaflets or to discuss with workers, for example, about the implementation of the collective agreement.

All these rights are given to the union, which, according to its by-laws, is competent for the plant. It is not necessary to have already a certain number of members. Even a workers' association that is not strong enough to be a union may use this legal set of activities.[16] Only organizations that depend financially or in another way on the employer are not admitted.

This list of rights seems to be quite impressive. But one should not forget the limits imposed to them by the required 'balancing' with the fundamental rights of the employer. Discussions on trade union matters are normally restricted to the (tea) breaks and to the time before the beginning and after the end of the work. Whether one is allowed to read an e-mail coming from the union during working time is quite uncertain. Courts would probably accept discussions on trade union matters on the same scale as discussions on problems of daily life.[17] If there is not enough work no problem for reading a union pamphlet during working time, but

11. BAG AP Nr. 10 zu Article 9 GG.
12. W. Däubler, Gewerkschaftsrechte im Betrieb (Baden-Baden: Nomos, 2010), para. 354 et seq., 547 et seq.
13. M. Brock, Gewerkschaftliche Betätigung im Betrieb nach Aufgabe der Kernbereichslehre durch das Bundesverfassungsgericht, Schriften zum Sozial- und Arbeitsrecht, Bd. 202 (Berlin: Duncker & Humblot 2002), 205; Koch, in: Erfurter Kommentar zum Arbeitsrecht, 11. Aufl. 2011, § 2 BetrVG para. 7; Fitting, Handkommentar zum BetrVG, 25. Aufl. 2010, § 2 para. 89; Richardi, Kommentar zum BetrVG, 12. Aufl. 2010, § 2 para. 174; until now, there are no clear court decisions.
14. Arbeits-Rechts-Berater 2011, 15.
15. BAG NZA 2006, 798.
16. BAG NZA 2007, 518, 522.
17. W. Däubler, Gewerkschaftsrechte im Betrieb (Baden-Baden: Nomos, 2010), para. 384 et seq.

normally this situation does not happen. The distribution of leaflets and the election of union speakers must not disturb the performance of work. Only a few posters are admitted because the union cannot change the character of the room belonging to the employer. The prohibition of discrimination is unchallenged, but unlike antidiscrimination law it does not comprise any special rule of proof. It is up to the worker to prove that the membership in the union or the activity is the decisive reason for being transferred or dismissed.

## IV. THE WORKS COUNCIL AS 'CONCURRING UNION' AT THE WORKPLACE

In all plants employing at least five employees a works council must be elected. At least, this is what the law on works councils provides, but the reality is very different. Only in about 10% of plants works councils are elected. However, since these are generally the larger ones, nevertheless about 50% of all employees are represented by a works council.[18]

A works council is elected by all employees working in the plant the union membership being legally without any importance. The works council has a well elaborated position.

Works councillors are entitled to exercise their functions during working time, paid by the company.[19] This is especially important for their weekly meetings and for contacting workers. The latter are subject to similar conditions when attending the consulting hours of the works council or contacting one of its members:[20] they are entitled to bring forward grievances or ideas to works council members during working time without losing pay. Contacting union spokesmen would be possible only during breaks or before the beginning and after the end of the work.

In plants with at least 200 employees, one member of the works council has the right to function on a full-time basis.[21] The wages of all works councillors must not be reduced because of their activities.

Members of the works council may go to seminars to acquire the know-how they need to exercise their functions. During their absence, their wages are paid by the employer as are the costs of participating in the seminar.[22] Similar possibilities for trade union activists do not exist.

The employer must also provide the works council with the necessary equipment, such as meeting room, office, phone, computer and internet access. Unconceivable to give similar rights to trade union spokesmen; it would be considered to endanger the independence of the union from the employer's side.

