Re-regulation in Times of Neo-Liberalism?
- The German Experience -

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I. Deregulation

As labour lawyers, we are accustomed to live in an era of deregulation. Rules protecting the weaker side of a legal relationship become more "flexible" or are abolished. The market takes power, the state moves to the background. Social disadvantages for certain groups of persons are accepted to a higher degree than 30 years ago. The threshold for state intervention seems to be reached much later.

For workers and unions, the phenomenon of deregulation is particularly perceptible. In many European countries the protection against dismissal has diminished compared to the situation in the 1970-ier and 1980-ies; the danger to become unemployed has increased. The financial crisis brought in some countries brutal steps back from modern labour law to situations without any protection. Greece offers the most convincing examples of that kind.[1] Is it not really obvious that we live in an "era of deregulation"?

Deregulation happened in Germany, too. There are two main events which need to be mentioned in this context.

1. The indirect restriction of the right to strike

German courts recognize strikes to be lawful only if they are organized by a union and if they aim at concluding a collective agreement.[2] In practice, trade unions consider themselves

[1] Ioannou, Recasting Greek Industrial Relations: Internal Devaluation in Light of the Economic Crisis and European Integration, The International Journal of Comparative Labour Law and Industrial Relations 28 (2012) p. 199 et seq.; Travlos-Tzanetatos, Die Tarifautonomie in kritischer Wende, FS Säcker 2011, S. 325 ff.
[2] BAG Beschluss vom 28.1.1955 – GS 1/54 – AP Nr. 1 zu Art. 9 GG Arbeitskampf; vom 21.4.1971 – GS 1/68 – AP Nr. 43 zu Art. 9 GG Arbeitskampf; BAG Urteil vom 10.6.1980 – 1 AZR 822/79 – AP Nr. 64 zu Art. 9 GG Arbeitskampf; vom 5.3.1985 – 1 AZR 468/83 – EzA Art. 9 GG Arbeitskampf Nr. 57 (BAG = Bundesarbeitsgericht = Federal Labour Court).

as social partners; employers´ associations act in the same way. Strikes were quite rare during the last 60 years because both sides preferred to anticipate by agreement the possible outcome of a "showdown". Only in exceptional cases they occurred. As in other countries, employees lose their salary during the strike. If they are union members they get in Germany a so-called strike benefit from their union which amounts to 70 %, sometimes to 90 % of their net income.

When the growth rates in the German economy became smaller and enterprises had to face economic difficulties, the social partnership came under pressure, especially in the metal industry. Big Strikes happened in 1971, 1976 and 1978 which were accompanied by lock-outs.[3] The unions had funds enough to pay strike benefits not only to the strikers but also to those of their members who were locked out. The increasing complexity of the working process led to a situation that a strike in a very small part of an industry could block the activities of numerous other enterprises. If car keys are no more produced the production of automobiles will stop after some time. What happens to those workers in third enterprises who cannot continue to work?

In the metal industry, collective negotiations are made on a regional level. The metal-workers´ union was able to pay strike-benefits to employees "without work" within the field of application of the intended collective agreement. But they were not able to pay the necessary money to all members affected by the consequences of an industrial action in the whole country. Until 1985, this was no problem because there was no need to do it: Employees outside the field of application of the collective agreement got short-time work benefits from the labour administration.[4] There was only one exception: if the union raised the same demands in the other region, the money was not paid because it would support the union´s position and therefore be in conflict with the neutrality of the state. But unions always avoided such a situation in raising different demands. The strike remained "feasible" despite the tradition of strike benefits which puts the workers in a quite comfortable situation.

In 1984, the metalworkers´ and the printers´ unions tried to get the 35-hours-week by collective agreement. Their strikes ended with a compromise bringing the 38.5 hours-week

[3] As to strikes in the Federal Republic of Germany cf. Däubler, in: Däubler (ed.), Arbeitskampfrecht, 3. Aufl., Baden-Baden 2011, § 8 Rn. 36 ff.
[4] For short-time work see infra III.

combined with a high degree of flexibility.[5] This was possible only because the employees in other regions got their short-time work benefits. As a reaction, the Government changed the law taking away the right to short-time work benefits in the same industry if *one* main demand raised in the other region was "essentially identical" with the demands in the region where the strike occurs.[6] It is extremely difficult to avoid such a situation. The metalworkers ´ union renounced therefore to strikes having consequences in other regions and organized only so called "warning-strikes" which interrupted work for some hours never exceeding one day. The employers were always willing to accept a compromise. The reasons are not quite clear but it can be assumed that they did not want to provoke the union which could perhaps develop other means of pressure. Social partnership continues, but it is practiced on a lower level than before. The unions never discussed the possibility to organize a strike without strike benefits or give benefits only to workers being in an emergency situation.

2. The so-called Hartz-legislation

In 2003, the unemployment was high and the economic growth quite low. The Government thought that all kinds of social benefits should be reduced and created a commission of experts chaired by Peter Hartz, the chief human resources manager of Volkswagen. Their proposals led to four acts of Parliament (named "Hartz I", "Hartz II" etc.) accompanied by a reduction of the protection against dismissal. The most important measures were the following ones.

- "Hartz I" deregulated the temporary agency work. Since 1972, this form of activity was subjected to special rules: At the beginning (until 1982), work in one enterprise was limited to three months. After 1982 it was extended step and step; in 2001 it reached one year. In 2004 the time limit was dropped so that permanent workers could be replaced by "temporary" agency workers whose salaries were about 30 % lower. The rule that an agency was not entitled to employ a worker just for the purpose to go for some months to a concrete enterprise was cancelled. On the other hand, the principles of equal pay and equal treatment were established remaining, however, of a purely theoretical importance: It was (and still is) possible to deviate from these principles by collective agreement. A small so-called Christian union concluded a collective agreement which confirmed the lower pay and the

[5] The collective agreement can be found in RdA (=Recht der Arbeit) 1984, 362 ff.
[6] The legislation and its actual impact are analysed by Deinert, Gibt es Neues zum „Streikparagraphen"? Arbeitskampf zwischen Arbeitsrecht und Sozialrecht, AuR (=Arbeit und Recht) 2010, 290 ff.

bad working conditions of agency workers. The big unions of the DGB (Deutscher Gewerkschaftsbund = German Confederation of Trade Unions) followed by concluding slightly better agreements. The number of agency workers increased a lot (from 150.000 in 2003 to about 800.000 in 2008). Permanent workers lived under the (more or less concrete) threat to be replaced by an agency worker – a fact which reduced the readiness to go on strike and made modest compromises acceptable.[7]

- The protection against dismissal was lowered in 2004. Rules which the Kohl Government had introduced in 1996 and which the first Schröder Government had repealed in 1998[8] were reintroduced. By this way, the employers should get an incentive to recruit employees because dismissal became easier than before.[9] Three main points have to be mentioned.

The act on protection against dismissals applies now only to establishments having more than ten employees. Before, the limit was "more than five employees". Part-time workers are calculated 50 % if they work until 20 hours a week, and 75 % if they work between 20 and 30 hours.[10] The workers remaining outside the act have only a basic protection developed by the Constitutional Court which prohibits "arbitrary" dismissals.[11]

In redundancy cases, there has to be a selection among comparable employees according to social criteria. These criteria were never defined in an exhaustive way (which made the social selection quite risky for the employer). In 2004, the legislator recognized four criteria (age, length of service, family maintenance obligations, handicap); other ones were no more admitted. Employer and works council may agree about "guidelines" which determine the importance of each criterion or introduce additional ones. Some people are not included into the selection for being high performers or in the interest of a "balanced" composition of the personnel. "Balanced" means in practice that the percentage of younger and older workers remains the same after the redundancy dismissals have been realized. In practice, "groups" of comparable workers are defined according to age ("people between 30 and 40", "People

[7] More details about the evolution of the law on temporary agency work at Däubler, Das Arbeitsrecht 2, 12. Aufl., Reinbek 2012, Rn. 1999 ff.; Ulber, Arbeitnehmerüberlassungsgesetz. Kommentar, 4. Aufl., Frankfurt/Main 2011, Einl. Rn. 1 – 70.
[8] Details about the „Korrekturgesetz" of December 1998 at Däubler, Das Gesetz zu Korrekturen in der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte, NJW (=Neue Juristische Wochenschrift) 1999, 601 ff.
[9] There was never a comprehensive empirical research whether this assumption was right or wrong.
[10] Details at Bader, in: Etzel/Bader/Fischermeier et alii, Gemeinschaftskommentar zum Kündigungsschutzgesetz und zu sonstigen kündigungsschutzrechtlichen Vorschriften, 10. Aufl., Köln 2013, § 23 KSchG Rn. 24 ff.
[11] Details at Däubler, in: Kittner/Däubler/Zwanziger (ed.), Kündigungsschutzrecht. Kommentar, 9. Aufl., Frankfurt/Main 2014, § 242 BGB Rn. 22 – 39a

between 40 and 50" etc.); in each group an identical percentage of employees will afterwards be dismissed.

Employer and works council can agree to establish a so-called name-list of employees to be dismissed. The persons whose names are on the list can only invoke in a lawsuit that the selection according to social criteria was "obviously wrong" which is extremely difficult to prove.[12]

- "Hartz IV" was the most important reform whose implications are still discussed. It deals especially with long-term unemployed persons whose position was worsened in a rather brutal way. Before 2004, unemployment benefits (60 % of net wages as a rule, 67 % of net wages for persons who take care of at least one child) ended normally after one year and a half or after two years (depending on the age of the worker and the years having paid contributions to the unemployment insurance). This period was restricted to one year. But much more important was what happened after this time. Before 2004, the unemployed worker received "unemployment aid" (= "Arbeitslosenhilfe" - 50 % or 57 % of the net wages) if the person was needy as defined by law. After 2004, the unemployed received only social aid, independently of the former income. As social aid wants to satisfy only basic needs, it is quite low (345 Euros at that time plus rent to be paid for a modest apartment and costs for heating). In addition, the new criteria of being needy require to sell and consume all your savings (except 4.000 Euros) including a life insurance which one has to "buy back" from the insurance company at a very low price. A person receiving "Hartz IV" (a notion now commonly used in Germany) is obliged to accept every kind of work except for activities prohibited for medical reasons.[13]

The fact of coming into a Hartz IV situation after one year of unemployment makes people anxious. Many employees are ready to accept even bad conditions and refrain from being a union member or taking an initiative to elect a works council.

3. **Possible effects**

[12] For all details see Deinert, in: Kittner/Däubler/Zwanziger (note 11) § 1 KSchG Rn. 572 - 753
[13] A brief overview on the rules is given by Waltermann, Sozialrecht, 11. Aufl., Heidelberg u. a. 2014, Rn. 509 – 528.

In the last two decades, union membership decreased to a large extent. In 1993, 11.3 million workers were members of a trade union within the German Confederation of Trade Unions, whereas the actual number is 6.3 million.[14] In the 1970-ies and in the 1980-ies, nearly 90 % of all employees were protected by a collective agreement; in 2013, this number had decreased to only 58 %.[15] If one considers the net wages and the yearly inflation rate, there was a decline of 1.6 % between 1992 and 2012.[16] A worker doing the same job as twenty years ago, had a smaller purchasing power in 2012. The decreasing wage costs were quite useful in the international competition; lower prices were feasible without any restriction of profits. Critics were advocating that it would be better to increase wages and develop the demand on the national market renouncing to certain advantages in foreign trade.

Of course, it would be wrong to attribute these developments exclusively to the deregulation described above, but nobody would admit that there is no link between the two phenomena at all.

II. Improving individual labour law

Some people stop at this point complaining the unacceptable consequences of deregulation. But they forget, that there have been a lot of new regulations during the last twenty years improving the protection of workers. Their range was quite different.

1. Fixed-term contracts

According to case law, the conclusion of a fixed-term employment contract depended on the existence of a so-called "sound reason" ("sachlicher Grund"). This requirement was developed by the Federal Labour Court in order to avoid the fixed-term contract being used as an instrument to circumvent the protection against dismissal.[17] In cases in which the law on protection against dismissals was not applicable (small units with five employees or less, first six months of an employment relationship) no "sound reason" was required.

[14] See http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen
[15] See http://www.boeckler.de/wsi-tarifarchiv_2257.htm
[16] See http://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/61766/lohnentwicklung. „bpb" stands for Bundeszentrale für politische Bildung, a public institution.
[17] BAG Beschluss vom 10. 6. 1960 – GS 1/59 - AP Nr. 16 zu § 620 BGB Befristeter Arbeitsvertrag = NJW 1961, 798

The first Act on the Promotion of Employment ("Beschäftigungsförderungsgesetz") of 1985 offered the possibility to employers to conclude fixed-term contracts for up to 18 months without having a "sound reason". This "deregulation" of case law was pushed forwards by the second Act on the Promotion of Employment in 1996: It was permitted to conclude a fixed-term contract without sound reason for two years. This period can be split into two, three or four fixed-term contracts which have to succeed immediately one after the other. This kind of employment can be repeated if there are more than four months between the two series of contracts.

In 2001, the Act on part time and fixed-term Contracts ("Teilzeit- und Befristungsgesetz") changed these rules in two points: The recourse to this kind of fixed-term contracts is only possible if there has been no employment relationship with the same employer before. The second point is derived from the EC-Directive on fixed-term contracts and prohibits any discrimination in comparison to employees with an open-ended contract. This is a very modest kind of re-regulation which only reduces to a small extent the effects of the deregulation realized in former times, but it is a step in another direction.