18. P. Ellguth, 'Quantitative Reichweite der betrieblichen Mitbestimmung', WSI-Mitteilungen 56 (2003): 194–199.
19. Article 37 § 2 Works Constitution Act.
20. Article 39 § 3 Works Constitution Act.
21. Article 38 § 1 Works Constitution Act.
22. Articles 37 § 6 and 40 Works Constitution Act.

Works council members can be dismissed only for grave misconduct.[23] Even in that case, a second condition applies: an employer's dismissal request needs to be approved by the works council.[24] If the works council does not agree the employer may ask the local labour court to decide. In the course of the lawsuit (which may take between 6 and 12 months) the works councillor continues to exercise his or her functions and to work at the plant. Once more, union representatives are never protected in the same way.

The works council has a comprehensive right to be informed by the employer about everything related to the plant.[25] The council may also obtain information from other sources such as newspapers, websites or the workforce. Having sufficient information is considered to be an elementary condition for the council to exercise its rights of consultation and codetermination.

The rights to consultation and codetermination are laid down in the law but can be extended by collective agreement (and sometimes are). With regard to consultation, there is a general rule that planned changes in working conditions (in a broad sense) must be communicated to the works council and discussed with its members.

The right to codetermination is much more important. Codetermination means joint responsibility for certain decisions taken together with the employer. This requires an even higher standard of information. In fields in which codetermination applies, council and employer must take a joint decision. In practice, the decision is made by the employer with the consent of the council. A unilateral decision would have no legal effect; no employee would be obliged to follow it. In addition, the works council could go to the labour court asking for an injunction.[26] Within a few days, a court decision would oblige the employer to withdraw the measure until an agreement with the works council has been reached.

If negotiations between employer and works council fail, either side may ask a conciliation board to decide. Normally, the board consists of two or three members from each side and an impartial chair from outside the plant. As a rule, the board reaches a compromise; in exceptional cases it takes a majority decision. Its legality can be supervised by the labour court if one side requests it.

The areas of codetermination are laid down in the law. They comprise rules to employees, which are not directly linked to work.[27] This includes for instance the obligation to wear a uniform or to discuss the medical or social reasons for an illness exceeding six weeks in a year if the worker agrees. Another field is overtime, short time work and beginning and end of working time.[28] Monitoring workers by means of technical equipment, such as video cameras or listening into phone calls, is comprised, too.[29] Other important fields are the distribution criteria for

23. Article 15 § 1 Act Protecting against Dismissals.
24. Article 103 Works Constitution Act.
25. Article 80 § 2 Works Constitution Act.
26. BAG DB 1994, 2450; BAG DB 1997, 378.
27. Article 87 § 1 No. 1 Works Constitution Act.
28. Article 87 § 1 Nos 2 and 3 Works Constitution Act.

fringe benefits among employees[30] and the social plan in the case of 'fundamental change' of the plant, such as its partial or total closure.[31]

## V. THE RELATIONSHIP BETWEEN TRADE UNIONS AND WORKS COUNCIL

If the works council would be completely independent from the union it would be the only representation of workers' interests in daily life. For an individual worker the best way to solve a problem would be to go to the works council and ask for support. The union would be marginalized. Why should one go during one's free time to an organization, which would have no real influence in the plant? It could publish a protest, nothing more. Its 'codetermination' would be the conclusion of a collective agreement, which normally applies to the whole branch or at least to a part of it. The small problem of an individual has no place in such a kind of collective negotiations.

Law and reality establish a much more balanced system. The legislator has established numerous coordination mechanisms to protect unions and prevent their replacement by works councils.

Unions have an important role in the creation of works councils. They can take the initiative to call for elections or install an election committee.[32] However, the union's initiative is not essential and a works council can be established without any union support.

The union does not have a reserved seat on works councils and there is no formalized link between the two. Unions can participate in works council elections with a union list, made up of company employees and not trade union staff. However, if candidates on a trade union list are elected, they enjoy their mandate as individuals and not as union representatives.