2. Part-time work

The Act on part-time and fixed-term Contracts implemented not only the EC-Directive on part-time work comprising a prohibition to be discriminated in comparison with full-time employees. It also established the right of employees to reduce their working time – going from full-time to part-time or from part-time to a smaller amount of hours. This right which never existed before in Germany is based on the idea that many people desire to reduce their working time and that its reduction will give job opportunities to other people and thus reduce unemployment. The law requires in Section 8 only that the employee has been working for six months with the same employer, that he announces his wish to reduce working time at least three months in advance and that the enterprise employs more than fifteen employees. The employer can refuse such a demand for operational reasons ("betriebliche Gründe"): It may perhaps be necessary to have a full-time employee who can give advice to customers during the whole office hours. On the other hand there are normally no operational reasons if employees with a comparable function already work in part-time. There is a lot of detailed case law in this field which shows that the provision is

of a certain importance.[18] Normally women with children use this right; because of urgent family responsibilities they even risk a conflict with the employer. If the children become older or have grown up the worker often wants to come back to a full-time job. Until now, this is a project difficult to realize because a "right to increase working time" is recognized by Section 9 of the Act only if there is a vacant quantity of hours or a vacant part-time workplace. The programme of the actual government has promised to enlarge the possibility of coming back because it would make the right to part-time much more attractive.

There are two other cases in which the employee can ask for a reduction of working time. According to the law on parents´ money and parental leave ("Bundeselterngeld- und Elternzeitgesetz"), father and mother of a child have a right to parental leave for three years which is normally exercised by the mother. Instead of taking full leave, the parents can ask for part-time work between 15 and 30 hours a week if the general conditions are fulfilled (six months of work, announcement in time, more than 15 employees in the enterprise). The employer can refuse only because of "urgent operational reasons". After the end of the parental leave the employee can return to his former workplace; the working time and other conditions will be the same again as before the beginning of the part-time work.[19]

During the first year after the birth of the child the state pays parents´ money if the mother or the father remains at home. If both do it (normally one after the other) the money is paid during 14 months; a lot of fathers, therefore, stay at home for two months. Parents´ money amounts to 67 % of the former income but cannot be more than 1.800 Euros a month. Actually the legislator deals with an improvement of these rules; there can be a combination between parents´ money and part-time work in the future.

Handicapped persons have a right to part-time work if the reduction of working time is necessary because of the nature and severity of the handicap. Normally this will be shown by a medical examination. The employer can refuse such a demand only if the burden is not reasonable or if it requires a disproportionate expenditure.[20] The labour administration may give subsidies.

[18] Details at Preis, in: Müller-Glöge/Preis/Schmidt (ed.), Erfurter Kommentar zum Arbeitsrecht, 14. Aufl., München 2014, § 8 Rn. 1 - 58
[19] For details see Gallner, in: Müller-Glöge/Preis/Schmidt (note 18) § 15 BEEG Rn. 10 - 30
[20] Details at Deinert, in: Deinert/Welti (ed.), Stichwortkommentar Behindertenrecht, Baden-Baden 2014, Nr. 58 Rn. 18 - 26

3. **Consumers´ rights for the workers**

In 2001, the German Civil Code, especially the chapters on contracts was amended. One of the reasons was the necessity to implement EC-Directives dealing with the sale of consumer goods and with E-Commerce. Another reason was to adapt the wording of the Civil Code which had remained nearly unchanged since 1900 to the numerous rules of case law which the courts had developed. The third reason was to modernize the Civil Code and to pick up some of the proposals made by lawyers and practitioners.[21] At the beginning, labour law was not included in the reform despite of the fact that there are some articles about the employment contract in the Code and that labour courts refer to the Civil Code if they cannot find a special labour law rule. By the end of the complicated process of legislation, the situation had changed: The final text included even additional rules about the rights of workers.

The new sections 305 to 310 of the Civil Code contain provisions about standard business conditions; they replace the General Terms and Conditions Act of 1976. For the first time employment contracts are now included. Until 2001, they were controlled by the labour courts in a more or less generous way. Art. 310 § 4 states now: "When it (the chapter) is applied to employment contracts, reasonable account must be taken of the special features that apply in labour law."

There are two sets of rules dealing with the control of standard business conditions. The first is the general one which presupposes the existence of "general" terms and conditions which shall be used at least in three cases. The second one applies to consumers. Its field of application is much broader in the sense that even an individual contract with an entrepreneur is included. In addition, "standard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer." As a practical result, all contracts concluded with an entrepreneur are to be controlled according to the sections 305 et seq. of the Civil Code.

Can an employee be considered to be a consumer? The terminology seems clear in the sense that both categories have nothing to do with each other. There is, however, a definition of the consumer in the new Section 13 of the Civil Code. Its wording is

[21] See Däubler-Gmelin, Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform, NJW 2001, 2281 ff.

comprehensive: “A consumer means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.” The official justification document made clear that “trade, business or professions” means a self-employed activity like that of an entrepreneur. Concluding and fulfilling an employment contract does not enter into that category. The employee is therefore considered to be a consumer in the legal sense; after an intensive discussion among scholars the Federal Labour Court decided in 2005 that the employee is a consumer.[22] As to the control of terms and conditions of the employment contract the second alternative applies: Even individual contracts are controlled and there is a presumption that the employer presented the text of the contract. The general rules apply only if the employer is no entrepreneur which will often be the case in the field of domestic work.

What does the application of Sections 305 to 310 Civil Code mean? There are five points which have become important in the field of labour law.

- Surprising clauses. Section 305c § 1 of the Civil Code defines them: “Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.” This is e.g. the case if a clause like “The employee has to exercise all his claims within three months” is hidden in a long text under the headline of “Miscellaneous”.

- Ambiguous clauses. Section 305c § 2 of the Civil Code states: “Any doubts in the interpretation of standard business terms are resolved against the user.” The fact that the employer calls a payment “voluntary” does not mean for instance that he will not be obliged in the future.[23]

- Clauses have to be transparent in the sense that a normal employee can understand them. As Section 307 § 1 phrase 2 of the Civil Code says: A provision of the contract “not being clear and comprehensible” may be considered as an unreasonable disadvantage for the weaker part, i. e. the employee.

- The contents of clauses are examined whether they are compatible with the rules established in the Sections 307 to 309 of the Civil Code. The most important one is the

[22] BAG Urteil vom 25.5.2005 – 5 AZR 572/04 – NZA 2005, 1111, 1115, confirmed by decision of the Constitutional Court: BVerfG Beschluss vom 23. 11. 2006 – 1 BvR 1909/06 – NZA 2007, 85.
[23] BAG Urteil vom 17. 4. 2013 – 10 AZR 281/12 – NZA 2013, 787

principle that the user of the general terms and conditions (i. e. the employer) must not inflict an "unreasonable disadvantage" to the other side (i. e. the employee- Section 307 § 1). Section 307 § 2 prohibits clauses which are "not compatible with essential principles of the statutory provision from which it deviates" and clauses that limit "essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised." Sections 308 and 309 contain numerous examples of inadequate clauses. The relationship between performance and consideration is normally not under legal control. An exception is made if there is a legal rule dealing with this point. To take an example from the case law established by the Federal Labour Court: Section 6 § 5 of the Act on Working Time requires an "adequate" extra-pay for night-work. Whether 10 % or 30 % are "adequate" can be examined by the labour courts.[24]

- If a clause is in contradiction to the rules of the Civil Code, it will be null and void, but the remaining parts of the labour contract remain valid. The clause can be replaced by the specific legal rule if it exists. If it does not exist one asks what the contracting parties would have agreed upon if they had known that their clause cannot work. There is no possibility to reduce a clause in the sense that it receives "acceptable" contents.[25]

In practice, the importance of the sections 305 to 310 of the Civil Code is considerable. It is one of the most controversial fields in the jurisprudence of the Federal Labour Court. In comparison to the situation before 2001, a lot of changes in the sense of a better protection of workers have occurred. To show just some examples:

- Clauses providing for a lump sum for overtime work are not transparent enough and therefore invalid. The worker can ask for a regular payment for the concrete overtime hours, but there is an important exception to this rule: If the employee gets a high salary he cannot expect to receive an additional pay.[26]

- If both sides sign a cancellation agreement they often renounce to all (known or unknown) claims. This "full and final settlement" is invalid if in reality the worker is the only one giving up rights (compensation, possibility to go to court for examining the dismissal).[27]

[24] BAG Urteil vom 31. 8. 2005 – 5 AZR 545/04 – NZA 2006, 324, 328; BAG Urteil vom 15.7.2009 – 5 AZR 867/08 AP Nr. 10 zu § 6 ArbZG
[25] See Bonin, in: Däubler/Bonin/Deinert, AGB-Kontrolle im Arbeitsrecht, 4. Aufl., München 2014, § 306 BGB Rn. 14 ff.
[26] BAG Urteil vom 1. 9. 2010 – 5 AZR 517/09 – NZA 2011, 575, 576
[27] BAG Urteil vom 6. 9. 2007 – 2 AZR 722/06 – NZA 2008, 219; BAG Urteil vom 21.6.2011 – 9 AZR 203/10 – AP Nr. 53 zu § 307 BGB mit Anmerkung Däubler

- In many labour contracts one can find a clause establishing a preclusive time limit. All claims have to be lodged within two months or within six months etc. After this period of time, the worker loses the claim, his right "disappears". Before the reform of 2001 the Federal Labour Court had accepted even one month as a sufficient period of time.[28] Under the new law it had to change its mind; now three months are considered to be the minimum.[29] A shorter period would be an unreasonable disadvantage for the worker.

- If the employer gives fringe benefits he will often be interested not to create an obligation for the future. This can be done by a clause which gives a right of rescission. Under the new law, the Federal Labour Court accepts it only if certain conditions are fulfilled.[30] The most important one is that the contract has to enumerate the reasons why a right of rescission can be exercised, a requirement based on the transparency principle. An unconditional right of rescission which was accepted before would be invalid. The employer can exclude obligations for the future, but has to do it in a clear way. As to current payments for the work performed this is, however, excluded.[31]

- A contractual penalty clause is no more valid if the circumstances under which a penalty has to be paid are not described in the contract in a clear way. It would be insufficient to say that in case of "grave misconduct" a penalty has to be paid: That would not be transparent enough. Under normal circumstances, the penalty must not exceed one month´ salary.[32]

- Employment contracts often contain a clause enabling the employer to transfer the employee to another workplace if it is "in the interest of the enterprise". The Federal Labour Court accepts this clause only if the interests of the employee are considered, too.[33]

One could easily find a lot of other examples for a stronger control over the clauses in a labour contract.

Undoubtedly, the reform of 2001 is an example for re-regulation; the protection of the workers is extended. But one should not overlook an important handicap: Whereas consumers´ associations have the right to sue an entrepreneur in representing the interests

[28] BAG 13. 12. 2000 - 10 AZR 168/00 – NZA 2001, 723
[29] BAG Urteil vom 25. 5. 2005 – 5 AZR 572/04 – NZA 2005, 1111
[30] BAG Urteil vom 21.3.2012 – 5 AZR 651/10 – NZA 2012, 616, 617; BAG Urteil vom 20. 4. 2011 – 5 AZR 191/10 – NZA 2011, 796; BAG Urteil vom 11. 10. 2006 – 5 AZR 721/05 – NZA 2007, 87
[31] BAG Urteil vom 25.4.2007 – 5 AZR 627/06 – NZA 2007, 853 ff.
[32] Details at Däubler, in: Däubler/Bonin/Deinert (note 25) § 309 Nr. 6 Rn. 12 ff.
[33] BAG Urteil vom 26.9. 2012 – 10 AZR 412/11 – NZA 2013, 528

of their members (the European form of the American class action) trade unions or other organisations of workers have no comparable possibility. Labour law is explicitly excluded from collective actions open to consumer associations.[34] The only way to invoke the invalidity of a clause is an individual lawsuit of an employee against his employer. This is a high obstacle but the decisions of the Federal Labour Court show that it can be overcome.

One may add the question whether other consumer rights apply to employees, too. The right to withdraw from a contract concluded at the doorstep or at the workplace is not given to the worker-consumer; the Federal Labour Court has declined it explicitly.[35] On the other hand there is still a discussion whether the obligation of an entrepreneur or a dealer to give comprehensive information to a consumer can be transferred to the relationship between employer and worker-consumer, too. Such a step would be very useful for employees because the protection of consumers in this field is much higher than the protection of employees in labour law.[36]

4. Antidiscrimination law

In 2006, the German legislator implemented the EC-Directives 2000/43/EC and 2000/78/EC against discrimination. The "General Act on Equal Treatment" ("Allgemeines Gleichbehandlungsgesetz") seems to deal with equality in general, but in reality it is just an antidiscrimination law. It implements the directives one to one with two exceptions:

On the one hand, dismissals are excluded from the field of application by Section 2 § 4 of the Act. The majority in Parliament was anxious that there would be exaggerated sanctions against discriminating dismissals like in the US. The courts repaired this obvious contradiction to European law by interpreting the rules on dismissal "in conformity with the directives".[37] A dismissal would be null and void if it would discriminate for one of the reasons enumerated in the directives (and in German law). The employer would be forced to pay damages as it is provided by Section 15 of the Act. These damages are far from what may happen in the United States.

[34] Section 15 of the Act on Preventive Action for Injunction ("Unterlassungsklagengesetz")
[35] BAG Urteil vom 27. 11. 2003 – 2 AZR 135/03 – NZA 2004, 597, confirmed by BAG Urteil vom 18.8.2005 – 8 AZR 523/04 – NZA 2006, 145, 149
[36] Däubler, in: Däubler/Bonin/Deinert (note 25), Einleitung Rn. 147
[37] BAG Urteil vom 6. 11. 2008 – 2 AZR 523/07 – NZA 2009, 361; BAG Urteil vom 12. 12. 2013 – 8 AZR 838/12 – NZA 2014, 727

On the other hand the legislator has given in Section 17 of the Act to the works council a right to go to court if a direct or indirect discrimination happens in the establishment. The idea is to have a kind of collective lawsuit; for a works council it would be much easier than for an individual worker to sue the employer. Despite of obvious discriminations which occur in practice, Section 17 has no real importance. There are no decisions of the Federal Labour Court and as far as I know no lawsuits at all. This can be explained at least partially by the lacking tradition of "class actions" and comparable forms of common activities to make rights work in practice. Another reason may be that most of the works councils share the quite defensive position of the German unions and do not dare to change the established rules in the enterprise.