Collective agreements must be respected by the employer and the works council; both can act only within the framework defined by the mutual decisions of unions and employers. In particular, codetermination with regard to wages and working time applies only to matters left unregulated by the collective agreement.

Individual works councillors are free in their union activities.[33] They are not bound by the peace obligation, which is addressed only to the works council as such.

Unions help works councils to perform their functions if the latter accept it. Unions offer many courses to provide works councillors with the knowledge they need. The works council

29. Article 87 § 1 No. 6 Works Constitution Act.
30. Article 87 § 1 No. 10 Works Constitution Act.
31. Article 111, 112 Works Constitution Act.
32. For details see Däubler, Gewerkschaftsrechte, para. 91 et seq.
33. Article 74 § 3 Works Constitution Act.

(even a minority of its members) can request that a union official take part in all its meetings.

Unions have the right to supervise the behaviour of works councils and to ask the labour court to end the office of a particular works council if it has neglected its duties to a considerable extent.[34]

Normally, all these mechanisms lead to close cooperation between works councils and unions. About 70% of all works councillors are union members (whereas the union density among workers in general is nowadays less than 20%). In former times works councils had an important role in recruiting new trade union members despite the fact that there is a legal obligation of neutrality towards unions for works councils as such.

The most important instrument to make the union stronger than the works council is the collective agreement. It deals with wages, weekly working time and some fringe benefits whereas the main task of the works council is to influence the way the work is performed (e.g., beginning and end of work, overtime, monitoring of workers by technical means etc.). If a collective agreement has regulated a certain matter the works council is prohibited to conclude works agreements on the same topic. According to Article 77 § 3 of the Works Constitution Act, these agreements are illegal even in the case that 'usually' the questions are regulated by collective agreement in the firm; it is not required that the concrete employer is bound by them. One may call this a division of labour between works councils and unions – the works council tries to solve the questions of daily life whereas the union deals with the fundamental questions of wages and working time. The union is the only agent entitled to organize a strike and to bring by this way real economic progress. The rights on workplace level described above[35] are of a high importance if it prepares negotiations about a new collective agreement or if it tries to activate people for other aims.

## VI. PERSPECTIVES

The concept of a harmonious division of labour between works councils and unions cannot be identified with a general reality in German plants. Four points should be mentioned.

Works councils often share some economic views of the employer and prioritize the interests of the enterprise (e.g., to get sufficient profit). This will not be openly declared, but the existence of such an attitude is obvious for those who are involved in collective bargaining. This constrains radical trade union demands and the use of the right to strike. In practice, works council members play an active role in defining trade union policy because a strike depends normally on their readiness to influence workers at plant level in an informal way. In nearly all unions, one will find a collective bargaining committee in which works councillors have a clear

34. Article 23 § 1 Works Constitution Act.
35. See section III.



AQ1

majority. The committee offers only a recommendation, not a binding opinion, but its position is of considerable importance. The legal principles of social partnership laid down in the Works Constitution Act influence, therefore, the behaviour of the union. The interaction between unions and works councils has certainly contributed to more modest wage demands over the past years. It is, therefore, not surprising that the average income of workers protected by collective agreements grew by only 4% between 2000 and 2008, whereas in comparable countries, such as France, Great Britain and Sweden, the percentage was much higher. If one takes the real wages of all workers, the development is still more striking: while in Germany wages have decreased by 0.8%, they have increased by 4.6% in Spain, 7.5% in Italy, 12.4% in the Netherlands, 17.9% in Sweden and 26.1% in Great Britain.[36] It is not surprising that trade union membership has decreased from about 11.3 million people in 1993 to about 6.2 million in 2010; the price unions had to pay for their policy of social partnership and modesty is a quite high one. Will the 'German model' survive for long under these circumstances? The answer is still unknown. It may depend on the capacity of unions to link a more aggressive wage bargaining strategy with a campaign to increase membership.