Though the "General Act on Equal Treatment" would never have been enacted without the EC-Directives, it is another step of re-regulation. Different aspects play a role.

On the normative level, the Act did not introduce a completely new element in German law. Since 1980, Section 611a of the Civil Code prohibited the discrimination of employees for reason of sex; based on the decisions of the European Court of Justice even the indirect discrimination was recognized (and practiced in relationship to part-time workers who are predominantly women). The sanctions were less clear; a person discriminated against could ask for moral damages because of a violation of personal rights but this was judge-made law. There were only cases in which applicants were refused by reason of sex; the highest amount of compensation they could reach was the salary for three months. What would happen in cases of non-promotion and dismissal was unclear. Despite of this uncertainty, Section 611a of the Civil Code was extended in 2001 to handicapped persons (Section 81 § 2 Book IX Social Security Code).[38]

The General Act on Equal Treatment included six other elements (race, ethnic origin, religion, belief, age and sexual orientation) and established concrete rules on damages. But its importance was much higher: It had a psychological impact creating an increased degree of attention whether discriminations take place or not. The hard criticism against the Act including very emotional arguments invoking e. g. the end of private autonomy was an important contribution to create a consciousness which did not exist before. The growing importance of antidiscrimination law is indicated by the fact that the database "Juris" contains 334 decisions of the Federal Labour Court dealing with problems of the General

[38] For other antidiscrimination rules of minor importance before the Act s. Däubler, in: Däubler/Bertzbach (ed.), Allgemeines Gleichbehandlungsgesetz, Handkommentar, 3. Aufl., Baden-Baden 2013, Einleitung Rn. 44 ff.

Law on Equal Treatment whereas Section 611a of the Civil Code was mentioned only 43 times in the years before 2006.

5. Data Protection Law

A re-regulation seems to exist in the field of data protection, too. In 2001, the Federal Act on Data Protection implemented the EC-Directive extending and improving the legal rules existing before.[39] There were no special labour law provisions in it; the protection of the employees followed the general rules. In 2009, Section 32 was put into the Federal Act on Data Protection regulating for the first time specific problems of workers. This was conceived as a provisional solution because the Government intended to enact a special law on data protection for workers. The proposals which were developed after 2009 were, however, so much criticized that the legislator did not want to take a decision before the elections of 2013. The actual government wants to make a special law once again, but it is still waiting for the outcome of the discussion on EU level and a possible EU-Regulation.

The protection of workers´ data is considered in public and among workers, works councils and unions as a very important topic. Law in the books is sometimes transformed into law in action. Once more we can refer to the court decisions. In the years between 2004 and 2014, the Federal Labour Court had to deal with the Federal Act on Data Protection in 39 lawsuits, whereas the number of cases was only 9 between 1993 and 2003. Analysing the decisions of the regional labour courts one comes to a comparable result: 105 cases between 2004 and 2014 and only 23 between 1993 and 2003.

The increasing legal protection of workers should not be automatically qualified as a case of re-regulation because the situation is different from the other fields described here: The danger that personal data will be collected, stored, transferred to other countries and combined with other personal data is much higher today than ten or twenty years ago. Considering what happens in the internet where data can be stored and used by other people in an uncontrollable way it may seem probable that there is in reality less protection today than in the past. Law is slower than the technical development.

6. Temporary agency work

[39] Details see Däubler, Das neue Bundesdatenschutzgesetz und seine Auswirkungen im Arbeitsrecht, NZA 2001, 874

As was described above, temporary agency work was at the centre of deregulation in 2004. In the meantime, the situation has changed. Since several years, trade unions have developed a campaign in order to improve the wages and working conditions of agency workers and to restrict their number. The continuing increase of this form of employment was considered to threaten the position of permanent workers who are much more represented by unions than temporary agency workers. Several steps have to be mentioned.

- The collective agreements concluded by the so-called Christian trade unions were declared to be invalid by the Federal Labour Court.[40] The reason was, that the statutes of these organizations did not comprise the whole sector of temporary agency work and that it was quite doubtful whether they were trade unions or not. This decision was very important because the Christian Unions had concluded not only a collective agreement for the whole sector but also some 200 agreements with individual agencies providing for much worse conditions, e. g. wages of 5 or 6 Euros an hour.

- The disappearance of these collective agreements improved the situation of the big unions in their negotiations with the agencies. They succeeded to obtain for certain sectors an extra-pay for agency workers who work in the same enterprise for more than three months; this is the case in the metal industry, in the chemistry and in the public service. These new rules are useful only for a part of the agency workers; those who are sent to different enterprises at small intervals and those who work outside the mentioned sectors are not covered.

- As other Member States of the EU, Germany had to implement the EU-Directive on temporary agency work. That was done in an act modifying the Act on Temporary Agency Work ("Arbeitnehmerüberlassungsgesetz") in 2011. It improved the situation of this group of workers without returning, however, to the situation before 2004.

- The Act on Temporary Agency Work was amended in the sense that it covers also agencies which do not try to make profit. Before this new rule was enacted, some groups of enterprises had founded special companies which were non-profit making in order to escape by this way the application of the Act.

- The posting of agency workers has to be "temporary"; it is no more possible to do it for an indefinite time. If an employer would "hire" an agency worker without time limits, the

[40] BAG Beschluss vom 14. 12. 2010 – 1 ABR 19/10 - NZA 2011, 289; BAG Beschluss vom 23. 5. 2012 – 1 AZB 58/11 - NZA 2012, 623

works council can veto it. The problem is that there are only rare cases in which an employer will not say that the hiring is of a "temporary" character. What "temporary" means exactly remains until now an unsettled question. A regional labour court has decided that one has to distinguish between permanent and temporary jobs. A temporary agency worker can be put on a permanent job only if he replaces the person who normally works there and who may be ill, in parental leave or sent abroad for a definite time.[41] That may be a good way, but the problem is which sanctions apply if this rule is not observed. The Federal Labour Court has denied to apply by analogy the rule in the Act on Temporary Agency Work that an employment relationship comes into being by law if the agency has no state permission for its activity.[42] In the Treaty concluded between the Christian Democratic Party and the Social Democratic Party for their actual grand coalition they want to tackle the problem: "Temporary" shall mean "until 18 months" and after nine months equal pay and equal treatment shall have a compulsory character excluding lower collective agreements.

- Temporary agency workers have since 2011 a right to get social benefits (like meals in the canteen to a low price) in the same way as permanent workers of the enterprise they are sent to. In the time before, this was not the case.

- Some enterprises founded a subsidiary which got a permission to act as a temporary work agency. When workers were dismissed for economic reasons they were offered to continue as "temporary agency workers" at 30 % lower wages – often at the same place where they had worked before. This "model" developed by the group "Schlecker" was made economically unattractive: If a worker is employed during a period of six months after his dismissal as a temporary agency worker by the same enterprise or the same group of enterprises the principle of equal pay and equal treatment will apply automatically; lower collective agreements are excluded by law.

- For temporary agency workers there is a minimum wage based on a collective agreement concluded between the unions and the employers´ associations (Section 3a of the Act on Temporary Agency Work). The labour ministry regularly declares it to be generally binding ("Allgemeinverbindlicherklärung"). The amount is higher than the general minimum wage of 8.50 Euros an hour.

[41] LAG Berlin-Brandenburg, Beschluss vom 19.12.2012 – 4 TaBV 1163/12 – LAGE § 99 BetrVG 2001 Nr. 17. See also Zimmer, „Vorübergehender" Einsatz von LeiharbeitnehmerInnen, AuR 2012, 422 ff.
[42] BAG, Urteil vom 03. Juni 2014 – 9 AZR 111/13 –, juris

This is a lot of re-regulation starting, however, from a very low level. Certain employers try to avoid temporary agency work using the instrument of outsourcing: A third company shall do the job which was done by agency workers before. The number of agency workers did no more increase during the last two or three years.

7. Minimum wage

Until now, Germany was one of the few EU-Member States which had no legal minimum wage. As long as the collective agreements covered more or less all employees there was no need for such a legislative measure. With the decreasing importance of collective agreements the situation changed. Beginning with 1 January 2015, an employee must earn at least 8.50 Euro per hour; this is the main point of the Minimum Wage Act ("Mindestlohngesetz").[43] In comparison to the situation before it is a considerable step to protect the most vulnerable workers.

The situation before the act comes into force is characterized by two elements:

- Very low wages are considered to be in contradiction with public morals and public policy; according to Section 138 § 1 of the Civil Code such a clause in the contract is void. According to Section 612 of the Civil Code, the employee may ask for the "usual" salary which is still in many parts of the economy the wage fixed by collective agreements. The limit for "very low wages" (also called "starvation wages") is below two thirds of the amount fixed by collective agreement.[44] One problem is, that there are collective agreements providing for very low wages of 4, 5 or 6 Euros an hour; in these cases this rule does not bring any relief. The second problem consists in the fact, that individual workers have big difficulties to sue their employer if they do not get the adequate salary: Normally low-paid workers can easily be replaced by other ones and, therefore, do not want to run any risk. Finally it is quite unclear which will be the adequate wages in sectors where no collective agreement exists.

- According to the Act on Posted Workers there were minimum wages in some sectors of the economy like construction or personal care.[45] These minimum wages are based on a collective agreement which is declared to be generally binding by the Federal Minister of

[43] Dated 11 August 2014 (BGBl I S. 1348)
[44] BAG Urteil vom 22. 4. 2009 – 5 AZR 436/08 - NZA 2009, 837; BAG Urteil vom 18.4.2012 – 5 AZR 630/10 - NZA 2012, 978
[45] See below IV 2

Labour. It protects not only posted workers coming from another country but also German workers who risk to be paid very low. The problem is that only specific parts of the economy are covered and that the collective agreement needs the consent of the employers´ side. This will make it quite difficult to come to a satisfying result for the employees. In the reality, the use of the right to strike is impossible due to the weak position of the workers.

The Minimum Wage Act changes the economic situation of more than 5 million workers who earn actually less that 8.50 Euros per hour. 1.3 million employees get even less than 5 Euros. If the act is really applied it corrects the market to a considerable extent.[46] The Act contains specific rules about the implementation, a task which is entrusted to an administrative body which is competent until now to find out illegal work and which is composed of former civil servants of the customs authority. Its reputation to apply correctly the law is quite good. On the other hand one has to admit, that an hourly income of 8.50 Euros permits an individual to have a modest, but decent life. If the worker has no other source of income and if he has to care for a family he will, however, earn less than the amounts given by the authorities applying "Hartz IV". He is forced to top up income to subsistence level by asking for social aid**.**

III. Coping with the crisis

Germany went through the economic crisis between 2008 and 2010 with only a low increase of unemployment. The circumstances show that this was another example where increased legal protection played an important role.

Since the 1920-ies, German law provides for "short-time work benefits". The idea is quite simple: If there is a temporary economic crisis of an enterprise, a sector of industry or the whole economy, workers are, of course, interested in keeping their employment until the situation improves again. Employers normally share this interest because it gives them the opportunity to restart their business after the crisis with the experienced and qualified persons they had before. Because of this "common interest" the system of short-time work benefits was never criticized as such; only details were discussed in Germany.[47]

[46] For details see Däubler, Der gesetzliche Mindestlohn, NJW 2014, 1924 ff.
[47] Short overview: Waltermann (note 13) Rn. 458 ff.

If the economic difficulties of the enterprise are of a temporary character, the employer is normally entitled to reduce the working time; it can even be reduced to zero. The legal basis for this modification of the employment contract is in most cases a collective agreement; where it does not exist, the employment contract may contain such a clause or the employee will agree to have a shorter working time. In such a situation the workers will get the so-called short-time work benefit ("Kurzarbeitergeld"): For the hours being cancelled the employee receives 60 % of his net wages; if he has to take care at least of one child, he receives 67 %. The money is paid by the Federal Labour Agency responsible for the unemployment insurance in general; its budget is financed by the contributions of workers and employers and sometimes complemented by the Federal Republic. Short-time work benefits are normally paid for one year; if the enterprise is in difficulty for a longer period, this is no more considered to be of a temporary character.

During the short-time work, the employer has to pay the full contributions to the social security system for the hours the employees get short-time benefit. This is a big burden, because the contributions paid by the employer and the contributions paid by the employee amount to more than 40 % of the wages. In addition, the employer has to pay the remuneration for annual leave.

In many enterprises, one can find working-time accounts: Especially the overtime work is put on an account which can easily reach 100 or 300 hours of "credit". The rules on short-time work provide that before reducing working time the "credits" should be consumed: It may happen that the worker could remain for six or even ten weeks at home. During this time he would get his normal salary.

When the crisis arrived in 2008, these rules were no more sufficient. In many enterprises it was obvious that they would not overcome their economic difficulties within one year. In addition, it was economically not feasible for the enterprises to pay the contributions to the social security system and to bring down to zero the working-time accounts: "paid leave" for one or two months for a lot of workers was obviously too expensive in a situation of crisis. Under these conditions, Government, employers´ associations and unions cooperated in a very successful way.