In some enterprises we can find works councils without links to trade unions. In most of these cases, the employer wants to keep the union out and the works council sees no possibility to resist. Sometimes the employer offers relatively good wages and labour conditions in order to make the collaboration with the union less attractive. In some other cases, the majority in the works council is very far from trade union thinking; examples can be found in the computer industry or in other parts of the economy where highly qualified people with a good position in the labour market work. In a third group of cases, the works council is on the contrary deceived by the politics of the union trying to defend workers' interests by its own forces. In all these situations, the dualistic system of representation does not function.

In recent years, groups of specialized employees have formed their own unions. Pilots and cabin staff (stewardesses and pursers) have done it in the beginning of the 1990s. They were followed by the air controllers and the doctors in hospitals. The engine drivers always had their own union, which closely collaborated with the big union of railwaymen renouncing on collective bargaining by their own. In 2002 a dissociation of the organizations took place. In all these cases, the specialists were dissatisfied by the results the big unions had attained in collective bargaining. Indeed, all the groups mentioned could reach better results by acting alone, normally organizing strikes.

The traditional unions reproached them to follow an egoistic trip. Money they receive would no more be available for the less qualified people who would need special support; the gap between the 'rich' and the 'poor' widens. On the other hand, this is true only if the quantity of money that is to be distributed cannot be influenced. The overview on the wage increases between 2000 and 2008 shows, however, that this assumption does not seem to be very

36. Thorsten Schulten, 'Europäischer Tarifbericht des WSI 2007/2008', <www.boeckler.de/pdf/impuls_2008_14_1.pdf>, August 2008.

realistic. Another argument is that the big unions did not try to exercise pressure on the employer side by calling these 'strong' groups to participate in a strike. The power of air controllers, engine drivers and doctors in hospitals is obvious, not only for the public but also for the employees themselves. Why should they accept, for example, a wage increase below the inflation rate because the union accepts the proposal of a mediator without trying to organize a strike? Never were they given a chance to fight for better wages for all workers of the branch; doing it alone was the ultimate way-out.

The emergence of new unions had a specific impact on the dualistic system. Doctors or engine drivers will rarely have a majority in the works council and cannot automatically count on the support of the other groups. Problems in daily work will not be solved by the works council like in other plants; it is up to the union to take the necessary steps. Let me give an example. Doctors in hospitals are often obliged to do an on-call service during the night. It is less paid than ordinary work. According to the collective agreements, on-call service permits only 50% of the time being spent with work. If this limit is not respected the doctor has to be paid as if he or she had worked during the whole night. It is, therefore, essential that each doctor writes a kind of diary about the work done during the on-call service. Under normal circumstances, the works council would tell the doctors to do so and even organize a coordinated action, but there are no examples for this in hospitals. It is up to the doctors' union to take the initiative and to take this (modest) step forward. The surprising consequence is that in these fields we have a one-channel system in Germany.

What about the 50% of workers who are not represented by a works council and who will not be represented by a union? To have a group of union members and no works council is an extremely improbable situation, because it is much more dangerous to create against the will of the employer a union group instead of a works council. In this 'dark half' of our industrial relations there is only an informal kind of workers representation whose character depends more or less on the employer. If he is convinced that workers should be consulted because problems will become visible and can be solved afterwards, he will have an open ear to grievances or, in bigger plants, even install a representation body that can be the speaker of the workers.[37] If he thinks to be always on the right way he will practice an authoritarian style and workers have to obey.[38] A correction can only be realized by workers having a good position in the labour market; they can threaten to leave the plant or effectively do it. Union rights on the workplace exist as in other plants but one does not dare to use them. They are law in the books, not law in action.

37. W. Däubler, 'Privatautonome Betriebsverfassung?', in Festschrift für Hellmut Wißmann, Wolfhard Kohte, Hans-Jürgen Dörner & Rudolf Anzinger (München: Beck, 2005), 275 et seq.
38. I. Artus, Interessenhandeln jenseits der Norm (Frankfurt: Campus, 2008), 209 et seq.