The period for short-time work was prolonged by regulation of the labour minister to two years. After six months of short-time work, the employers were no more obliged to pay the contributions to the social security system; it was up to the state to do it. Even in the

first six months they could avoid it by offering qualification measures to their employees. The problem of working-time accounts was solved in a very pragmatic way: The Federal Labour Agency issued an internal directive that short-time benefits do no more depend on the previous consuming of "credits". This was in contradiction to the existent law, but nobody cared about it; the economic rationality prevailed.[48]

In the meantime, the legislator went back to the previous rules (one year only, etc.) but the treaty concluded between the actually governing parties provides for a "quick modification" of the existing rules if a new crisis would arrive.

IV. Improving collective labour law?

The re-regulation occurred in the field of individual labour law and in the field of unemployment insurance. During a long time, collective labour law and especially the right of unions to conclude collective agreements followed the old rules which were no more sufficient to face the challenges of the globalized economy. In the chapter about deregulation it was described, how the bargaining power of unions went down and which was the role of the legislator in this process.[49] It would, however, be misleading to stop at this point. In the field of trade union rights, there was an important change in case law in 1995 which improved the legal position of unions. Even their right to strike got some new accents. The Act on Posted Workers ("Arbeitnehmerentsendegesetz") reacted to the opening of the labour market. Recently, the "Act to make collective autonomy stronger" ("Tarifautonomiestärkungsgesetz") does not only contain in its Article 1 the Minimum Wage Act but brings in its Article 5 some modifications to the Act on Collective Agreements and to the Act on Posted Workers.

1. The improved constitutional basis of trade union rights

The wording of Article 9 § 3 of the German Constitution guarantees only the individual right to create or join a union or an employers´ association. The text is the following one:

"The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession.

[48] See also Heise/Schwald, Arbeitsrechtliche Instrumente in der Wirtschaftskrise, NZA 2009, 753 ff.
[49] See above I

Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions."

The Federal Constitutional Court interpreted the first phrase of this paragraph in a sense that not only individuals but also the associations as such (trade unions and employers´ associations) are bearer of the fundamental right. In a decision of 1954, the Court declared that Article 9 § 3 contained a guarantee that collective agreements must be possible.[50] This was derived from the historical development; the authors of the Constitution did not want to go back behind the Constitution of Weimar whose articles provided for the existence of collective agreements. The Federal Constitutional Court used the words that the constitutional guarantee existed in a "core area" ("Kernbereich"). Afterwards this notion was used as an instrument to restrict the collective freedom of association, i. e. trade union rights. The "core area" would only comprise means that are "indispensable" for the unions to fulfil their functions. There was a lot of case law on that point: Is it allowed to elect trade union speakers within the premises of the enterprise? No, because the elections could be organized also in a bus stationed near the entrance of the factory or the office.[51] Has the union a right of access to the premises of the employer in order to inform the personnel about their aims and to canvass new members? No, because this can be done by employees of the firm who are already members of the union.[52] Is it possible that an employee who finished his work in the evening speaks two minutes about union matters to a colleague who is still working? No, this is not really necessary because one could wait until the end of the work or use the pauses.[53] Other examples could be given easily.

In the case dealing with the conversation of two minutes the employee, represented by the union, went to the Constitutional Court invoking a breach of Article 9 § 3. The Court did not reverse his former case law but stated that it was misunderstood: The word "core area" would only mean that the legislator is not allowed to touch this field. In reality – and this was the most important phrase - Article 9 § 3 of the Constitution guarantees all kinds of

[50] BVerfG Beschluss vom 18.11.1954 – 1 BvR 629/52, BVerfGE 4,96. Phrase 3 of Article 9 § 3 was added only in 1968.
[51] BAG Beschluss vom 8. 12. 1978 – 1 AZR 303/77 - DB 1979, 1043 = AuR 1979, 254
[52] BAG Beschluss vom 19. 1. 1082 – 1 AZR 279/81 - DB 1982, 1015
[53] BAG Beschluss vom 26.1. 1982 – 1 AZR 610/80 – DB 1982, 1327 = AuR 1982, 293

trade union activities which aim to safeguard and improve working and economic conditions. Limits can be derived only from the fundamental rights of the employer; a balance between the fundamental rights of both sides can be necessary.[54]

This was a new setting of the course. Trade union activities in the premises of the employer were now admitted. The question of being "indispensable" was no more raised. Of course, the rights of the employer would prevail if the union activity would really disturb the workflow (outside the right to strike). Conversations about trade union matters, however, are possible; they do not disturb more than a conversation about football or local scandals. The right of the union to send a representative to the premises of the employer is now recognized by the Federal Labour Court.[55]

The principle that all kinds of trade union activities are protected by article 9 § 3 of the Constitution has consequences even in the field of industrial action. The case was not a typically German one. The Service Union (Vereinigte Dienstleistungsgewerkschaft -"Verdi") had asked by SMS members and other people to participate at 10 a. m. in a flash-mob at a supermarket in Berlin. About 50 people came and went into the supermarket. Most of them filled the trolleys with goods and left. Other participants bought articles for 10 or 20 cents and queued up at the cash-point. Two of them put a lot of goods into a trolley and went to the cash-point; when all the goods were registered in the cashier, they exclaimed: "Oh sorry, I have forgotten my purse". During two hours, the supermarket did not function any more. The labour courts considered that this event was a lawful form of industrial action, because the union is free to choose the means it thinks adequate.[56] The Constitutional Court recently confirmed this decision.[57]

Other questions of industrial conflicts are still open. According to the traditional principles of German labour law, a strike is lawful only if it aims at a collective agreement. Unlike in Spain, France and Italy a strike for other aims or a so-called wild-cat strike are forbidden. Is this not a contradiction to the freedom given to the union by the Constitutional Court? There is also a decision by the labour ministers within the framework of the Council of Europe that Germany violates article 6 § 4 of the European Social Charter if it does not recognize these two forms of strike. Until now, the Federal Labour Court did not modify

[54] BVerfG Beschluss vom 14. November 1995 – 1 BvR 601/92 – BVerfGE 93, 352 ff.
[55] BAG Beschluss vom 28.2.2006 – 1 AZR 460/04 – NZA 2006, 798
[56] BAG Urteil vom 22. 9. 2009 – 1 AR 972/08 – NZA 2009, 1347
[57] BVerfG Beschluss vom 26. 3. 2014 – 1 BvR 3185/09 – NZA 2014, 493

its case law but declared explicitly in the text of two judgments that there is no need to decide whether lawful strikes are possible without aiming at a collective agreement.[58]

Apparently, there is a certain reluctance to give more rights to trade unions in the field of industrial conflict. Civil servants are still deprived of the right to strike despite of the decisions of the European Court of Human Rights ("Demir and Baykara", "Enerji Yapi Yol Sen") but the Federal Administrative Court has decided that the legislator has to change the existing law in order to obey to the European Court. As long as this is not realized the results of collective bargaining between unions (acting on behalf of the public employees) and employers have to be transferred to the civil servants.[59]

2. The Act on Posted Workers

In 1996, the German legislator responded to the challenges of the European market. The old rule that migrant workers coming from other Member States of the European Community had a right to equal treatment compared to German workers was no more sufficient. Most foreign workers did not use the free movement established by the EC-Treaty. They came within the framework of the freedom to deliver services and were sent by their foreign employers to Germany. They brought with them the conditions of their home country, i. e. much lower wages than usually paid in Germany. The problem arose especially in the construction sector but was not limited to this field. After a long discussion among lawyers, the legislator decided that certain fundamental principles of labour law shall apply to workers sent by their employers to Germany (so-called posted workers). For the construction sector there was an additional rule: Collective agreements about minimum wages and annual leave could by decision of the labour minister get binding effect for all employers in this sector, including foreign employers. This law was amended in 1998 in order to implement the EC-Directive about Posted Workers; afterwards the provisions on collective agreements were extended to ten different sectors of the economy comprising for instance personal care.

The Act on Posted Workers brings a new kind of protection. To call it an increase of regulation is, however, quite doubtful because the conditions of the market have changed. Compared to the situation in the 1960-ies and the 1970-ies the real protection may even

[58] BAG Urteil vom 10. 12. 2002 – 1 AZR 96/02 – NZA 2003, 735, 740; BAG Urteil vom 24. 4. 2007 – 1 AZR 252/06 – NZA 2007, 987, 994
[59] BVerwG Urteil vom 27. 2. 2014 – 2 C 1/13 – NZA 2014, 616

have decreased: The minimum wage (which is from January 1 2015 possible in all sectors of the economy) and the annual leave are far from the principle of equality of wages and working conditions which is part of the free movement of workers. Foreign labour remains still less expensive. This is confirmed by the fact that contributions to the social security system are normally lower in less industrialized countries. Considering these conditions, the law excludes a real social dumping but does not abolish the considerable comparative advantage of employers from low-wage countries.

3. The legally binding effect of collective agreements

Unlike in Spain, German collective agreements have a legally binding effect only for the members of the union and the members of the employers´ association. In enterprises in which the employer is bound all the employment contracts refer usually to the collective agreement: The employer often does not know who is a member of the union. And he does not want to give an advantage to unionized employees because this would create an incentive to join the union. If the employer is not bound, the collective agreement is often not applied at all; wages and working conditions are fixed by individual employment contracts. This can create a kind of "social competition" in the sense, that low social standards generate an advantage in the competition with other enterprises.[60] In some cases this can put in danger the existence of a collective agreement. To avoid such an effect Section 5 of the Collective Agreement Act ("Tarifvertragsgesetz") enables the labour minister to decide that the collective agreement has binding effect in the whole sector of the economy. Such a decision required a request at least from one side und the consent of the so-called collective agreement commission. It is a joint commission with three representatives of the employers and three representatives of the unions. As it can take decisions only by majority, each side has a power of veto.

The Collective Agreement Act requires also two substantial conditions: The binding effect should be justified by a public interest (1) and the employers already bound by the collective agreement must employ at least 50 % of the employees working in the (possible) field of application of the collective agreement (2). Under the current conditions, it is very difficult to fulfil the second condition, because many enterprises left their associations. The number of collective agreements having generally binding effect

[60] For the notion of „social competition" see Rigaux, From Labour Law to Social Competition Law, Antwerp 2014

became smaller and smaller during the last years.[61] In the construction sector and in some other fields there are so-called common institutions of the social partners which are responsible e. g. for an additional old-age pension. These institutions are necessary because workers in the construction sector often change their employers; to guarantee certain social benefits it is necessary that all employers in this field cooperate and pay contributions to the common institution. This means that the collective agreement must have a generally binding effect. The employers´ associations share this view.

The "Act to make collective autonomy stronger" has changed the substantial conditions for creating a binding effect. The 50 % - clause does no more exist. It is sufficient that the collective agreement is of a "predominant importance" or – second alternative – that the effectiveness of the collective agreement needs to be defended against undesirable economic developments. As to common institutions, even these conditions are not required; a public interest as such is sufficient. The decision creating a binding effect needs now a common request of the union and the employers´ side. By this way, collective agreements may become more efficient – a first step in the right direction to correct the erosion of collective bargaining.

V. Deregulation and re-regulation at the same time – a contradiction?

The German development shows quite clearly that the traditional complaint is wrong: The deregulation exists and is quite important, but there is a lot of re-regulation, too.

The first impression may lead to the conclusion that re-regulation concentrates on individual labour law whereas deregulation occurs in the field of collective bargaining. This may be perhaps a tendency but not the full truth: There have been some better rules in collective labour law, too. The freedom of action offered to trade unions has been increased due to the case law of the Constitutional Court. The fact that the right to go to court given to the works councils by the antidiscrimination act[62] has no practical impact shows that the reasons for the decline of collective bargaining may lie outside the legal framework.

Another point seems more important: Deregulation always works. The de-facto-restriction of the right to strike and the "Hartz"-legislation have a direct effect on the life and the

[61] See Thorsten Schulten, Stellenwert der Allgemeinverbindlicherklärung für die Tarifsysteme in Europa, WSI-Mitteilungen 2012, 485 ff.
[62] See above II 4

behaviour of workers. There were no big strikes any more in the metal industry after 1986, temporary agency work developed rapidly after 2004 and workers got anxious not to become unemployed what can bring them to “Hartz IV”. In contrast, regulation or “re-regulation” needs special mechanisms to be implemented because the individual employee is not able to go to court in most of the cases. These mechanisms are quite rare in German law which trusts in the resolution of conflicts by the jurisdiction. The labour inspection is not competent to check whether collective agreements or legal rules concerning the employment relationship have been observed; its competence is limited to occupational health questions. The German legislator is only beginning to establish an effective administrative mechanism in the field of illegal work and in the field of minimum wages.

Another aspect should be stressed upon. The situation of workers on the labour market is quite different. Qualified people are often in a position to invoke their rights because a reasonable employer would not run the risk that they leave the enterprise. For this (privileged) group, the rules about general terms and conditions in employment contracts and the antidiscrimination law have a real effect. On the other hand one can forget all these provisions in cases in which the worker can be replaced from day to day; a cleaning lady will never invoke the fine new rules the legislator offers to her. In my view, the essential element is not to be in a standard or in an atypical employment relationship; the market position of the worker is much more important. Of course, a sought-after specialist will normally work in a standard employment relationship whereas a worker with a low bargaining position will have a fixed-term contract or be an “independent” contractor. To create an efficient labour inspection would help the second group to be really protected by labour law.

The implementation of rules is biased. Deregulation works at a hundred percent, regulation may work at 20 or 30 percent. But there is an important exception: If labour law rules are desired by the majority of the employers or are at least compatible with their interests, they will be implemented. An important example is the handling of short-time work benefits during the financial crisis in Germany. Another one may be the new rule of giving generally binding effect to collective agreements: If both sides agree, labour law will become reality.